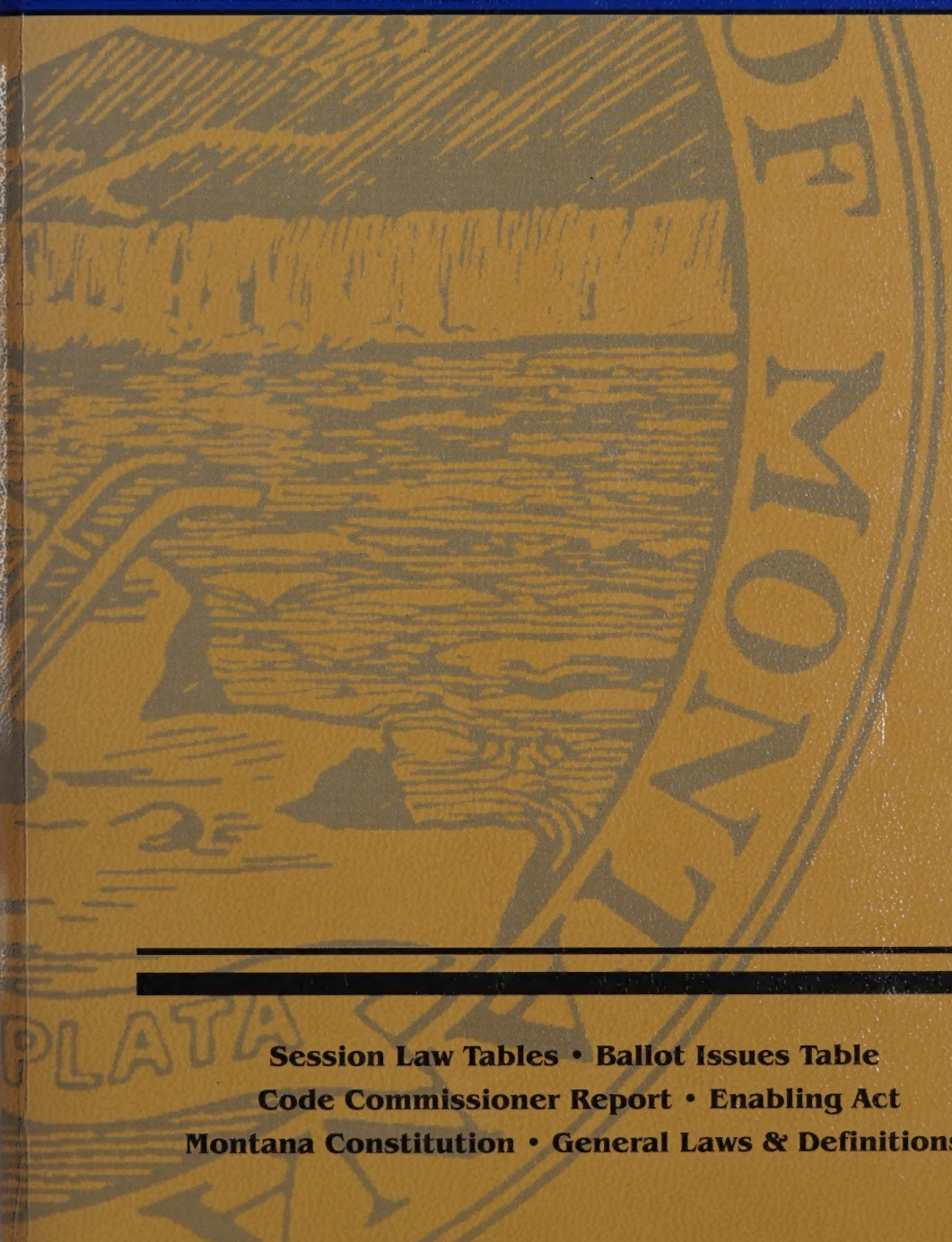
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Montana Code Annotated

Annotations

2016



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STATE LAW
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OF MONTANA

2016
ANNOTATIONS
to the
MONTANA CODE ANNOTATED

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Telephone (406)444-3064, Fax (406)444-3036
Website: leg.mt.gov

Printed and Bound by
Thomson Reuters Core Publishing Solutions
610 Opperman Dr
Eagan, MN 55123

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Amendment notes listed under compiler's comments are intended to explain only amendments made in the year indicated and may not accurately reflect current statutory language because of subsequent amendment.

The annotations are provided as a convenience to the user and are not intended to be an exhaustive compilation of the law under a given statute or in a given area.

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97	1	16-4-406
	2	Effective date
98	1	33-18-217
	2	33-18-210
	3	Codification instruction
	4	Effective date
99	1	22-3-804
	2	22-3-811
	3	Effective date
100	1	47-1-216
101	1	7-14-2101
	2	Notification to tribal governments
	3	Effective date
102	1	80-6-1109
	2	80-6-1112
	3	80-11-304
	4	80-11-310
	5	Effective date
103	1	46-18-243
	2	Effective date
104	1	69-14-104
	2	10-3-1309
	3	15-6-227
	4	25-2-122
	5	69-12-209
	6	69-14-102
	7	69-14-111
	8	69-14-252
	9	69-14-1102
	10	Repealer
	11	Codification instruction
	12	Saving clause
	13	Severability
105	1	87-1-107
	2	87-2-101
	3	87-6-101
	4	Codification instruction
106	1	2-17-544
	2	2-17-545
	3	2-17-506
	4	2-17-512
	5	2-17-543
	6	Repealer
	7	Codification instruction
107	1	75-11-307
	2	75-11-508
	3	Effective date
108	1	77-1-1112
	2	77-1-1114
	3	Effective date
109	1	15-24-3004
	2	Effective date
110	1	46-18-111
	2	46-18-222
	3	46-23-502
	4	46-23-504
	5	46-23-509
111	1	40-4-217
112	1	40-9-102
113	1	46-18-255
	2	46-23-215
	3	46-23-1011
	4	46-24-203
	5	46-24-212
114	1	76-16-112
	2	Effective date
115	1	87-2-818
	2	Codification instruction
	3	Effective date
116	1	87-6-302
	2	87-6-304
	3	Saving clause
	4	Severability
117	1	32-3-422
	2	Repealer
	3	Codification instruction
118	1	17-7-160
	2	17-7-161
	3	17-7-162
	4	Effective date
119	1	75-10-711
	2	75-10-743
	3	Effective date
120	1	61-1-101
	2	61-3-224
	3	Effective date
121	1	7-1-4134
	2	13-1-506
	3	Repealer
	4	Codification instruction
122	1	5-5-202
	2	5-5-231
	3	75-1-208
	4	75-1-324
	5	75-5-313
	6	75-5-703
	7	85-1-203
	8	85-1-621
	9	85-2-105
	10	85-2-281
	11	85-2-350
	12	85-2-436
	13	Effective date
123	1	39-71-107
	2	39-71-704
	3	39-71-736
	4	39-71-915
	5	Effective date
124	1	20-5-403
	2	20-5-404
125	1	37-19-828
126	1	61-10-126
	2	Effective date
127	1	2-9-220
	2	Codification instruction
	3	Effective date
128	1	20-10-132
	2	Effective date
129	1	82-11-188
	2	Codification instruction
130	1	2-15-1744
	2	37-17-104
	3	37-22-102
	4	37-22-305
	5	37-22-313
	6	37-23-102
	7	37-23-201
	8	37-23-213
	9	37-37-102
	10	37-37-201
	11	37-37-205
	12	Name change – directions to code commissioner
	13	Codification instruction
131	1	75-5-302
132	1	2-15-1704
	2	15-31-150
	3	39-51-201
	4	39-51-204
	5	39-51-1110
	6	39-51-1206
	7	39-51-1212
	8	39-51-1219
	9	39-51-2402
	10	39-51-2403
	11	39-51-2404
	12	39-51-2410
	13	Effective date
133	1	2-3-214
	2	Codification instruction
	3	Effective date
134	1	45-8-322
	2	45-8-323
135	1	50-12-101
	2	50-12-102
	3	50-12-103
	4	50-12-104
	5	50-12-105
	6	50-12-106
	7	50-12-107
	8	50-12-108
	9	50-12-109
	10	50-12-110
	11	Codification instruction
	12	Severability
	13	Two-thirds vote required
	14	Effective date
136	1	Sec. 11, Ch. 241, L. 2013
	2	Effective date

137	1	40-4-108
	2	Applicability
138	1	19-1-102
	2	19-1-304
	3	19-1-401
	4	19-1-402
	5	19-1-823
139	1	33-1-402
	2	33-2-708
	3	33-17-102
	4	33-17-301
	5	33-17-302
	6	33-17-303
	7	33-17-1001
	8	33-17-1002
	9	33-17-1004
	10	33-17-1202
	11	33-17-1203
	12	33-17-1205
	13	Codification instruction
	14	Saving clause
	15	Severability
	16	Effective date
140	1	19-2-504
	2	19-2-1001
	3	19-2-1014
	4	19-3-2102
	5	19-50-101
	6	19-50-104
	7	Effective date
	8	Retroactive applicability
141	1	61-2-108
	2	Effective date
142	1	20-7-1201
	2	20-7-1202
	3	Codification instruction
	4	Effective date
143	1	41-5-103
	2	41-5-112
	3	41-5-121
	4	41-5-130
	5	41-5-131
	6	41-5-132
	7	41-5-1504
	8	41-5-1512
	9	41-5-1513
	10	41-5-2003
	11	41-5-2004
	12	41-5-2005
	13	41-5-2006
	14	41-5-2011
	15	41-5-2012
	16	53-1-203
	17	Effective date
144	1	45-5-504
	2	46-23-502
145	1	18-4-301
	2	18-4-302
	3	Effective date
146	1	61-6-302
	2	61-6-309
147	1	39-29-201
	2	39-29-202
	3	39-29-203
	4	Codification instruction
148	1	60-1-222
	2	Codification instruction
	3	Effective date
149	1	87-6-101
	2	87-6-404
	3	87-6-411
	4	87-6-412
	5	Effective date
150	1	81-10-102
151	1	80-11-510
	2	80-11-512
	3	Repealer
	4	Effective date
152	1	45-5-624
153	1	61-3-701
	2	Effective date
154	1	27-6-103
	2	37-3-102
	3	37-3-103
	4	37-3-201
	5	37-3-203
	6	37-3-204
	7	37-3-211
	8	37-3-301
	9	37-3-303
	10	37-3-305
	11	37-3-307
	12	37-3-308
	13	37-3-312
	14	37-3-321
	15	37-3-323
	16	37-3-403
	17	37-20-402
	18	Repealer
	19	Effective date
155	1	76-15-1001
	2	76-15-1004
	3	76-15-1005
	4	76-15-1006
	5	76-15-1011
	6	76-15-1012
	7	76-15-1013
	8	76-15-1014
	9	Severability
	10	Codification instruction
	11	Effective date
156	1	2-2-106
157	1	20-9-311
	2	Effective date
	3	Applicability
158	1	7-2-4211
159	1	46-18-226
	2	Codification instruction
160	1	7-15-4279
161	1	37-3-103
	2	37-60-303
	3	39-3-406
	4	39-30-103
	5	44-5-103
	6	45-2-101
	7	45-2-211
	8	45-5-501
	9	45-8-321
	10	46-14-101
	11	46-14-102
	12	46-14-103
	13	46-14-202
	14	46-14-204
	15	46-14-206
	16	46-14-214
	17	46-14-217
	18	46-14-301
	19	46-14-302
	20	46-14-304
	21	46-14-311
	22	46-14-312
	23	46-15-323
	24	53-1-104
	25	80-20-102
	26	81-30-102
	27	Effective date
	28	Name change – directions to code commissioner
162	1	42-2-409
	2	42-6-102
	3	42-6-109
	4	50-15-223
163	1	30-10-105
	2	Effective date
164	1	46-11-701
	2	Effective date
165	1	17-7-140
	2	Effective date
166	1	30-13-202(4)
	2	30-13-203
	3	35-1-310
	4	35-4-206
	5	35-8-1003
	6	35-10-701
	7	35-10-703
	8	Codification instruction
	9	Effective date
167	1	13-37-201
	2	13-37-225
168	1	35-20-316
	2	35-20-313
	3	Codification instruction
	4	Effective date
	5	Applicability
169	1	2-7-501
	2	2-15-1756
	3	15-61-102
	4	15-63-102
	5	37-50-101
	6	37-50-102
	7	37-50-203
	8	37-50-301
	9	37-50-302
	10	37-50-305
	11	37-50-309
	12	37-50-314
	13	37-50-316
	14	37-50-325
	15	37-50-330
	16	37-50-335
	17	37-50-341
	18	37-50-401
	19	37-50-402
	20	37-50-403
	21	37-50-318
	22	80-4-502
	23	80-4-601
	24	Repealer
	25	Codification instruction
	26	Effective date
170	1	19-2-303
	2	19-2-407
	3	19-3-2117
	4	19-21-214
	5	Repealer
	6	Effective date
	7	Retroactive applicability
171	1	76-2-226
	2	76-2-227
	3	76-2-228
172	1	87-1-216
	2	Effective date
173	1	7-1-111
	2	7-14-4116
	3	7-14-4102
	4	7-14-4103
	5	7-14-4104
	6	61-10-121
	7	61-12-101

	8	Codification instruction
174	1	40-5-1005
	2	40-5-1009
	3	40-5-1018
	4	40-5-1069
	5	40-5-1070
	6	40-5-1073
	7	40-5-1074
	8	40-5-1075
	9	40-5-1076
	10	40-5-1077
	11	40-5-1078
	12	40-5-1079
	13	40-5-1080
	14	40-5-1081
	15	40-5-1082
	16	40-5-1083
	17	40-5-1084
	18	40-5-1085
	19	40-5-103 (renumbered 40-5-1002)
	20	40-5-143 (renumbered 40-5-1003)
	21	40-5-144 (renumbered 40-5-1004)
	22	40-5-145 (renumbered 40-5-1008)
	23	40-5-146 (renumbered 40-5-1017)
	24	40-5-147 (renumbered 40-5-1010)
	25	40-5-148 (renumbered 40-5-1011)
	26	40-5-149 (renumbered 40-5-1012)
	27	40-5-150 (renumbered 40-5-1013)
	28	40-5-151 (renumbered 40-5-1014)
	29	40-5-152 (renumbered 40-5-1015)
	30	40-5-153 (renumbered 40-5-1088)
	31	40-5-154 (renumbered 40-5-1089)
	32	40-5-157(1) (renumbered 40-5-1046 40-5-157(2)-(4) (renumbered 40-5-1047) 40-5-157(5) (renumbered 40-5-1048) 40-5-157(6) (renumbered 40-5-1049) 40-5-157(7) (renumbered 40-5-1050) 40-5-157(8) (renumbered 40-5-1051)
	33	40-5-158 (renumbered 40-5-1021)
	34	40-5-159 (renumbered 40-5-1022)
	35	40-5-160 (renumbered 40-5-1023)
	36	40-5-161 (renumbered 40-5-1024)
	37	40-5-162 (renumbered 40-5-1025)
	38	40-5-163 (renumbered 40-5-1026)
	39	40-5-164 (renumbered 40-5-1027)
	40	40-5-165 (renumbered 40-5-1030)
	41	40-5-166 (renumbered 40-5-1028)
	42	40-5-171 (renumbered 40-5-1031)
	43	40-5-172 (renumbered 40-5-1032)
	44	40-5-173 (renumbered 40-5-1033)
	45	40-5-174 (renumbered 40-5-1035)
	46	40-5-175 (renumbered 40-5-1036)
	47	40-5-176 (renumbered 40-5-1037)
	48	40-5-177 (renumbered 40-5-1038)
	49	40-5-178 (renumbered 40-5-1039)
	50	40-5-179 (renumbered 40-5-1042)
	51	40-5-180 (renumbered 40-5-1052)
	52	40-5-181 (renumbered 40-5-1016)
	53	40-5-183 (renumbered 40-5-1034)
	54	40-5-184 (renumbered 40-5-1055)
	55	40-5-185 (renumbered 40-5-1056)
	56	40-5-186 (renumbered 40-5-1057)
	57	40-5-187 (renumbered 40-5-1058)
	58	40-5-188 (renumbered 40-5-1059)
	59	40-5-189 (renumbered 40-5-1060)
	60	40-5-190 (renumbered 40-5-1061)
	61	40-5-191 (renumbered 40-5-1062)
	62	40-5-192 (renumbered 40-5-1063)
	63	40-5-193 (renumbered 40-5-1064)
	64	40-5-194(1)-(6) (renumbered 40-5-1065) 40-5-194(7) (renumbered 40-5-1067) 40-5-194(8)-(9) (renumbered 40-5-1068)
	65	40-5-195 (renumbered 40-5-1066)
	66	40-5-196 (renumbered 40-5-1043)
	67	40-5-197 (renumbered 40-5-1092)
	68	40-5-272
	69	40-5-923
	70	Transition
	71	Codification instruction – directions to code commissioner
	72	Severability
	73	Effective date
175	1	45-6-332
	2	Applicability
176	1	90-3-1002
	2	90-3-1003
	3	Effective date
177	1	50-51-102
	2	Effective date
178	1	7-4-2503
	2	Effective date
179	1	Repealer
180	1	46-16-222
	2	45-6-333
	3	52-3-825
	4	Codification instruction
181	1	72-38-132
	2	72-38-301
	3	72-38-802
	4	72-38-1008
	5	72-38-1013
182	1	46-23-502
	2	Effective date
	3	Applicability
183	1	26-1-807
	2	Effective date
184	1	33-4-521
	2	33-4-522
	3	Codification instruction
185	1	50-50-102 (void Oct. 1, 2015 - sec. 3, Ch. 185)
	2	50-50-202 (void Oct. 1, 2015 - sec. 3, Ch. 185)
	3	Coordination instruction
	4	Effective date
186	1	30-13-151
	2	30-13-152
	3	30-13-153
	4	30-13-154
	5	Codification instruction
	6	Effective date
187	1	37-1-134
	2	81-1-102
	3	Effective date
188	1	Property owner entitled to costs and attorney fees (void - sec. 3, Ch. 188)
	2	Codification instruction
	3	Coordination instruction
	4	Applicability
189	1	Repealer
	2	Effective date
190	1	19-2-303 (void - sec. 6, Ch. 190)
	2	19-2-407 (void - sec. 6, Ch. 190)
	3	19-3-2117 (void - sec. 6, Ch. 190)
	4	19-21-214 (void - sec. 6, Ch. 190)
	5	Repealer (void - sec. 6, Ch. 190)
	6	Coordination instruction
	7	Effective date
	8	Retroactive applicability
191	1	19-21-214 (void - sec. 2, Ch. 191)
	2	Coordination instruction
	3	Effective date
	4	Retroactive applicability
192	1	85-2-312
	2	85-2-402
	3	Effective date
193	1	77-1-905
	2	77-2-363
194	1	76-15-706
	2	76-15-721
	3	76-15-722
	4	Effective date
195	1	77-1-223
	2	Repealer
196	1	7-32-303

	2	44-4-403
	3	Effective date
197	1	61-8-731
	2	Applicability
198	1	46-23-208
	2	46-23-201
	3	46-23-202
	4	Codification instruction
199	1	61-1-101
200	1	25-40-101
	2	25-40-102
	3	25-40-103
	4	25-40-104
	5	25-40-105
	6	25-40-106
	7	25-40-107
	8	25-40-108
	9	25-40-109
	10	25-40-110
	11	25-40-111
	12	25-40-112
	13	25-40-113
	14	25-40-114
	15	25-40-115
	16	25-40-116
	17	25-40-117
	18	25-40-118
	19	25-40-119
	20	25-40-120
	21	25-40-121
	22	Codification instruction
	23	Severability
201	1	7-4-2631
202	1	Repealer
	2	Effective date
203	1	37-3-356
	2	37-3-357
	3	Codification instruction
204	1	53-20-163
	2	Effective date
205	1	35-8-106
	2	Effective date
206	1	50-31-307
	2	50-31-308
	3	50-32-208
	4	Effective date
207	1	53-21-1202
	2	53-21-1203
	3	53-21-1204
	4	Appropriation (void - sec. 5, Ch. 207)
	5	Coordination instruction
	6	Effective date
208	1	Appropriation for youth mental health crisis diversion pilot projects – reporting requirement
	2	Effective date
209	1	13-1-203
	2	13-4-203
	3	Effective date
210	1	19-20-1201
	2	19-20-1202
	3	19-20-1203
	4	19-20-1204
	5	19-20-1205
	6	19-20-1206
	7	19-20-1211
	8	19-20-1215
	9	19-20-1212
	10	19-20-1213
	11	19-20-1214
	12	19-20-401
	13	19-20-402
	14	19-20-403
	15	19-20-404
	16	19-20-405
	17	19-20-408
	18	19-20-409
	19	19-20-410
	20	19-20-426
	21	19-20-427
	22	19-20-702
	23	19-20-715
	24	19-20-716
	25	19-20-718
	26	19-20-802
	27	19-20-904
	28	19-20-1001
	29	19-20-1101
	30	Repealer
	31	Codification instruction
	32	Effective date
	33	Retroactive applicability
211	1	37-51-102
	2	37-51-103
	3	37-51-301
	4	37-51-306
	5	37-51-313
	6	37-51-602
	7	Severability
	8	Effective date
212	1	37-1-332
	2	Codification instruction
	3	Effective date
	4	Applicability
213	1	71-1-316
214	1	13-12-203
	2	20-20-401
215	1	26-1-902
216	1	61-6-103
	2	Applicability
217	1	19-9-1301
	2	Codification instruction
	3	Effective date
	4	Retroactive applicability
218	1	7-4-2503
	2	Effective date
219	1	61-10-107
220	1	7-14-301
	2	7-14-304
	3	15-30-2618
	4	15-70-104
	5	15-70-113
	6	15-70-121
	7	15-70-231 (renumbered 15-70-440)
	8	15-70-235 (renumbered 15-70-451)
	9	15-70-236 (renumbered 15-70-452)
	10	15-70-301 (renumbered 15-70-401)
	11	15-70-320 (renumbered 15-70-405)
	12	15-70-326 (renumbered 15-70-404)
	13	15-70-330 (renumbered 15-70-441)
	14	15-70-341 (renumbered 15-70-402)
	15	15-70-343 (renumbered 15-70-403)
	16	15-70-344 (renumbered 15-70-410)
	17	15-70-345 (renumbered 15-70-411)
	18	15-70-348 (renumbered 15-70-412)
	19	15-70-349 (renumbered 15-70-415)
	20	15-70-351 (renumbered 15-70-416)
	21	15-70-352 (renumbered 15-70-417)
	22	15-70-353 (renumbered 15-70-418)
	23	15-70-354 (renumbered 15-70-420)
	24	15-70-356 (renumbered 15-70-425)
	25	15-70-357 (renumbered 15-70-419)
	26	15-70-361 (renumbered 15-70-426)
	27	15-70-362 (renumbered 15-70-430)
	28	15-70-364 (renumbered 15-70-432)
	29	15-70-366 (renumbered 15-70-443)
	30	15-70-503
	31	15-70-521
	32	15-70-522
	33	15-70-719
	34	60-3-201
	35	60-3-202
	36	61-12-206
	37	67-1-301
	38	75-11-302
	39	75-11-314
	40	Repealer
	41	Directions to code commissioner
221	1	Wells exempt from permitting – definition of combined appropriation – retroactive applicability
	2	Effective date
222	1	31-1-402
223	1	33-2-320
	2	33-2-311
	3	33-18-212
	4	Codification instruction
	5	Effective date
	6	Applicability
224	1	71-3-1111
	2	71-3-1112
	3	71-3-1114
	4	71-3-1115
	5	71-3-1117
	6	71-3-1118
225	1	33-22-142
	2	Effective date
226	1	69-1-106
	2	Effective date
227	1	20-26-1101
	2	Repealer
	3	Effective date
228	1	Commemoration of Sidney Edgerton – special revenue account
	2	2-17-808
	3	Contingent voidness
	4	Effective date
229	1	33-1-102
	2	33-28-101
	3	Effective date
230	1	19-17-110

231	1	61-3-206
	2	61-3-216
	3	61-3-509
	4	61-4-104
232	1	17-7-152
	2	17-7-153
	3	17-7-154
	4	17-7-150
	5	17-7-151
	6	Codification instruction
	7	Termination
233	1	18-4-227
	2	Effective date
234	1	69-3-603
	2	Effective date
	3	Retroactive applicability
235	1	10-1-902
	2	10-1-1002
	3	10-1-1003 (void and replaced by sec. 6, Ch. 363)
	4	10-1-1006
	5	10-1-1007
	6	10-1-1201
	7	19-2-707
	8	20-25-421
	9	72-5-103
	10	Effective date
236	1	13-1-116
237	1	2-17-513
	2	2-17-516
	3	Repealer
	4	Effective date
238	1	2-15-149
	2	Notification to tribal governments
	3	Effective date
239	1	50-50-116
	2	50-50-117
	3	50-50-120
	4	50-50-121
	5	30-12-301
	6	50-31-103
	7	50-46-309
	8	50-50-101
	9	50-50-102
	10	50-50-103
	11	50-50-105
	12	50-50-109
	13	50-50-110
	14	50-50-201
	15	50-50-202
	16	50-50-203
	17	50-50-205
	18	50-50-208
	19	50-50-209
	20	50-50-211
	21	50-50-212
	22	50-50-213
	23	50-50-214
	24	50-50-215
	25	50-50-301
	26	50-50-302
	27	50-50-303
	28	50-50-305
	29	50-57-102
	30	81-22-208
	31	Codification instruction
240	1	13-13-120
241	1	13-35-211
242	1	81-1-106
	2	Codification instruction
	3	Effective date
243	1	1-1-524
	2	Codification instruction
244	1	53-1-107
245	1	20-7-334
	2	Effective date
246	1	13-13-212
247	1	13-13-246
	2	13-19-301
	3	Codification instruction
248	1	5-2-304
	2	19-2-405
	3	19-2-801
	4	19-2-903
	5	19-2-904
	6	19-2-908
	7	19-3-411
	8	19-3-412
	9	19-3-413
	10	19-3-904
	11	19-3-1105
	12	19-3-1106
	13	19-3-1210
	14	19-3-1501
	15	19-3-2141
	16	19-5-701
	17	19-5-802
	18	19-7-301
	19	19-7-410
	20	19-7-503
	21	19-7-1001
	22	19-8-302
	23	19-8-801
	24	19-8-1001
	25	19-8-1002
	26	19-9-301
	27	19-9-1206
	28	19-17-112
	29	19-20-302
	30	Repealer
	31	Codification instruction
	32	Effective date
249	1	76-16-322
	2	81-4-101
	3	Effective date
250	1	19-1-102
	2	19-1-103
	3	19-1-104
	4	19-1-201
	5	19-1-202
	6	19-1-302
	7	19-1-303
	8	19-1-304
	9	19-1-401
	10	19-1-402
	11	19-1-501
	12	19-1-502
	13	19-1-503
	14	19-1-702
	15	19-1-704
	16	19-1-811
	17	19-1-815
	18	19-1-822
	19	19-1-823
	20	19-1-824
	21	19-1-826
251	1	50-32-501
	2	50-32-502
	3	50-32-503
	4	Codification instruction
	5	Effective date
252	1	69-8-402 (void and replaced by sec. 3, Ch. 252)
	2	69-8-412
	3	Coordination instruction
	4	Effective date
	5	Retroactive applicability
253	1	20-5-207
	2	20-5-208
	3	20-5-209
	4	20-5-210
	5	Codification instruction
254	1	61-4-104
255	1	61-8-102
	2	61-8-324
	3	61-8-326
	4	61-8-604
	5	61-8-605
	6	61-8-606
	7	61-8-607
256	1	33-22-139
	2	2-18-704
	3	33-31-111
	4	33-35-306
	5	Codification instruction
	6	Effective date
	7	Applicability
257	1	1-1-523
	2	Codification instruction
258	1	19-6-1001
	2	19-6-1002
	3	19-6-1003
	4	19-6-1004
	5	19-6-1005
	6	19-6-1006
	7	19-6-1007
	8	19-6-1008
	9	19-6-710
	10	Board to seek commissioner's ruling or determination – contingent voidness
	11	Codification instruction
259	1	2-2-121
	2	13-1-101
	3	13-35-225
	4	13-35-227
	5	13-35-402
	6	13-37-114
	7	13-37-201
	8	13-37-216
	9	13-37-219
	10	13-37-225
	11	13-37-226
	12	13-37-228
	13	13-37-229
	14	13-37-232
	15	13-37-231
	16	13-37-233
	17	13-37-402
	18	Repealer
	19	Codification instruction
	20	Saving clause
	21	Severability
260	1	87-6-401
	2	Effective date
261	1	7-32-401
	2	7-32-402
	3	Codification instruction
262	1	2-7-503
	2	2-9-101
	3	7-1-204
	4	7-1-2123
	5	7-4-2104
	6	7-4-2106
	7	7-4-2312

	8	7-4-2631
	9	7-4-2801
	10	7-6-616
	11	7-6-2801
	12	7-7-2101
	13	7-11-1030
	14	7-11-1024
	15	7-12-2202
	16	7-14-2606
	17	7-22-2101
	18	7-32-2107
	19	7-32-2108
	20	7-13-2350
		7-22-2113
		7-33-2112
	21	20-9-212
	22	76-15-324
	23	Repealer
	24	Codification instruction
	25	Effective date
263	1	39-2-307
	2	Codification instruction
	3	Effective date
264	1	16-3-107
	2	Effective date
265	1	53-6-2101
	2	53-6-2102
	3	53-6-2103
	4	Codification instruction
	5	Appropriation (line-item vetoed)
	6	Effective date
	7	Termination
266	1	2-3-114
	2	Effective date
	3	Applicability
267	1	33-15-1126
	2	39-71-606
	3	Codification instruction
	4	Effective date
268	1	77-2-318
	2	77-2-325
	3	77-2-363
	4	Effective date
269	1	17-7-102
	2	85-2-231
	3	85-2-237
	4	85-2-270
	5	85-2-271
	6	85-2-280
	7	85-2-281
	8	85-2-282
	9	Coordination instruction
	10	Sec. 18, Ch. 288, L. 2005
	11	Sec. 11, Ch. 319, L. 2007
	12	Effective date
270	1	20-1-601
	2	20-1-602
	3	20-1-603
	4	20-1-604
	5	20-1-605
	6	20-1-606
	7	Codification instruction
	8	Effective date
271	1	81-23-202
	2	Effective date
272	1	61-12-1001
	2	61-12-1002
	3	61-12-1003
	4	61-12-1004
	5	Codification instruction
	6	Coordination instruction
273	1	46-18-204
	2	Applicability
274	1	2-17-513
	2	2-17-1102
	3	2-17-1103
	4	Repealer
	5	Effective date
275	1	85-1-211
	2	Effective date
276	1	7-6-1602
	2	7-6-1604
277	1	20-1-231
	2	Repealer
	3	Effective date
278	1	76-13-154
	2	Effective date
279	1	39-3-406
	2	Effective date
280	1	35-1-113
	2	35-1-311 (void and replaced by sec. 27, Ch. 280)
	3	35-1-819
	4	35-1-1028
	5	35-1-1029
	6	35-1-1037
	7	35-1-1038
	8	35-2-114
	9	35-2-307
	10	35-2-613
	11	35-2-822
	12	35-2-823
	13	35-2-831
	14	35-2-832
	15	35-3-205
	16	35-4-109
	17	35-5-201
	18	35-8-102
	19	35-8-108
	20	35-8-1007
	21	35-8-1010
	22	35-8-1011
	23	35-10-641
	24	35-12-504
	25	35-12-1301
	26	Notification to tribal governments
	27	Coordination instruction
	28	Effective date
281	1	85-2-316
	2	Effective date
282	1	87-3-303
283	1	85-2-233
284	1	15-70-210
	2	15-70-352
	3	Coordination instruction
285	1	45-5-701
	2	45-5-702
	3	45-5-703
	4	45-5-704
	5	45-5-705
	6	45-5-706
	7	45-5-707
	8	45-5-708
	9	45-5-709
	10	45-5-710
	11	27-1-755
	12	44-4-1502
	13	44-4-1503
	14	44-4-1504
	15	1-1-411
	16	44-5-311
	17	46-18-111
	18	46-18-201
	19	46-18-203
	20	46-18-205
	21	46-18-207
	22	46-18-222
	23	46-18-231
	24	46-18-608
	25	46-23-502
	26	46-23-1011
	27	Sec. 14, Ch. 374, L. 2009
	28	Repealer
	29	Codification instruction
	30	Effective date
286	1	20-1-225
	2	20-25-428
	3	Effective date
287	1	53-6-113
	2	53-6-131
	3	Effective date
288	1	2-15-1744
	2	37-17-104
	3	37-22-102
	4	37-22-201
	5	37-23-102
	6	37-35-102
	7	37-35-103
	8	37-35-201
	9	37-35-202
	10	37-37-102
	11	Repealer
	12	Name change – directions to code commissioner
289	1	80-7-1016
	2	80-7-1017
	3	80-7-1018
	4	80-7-1013
	5	Codification instruction
	6	Effective date
290	1	80-7-1006
	2	80-7-1015
	3	80-7-1019
	4	Codification instruction
291	1	50-1-115
	2	17-7-502
	3	Codification instruction
	4	Coordination instruction
	5	Effective date
	6	Termination
292	1	Sec. 14, Ch. 374, L. 2009
	2	Effective date
293	1	72-7-101
	2	72-7-102
	3	72-7-103
	4	72-7-104
	5	72-7-201
	6	72-7-202
	7	72-7-203
	8	72-7-204
	9	72-7-205
	10	72-7-206
	11	72-7-301
	12	72-7-302
	13	72-7-303
	14	72-7-304
	15	72-7-305
	16	72-7-306
	17	72-7-307
	18	72-7-308
	19	72-7-309
	20	72-7-310
	21	72-7-311
	22	72-7-312
	23	72-7-313
	24	72-7-314

	25	72-7-401
	26	72-7-402
	27	72-7-403
	28	72-7-404
	29	72-7-405
	30	72-7-406
	31	72-7-407
	32	72-7-501
	33	72-7-502
	34	72-7-503
	35	72-7-504
	36	72-7-601
	37	72-7-602
	38	72-7-603
	39	Codification instruction
	40	Repealer
294	1	85-20-1901
	2	85-20-1902
	3	3-7-211
	4	85-2-111
	5	85-2-114
	6	85-2-301
	7	85-2-302
	8	85-2-306
	9	85-2-427
	10	85-2-506
	11	85-5-110
	12	Notification to tribal governments
	13	Codification instruction
	14	Effective date
295	1	7-34-2131
	2	Effective date
	3	Retroactive applicability
296	1	75-11-401
	2	75-11-402
	3	75-11-403
	4	75-11-407
	5	75-11-408
	6	75-11-409
	7	75-11-307
	8	75-11-309
	9	Codification instruction
	10	Saving clause
	11	Severability
	12	Effective date
297	1	70-24-111 70-33-108
	2	Codification instruction
298	1	Time limits
	2	Appropriations
	3	Effective date
299	1	Appropriations for reclamation and development grants
	2	Coordination of fund sources for grants to political subdivisions and local governments
	3	Condition of grants
	4	Other appropriations
	5	Approval of grants – completion of biennial appropriation
	6	Notification to tribal governments
	7	Coordination instruction
	8	Severability
	9	Effective date
300	1	Appropriations from treasure state endowment state special revenue account
	2	Approval of grants – completion of biennial appropriation
	3	Condition of grants – disbursements of funds
	4	Other powers and duties of department
	5	Appropriations from treasure state endowment state special revenue account for emergency grants
	6	Appropriations from treasure state endowment state special revenue account for infrastructure planning grants
	7	Appropriation from treasure state endowment regional water system special revenue account
	8	Approval of funds – completion of appropriation
	9	Conditions – manner of disbursements of funds
	10	Notification to tribal governments
	11	Coordination instruction
	12	Effective date
301	1	15-36-304
	2	Effective date
302	1	13-25-203 (void - sec. 4, Ch. 340)
	2	13-25-205 (void - sec. 4, Ch. 340)
	3	Repealer (void - sec. 4, Ch. 340)
	4	Effective date
	5	Submission to electorate
303	1	37-54-102
	2	37-54-105
	3	37-54-202
	4	37-54-302
	5	37-54-508
	6	37-54-518
304	1	33-23-221
	2	33-23-222
	3	33-23-223
	4	33-23-224
	5	33-23-225
	6	33-23-226
	7	33-18-210
	8	Codification instruction
	9	Applicability
305	1	Sec. 8, Ch. 390, L. 2013
	2	Sec. 9, Ch. 390, L. 2013
	3	Sec. 10, Ch. 390, L. 2013
306	1	35-1-1401
	2	35-1-1402
	3	35-1-1403
	4	35-1-1404
	5	35-1-1405
	6	35-1-1406
	7	35-1-1407
	8	35-1-1408
	9	35-1-1409
	10	35-1-1410
	11	35-1-1411
	12	35-1-1412
	13	Saving clause
	14	Codification instruction
307	1	20-9-406
	2	20-9-407
	3	Effective date
308	1	15-1-206
	2	15-1-216
	3	15-30-2110
	4	15-30-2339
	5	15-30-2341
	6	15-30-2512
	7	15-30-2531
	8	15-30-2604
	9	15-30-2605
	10	15-30-2606
	11	15-30-2607
	12	15-30-2609
	13	15-30-2643
	14	15-30-3003
	15	Coordination instruction
	16	Effective dates
	17	Applicability
	18	Termination
309	1	Asbestos advisory group – members – duties
	2	75-2-505
	3	75-2-502
	4	Codification instruction
	5	Effective date
310	1	2-3-221 (void - sec. 63, Ch. 348)
	2	Effective date
	3	Applicability
311	1	32-5-301
	2	Effective date
312	1	44-4-1202
	2	44-4-1203
	3	44-4-1205
	4	Effective dates
313	1	46-21-110
	2	Effective date
314	1	7-12-2128
	2	7-8-2211
	3	Codification instruction
315	1	39-71-442
	2	39-71-401
	3	Codification instruction
	4	Effective date
	5	Termination
316	1	2-15-1816
	2	Notification to tribal governments
	3	Effective date
317	1	32-3-102
	2	32-3-301
	3	32-3-321
	4	32-3-322
	5	32-3-401
	6	32-3-403
	7	32-3-405
	8	32-3-406
	9	32-3-416
	10	32-3-417
	11	32-3-418
	12	32-3-608
	13	32-3-701
	14	Repealer
318	1	30-10-327
	2	30-10-301
	3	30-10-303
	4	30-10-324
	5	Repealer
	6	Codification instruction
	7	Saving clause
319	1	75-5-702
	2	Effective date

320	1	33-1-115
		39-71-2375
	2	2-4-101
	3	17-1-102
	4	17-2-110
	5	33-1-102
	6	33-2-1902
	7	33-16-303
	8	33-16-1002
	9	33-16-1008
	10	33-16-1021
	11	33-16-1033
	12	33-16-1035
	13	39-71-2312
	14	39-71-2315
	15	39-71-2316
	16	39-71-2323
	17	39-71-2330
	18	39-71-2332
	19	39-71-2351
	20	39-71-2361
	21	39-71-2363
	22	Repealer
	23	Transition
	24	Codification instruction
	25	Effective date – applicability date
321	1	1-1-531
	2	Codification instruction
322	1	18-4-313
	2	23-1-102
	3	Effective date
323	1	20-1-401
	2	20-9-236 (Sec. 9, Ch. 364, L. 2013)
	3	Sec. 12, Ch. 364, L. 2013
	4	Effective date
324	1	53-6-405
	2	53-6-406
	3	53-6-402
	4	Codification instruction
325	1	77-1-130
	2	Sec. 2, Ch. 325, L. 2011
	3	Sec. 3, Ch. 325, L. 2011
	4	Sec. 4, Ch. 325, L. 2011
	5	Sec. 5, Ch. 325, L. 2011
	6	Sec. 6, Ch. 325, L. 2011
	7	Sec. 7, Ch. 325, L. 2011
	8	Effective date
326	1	87-1-218
	2	Saving clause
327	1	23-2-302
	2	23-2-311
	3	Severability
	4	Effective date
328	1	45-5-209
	2	46-6-311
	3	46-9-302
329	1	15-2-201
	2	15-15-101
330	1	39-71-118
	2	Effective date
331	1	44-10-202
332	1	75-5-214
	2	Codification instruction
	3	Effective date
333	1	5-5-223
	2	Effective date
334	1	76-13-201
	2	Effective date
335	1	33-28-101
	2	33-28-102
	3	33-28-104
	4	33-28-105
	5	33-28-108
	6	33-28-109
	7	33-28-201
	8	33-28-206
	9	33-28-207
	10	33-28-301
	11	33-28-302
	12	Saving clause
	13	Severability
	14	Effective date
336	1	15-7-102
	2	15-7-308
	3	Effective date
337	1	16-11-122
	2	16-11-302
	3	16-11-303
	4	16-11-304
	5	16-11-305
	6	16-11-306
	7	16-11-308
	8	16-11-309
	9	16-11-310
	10	45-5-637
	11	Effective date
338	1	15-1-201
	2	15-1-218
	3	17-4-105
	4	Effective date
339	1	75-2-220
	2	75-2-221
	3	75-2-301
340	1	13-25-203
	2	13-25-205
	3	Repealer
	4	Coordination instruction
	5	Effective date
341	1	2-15-1773
	2	Effective date
	3	Applicability
342	1	33-22-111
	2	33-30-1019
	3	Codification instruction
	4	Effective date
343	1	Commission on sentencing
	2	Duties
	3	Appropriation (line-item vetoed)
	4	Notification to tribal governments
	5	Effective dates
	6	Termination
344	1	90-4-1110
	2	90-4-1111
	3	90-4-1112
	4	90-4-1113
	5	90-4-1114
	6	7-3-1325
		7-11-1035
	7	20-9-471
	8	90-4-1101
	9	90-4-1102
	10	90-4-1103
	11	90-4-1109
	12	Repealer
	13	Codification instructions
	14	Applicability
345	1	77-1-145
	2	Codification instruction
	3	Effective date
346	1	33-17-220
	2	33-17-241
347	1	7-14-112
	2	10-2-112
	3	10-2-603
	4	10-3-801
	5	15-1-122
	6	15-35-108
	7	Effective date
348	1	2-6-1001
	2	2-6-1002
	3	2-6-1003
	4	2-6-1006
	5	2-6-1007
	6	2-6-1012
	7	2-6-1013
	8	2-6-1009
	9	2-6-1008
	10	2-6-1014
	11	2-6-1017
	12	2-6-1020
	13	2-6-1101
	14	2-6-1102
	15	2-6-1107
	16	2-6-1108
	17	2-6-1109
	18	2-6-1112
	19	2-6-1113
	20	2-6-1114
	21	2-6-1103
	22	2-6-1201
	23	2-6-1202
	24	2-6-1205
	25	2-6-1501
	26	2-6-1502
	27	2-6-1503
	28	2-15-406
	29	2-3-212
	30	2-3-221
	31	2-3-301
	32	2-15-2017
	33	5-11-203
	34	7-4-2614
	35	7-5-2132
	36	7-5-4124
	37	7-11-1007
	38	13-1-303
	39	13-21-228
	40	15-1-103
	41	15-1-521
	42	15-62-209
	43	17-8-403
	44	18-4-126
	45	19-2-403
	46	19-17-111
	47	22-1-211
	48	30-9A-522
	49	30-14-1603
	50	30-17-101
	51	32-11-107
	52	33-1-1403
	53	33-28-108
	54	46-23-110
	55	53-21-1108
	56	61-6-157
	57	61-11-510
	58	81-2-115
	59	Repealer
	60	Codification instruction
	61	Coordination instruction
	62	Coordination instruction
	63	Coordination instruction
	64	Coordination instruction
	65	Coordination instruction
	66	Coordination instruction
	67	Coordination instruction

	68	Coordination instruction
	69	Coordination instruction
	70	Coordination instruction
	71	Coordination instruction
	72	Severability
349	1	81-1-113
	2	2-15-3110
	3	15-1-122
	4	81-1-110
	5	81-1-112
	6	Codification instruction
	7	Effective date
	8	Termination
350	1	20-7-306
	2	Appropriation
	3	Coordination instruction
	4	Effective date
351	1	20-7-1310(1)
	2	20-7-1310(2)-(4)
	3	Codification instruction
	4	Effective date
352	1	Sec. 7, Ch. 433, L. 2009
	2	Effective date
353	1	Judicial redistricting commission
	2	Appropriation
	3	Effective date
	4	Termination
354	1	41-3-1208
	2	41-3-1209
	3	41-3-1210
	4	41-3-1211
	5	41-3-1212
	6	41-3-1213
	7	41-3-209
	8	41-3-205
	9	41-3-208
	10	Codification instruction
	11	Coordination instruction
	12	Effective date
355	1	19-17-404
	2	Effective date
356	1	7-33-2120
	2	7-33-2401
	3	Effective date
357	1	37-7-1511
	2	Sec. 20, Ch. 241, L. 2011
	3	Effective date
358	1	61-5-232
	2	61-5-105
	3	61-5-212
	4	Codification instruction
	5	Effective date
359	1	5-20-301
	2	20-9-309
	3	Appropriation
	4	Codification instruction
	5	Effective date
360	1	75-10-403
	2	75-10-405
	3	Effective date
	4	Retroactive applicability
361	1	15-7-110
	2	2-15-122
	3	5-2-301
	4	15-1-101
	5	15-2-301
	6	15-6-133
	7	15-6-134
	8	15-6-138
	9	15-6-143
	10	15-6-301
	11	15-6-302
	12	15-6-305
	13	15-6-311
	14	15-7-102
	15	15-7-103
	16	15-7-111
	17	15-7-112
	18	15-7-131
	19	15-7-139
	20	15-7-201
	21	15-8-111
	22	15-10-420
	23	15-15-102
	24	15-15-103
	25	15-16-101
	26	15-16-102
	27	15-24-3202
	28	15-24-3203
	29	15-44-103
	30	77-1-208
	31	Repealer
	32	Codification instruction
	33	Effective date
	34	Retroactive applicability
362	1	16-1-404
	2	16-2-101
	3	Effective dates
363	1	10-1-1002
	2	10-1-1003 (void and replaced by sec. 6, Ch. 363)
	3	10-1-1005
	4	10-1-1007
	5	10-1-1009
	6	Coordination instruction
	7	Effective date
364	1	39-71-117
	2	39-71-118
365	1	39-71-201
	2	39-71-435
	3	39-71-1050
	4	50-71-113
	5	50-71-119
	6	50-72-106
	7	50-73-107
	8	50-71-128
	9	Codification instruction
	10	Transition – contingency provision
	11	Effective dates
366	1	15-6-201
	2	Effective date
	3	Retroactive applicability
367	1	2-17-807
368	1	53-6-1301
	2	53-6-1302
	3	53-6-1303
	4	53-6-1304
	5	53-6-1305
	6	53-6-1306
	7	53-6-1307
	8	53-6-1311
	9	53-6-1312
	10	53-6-1313
	11	53-6-1316
	12	53-6-1317
	13	53-6-1318
	14	39-12-101
	15	39-12-102
	16	39-12-103
	17	39-12-107
	18	15-30-2660
	19	25-3-106
	20	17-7-502
	21	27-2-205
	22	Appropriations
	23	Transition
	24	Codification instruction
	25	Saving clause
	26	Nonseverability
	27	Effective date – contingent effective date
	28	Termination
369	1	33-15-601
	2	33-15-602
	3	33-15-603
	4	33-15-604
	5	33-15-605
	6	33-15-606
	7	33-15-610
	8	33-15-611
	9	61-6-302
	10	Codification instruction
	11	Effective date
	12	Applicability
370	1	33-2-1130
	2	33-2-1131
	3	33-2-1132
	4	33-2-1133
	5	33-2-1134
	6	33-2-1135
	7	33-2-1136
	8	33-2-1137
	9	33-2-1138
	10	33-2-401
	11	33-2-402
	12	33-2-403
	13	33-2-404
	14	33-2-405
	15	33-2-406
	16	33-2-418
	17	33-2-521 (renumbered 33-2-407)
	18	33-2-523 (renumbered 33-2-409)
	19	33-2-525 (renumbered 33-2-411)
	20	33-2-526 (renumbered 33-2-412)
	21	33-2-527 (renumbered 33-2-413)
	22	33-2-537 (renumbered 33-2-417)
	23	33-2-1101
	24	33-2-1104
	25	33-2-1105
	26	33-2-1106
	27	33-2-1111
	28	33-2-1112
	29	33-2-1113
	30	33-2-1115
	31	33-2-1116
	32	33-2-1120
	33	33-2-1216
	34	33-2-1217
	35	33-2-1501
	36	33-11-103
	37	33-20-203
	38	33-20-208
	39	33-31-204
	40	Codification instruction – directions to code commissioner
	41	Saving clause
	42	Severability
	43	Effective date
	44	Retroactive applicability

371	1	Appropriation
	2	Effective date
372	1	15-6-231
	2	15-6-232
	3	15-6-233
	4	15-6-234
	5	15-16-203
	6	Codification instruction
	7	Effective date
	8	Termination
373	1	53-20-126
374	1	15-6-219
	2	33-23-204
	3	61-1-101
	4	61-8-102
	5	61-8-601
	6	61-8-602
	7	61-8-603
	8	61-8-604
	9	61-8-605
	10	61-8-606
	11	61-8-607
	12	61-8-608
	13	61-8-609
	14	61-12-101
375	1	16-4-311
	2	Effective dates
376	1	41-3-305
	2	3-1-702
	3	41-3-301
	4	Appropriation
	5	Codification instruction
	6	Effective date
	7	Termination
377	1	33-2-705
	2	33-2-708
	3	33-27-118
	4	Effective date
	5	Retroactive applicability
378	1	75-5-222
	2	75-5-203
	3	Repealer
	4	Codification instruction
379	1	20-3-106
	2	20-7-101
	3	Effective date
380	1	37-19-203
	2	7-4-2631
	3	50-15-111
	4	Codification instruction
	5	Effective date
	6	Termination
381	1	72-5-321
	2	72-5-324
	3	Effective date
382	1	23-4-101
	2	23-4-301
	3	Saving clause
383	1	85-25-101
	2	85-25-102
	3	17-7-502
	4	Codification instruction
	5	Effective date – contingency
384	1	Inventory of trails and paths – maintenance – report to legislature
	2	Effective date
	3	Termination
385	1	20-26-614
	2	20-26-615
	3	20-26-616
	4	20-26-617
	5	17-7-502
	6	20-26-601
	7	20-26-602
	8	20-26-603
	9	20-26-605
	10	20-26-606
	11	23-7-102
	12	23-7-202
	13	23-7-402
	14	Appropriation
	15	Codification instruction
	16	Effective date
386	1	Task force on state public defender operations – membership
	2	Task force duties
	3	Appropriation
	4	Effective dates
	5	Termination
387	1	15-37-117
	2	75-10-704
	3	75-10-743
	4	Effective date (amended by sec. 10, Ch. 438)
	5	Termination
388	1	15-30-2381
	2	15-31-171
	3	50-51-114
	4	50-51-115
	5	Effective date
	6	Retroactive applicability
389	1	50-63-104
	2	Saving clause
	3	Effective date
	4	Applicability
390	1	5-16-103
	2	Effective date
391	1	1-5-601
	2	1-5-602
	3	1-5-603
	4	1-5-604
	5	1-5-605
	6	1-5-606
	7	1-5-607
	8	1-5-608
	9	1-5-609
	10	1-5-610
	11	1-5-611
	12	1-5-615
	13	1-5-616
	14	1-5-617
	15	1-5-618
	16	1-5-619
	17	1-5-620
	18	1-5-621
	19	1-5-622
	20	1-5-623
	21	1-5-624
	22	1-5-625
	23	1-5-626
	24	1-5-627
	25	1-5-628
	26	Repealer
	27	Notification to tribal governments
	28	Codification instruction
	29	Saving clause
	30	Applicability
392	1	15-30-2380
	2	87-1-294
	3	Sec. 6, Ch. 346, L. 2013
	4	Effective date
	5	Applicability
393	1	69-8-402
	2	69-8-414
	3	Effective date
	4	Applicability
394	1	77-1-804
	2	77-1-820
	3	Codification instruction
	4	Effective date
395	1	61-8-303
	2	61-8-309
	3	61-8-312
	4	61-8-725
	5	61-11-203
396	1	17-6-308
	2	90-6-603
	3	Effective date
397	1	15-30-3302
	2	15-30-3313
	3	Applicability
398	1	61-3-103
	2	61-3-203
	3	61-3-204
	4	61-3-550
	5	61-5-111
	6	Effective dates – applicability
399	1	82-4-301
	2	82-4-303
	3	82-4-305
	4	82-4-375
	5	82-4-376
	6	82-4-377
	7	82-4-378
	8	82-4-379
	9	82-4-380
	10	82-4-381
	11	82-4-335
	12	82-4-336
	13	82-4-337
	14	82-4-342
	15	Codification instruction
	16	Applicability
400	1	Short title
	2	First level expenditures
	3	Legislative intent
	4	Severability
	5	Appropriation control
	6	Program definition
	7	Personal services funding – 2019 biennium
	8	Totals not appropriations
	9	Effective dates
	10	Appropriations
	11	Appropriations
	12	Rates
401	1	Appropriation of cultural and aesthetic grant funds – priority of disbursement
	2	Appropriation of cultural and aesthetic grant funds
	3	Reversion of grant money
	4	Changes to grants on pro rata basis
	5	Effective date
402	1	46-23-110
	2	Termination
403	1	15-1-121
	2	53-21-1203
	3	Appropriation (void - sec. 4, Ch. 403)
	4	Coordination instruction
	5	Effective date
404	1	Appropriation (void - sec.

		2, Ch. 404)
	2	Coordination instruction
	3	Effective date
405	1	7-15-4291
	2	20-9-104
	3	20-9-141
	4	Transition – existing agreements
	5	Effective date
	6	Applicability
406	1	37-8-434
	2	37-8-202
	3	Codification instruction
407	1	15-6-135
	2	15-6-158
	3	15-6-219
	4	Transition after termination – carryover of abatement
	5	Effective date
	6	Retroactive applicability
	7	Termination
408	1	87-6-215
	2	87-6-403
	3	87-6-405
	4	Saving clause
409	1	23-2-802
	2	23-2-814
410	1	27-1-753
	2	28-2-702
	3	Effective date
411	1	1-1-541
	2	Codification instruction
	3	Effective date
412	1	45-5-513
	2	46-18-255
	3	46-23-520
	4	Codification instruction
	5	Effective date
	6	Retroactive applicability
413	1	15-38-202
	2	82-11-161
	3	90-2-1113
	4	Effective date
414	1	15-35-108
	2	Coordination instruction
	3	Effective date
415	1	75-5-319
	2	Codification instruction
416	1	23-2-636
	2	15-1-122
	3	23-2-601
	4	23-2-614
	5	23-2-644
	6	23-2-657
	7	Repealer
	8	Codification instruction
417	1	39-51-2111
	2	Effective date
418	1	15-30-2101
	2	15-30-2103
	3	15-30-2110
	4	15-30-2114
	5	15-30-2132
	6	15-30-2602
	7	Transition
	8	Coordination instruction
	9	Applicability
419	1	Definitions
	2	Capital projects appropriations and authorizations
	3	Capital improvements
	4	Land access appropriations
	5	Planning and design
	6	Capital projects – contingent funds
	7	Review by department of environmental quality
	8	Transfer of funds
	9	Legislative consent
	10	General fund transfer
	11	Severability
	12	Contingent voidness
	13	Effective date
420	1	13-10-201
	2	13-10-211
	3	13-38-201
	4	13-38-202
421	1	44-12-207
	2	44-12-208
	3	44-12-209
	4	44-12-210
	5	44-12-211
	6	44-12-101
	7	44-12-102
	8	44-12-103
	9	44-12-205 (renumbered 44-12-212)
	10	45-6-328
	11	45-9-206
	12	61-8-421
	13	Repealer
	14	Codification instruction
	15	Saving clause
	16	Severability
	17	Applicability
	18	Effective date
422	1	17-7-214
	2	17-7-215
	3	17-7-502
	4	Codification instruction
	5	Termination
423	1	22-3-116
	2	22-3-117
	3	17-7-502
	4	Codification instruction
	5	Effective date
	6	Termination
424	1	61-8-402(6)(b)
	2	46-16-130
	3	61-5-208
	4	61-5-231
	5	61-8-401
	6	61-8-402
	7	61-8-403
	8	61-8-405
	9	61-8-408
	10	61-8-409
	11	61-8-421
	12	61-8-442
	13	61-8-465
	14	61-8-714
	15	61-8-722
	16	61-8-731
	17	61-8-732
	18	61-8-733
	19	61-8-734
	20	61-8-741
	21	Codification instruction
	22	Applicability
	23	Effective date
425	1	76-13-117
	2	76-13-118
	3	Appropriation
	4	Codification instruction
	5	Effective date
	6	Termination
426	1	20-9-537
	2	Appropriation (void - sec. 4, Ch. 426)
	3	Sec. 7, Ch. 410, L. 2013
	4	Coordination instruction
	5	Notification to tribal governments
	6	Effective date
	7	Termination
427	1	37-50-209
	2	2-15-1756
	3	17-7-502
	4	37-1-101
	5	37-50-205
	6	37-50-210
	7	Repealer
	8	Codification instruction
	9	Effective date
	10	Termination
428	1	33-32-205
	2	33-32-206
	3	33-32-207
	4	33-32-208
	5	33-32-211
	6	33-32-212
	7	33-32-215
	8	33-32-216
	9	33-32-217
	10	33-32-301
	11	33-32-302
	12	33-32-303
	13	33-32-306
	14	33-32-307
	15	33-32-308
	16	33-32-309
	17	33-32-401
	18	33-32-402
	19	33-32-403
	20	33-32-404
	21	33-32-405
	22	33-32-410
	23	33-32-411
	24	33-32-412
	25	33-32-415
	26	33-32-416
	27	33-32-417
	28	33-32-418
	29	33-32-421
	30	33-32-422
	31	33-32-423
	32	33-30-102
	33	33-31-111
	34	33-32-101
	35	33-32-102
	36	33-32-103
	37	33-32-104
	38	33-32-105
	39	33-33-103
	40	Repealer
	41	Codification instruction
	42	Severability
	43	Effective date – applicability
429	1	81-29-101
	2	81-29-102
	3	81-29-106
	4	81-29-104
	5	81-29-103
	6	81-29-105
	7	81-4-207

	8	81-4-208
	9	Codification instruction
	10	Effective date
430	1	7-14-112
	2	10-3-801
	3	15-1-122
	4	15-68-820
	5	Notification to tribal governments
	6	Effective date
	7	Applicability
431	1	33-22-170
	2	33-22-171
	3	33-22-172
	4	33-22-173
	5	Codification instruction
432	1	17-7-502
	2	20-9-310
	3	20-9-517
	4	20-9-520
	5	Effective date
433	1	17-7-502
	2	20-9-310
	3	20-9-517
	4	20-9-518
	5	20-9-520
	6	Effective dates
	7	Termination
434	1	15-30-2117
	2	Applicability
435	1	Interim study of fees assessed – governmental agencies – boards
	2	Appropriation – directions to committee (line-item vetoed)
	3	Contingent voidness
	4	Effective date
	5	Termination
436	1	53-25-101
	2	53-25-102
	3	53-25-103
	4	53-25-104
	5	53-25-105
	6	53-25-109
	7	53-25-110
	8	53-25-111
	9	53-25-112
	10	53-25-113
	11	53-25-117
	12	53-25-118
	13	53-25-119
	14	53-25-120
	15	53-25-121
	16	15-30-2110
	17	Transition
	18	Codification instruction
	19	Effective date
	20	Retroactive applicability
437	1	23-3-402
	2	23-3-404
	3	23-3-405
	4	23-3-501
	5	23-3-503
	6	Repealer
	7	Codification instruction
	8	Effective date
438	1	Transfers
	2	Legislative policy statement for mental health investments for 2017 biennium
	3	Legislative intent
	4	Conditions for state employee group benefit plans
	5	2-18-301
	6	2-18-303
	7	2-18-703
	8	2-18-812
	9	87-1-625
	10	Coordination instruction
	11	Coordination instruction – funding from state special revenue account instead of general fund
	12	Effective date
439	1	81-1-102
	2	Appropriation
	3	Effective dates
440	1	30-20-201
	2	30-20-202
	3	30-20-203
	4	30-20-204
	5	30-20-205
	6	30-20-206
	7	15-6-219
	8	15-24-1410
	9	27-1-720
	10	90-1-118
	11	90-1-202
	12	Codification instruction
	13	Severability
	14	Effective date
	15	Applicability
	16	Termination
441	1	15-30-2604 (void - sec. 2, Ch. 441)
	2	Coordination instruction
442	1	20-7-1401
	2	20-7-1402
	3	20-7-1403
	4	20-7-1404
	5	20-9-327
	6	Appropriation
	7	Codification instruction
	8	Notification to tribal governments
	9	Effective date
	10	Termination
443	1	75-5-611
444	1	Legislative intent – direction to department of public health and human services
	2	Transition planning committee – membership – duties
	3	Transition planning – department of public health and human services responsibilities – rulemaking
	4	Transfer fee
	5	Limitation on expenditures
	6	20-7-401
	7	53-20-102
	8	53-20-104
	9	53-20-125
	10	53-20-129
	11	53-20-146
	12	53-20-148
	13	53-20-161
	14	53-20-163
	15	53-20-214
	16	90-7-220
	17	Codification instruction
	18	Coordination instruction
	19	Effective dates
445	1	2-15-243
	2	76-22-101
	3	76-22-102
	4	76-22-103
	5	76-22-104
	6	76-22-105
	7	76-22-109
	8	76-22-110
	9	76-22-111
	10	76-22-112
	11	76-22-113
	12	76-22-114
	13	76-22-118
	14	Transfer of funds (void - sec. 18, Ch. 445)
	15	Reversion of funds (void - sec. 18, Ch. 445)
	16	Notification to tribal governments
	17	Codification instruction
	18	Coordination instruction
	19	Effective date
446	1	Appropriations for renewable resource grants
	2	Coordination of fund sources for grants to political subdivisions and local governments
	3	Conditions of grants
	4	Appropriations established
	5	Approval of grants – completion of biennial appropriation
	6	Notification to tribal governments
	7	Severability
	8	Effective date
447	1	Authorization to provide loans
	2	Projects not completing requirements – projects reauthorized
	3	Coal severance tax bonds authorized
	4	Condition of loans
	5	Private and discount purchase of loans
	6	Appropriations established
	7	Creation of state debt – appropriation of coal severance tax – bonding provisions
	8	Notification to tribal governments
	9	Severability
	10	Effective date
448	1	Definitions
	2	Appropriations and authorizations
	3	Fund transfer
	4	Judicial branch information technology capital projects appropriation
	5	Direction to department of administration – state data center

	6	Statewide networks efficiencies
	7	Appropriation – third-party audit requirement for medicaid management information systems replacement
	8	Fiscal agent services for current legacy medicaid management information systems
	9	Authorization for department of public health and human services to terminate medicaid management information systems replacement contract
	10	Severability
	11	Effective date
449	1	87-1-629
	2	87-2-116
	3	61-8-369
	4	87-1-270
	5	87-1-290
	6	87-2-104
	7	87-2-105
	8	87-2-202
	9	87-2-301
	10	87-2-302
	11	87-2-304
	12	87-2-306
	13	87-2-307
	14	87-2-403
	15	87-2-404
	16	87-2-505
	17	87-2-506
	18	87-2-510
	19	87-2-511
	20	87-2-514
	21	87-2-520
	22	87-2-522
	23	87-2-525
	24	87-2-526
	25	87-2-701
	26	87-2-706
	27	87-2-711
	28	87-2-711
	29	87-2-801
	30	87-2-803
	31	87-2-805
	32	87-6-301
	33	87-6-403
	34	87-6-405
	35	87-6-921
	36	87-2-816
	37	87-2-817
	38	87-2-810
	39	87-6-307
	40	Repealer
	41	Codification instruction
	42	Effective dates
450	1	44-3-301
	2	Appropriations
	3	Effective date
451	1	53-20-223
	2	53-20-202
	3	Codification instruction
	4	Effective date
452	1	5-2-204
	2	Codification instruction
	3	Effective date
453	1	53-6-196
	2	53-6-111
	3	Codification instruction
	4	Effective date
	5	Applicability
454	1	70-24-103
	2	70-24-427
	3	70-33-103
	4	70-33-427
	5	Saving clause
455	1	85-2-306
	2	85-2-355
456	1	69-12-340
	2	69-12-341
	3	69-12-342
	4	69-12-343
	5	69-12-344
	6	69-12-345
	7	7-1-111
	8	69-12-101
	9	69-12-102
	10	69-12-205
	11	69-12-210
	12	69-12-301
	13	69-12-311
	14	69-12-312
	15	69-12-313
	16	69-12-314
	17	69-12-321
	18	69-12-323
	19	69-12-324
	20	69-12-404
	21	69-12-406
	22	69-12-407
	23	69-12-415
	24	69-12-501
	25	Repealer
	26	Grandfather clause – transition
	27	Codification instruction
	28	Saving clause
	29	Severability
	30	Effective date
457	1	20-9-901
	2	20-9-902
	3	20-9-903
	4	20-9-904
	5	20-9-905
	6	20-9-906
	7	15-30-3101
	8	15-30-3102
	9	15-30-3103
	10	15-30-3104
	11	15-30-3105
	12	15-30-3106
	13	15-30-3110
	14	15-30-3111
	15	15-30-3112
	16	15-30-3113
	17	15-30-3114
	18	15-30-2334
	19	15-30-2335
	20	15-31-158
	21	15-31-159
	22	20-9-570
	23	15-30-2110
	24	15-30-2618
	25	15-31-511
	26	17-7-502
	27	20-9-543
	28	Codification instruction
	29	Coordination instruction
	30	Severability
	31	Effective date
	32	Applicability
	33	Termination

OFFICIAL REPORT OF THE MONTANA CODE COMMISSIONER — 2015

In accordance with 1-11-204(3)(a)(iii), MCA, the Montana Code Commissioner hereby reports all changes made during the continuous recodification since the last report.
The law requires a report in tabular or other form explaining all changes made other than punctuation, spelling, and capitalization. In addition, 1-11-103, MCA, provides that:

> In case of any inconsistency in meaning arising through omission or otherwise between the provisions of the Montana Code Annotated and the corresponding portion of the official enrolled bill on file with the secretary of state, effect must be given to the official enrolled bill.

The Code Commissioner Report reflects changes made during the interim and changes made by session law chapters. In instances in which a section was amended by more than one chapter, subsection references in the Code Commissioner Report may not correspond to subsection references in the Montana Code Annotated because of composite preparation. In instances in which a section has different effective dates, references in the Code Commissioner Report may not correspond to references in the Montana Code Annotated because of multiple versions of the section. A section number may not reflect renumbering of that section during the codification process.

Changes to match Legislative Council bill drafting style are reported as "style" changes.

Section 40, Chapter 55, Laws of 2015, provided: "The code commissioner is directed to implement 1-11-101(2)(g)(ii) by correcting any clearly inaccurate references to other sections of the Montana Code Annotated contained in material enacted by the 64th legislature and previous legislatures."

TITLE 1

1-1-411	In (1), changed "[section 12]" to "44-4-1502". (Ch. 285)
1-5-603	In (5), changed "30-3-510(b)" to "30-3-510(1)(b)" - erroneous reference; in (7)(a), changed "[section 12] and [section 25]" to "1-5-615 and 1-5-628". (Ch. 391)
1-5-604	In (3), changed "by law of this state" to "by a law of this state" - clarity. (Ch. 391)
1-5-605	In (4), changed "[section 16]" to "1-5-619". (Ch. 391)
1-5-608	In (3), changed "with respect to which notarial act is performed" to "with respect to which the notarial act is performed" - clarity. (Ch. 391)
1-5-609	In (3), after "this subsection" inserted "and" - grammar; in (3)(d), changed "[section 13]" to "1-5-616". (Ch. 391)
1-5-618	In (4), changed "[section 12]" to "1-5-615". (Ch. 391)
1-5-619	In (2), changed "[section 17]" to "1-5-620" and changed "[section 18]" to "1-5-621". (Ch. 391)
1-5-621	In (1)(i), changed "[section 16]" to "1-5-619". (Ch. 391)
1-5-625	In (3)(a), changed "giving" to "give" and changed "practicing" to "practice" - grammar; in (4)(a), changed "orally" to "oral" - grammar. (Ch. 391)
1-5-626	In (2)(a), after "notarial act that" deleted "the fee" - grammar; in (2)(a)(i), after "(i)", inserted "the fee" - grammar; in (2)(a)(ii), after "(ii)", inserted "the fee" - grammar. (Ch. 391)
1-5-628	In (3)(d), changed "assuring" to "ensuring" - grammar; in (3)(f), changed "[section 16]" to "1-5-619"; in (3)(g), changed "[section 17(1)]" to "1-5-620(1)" and changed "[section 17(2)]" to "1-5-620(2)"; in (4), changed "this act" to "this part" - style. (Ch. 391)

TITLE 2

2-3-301	In (3), changed "[section 3]" to "2-6-1003". (Ch. 348)
2-4-101	In (3) (two places), changed "state fund" to "the state fund" and changed "State fund" to "The state fund" - consistency. (Ch. 320)
2-4-102	In (2)(a)(i), changed "is exempt" to "which is exempt" - grammar. (Ch. 64)
2-6-1002	In (8), changed "[section 22]" to "2-6-1201"; in (15), changed "[section 15]" to "2-6-1107". (Ch. 348)
2-6-1003	In (3), changed "will be made accessible" to "must be made accessible" - style. (Ch. 348)
2-6-1007	In (1), (3), (4), changed "[section 4]" to "2-6-1006". (Ch. 348)
2-6-1008	In (1), (2), changed "[section 3]" to "2-6-1003"; in (1), changed "[section 4]" to "2-6-1006"; in (2), changed "[sections 4 and 5(4)]" to "2-6-1006 and 2-6-1007(4)". (Ch. 348)
2-6-1009	In (3), changed "[sections 1 through 24]" to "Title 2, chapter 6, parts 10 through 12". (Ch. 348)

2-6-1012 In (1)(b), (1)(d), changed "[sections 13 through 21]" to "Title 2, chapter 6, part 11"; in (1)(c), changed "[sections 22 through 24]" to "Title 2, chapter 6, part 12". (Ch. 348)
2-6-1101 In (1)(f), changed "[section 14]" to "2-6-1102". (Ch. 348)
2-6-1113 In (5), changed "[section 17]" to "2-6-1109". (Ch. 348)
2-6-1114 In (3), changed "[section 18]" to "2-6-1112". (Ch. 348)
2-6-1205 In (3)(d), changed "allows the local government" to "allow the local government" and changed "fulfills the notification requirements" to "fulfill the notification requirements" - grammar. (Ch. 348)
2-6-1501 In introduction, changed "[sections 25 through 27]" to "this part". (Ch. 348)
2-6-1502 In (3), changed "[the effective date of this act]" to "October 1, 2015". (Ch. 348)
2-6-1503 In (5) near end, changed "If a notification is made" to "If notification is made" - grammar. (Ch. 348)
2-15-243 In (3), changed "[sections 2 through 13]" to "Title 76, chapter 22, part 1". (Ch. 445)
2-15-406 In (2), changed "[section 15]" to "2-6-1107". (Ch. 348)
2-15-1747 In (2)(a), changed "a least" to "at least" - grammar. (Ch. 15)
2-15-2017 In (8), changed "[section 2]" to "2-6-1002". (Ch. 348)
2-16-622 In (1), changed "a election" to "an election" - grammar. (Ch. 49)
2-17-512 In (1), inserted "shall" in introduction and deleted "shall" from (1)(a) through (1)(y) - style; in (1)(p), changed "2-17-543, [section 1], and [section 2]" to "2-17-543 through 2-17-545"; in (1)(u), changed "must accept" to "shall accept" - style. (Ch. 106)
2-17-543 In (1), changed "[section 2]" to "2-17-545". (Ch. 106)
2-18-704 In (7)(b), changed "[section 1]" to "33-22-139"; in (13)(a), changed "same level of benefits as are available" to "same level of benefits as is available" - grammar. (Ch. 256)

TITLE 3

3-1-702 In (7), changed "[section 1]" to "41-3-305". (Ch. 376)
3-7-211 Changed "[section 2]" to "85-20-1902". (Ch. 294)
3-10-601 In (2), changed "44-12-206" to "44-12-213"- to reflect renumbering. (Ch. 421)

TITLE 5

5-2-304 In (3)(a)(ii), (3)(b), changed "[section 9]" to "19-3-413". (Ch. 248)
5-5-223 In (2), changed "must annually provide a report on its budget as approved by the state compensation insurance fund board of directors to the committee" to "shall annually provide to the committee a report on its budget as approved by the state compensation insurance fund board of directors" - style, clarity. (Ch. 333)
5-11-203 In (2), changed "[sections 1 through 12]" to "Title 2, chapter 6, part 10". (Ch. 348)
5-20-301 In (7), changed "the 15th of September" to "September 15" - style. (Ch. 359)

TITLE 7

7-1-201 In (3)(b), changed "[sections 1 through 5]" to "Title 13, chapter 1, part 5". (Ch. 49)
7-2-2215 In (2), changed "[sections 6 through 10]" to "Title 13, chapter 1, part 4". (Ch. 49)
7-2-2604 In (2), changed "[sections 6 through 10]" to "Title 13, chapter 1, part 4"; in (3), changed "shall not be submitted" to "may not be submitted" - style. (Ch. 49)
7-2-2709 In (1)(a), changed "[sections 6 through 10]" to "Title 13, chapter 1, part 4". (Ch. 49)
7-2-2804 In (4), changed "[sections 6 through 10]" to "Title 13, chapter 1, part 4". (Ch. 49)
7-2-4104 In (2), changed "[sections 6 through 10]" to "Title 13, chapter 1, part 4". (Ch. 49)
7-2-4106 In (2), changed "[sections 6 through 10]" to "Title 13, chapter 1, part 4". (Ch. 49)
7-2-4602 Changed "[sections 6 through 10]" to "Title 13, chapter 1, part 4". (Ch. 49)
7-2-4733 Changed "[sections 6 through 10]" to "Title 13, chapter 1, part 4". (Ch. 49)
7-2-4902 In (2), changed "[sections 6 through 10]" to "Title 13, chapter 1, part 4". (Ch. 49)
7-3-149 In (1), changed "[sections 6 through 10]" to "Title 13, chapter 1, part 4". (Ch. 49)
7-3-160 In (1), changed "[sections 6 through 10]" to "Title 13, chapter 1, part 4". (Ch. 49)
7-3-176 In (2), changed "[section 7]" to "13-1-403"; in (5), changed "[section 7(4) and (5)]" to "13-1-403(4) and (5)". (Ch. 49)
7-3-1205 In (2), changed "[sections 6 through 10]" to "Title 13, chapter 1, part 4". (Ch. 49)
7-3-1208 In (1), changed "[sections 6 through 10]" to "Title 13, chapter 1, part 4"; in (2), changed "[section 7]" to "13-1-403". (Ch. 49)
7-3-1216 In (2), changed "shall commence" to "must commence", changed "such members" to "the members", and in two places changed "shall expire" to "expire" - style. (Ch. 49)
7-3-1229 In (2), changed "[sections 6 through 10]" to "Title 13, chapter 1, part 4". (Ch. 49)
7-3-1231 In (2), changed "[sections 6 through 10]" to "Title 13, chapter 1, part 4". (Ch. 49)
7-3-1254 In (3), changed "must be found guilty of a misdemeanor" to "is guilty of a misdemeanor" - style. (Ch.

49)

7-3-4208 In (1), changed "[sections 6 through 10]" to "Title 13, chapter 1, part 4"; in (2), changed "[section 9]" to "13-1-405". (Ch. 49)

7-3-4222 In (2), changed "[sections 6 through 10]" to "Title 13, chapter 1, part 4". (Ch. 49)

7-3-4223 Changed "[sections 6 through 10]" to "Title 13, chapter 1, part 4". (Ch. 49)

7-3-4305 In (1), changed "[sections 6 through 10]" to "Title 13, chapter 1, part 4"; in (2), changed "[section 9]" to "13-1-405". (Ch. 49)

7-3-4310 In (1), changed "[sections 6 through 10]" to "Title 13, chapter 1, part 4" and changed "[section 9]" to "13-1-405". (Ch. 49)

7-3-4311 In (1), (5), changed "[sections 6 through 10]" to "Title 13, chapter 1, part 4". (Ch. 49)

7-4-2614 In (2), changed "[section 2]" to "2-6-1002". (Ch. 348)

7-4-2631 In (1)(m), changed "[section 3], [section 13], [section 20], or [section 22]" to "7-1-204, 7-11-1030, 7-13-2350, 7-22-2113, 7-33-2112, or 76-15-324". (Ch. 262)
In (4)(a), changed "[section 1]" to "37-19-203". (Ch. 380)

7-5-132 In (5), changed "[sections 6 through 10]" to "Title 13, chapter 1, part 4" and changed "[section 9]" to "13-1-405". (Ch. 49)

7-5-2132 Changed "[section 23]" to "2-6-1202". (Ch. 348)

7-5-4124 Changed "[section 23]" to "2-6-1202". (Ch. 348)

7-5-4321 In (3), changed "[sections 6 through 10]" to "Title 13, chapter 1, part 4". (Ch. 49)

7-6-1504 In (5), changed "[sections 1 through 5]" to "Title 13, chapter 1, part 5". (Ch. 49)

7-6-1536 In (1), changed "[sections 1 through 5]" to "Title 13, chapter 1, part 5". (Ch. 49)

7-6-1541 In (2)(a), changed "[sections 1 through 5]" to "Title 13, chapter 1, part 5". (Ch. 49)

7-6-1542 In (2), changed "[sections 1 through 5]" to "Title 13, chapter 1, part 5". (Ch. 49)

7-6-1544 In (1), changed "[sections 1 through 5]" to "Title 13, chapter 1, part 5"; in (2), changed "[section 2]" to "13-1-502"; in (3)(b), changed "[section 4(1)(b)]" to "13-1-504(1)(b)". (Ch. 49)

7-6-1546 In (2), changed "[sections 1 through 5]" to "Title 13, chapter 1, part 5". (Ch. 49)

7-6-1548 In (2), changed "[sections 1 through 5]" to "Title 13, chapter 1, part 5". (Ch. 49)

7-6-1551 In (5), changed "[sections 1 through 5]" to "Title 13, chapter 1, part 5". (Ch. 49)

7-7-2223 In (1), changed "[sections 6 through 10]" to "Title 13, chapter 1, part 4". (Ch. 49)

7-7-2406 Changed "[sections 6 through 10]" to "Title 13, chapter 1, part 4". (Ch. 49)

7-7-4226 In (2)(d), changed "[sections 6 through 10]" to "Title 13, chapter 1, part 4". (Ch. 49)

7-7-4426 In (2)(b), changed "[sections 6 through 10]" to "Title 13, chapter 1, part 4". (Ch. 49)

7-8-2211 In (5), changed "[section 1]" to "7-12-2128". (Ch. 314)

7-8-4201 In (2)(b), changed "[sections 6 through 10]" to "Title 13, chapter 1, part 4". (Ch. 49)

7-10-104 In (1), changed "[sections 1 through 5]" to "Title 13, chapter 1, part 5". (Ch. 49)

7-10-110 In (5), changed "[sections 1 through 5]" to "Title 13, chapter 1, part 5". (Ch. 49)

7-11-1007 In (3)(b), changed "[section 11]" to "2-6-1017". (Ch. 348)

7-11-1011 In (3), changed "[sections 1 through 5]" to "Title 13, chapter 1, part 5". (Ch. 49)

7-11-1030 In introduction, changed "[section 3]" to "7-1-204". (Ch. 262)

7-12-4243 In (1)(a), changed "[sections 1 through 5]" to "Title 13, chapter 1, part 5". (Ch. 49)

7-13-2208 In (2), changed "[sections 1 through 5]" to "Title 13, chapter 1, part 5". (Ch. 49)

7-13-2214 In (1), changed "each such county" to "each affected county" - clarity, style; in (2), changed "each such county" to "each county" - clarity, style. (Ch. 49)

7-13-2222 Changed "[sections 1 through 5] shall govern" to "Title 13, chapter 1, part 5, govern" - style. (Ch. 49)

7-13-2241 In (1), changed "[section 2]" to "13-1-502"; in (2), changed "[section 5]" to "13-1-505". (Ch. 49)

7-13-2323 In (1), changed "[section 4]" to "13-1-504". (Ch. 49)

7-13-2350 Changed "[section 3]" to "7-1-204". (Ch. 262)

7-13-4204 In (1), changed "[sections 1 through 5]" to "Title 13, chapter 1, part 5". (Ch. 49)

7-13-4512 In (1), changed "[sections 1 through 5]" to "Title 13, chapter 1, part 5". (Ch. 49)

7-13-4535 In (2), changed "[sections 1 through 5]" to "Title 13, chapter 1, part 5". (Ch. 49)

7-14-210 In (2), changed "[sections 1 through 5]" to "Title 13, chapter 1, part 5". (Ch. 49)

7-14-212 In (1), changed "[sections 1 through 5]" to "Title 13, chapter 1, part 5". (Ch. 49)

7-14-301 In (7), changed "15-70-301" to "15-70-401" - to reflect renumbering. (Ch. 220)

7-14-304 In (2), changed "part 3" to "part 4" - to reflect renumbering. (Ch. 220)

7-14-1106 In (1), changed "[section 2]" to "13-1-502"; in (2), changed "[sections 1 through 5]" to "Title 13, chapter 1, part 5". (Ch. 49)

7-14-1633 In (2), changed "[sections 1 through 5]" to "Title 13, chapter 1, part 5". (Ch. 49)

7-14-4102 In (1), changed "[section 2]" to "7-14-4116". (Ch. 173)

7-14-4103 In (1), changed "[section 2]" to "7-14-4116". (Ch. 173)

7-14-4104 Changed "[section 2]" to "7-14-4116". (Ch. 173)

7-14-4512 Changed "[sections 6 through 10]" to "Title 13, chapter 1, part 4". (Ch. 49)

7-14-4642 In (2), changed "[sections 6 through 10]" to "Title 13, chapter 1, part 4". (Ch. 49)

7-22-2113 Changed "[section 3]" to "7-1-204". (Ch. 262)

7-33-2106 In (2), changed "[sections 1 through 5]" to "Title 13, chapter 1, part 5"; in (5), changed "[section 5]" to

"13-1-505" and changed "[section 2]" to "13-1-502". (Ch. 49)

7-33-2112 Changed "[section 3]" to "7-1-204". (Ch. 262)

7-33-2120 In (1), changed "each of the consolidating rural fire district's" to "each consolidating rural fire district's" - clarity, grammar; in (4), changed "governing boards" to "governing board" - clarity. (Ch. 356)

7-34-2110 In (2), changed "[sections 1 through 5]" to "Title 13, chapter 1, part 5". (Ch. 49)

7-34-2117 In (1), changed "[sections 1 through 5]" to "Title 13, chapter 1, part 5". (Ch. 49)

TITLE 13

13-1-101 In (32)(b), changed "requirements, as provided in" to "requirements provided in" - clarity. (Ch. 259)

13-1-108 In (1), changed "this subsection (1)" to "this subsection" - style. (Ch. 49)

13-1-203 In (3)(a), changed "training shall also include" to "training must also include" - style. (Ch. 209)

13-1-303 In (2), changed "[section 22]" to "2-6-1201". (Ch. 348)

13-1-402 In (1), (2), changed "[sections 6 through 10]" to "this part". (Ch. 49)

13-1-403 In (2), changed "[section 8]" to "13-1-404". (Ch. 49)

13-1-501 In (1), (2), changed "[sections 1 through 5]" to "this part". (Ch. 49)

13-1-502 In (3), changed "[section 3]" to "13-1-503". (Ch. 49)

13-2-304 In (1)(a), changed "registration in 13-2-301" to "registration as provided in 13-2-301" - clarity; in (1)(c), changed "13-2-514(2)(a) and subsection (1)(d)" to "13-2-514(2)(a) and subsection (1)(d) of this section" - clarity. (Ch. 49)

13-10-211 In (1), changed "subsection (2) and 20-3-305(3)(b)" to "20-3-305(3)(b) and subsection (2) of this section" - style, clarity. (Ch. 49)

13-19-207 In (1), changed "13-13-205(2) and subsection (2)" to "13-13-205(2) and subsection (2) of this section" - clarity. (Ch. 49)

13-19-301 In (3), changed "[section 1]" to "13-13-246". (Ch. 247)

13-21-228 In (2), changed "[section 2]" to "2-6-1002". (Ch. 348)

13-37-226 In (4)(a), (4)(d), changed "in which it participates" to "in which they participate" - grammar; in (5)(b), changed "[section 14(1)]" to "13-37-232(1)". (Ch. 259)

13-37-229 In (2)(a)(ii), changed "expenditure for personal services, salaries, and reimbursed expenses have been made" to "expenditure for personal services, salaries, and reimbursed expenses has been made" - grammar. (Ch. 259)

13-37-232 In (2)(b), changed "expenditure for personal services, salaries, and reimbursed expenses have been made" to "expenditure for personal services, salaries, and reimbursed expenses has been made" - grammar. (Ch. 259)

13-38-201 In (3)(b), changed "subsection (4)" to "subsection (4) of this section" - style. (Ch. 420)

TITLE 15

15-1-103 In (3), changed "[section 15]" to "2-6-1107". (Ch. 348)

15-1-521 Changed "[section 5]" to "2-6-1007". (Ch. 348)

15-6-219 In (8), changed "[section 4]" to "30-20-204". (Ch. 440)

15-6-231 In (2)(a), (7), changed "[section 3]" to "15-6-233"; in (2)(a), changed "[the effective date of this act]" to "April 30, 2015". (Ch. 372)

15-6-232 In (1), (3), changed "[section 1]" to "15-6-231". (Ch. 372)

15-6-233 In (2), (2)(f), (4), changed "[sections 1 and 2]" to "15-6-231 and 15-6-232". (Ch. 372)

15-6-301 In (4)(a)(iii), changed "[section 11(2)]" to "15-6-302(2)"; in (6)(b), changed "[section 12]" to "15-6-305 [15-6-311]". (Ch. 361)

15-6-302 In (1), (3), (8)(a), changed "[section 12] or [section 13]" to "15-6-305 or 15-6-311"; in (2), (9), (10), changed "[section 12] and [section 13]" to "15-6-305 and 15-6-311"; in (2), (3), (4)(b)(ii), (5)(b), changed "[section 10]" to "15-6-301". (Ch. 361)

15-6-305 In (1), changed "[section 11]" to "15-6-302"; in (3), changed "[section 10]" to "15-6-301". (Ch. 361)

15-6-311 In (1), changed "[section 12]" to "15-6-305 [15-6-302]"; in (5), changed "[section 10]" to "15-6-301". (Ch. 361)

15-7-102 In (1)(b)(i), changed "[section 10 through section 13]" to "Title 15, chapter 6, part 3"; in (3)(e), changed "The county tax appeal board must" to "The county tax appeal board [department] shall". (Ch. 361)

15-7-110 Changed "[section 16]" to "section 16, Chapter 361, Laws of 2015" and changed "[sections 6 and 7]" to "sections 6 and 7, Chapter 361, Laws of 2015". (Ch. 361)

15-7-308 In (1), changed "is not a public record" to "are not a public record" (grammar) and changed "sales used by the department" to "sales data used by the department" - clarity, consistency. (Ch. 336)

15-10-425 In (2), changed "[sections 1 through 5], [sections 6 through 10]" to "Title 13, chapter 1, part 4 or 5". (Ch. 49)

15-15-103 In (3), changed "The county tax appeal board must" to "The county tax appeal board shall" - style.

(Ch. 361)

15-16-101 In (2)(a)(vi), changed "[section 10 through section 13]" to "Title 15, chapter 6, part 3". (Ch. 361)

15-16-102 In (4)(b), changed "[section 12]" to "15-6-305". (Ch. 361)

15-16-203 In (1), changed "[section 1(3)]" to "15-6-231(3)". (Ch. 372)

15-24-1410 Changed "[section 4]" to "30-20-204" and changed "[sections 1 through 6]" to "Title 30, chapter 20, part 2". (Ch. 440)

15-24-3102 In (1), changed "15-70-301" to "15-70-401" - to reflect renumbering. (Ch. 220)

15-30-2110 In (12)(b), changed "[section 12]" to "53-25-118". (Ch. 436)
In (2)(t), changed "[section 10]" to "15-30-3104". (Ch. 457)

15-30-2117 In (2)(b)(ii)(B), changed "Title 32 U.S.C. 901" to "32 U.S.C. 901" - style. (Ch. 434)

15-30-2334 Changed "[section 13]" to "15-30-3110". (Ch. 457)

15-30-2335 Changed "[section 14]" to "15-30-3111". (Ch. 457)

15-30-2380 Reoutlined subsection (5)(b) - clarity; in (5)(b)(ii), changed "The term does not include" to "does not include" - to reflect reoutlining. (Ch. 392)

15-30-2501 In (3)(b)(iii), changed "trustee" to "a trustee" - grammar. (Ch. 36)

15-30-2602 In (1), changed "are liable" to "is liable" - grammar. (Ch. 418)

15-30-2618 In (9)(g) (two places), changed "15-70-362" to "15-70-430" - to reflect renumbering. (Ch. 220)
In (9)(i), changed "[section 5]" to "20-9-905". (Ch. 457)

15-30-2660 In (1)(a), changed "[sections 1 through 13] and [sections 14 through 17]" to "Title 53, chapter 6, part 13, and Title 39, chapter 12". (Ch. 368)

15-30-3101 Changed "[sections 7 through 17]" to "this part". (Ch. 457)

15-30-3102 In introduction, changed "[sections 7 through 17]" to "this part"; in (3), (4), changed "[section 3]" to "20-9-903". (Ch. 457)

15-30-3103 In (1)(a)(i), changed "[section 11(1)(b)]" to "15-30-3105(1)(b)"; in (1)(d), (1)(e), changed "[section 22]" to "20-9-570"; in (1)(i), changed "[sections 10 and 11]" to "15-30-3104 and 15-30-3105"; in (2), changed "[section 16]" to "15-30-3113". (Ch. 457)

15-30-3104 In (2), changed "[section 22]" to "20-9-570". (Ch. 457)

15-30-3105 In (3), changed "[section 16]" to "15-30-3113". (Ch. 457)

15-30-3106 In (1)(a), changed "[section 11(1)(a)]" to "15-30-3105(1)(a)"; in (2)(b), changed "[section 8(7)(d)(ii)]" to "15-30-3102(7)(d)(ii)". (Ch. 457)

15-30-3110 In (1), changed "[section 5]" to "20-9-905" and changed "[section 4(2)(b)]" to "20-9-904(2)(b)"; in (5)(a)(ii), changed "were preapproved" to "was preapproved" - grammar. (Ch. 457)

15-30-3111 In (5)(a)(ii), changed "were preapproved" to "was preapproved" - grammar. (Ch. 457)

15-30-3112 Changed "[section 14]" to "15-30-3111". (Ch. 457)

15-30-3113 In (1), changed "[sections 8, 9, and 11]" to "15-30-3102, 15-30-3103, and 15-30-3105"; in (3)(b)(i), changed "[section 12]" to "15-30-3106"; in (7), changed "[section 5]" to "20-9-905". (Ch. 457)

15-30-3114 Changed "[sections 7 through 17]" to "this part". (Ch. 457)

15-30-3313 In (1), changed "corporation, any other entity" to "corporation, or any other entity" - grammar. (Ch. 397)

15-31-158 Changed "[section 13]" to "15-30-3110". (Ch. 457)

15-31-159 Changed "[section 14]" to "15-30-3111". (Ch. 457)

15-31-511 In (4)(c), changed "[section 5]" to "20-9-905". (Ch. 457)

15-32-702 In (9)(a), changed "15-70-301" to "15-70-401" - to reflect renumbering. (Ch. 220)

15-32-703 In (9), changed "15-70-301" to "15-70-401" - to reflect renumbering. (Ch. 220)

15-62-209 Changed "[section 2]" to "2-6-1002". (Ch. 348)

15-70-104 In (2), changed "parts 3 and 7" to "parts 4 and 7" - to reflect renumbering. (Ch. 220)

15-70-113 In (3), changed "15-70-344" to "15-70-410" - to reflect renumbering. (Ch. 220)

15-70-121 In (8)(b), changed "15-70-301" to "15-70-401" - to reflect renumbering. (Ch. 220)

15-70-352 In (2), changed "15-70-344" to "15-70-410" - to reflect renumbering. (Ch. 284)

15-70-401 In (16)(a), changed "15-70-341" to "15-70-402" - to reflect renumbering. (Ch. 220)

15-70-402 In (1)(a), changed "15-70-301" to "15-70-401" - to reflect renumbering; in (6), changed "15-70-357" to "15-70-419" - to reflect renumbering. (Ch. 220)

15-70-404 In (1), (2), changed "15-70-343(1)" to "15-70-403(1)" - to reflect renumbering; in (2), changed "15-70-343(4)" to "15-70-403(4)" - to reflect renumbering. (Ch. 220)

15-70-405 In (1), changed "15-70-343" to "15-70-403" - to reflect renumbering; in (2), changed "15-70-362" to "15-70-430" - to reflect renumbering. (Ch. 220)

15-70-410 In (1), changed "15-70-343" to "15-70-403" and changed "15-70-356" to "15-70-425" - to reflect renumbering. (Ch. 220)

15-70-417 In (1), changed "15-70-344" to "15-70-410" - to reflect renumbering. (Ch. 220)

15-70-419 In (2)(b), changed "15-70-341" to "15-70-402" - to reflect renumbering. (Ch. 220)

15-70-425 In (1), changed "15-70-361" to "15-70-426" - to reflect renumbering; in (5), changed "15-70-351" to "15-70-416" - to reflect renumbering. (Ch. 220)

15-70-430 In (6), changed "15-70-361" to "15-70-426" - to reflect renumbering. (Ch. 220)

15-70-432 In (2), changed "15-70-301" to "15-70-401" - to reflect renumbering. (Ch. 220)

15-70-433 In (1), changed "15-70-343" to "15-70-403" and changed "15-70-301" to "15-70-401" - to reflect renumbering. (Ch. 220)
15-70-440 Changed "15-70-366" to "15-70-443" - to reflect renumbering. (Ch. 220)
15-70-441 In (1)(b)(i), (1)(b)(ii), changed "15-70-366" to "15-70-443" - to reflect renumbering; in (2) (two places), changed "15-70-343" to "15-70-403" - to reflect renumbering. (Ch. 220)
15-70-451 In (2), changed "department must deposit" to "department shall deposit" (style) and changed "15-70-234" to "15-70-450" - to reflect renumbering. (Ch. 220)
15-70-452 In (2), changed "department must deposit" to "department shall deposit" (style) and changed "15-70-234" to "15-70-450" - to reflect renumbering; in (3), changed "15-70-234" to "15-70-450" - to reflect renumbering. (Ch. 220)
15-70-455 In (3), changed "15-70-312(3)" to "15-70-456(3)" - to reflect renumbering. (Ch. 220)
15-70-456 In (1), changed "15-70-311(1)" to "15-70-455(1)" - to reflect renumbering; in (3), changed "15-70-311(3)" to "15-70-455(3)" - to reflect renumbering. (Ch. 220)
15-70-457 Changed "15-70-311 through 15-70-314 shall be furnished" to "15-70-455 through 15-70-458 must be furnished" - to reflect renumbering, style. (Ch. 220)
15-70-458 In (1), changed "15-70-311" to "15-70-455" - to reflect renumbering. (Ch. 220)
15-70-503 In introduction, changed "15-70-301" to "15-70-401" - to reflect renumbering. (Ch. 220)
15-70-521 Changed "15-70-356" to "15-70-425" - to reflect renumbering. (Ch. 220)
15-70-522 In (1)(b), changed "15-70-343" to "15-70-403" - to reflect renumbering; in (4)(a), changed "15-70-344" to "15-70-410" - to reflect renumbering. (Ch. 220)
15-70-601 In (1)(a), changed "15-70-343" to "15-70-403" - to reflect renumbering. (Ch. 220)

TITLE 16

16-4-311 In (2), changed "legal agents who manufacture and convert" to "legal agent who manufactures and converts" (consistency) and changed "are not required" to "is not required" - grammar; in (3)(b), changed "must maintain records" to "shall maintain records" - style. (Ch. 375)
16-11-302 Reoutlined subsections (1), (6), (7) - style. (Ch. 337)

TITLE 17

17-5-205 Changed "[the effective date of this act]" to "February 13, 2015". (Ch. 6)
17-7-215 In (1)(a), (2), changed "[section 1]" to "17-7-214". (Ch. 422)
17-7-502 In (3), changed "15-70-369" to "15-70-433" - to reflect renumbering. (Ch. 220)
In (3), changed "[section 1]" to "50-1-115". (Ch. 291)
In (3), changed "[section 4]" to "53-6-1304". (Ch. 368)
In (3), changed "[section 2]" to "85-25-102". (Ch. 383)
In (3), changed "[section 4]" to "20-26-617". (Ch. 385)
In (3), changed "44-12-206" to "44-12-213" - to reflect renumbering. (Ch. 421)
In (3), changed "[section 2]" to "17-7-215". (Ch. 422)
In (3), changed "[section 1]; [section 2]" to "22-3-116; 22-3-117". (Ch. 423)
In (3), changed "[section 1]" to "37-50-209". (Ch. 427)
In (3), changed "[section 5]" to "20-9-905". (Ch. 457)
17-8-107 In (3), changed "one fiscal year" to "1 fiscal year" - style. (Ch. 7)
17-8-403 In (6)(b), changed "[section 3]" to "2-6-1003". (Ch. 348)

TITLE 18

18-4-126 In (1), changed "[section 3]" to "2-6-1003"; in (2), (3), changed "[sections 1 through 21]" to "Title 2, chapter 6, parts 10 and 11". (Ch. 348)

TITLE 19

19-1-501 Changed "such political subdivision" to "the political subdivision" - style. (Ch. 250)
19-2-403 In (12), changed "[section 11]" to "2-6-1017". (Ch. 348)
19-2-909 In (2)(b), changed "40-5-157" to "40-5-1046 through 40-5-1051" - to reflect renumbering. (Ch. 174)
19-3-411 In introduction, changed "[section 9]" to "19-3-413". (Ch. 248)
19-3-412 In (4), changed "the the failure" to "the failure" - grammar. (Ch. 248)
19-3-1106 In (4), (5)(b), changed "[section 9]" to "19-3-413". (Ch. 248)
19-6-710 In (3), changed "subsections (2)(b) and (4) and [section 7(3)]" to "19-6-1007(3) and subsections (2)(b) and (4) of this section" - clarity, style. (Ch. 258)
19-6-1001 Changed "[Sections 1 through 8]" to "This part". (Ch. 258)
19-6-1002 In introduction, changed "[sections 1 through 8]" to "this part"; in (4), changed "[section 4]" to "19-6-1004"; in (5), changed "[section 5]" to "19-6-1005". (Ch. 258)

19-6-1003 In (3), changed "[sections 1 through 8]" to "this part". (Ch. 258)
19-6-1006 In (1), changed "[section 8]" to "19-6-1008". (Ch. 258)
19-6-1007 In (3), changed "pursuant to (2)(b)(i) and pursuant to (2)(b)(ii)" to "pursuant to subsections (2)(b)(i) and (2)(b)(ii)" - style. (Ch. 258)
19-17-111 In (2), changed "[sections 13 through 21]" to "Title 2, chapter 6, part 11". (Ch. 348)
19-20-302 In (2), changed "[section 9]" to "19-3-413". (Ch. 248)
19-20-306 In (2)(b), changed "40-5-157" to "40-5-1046 through 40-5-1051" - to reflect renumbering. (Ch. 174)
19-20-404 In (2)(a), changed "reportable the retirement system" to "reportable to the retirement system" - grammar. (Ch. 210)
19-20-702 In (2)(a), (2)(b), (2)(c), near beginning, changed "the optional" to "The optional" - consistency. (Ch. 210)
19-20-734 Changed "subsection (2)" to "subsection (2) of this section" - clarity. (Ch. 189)
19-20-1201 In introduction, changed "[sections 1 through 11]" to "this part"; in (1), changed "[section 6]" to "19-20-1206" and changed "[section 11]" to "19-20-1214". (Ch. 210)

TITLE 20

20-1-401 In (3), changed "[section 2]" to "20-9-236". (Ch. 323)
20-1-601 Changed "[Sections 1 through 6]" to "This part". (Ch. 270)
20-1-602 Changed "[sections 1 through 6]" to "this part". (Ch. 270)
20-1-603 In introduction, changed "[sections 1 through 6]" to "this part". (Ch. 270)
20-1-604 In (2)(b), changed "extending the period" to "extend the period" - grammar; in (2)(c), changed "[section 5]" to "20-1-605". (Ch. 270)
20-1-605 In (1)(a), (1)(d), changed "[section 4]" to "20-1-604"; in (1)(d), changed "under subsection (1)" to "under subsection (1)(a)" - clarity. (Ch. 270)
20-1-606 Changed "[sections 1 through 5]" to "this part" - the prior reference contains less material than the new reference, but the material in the new reference does not affect the meaning of the reference. (Ch. 270)
20-5-207 Changed "[Sections 1 through 4]" to "Sections 20-5-207 through 20-5-210". (Ch. 253)
20-5-210 Changed "[sections 1 through 4]" to "20-5-207 through 20-5-210". (Ch. 253)
20-7-1301 In (1), changed "this part" to "20-7-1301 through 20-7-1304"; in (2), changed "This part does" to "Sections 20-7-1301 through 20-7-1304 do". (Ch. 351)
20-7-1302 In introduction, changed "this part" to "20-7-1301 through 20-7-1304". (Ch. 351)
20-7-1310 Reoutlined section; in (1), changed "[Sections 1 and 2]" to "This section"; in (3), changed "subsection (3)" to "subsection (4)" - to reflect reoutlining; in (4), changed "subsection (2)" to "subsection (3)" - to reflect reoutlining. (Ch. 351)
20-7-1401 Changed "[Sections 1 through 4]" to "This part". (Ch. 442)
20-7-1402 In (2), changed "[sections 1 through 4]" to "this part". (Ch. 442)
20-7-1403 In introduction, changed "[sections 1 through 4]" to "this part". (Ch. 442)
20-7-1404 In (5), changed "[section 2(2)]" to "20-7-1402(2)". (Ch. 442)
20-9-309 In (5), changed "[section 1]" to "5-20-301". (Ch. 359)
20-9-310 In (5)(b)(i), changed "trustees must levy" to "trustees shall levy" - style; in (5)(c)(iii), changed "subsection (5) of this section" to "the provisions of this subsection (5)" - style. (Ch. 432)
(Version effective July 1, 2016) In (4)(a), changed "oil and natural gas revenues" to "oil and natural gas revenue" - consistency. (Ch. 433)
20-9-327 In (3)(c)(ii), changed "[sections 1 through 4]" to "Title 20, chapter 7, part 14". (Ch. 442)
20-9-543 In (1)(a)(x), changed "[section 2]" to "20-9-902"; in (2), changed "[section 4]" to "20-9-904". (Ch. 457)
20-9-901 Changed "[sections 1 through 6]" to "this part". (Ch. 457)
20-9-902 In introduction, changed "[sections 1 through 6]" to "this part"; in (3), changed "[section 3]" to "20-9-903"; in (4)(d), changed "supplements the curriculum" to "supplement the curriculum" and changed "provides a student with" to "provide a student with" - grammar; in (5), changed "[section 3]" to "20-9-903". (Ch. 457)
20-9-903 In (1)(a), changed "eleven regions" to "11 regions" - style. (Ch. 457)
20-9-904 In (1)(a), changed "[section 5]" to "20-9-905"; in (1)(c), changed "[section 13]" to "15-30-3110"; in (2)(a), changed "must allocate" to "shall allocate" - style. (Ch. 457)
20-9-905 In (2), changed "[section 13]" to "15-30-3110" and changed "[sections 1 through 6]" to "this part"; in (4), changed "[section 4]" to "20-9-904". (Ch. 457)
20-9-906 Changed "[sections 1 through 6]" to "this part". (Ch. 457)
20-15-203 In (1), changed "to the the county" to "to the county" - grammar; in (2), changed "[section 4(4)]" to "13-1-504(4)". (Ch. 49)
20-15-403 In (1), changed "[section 1]" to "17-6-205". (Ch. 84)
In (1), changed "15-70-301" to "15-70-401" - to reflect renumbering. (Ch. 220)
20-15-208 In (4), changed "[sections 1 through 5]" to "Title 13, chapter 1, part 5". (Ch. 49)
20-15-231 In (1), changed "[section 4]" to "13-1-504". (Ch. 49)

20-20-106 In (2), changed "13-1-401" to "13-1-305" - to reflect renumbering. (Ch. 49)
20-20-311 Changed "elections shall be" to "elections must be" - style. (Ch. 49)
20-26-606 In (2), changed "[section 1]" to "20-26-614". (Ch. 385)
20-26-614 In (3), changed "[sections 1 through 4]" to "20-26-614 through 20-26-617". (Ch. 385)
20-26-616 In (1), changed "[section 2]" to "20-26-615"; in (3), changed "[section 4]" to "20-26-617". (Ch. 385)
20-26-617 In (2), changed "[sections 2 and 3]" to "20-26-615 and 20-26-616"; in (5), changed "[sections 1 through 3]" to "20-26-614 through 20-26-616". (Ch. 385)

TITLE 22

22-1-211 In (3)(b), changed "[section 3]" to "2-6-1003". (Ch. 348)
22-1-304 In (2)(a), changed "[section 4]" to "13-1-504". (Ch. 49)
22-1-703 In (1), changed "[sections 1 through 5]" to "Title 13, chapter 1, part 5". (Ch. 49)
22-1-706 In (2), (6), changed "[sections 1 through 5]" to "Title 13, chapter 1, part 5"; in (3)(a), changed "[section 2]" to "13-1-502"; in (3)(b), (8), changed "[section 5]" to "13-1-505". (Ch. 49)
22-1-709 In (4), changed "[sections 1 through 5]" to "Title 13, chapter 1, part 5". (Ch. 49)
22-1-710 In (4), changed "[sections 1 through 5]" to "Title 13, chapter 1, part 5". (Ch. 49)

TITLE 23

23-3-503 Reoutlined section - style. (Ch. 437)
23-7-402 (Temporary version) In (4)(a), (4)(b), changed "[section 4]" to "20-26-617"; in (4)(b), changed "[sections 1 through 4]" to "20-26-614 through 20-26-617". (Version effective July 1, 2019) In (3), changed "[section 4]" to "20-26-617". (Ch. 385)

TITLE 25

25-40-101 Changed "[Sections 1 through 21]" to "This part". (Ch. 200)
25-40-103 In (1)(c), (2), changed "[sections 1 through 21]" to "this part". (Ch. 200)
25-40-105 In (1), changed "subsection (3) and [sections 6 and 7]" to "25-40-106 and 25-40-107 and subsection (3) of this section" - clarity. (Ch. 200)
25-40-108 In (2), changed "subsection (3) and [sections 9 and 10]" to "25-40-109 and 25-40-110 and subsection (3) of this section" - clarity. (Ch. 200)
25-40-109 In (1), (2), changed "[section 8(1)]" to "25-40-108(1)". (Ch. 200)
25-40-110 In (1), changed "[section 8(1)]" to "25-40-108(1)". (Ch. 200)
25-40-112 In introduction, changed "[Sections 1 through 21] do" to "This part does". (Ch. 200)
25-40-113 In (3)(c), changed "[section 8(3), 9(2), or 10(2)]" to "25-40-108(3), 25-40-109(2), or 25-40-110(2)". (Ch. 200)
25-40-116 In (1), changed "[sections 17 and 18]" to "25-40-117 and 25-40-118" and changed "subsection (2)" to "subsection (2) of this section" - clarity. (Ch. 200)
25-40-117 In (1), (2), changed "[section 16]" to "25-40-116". (Ch. 200)
25-40-118 In (1), (2), (3), (6), changed "[section 16]" to "25-40-116". (Ch. 200)
25-40-119 In (1), changed "[section 3]" to "25-40-103" and changed "[section 14 or 15]" to "25-40-114 or 25-40-115"; in (2)(b), changed "[sections 4, 5, 8, 9, and 10]" to "25-40-104, 25-40-105, 25-40-108, 25-40-109, and 25-40-110"; in (2)(c), changed "[section 16]" to "25-40-116". (Ch. 200)
25-40-121 Changed "[Sections 1 through 21] modify, limit, and supersede" to "This part modifies, limits, and supersedes" and changed "do not" to "does not" - grammar. (Ch. 200)

TITLE 27

27-1-755 In (1), changed "[section 2, section 3, section 4, or section 5] to "45-5-702, 45-5-703, 45-5-704, or 45-5-705"; in (5), changed "[section 1]" to "45-5-701". (Ch. 285)

TITLE 30

30-9A-522 In (1), changed "[sections 13 through 21]" to "Title 2, chapter 6, part 11". (Ch. 348)
30-10-103 In (11)(c), changed "Investment advisor does not include" to "The term does not include" - style; in (12)(a)(i)(C), changed "sale or sells" to "sale of or sells" - grammar; reoutlined subsection (22)(a) - style; in (22)(a)(xviii)(C), changed "subsection (22)(a)(xvii)" to "subsection (22)(a)(xviii)" - to reflect reoutlining. (Ch. 28)
30-10-105 In (8)(d), changed "offer or" to "offeror" - error made during 2011 codification; in (20), at end, deleted "or" - style; in (22)(b)(i), changed "$1,000,000" to "$1 million" - style. (Ch. 163).
30-10-303 In (1), changed "[or section 1]" to "or 30-10-327". (Ch. 318)
30-10-324 In introduction, changed "[section 1]" to "30-10-327". (Ch. 318)

30-13-151 In introduction, changed "[sections 1 through 4]" to "30-13-151 through 30-13-154". (Ch. 186)
30-13-152 In (3), changed "[Sections 1 through 4]" to "Sections 30-13-151 through 30-13-154". (Ch. 186)
30-13-153 In (1) (two places), (2), (3), changed "[sections 1 through 4]" to "30-13-151 through 30-13-154"; in (2), (3), (4), changed "[section 4]" to "30-13-154"; in (4), changed "[section 2]" to "30-13-152". (Ch. 186)
30-13-154 In introduction, changed "[sections 1 through 4]" to "30-13-151 through 30-13-154". (Ch. 186)
30-14-1603 In (4), changed "[section 2]" to "2-6-1002". (Ch. 348)
30-17-101 In (2)(a), changed "[section 11(1)]" to "2-6-1017(1)". (Ch. 348)
30-20-201 Changed "[Sections 1 through 6]" to "This part". (Ch. 440)
30-20-203 In introduction, changed "[sections 1 through 6]" to "this part". (Ch. 440)

TITLE 31

31-1-402 In (2), changed "examination of any peace officer" to "examination by any peace officer" - grammar. (Ch. 222)

TITLE 32

32-9-103 In (32)(c)(i), changed "[Section 12]" to "32-9-135". (Ch. 24)
32-9-130 In (9), changed "of the of the" to "of the" - grammar. (Ch. 24)
32-9-166 In (3)(b), at end deleted "or" - style. (Ch. 24)
32-11-107 In (1), changed "[section 3]" to "2-6-1003". (Ch. 348)

TITLE 33

33-1-115 In (3)(a)(ii), changed "state fund's obligation" to "the state fund's obligation" - consistency; in (4), changed "State fund" to "The state fund" - consistency; in (5)(b) (two places), changed "state fund" to "the state fund" - consistency. (Ch. 320)
33-1-1403 In (1), changed "[section 2]" to "2-6-1002". (Ch. 348)
33-2-111 In (3), changed "33-2-531" to "33-2-416" - to reflect renumbering. (Ch. 370)
33-2-311 In (1), changed "[section 1]" to "33-2-320". (Ch. 223)
33-2-401 Changed "[Sections 10 through 16], 33-2-521 through 33-2-529, 33-2-531, and 33-2-537" to "This part" - to reflect renumbering. (Ch. 370)
33-2-402 In (8), changed "[section 13]" to "33-2-404". (Ch. 370)
33-2-403 In (1), changed "33-2-521" to "33-2-407" - to reflect renumbering; in (4)(a), (4)(a)(ii), changed "33-2-521(2)" to "33-2-407(2)" - to reflect renumbering; in (4)(a)(i), (4)(d), changed "[section 13]" to "33-2-404"; in (4)(a)(iii), changed "[section 13(2)]" to "33-2-404(2)"; in (4)(b), changed "a description of which policies" to "a description of the policies" - style and changed "[section 13(1)]" to "33-2-404(1)"; in (4)(c)(i), changed "[section 13(3)(c)]" to "33-2-404(3)(c)"; in (5), changed "[section 14]" to "33-2-405". (Ch. 370)
33-2-404 In (3)(b), changed "assure" to "ensure" - grammar; in (3)(c), changed "[section 16]" to "33-2-418". (Ch. 370)
33-2-406 In (9)(a), (9)(c), (10)(a)(i)(A), changed "33-2-521" to "33-2-407" - to reflect renumbering; in (9)(a), (9)(c), (10)(a)(i)(D), changed "[section 13(3)(c)]" to "33-2-404(3)(c)"; in (9)(a), changed "[sections 10 through 16]" to "this part" - the prior reference contains less material than the new reference, but the material in the new reference does not affect the meaning of the reference; in (10)(a)(i)(B), (10)(a)(ii)(A), changed "[section 12(7)]" to "33-2-403(7)"; in (10)(a)(i)(C), changed "[section 13(3)(b)]" to "33-2-404(3)(b)"; in (10)(b), changed "[section 14]" to "33-2-405". (Ch. 370)
33-2-408 In (2), changed "33-2-524" to "33-2-410" - to reflect renumbering. (Ch. 370)
33-2-409 In (1), changed "33-2-524" to "33-2-410" - to reflect renumbering; in (2) (two places), changed "33-2-524, 33-2-525, and 33-2-537(2)" to "33-2-410, 33-2-411, and 33-2-417(2)" and changed "33-2-525, 33-2-526(3) and (4), and 33-2-537" to "33-2-411, 33-2-412(3) and (4), and 33-2-417" - to reflect renumbering; in (2)(a)(i), changed "33-2-525 and 33-2-526" to "33-2-411 and 33-2-412" - to reflect renumbering. (Ch. 370)
33-2-410 In (1), changed "33-2-527" to "33-2-413" and changed "33-2-525" to "33-2-411" - to reflect renumbering. (Ch. 370)
33-2-411 In (1), changed "subsection (4) of this section, 33-2-526(3) and (4), and 33-2-537(2)" to "33-2-412(3) and (4), 33-2-417(2), and subsection (4) of this section" - to reflect renumbering, style; in (2)(a), changed "33-2-526" to "33-2-412" - to reflect renumbering; in (2)(b), changed "33-2-523 and 33-2-527" to "33-2-409 and 33-2-413" - to reflect renumbering. (Ch. 370)
33-2-412 In (1)(a), changed "33-2-525, 33-2-537(2)" to "33-2-411, 33-2-417(2)" - to reflect renumbering; in (1)(b), changed "33-2-525(4)(c)" to "33-2-411(4)(c)" - to reflect renumbering; in (3), changed "33-2-524 and 33-2-527" to "33-2-410 and 33-2-413" - to reflect renumbering; in (4), changed "33-2-525(1)" to "33-2-411(1)" and changed "33-2-525" to "33-2-411" - to reflect renumbering. (Ch. 370)

33-2-413 In (2), changed "33-2-529" to "33-2-415" and changed "33-2-528" to "33-2-414" - to reflect renumbering. (Ch. 370)

33-2-414 In (1), changed "33-2-527" to "33-2-413" - to reflect renumbering. (Ch. 370)

33-2-415 In (1), changed "33-2-527" to "33-2-413" - to reflect renumbering. (Ch. 370)

33-2-416 In (1), changed "33-2-521 through 33-2-526" to "33-2-407 through 33-2-412" - to reflect renumbering. (Ch. 370)

33-2-417 In (1), changed "33-2-525 and 33-2-526(3)" to "33-2-411 and 33-2-412(3)" - to reflect renumbering; in (1)(b), changed "33-2-521 through 33-2-529" to "33-2-407 through 33-2-415" - to reflect renumbering; in (2), changed "[section 12]" to "33-2-403". (Ch. 370)

33-2-601 In (3), changed "33-2-531" to "33-2-416" - to reflect renumbering. (Ch. 370)

33-2-602 In (3), changed "33-2-531" to "33-2-416" - to reflect renumbering. (Ch. 370)

33-2-603 In (3), changed "33-2-531" to "33-2-416" - to reflect renumbering. (Ch. 370)

33-2-612 In (2)(b), changed "33-2-531" to "33-2-416" - to reflect renumbering. (Ch. 370)

33-2-1116 In (2), (4)(a), (4)(b)(i), (4)(b)(ii), (4)(b)(iii), (4)(b)(iv), (5) (two places), (6), (7), changed "[sections 10 through 16], 33-2-521 through 33-2-529, 33-2-531, 33-2-537" to "Title 33, chapter 2, part 4" - to reflect renumbering. (Ch. 370)

33-2-1130 Changed "[Sections 1 through 9]" to "Sections 33-2-1130 through 33-2-1138". (Ch. 370)

33-2-1131 In introduction, changed "[sections 1 through 9]" to "33-2-1130 through 33-2-1138". (Ch. 370)

33-2-1132 In introduction, changed "[sections 1 through 9]" to "33-2-1130 through 33-2-1138"; in (3), changed "[the effective date of this act]" to "April 30, 2015". (Ch. 370)

33-2-1134 Changed "[section 7]" to "33-2-1136". (Ch. 370)

33-2-1135 In (3)(a), changed "an examination or on request of the commissioner" to "examination on request of the commissioner" - clarity. (Ch. 370)

33-2-1136 In (1), (4)(a), (6), changed "[sections 1 through 9]" to "33-2-1130 through 33-2-1138". (Ch. 370)

33-2-1137 In (1) (two places), (6) (two places), (7), (8), (9), changed "[sections 1 through 9]" to "33-2-1130 through 33-2-1138". (Ch. 370)

33-2-1216 In (1), changed "subsections" to "subsection" - grammar; in (5)(e)(iii), changed "(5)(e)(ii)" to "subsection (5)(e)(ii)" - style; reoutlined subsection (10); in (10)(a)(i)(B), changed "subsection (10)(a)(i)" to "subsection (10)(a)(i)(A)" - to reflect reoutlining. (Ch. 370)

33-2-1902 In (10)(b)(i), (10)(b)(ii), (10)(d)(ii), changed "state fund" to "the state fund" - consistency. (Ch. 320)

33-4-521 In (2)(c), changed "the commissioner shall provide" to "the commissioner provides" - grammar; in (4), changed "with a farm mutual insurer" to "with farm mutual insurers" - clarity. (Ch. 184)

33-11-103 In (5), changed "[the effective date of this act]" to "April 30, 2015". (Ch. 370)

33-15-601 In introduction, changed "[sections 1 through 8]" to "this part". (Ch. 369)

33-15-602 In (1), (2), changed "[sections 1 through 8]" to "this part". (Ch. 369)

33-15-603 In (1), changed "[sections 1 through 8]" to "this part". (Ch. 369)

33-15-604 In (2)(b), (3), changed "[section 3(2)]" to "33-15-603(2)". (Ch. 369)

33-15-606 Changed "[section 3]" to "33-15-603". (Ch. 369)

33-15-610 Changed "[sections 1 through 8]" to "this part". (Ch. 369)

33-15-611 Changed "[sections 1 through 8]" to "this part". (Ch. 369)

33-16-1021 In (2)(b), changed "state fund" to "the state fund" - consistency. (Ch. 320)

33-17-303 In (5), changed "[section 5(4)]" to "33-17-302(4)". (Ch. 139)

33-18-201 In (8), changed "was was entitled" to "was entitled" - grammar.

33-18-210 In (4), changed "[section 1(1)(a)]" to "33-18-217(1)(a)" and changed "[section 1]" to "33-18-217". (Ch. 98)

In (3), changed "[sections 1 through 6]" to "33-23-221 through 33-23-226". (Ch. 304)

33-18-212 In (3), changed "[section 1]" to "33-2-320". (Ch. 223)

33-20-208 In (8)(f)(i), (8)(f)(ii), changed "33-2-523" to "33-2-409"- to reflect renumbering. (Ch. 370)

33-22-170 In introduction, changed "[sections 1 through 4]" to "33-22-170 through 33-22-173". (Ch. 431)

33-23-221 In introduction, changed "[sections 1 through 6]" to "33-23-221 through 33-23-226". (Ch. 304)

33-23-225 In (1), (2), changed "[sections 1 through 6]" to "33-23-221 through 33-23-226". (Ch. 304)

33-23-226 Changed "[sections 1 through 6]" to "33-23-221 through 33-23-226". (Ch. 304)

33-28-105 In (6)(c), changed "formed as a reciprocal" to "formed as a reciprocal insurer" - clarity, consistency. (Ch. 335)

33-28-108 In (4)(b), changed "[section 2]" to "2-6-1002". (Ch. 348)

33-31-111 In (7), changed "[section 1]" to "33-22-139". (Ch. 256)

33-32-102 In (1), changed "[section 18]" to "33-32-402"; in (15), changed "[sections 17 through 31]" to "Title 33, chapter 32, part 4"; in (16), changed "[sections 10 through 16]" to "Title 33, chapter 32, part 3"; in (23), changed "this subsection (22)" to "this subsection (23)" - erroneous reference. (Ch. 428)

33-32-205 In (2) (two places), changed "[sections 1 through 9]" to "this part" - the prior reference contains less material than the new reference, but the material in the new reference does not affect the meaning of the reference. (Ch. 428)

33-32-206 In three places, changed "[sections 1 through 9]" to "this part" - the prior reference contains less material than the new reference, but the material in the new reference does not affect the meaning

of the reference. (Ch. 428)

33-32-207 In (1)(c), changed "[sections 10 through 31]" to "Title 33, chapter 32, parts 3 and 4"; in (3)(b), changed "[sections 5 and 6]" to "33-32-211 and 33-32-212". (Ch. 428)

33-32-208 In (4), (5)(a), changed "[sections 5 and 6]" to "33-32-211 and 33-32-212"; in (5)(a), changed "[sections 1 through 9]" to "this part" - the prior reference contains less material than the new reference, but the material in the new reference does not affect the meaning of the reference; in (5)(b), changed "[sections 17 through 31]" to "Title 33, chapter 32, part 4"; in (6)(a), changed "[Section 5 or 6]" to "Section 33-32-211 or 33-32-212". (Ch. 428)

33-32-211 In (4)(b)(i), (8)(i), changed "[sections 10 through 31]" to "Title 33, chapter 32, parts 3 and 4"; in (5), (8)(b), (8)(f), (9)(a), changed "[sections 10 through 16]" to "Title 33, chapter 32, part 3"; in (7)(a), changed "[section 3]" to "33-32-207"; in (8)(b), changed "[sections 17 through 31]" to "Title 33, chapter 32, part 4". (Ch. 428)

33-32-212 In (6), changed "[section 3]" to "33-32-207"; in (7)(b), (7)(f), (7)(g), (7)(k), changed "[sections 10 through 16]" to "Title 33, chapter 32, part 3"; in (7)(b), changed "[sections 17 through 31]" to "Title 33, chapter 32, part 4"; in (8), changed "[section 5(9)]" to "33-32-211(9)". (Ch. 428)

33-32-301 Changed "[sections 10 through 31]" to "Title 33, chapter 32, parts 3 and 4". (Ch. 428)

33-32-302 In (1), changed "[sections 10 through 31]" to "the provisions of Title 33, chapter 32, parts 3 and 4" - clarity; in (2), changed "[sections 10 through 31]" to "Title 33, chapter 32, parts 3 and 4". (Ch. 428)

33-32-303 Changed "[sections 10 through 16]" to "this part". (Ch. 428)

33-32-306 In (4), changed "[section 15]" to "33-32-308"; in (7)(b)(i), changed "[section 14(4)(b)]" to "33-32-307(4)(b)". (Ch. 428)

33-32-307 In (1), changed "[section 16]" to "33-32-309"; in (1), (4)(a), changed "[section 15]" to "33-32-308"; in (2)(a), (3)(a), changed "[section 15 or 16]" to "33-32-308 or 33-32-309"; in (2)(a), (4)(b), (5), changed "[sections 10 through 16]" to "this part"; in (2)(b)(i), changed "[sections 17 through 31]" to "Title 33, chapter 32, part 4"; in (4)(b), changed "[section 13(7)]" to "33-32-306(7)". (Ch. 428)

33-32-308 In (1), changed "[sections 1 through 9]" to "Title 33, chapter 32, part 2" - the prior reference contains less material than the new reference, but the material in the new reference does not affect the meaning of the reference; in (8), changed "[section 14]" to "33-32-307"; in (11)(c), changed "[sections 10 through 16]" to "this part"; in (11)(c), (11)(f)(vii)(A), changed "[sections 17 through 31]" to "Title 33, chapter 32, part 4"; in (11)(f)(ix), changed "[section 5(9)]" to "33-32-211(9)". (Ch. 428)

33-32-309 In (7), changed "[section 14]" to "33-32-307"; in (8)(c), (8)(f)(vii), changed "[sections 17 through 31]" to "Title 33, chapter 32, part 4"; in (9), changed "[section 5(9)]" to "33-32-211(9)"

33-32-401 Changed "[sections 17 through 31]" to "this part". (Ch. 428)

33-32-402 In introduction, changed "[sections 17 through 31]" to "this part"; in (2)(d), changed "as provided subsection (2)(a)" to "as provided in subsection (2)(a)" - grammar. (Ch. 428)

33-32-403 In (1)(a), changed "[section 22, 23, or 24]" to "33-32-410, 33-32-411, or 33-32-412"; in (1)(b)(i), changed "[sections 1 through 9]" to "Title 33, chapter 32, part 2" - the prior reference contains less material than the new reference, but the material in the new reference does not affect the meaning of the reference; in (3)(b)(ii), (6), changed "[sections 17 through 31]" to "this part"; in (4)(a)(i), changed "[section 15]" to "33-32-308"; in (4)(a)(ii), changed "[section 15 or 16]" to "33-32-308 or 33-32-309", changed "[section 20]" to "33-32-404", and changed "[section 14]" to "33-32-307"; in (4)(a)(iii), changed "[section 23 or 24]" to "33-32-411 or 33-32-412"; in (4)(a)(iii)(A), (4)(b)(i), (4)(b)(ii), changed "[section 23]" to "33-32-411"; in (4)(a)(iii)(B), (4)(b)(iii), (4)(b)(iv), changed "[section 24]" to "33-32-412"; in (4)(a)(iv), changed "[section 21]" to "33-32-405"; in (4)(b)(i), changed "[section 22]" to "33-32-410"; in (5)(a), changed "[section 31]" to "33-32-423". (Ch. 428)

33-32-404 In (1), changed "[section 23]" to "33-32-411". (Ch. 428)

33-32-405 In (1), changed "[section 22, 23, or 24]" to "33-32-410, 33-32-411, or 33-32-412"; In (1), (3), changed "[sections 10 through 16]" to "Title 33, chapter 32, part 3"; in (2)(a), (4)(a), (4)(a)(i), changed "[section 15]" to "33-32-308"; in (2)(b), changed "[section 15 or 16]" to "33-32-308 or 33-32-309"; in (4)(a)(i), (4)(c), changed "[section 23]" to "33-32-411"; in (4)(a)(ii), changed "[section 24]" to "33-32-412"; in (4)(b), changed "[section 23 or 24]" to "33-32-411 or 33-32-412"; in (4)(b), (4)(c), (4)(c)(i), changed "[section 16]" to "33-32-309"; in (5), changed "[section 14]" to "33-32-307"; in (6), changed "[section 22 or 24]" to "33-32-410 or 33-32-412". (Ch. 428)

33-32-410 In (1), changed "[section 19]" to "33-32-403"; in (2)(c), (7), changed "[sections 10 through 16]" to "Title 33, chapter 32, part 3"; in (2)(c), changed "[section 14(2)]" to "33-32-307(2)"; in (5)(b), changed "[sections 1 through 31]" to "Title 33, chapter 32, parts 2 through 4" - the prior reference contains less material than the new reference, but the material in the new reference does not affect the meaning of the reference; in (6)(a), changed "[section 26]" to "33-32-416"; in (6)(c), changed "[section 27(4)]" to "33-32-417(4)"; in (7), changed "[sections 1 through 9]" to "Title 33, chapter 32, part 2" - the prior reference contains less material than the new reference, but the material in the new reference does not affect the meaning of the reference. (Ch. 428)

33-32-411 In (1)(a)(i), (1)(a)(ii), changed "[section 16]" to "33-32-309"; in (1)(b)(i), changed "[section 22]" to "33-32-410"; in (2)(a), (9)(a), changed "[section 22(2)]" to "33-32-410(2)"; in (4)(a), changed "[section 22(5)]" to "33-32-410(5)"; in (4)(b), changed "[sections 1 through 31]" to "Title 33, chapter 32, parts

2 through 4" - the prior reference contains less material than the new reference, but the material in the new reference does not affect the meaning of the reference; in (5)(a), changed "[section 26]" to "33-32-416"; in (5)(c), changed "[section 27(4)]" to "33-32-417(4)"; in (6), changed "[sections 1 through 9]" to "Title 33, chapter 32, part 2" - the prior reference contains less material than the new reference, but the material in the new reference does not affect the meaning of the reference, and changed "[sections 10 through 16]" to "Title 33, chapter 32, part 3"; in (8), changed "[section 22(19)]" to "33-32-410(19)"; in (9)(b)(ii), changed "[section 22(21)]" to "33-32-410(21)". (Ch. 428)

33-32-412 In (1), changed "[section 19]" to "33-32-403"; in (2)(c)(i), changed "[section 20]" to "33-32-404"; in (2)(c)(ii), changed "[sections 1 through 31]" to "Title 33, chapter 32, parts 2 through 4" - the prior reference contains less material than the new reference, but the material in the new reference does not affect the meaning of the reference; in (2)(d)(i), (8)(a), changed "[section 26]" to "33-32-416"; in (2)(d)(iii), (8)(c), changed "[section 27(4)]" to "33-32-417(4)"; in (4)(e), (13)(b), changed "[sections 10 through 16]" to "Title 33, chapter 32, part 3"; in (4)(e), changed "[section 14(2)]" to "33-32-307(2)"; in (12)(a), changed "[section 27]" to "33-32-417"; in (13)(b), changed "[sections 1 through 9]" to "Title 33, chapter 32, part 2" - the prior reference contains less material than the new reference, but the material in the new reference does not affect the meaning of the reference. (Ch. 428)

33-32-415 In (2), changed "[sections 17 through 31]" to "this part". (Ch. 428)

33-32-416 In (1), (2), (4), changed "[sections 17 through 31]" to "this part"; in (2)(a), (4), (5), (6), (7), changed "[section 27]" to "33-32-417". (Ch. 428)

33-32-417 In (1), (4)(a), (5)(a), changed "[section 26]" to "33-32-416"; in (1), changed "[sections 22, 23, and 24]" to "33-32-410 through 33-32-412"; in (1)(a)(vi), changed "[sections 17 through 31]" to "this part"; in (1)(c), changed "[section 29]" to "33-32-421"; in (2)(b)(iv), changed "any regulatory body" to "regulatory body" - consistency. (Ch. 428)

33-32-418 In (1), changed "[sections 17 through 31]" to "this part". (Ch. 428)

33-32--421 In (1), changed "[sections 22, 23, or 24]" to "33-32-410, 33-32-411, or 33-32-412"; in (3)(e), changed "[section 22(17) or 24(15)]" to "33-32-410(17) or 33-32-412(15)"; in (5), changed "[sections 1 through 31]" to "Title 33, chapter 32, parts 2 through 4" - the prior reference contains less material than the new reference, but the material in the new reference does not affect the meaning of the reference. (Ch. 428)

33-35-306 In (1)(g), changed "[section 1]" to "33-22-139". (Ch. 256)

TITLE 35

35-1-310 In (4), changed "distinguishable on the record to" to "distinguishable on the record from" - grammar. (Ch. 166)

35-1-1401 Changed "[Sections 1 through 12]" to "This part". (Ch. 306)

35-1-1402 In introduction, (1), (2)(b), changed "[sections 1 through 12]" to "this part"; in (1), changed "[section 8]" to "35-1-1408"; in (2)(c), changed "[section 10]" to "35-1-1410"; in (9)(a), changed "[section 6(2)(a)]" to "35-1-1406(2)(a)". (Ch. 306)

35-1-1404 In (1), (2), (2)(b), changed "[sections 1 through 12]" to "this part". (Ch. 306)

35-1-1405 In introduction, changed "[sections 1 through 12]" to "this part"; in (2), changed "[section 3]" to "35-1-1403". (Ch. 306)

35-1-1406 In (4), changed "[sections 1 through 12]" to "this part". (Ch. 306)

35-1-1407 In (1), changed "[sections 1 through 12]" to "this part". (Ch. 306)

35-1-1408 In (1), changed "[sections 1 through 12]" to "this part" and changed "[section 5]" to "35-1-1405". (Ch. 306)

35-1-1409 In (1) (two places), changed "[section 6]" to "35-1-1406"; in (1)(b)(ii), changed "[section 6(2)]" to "35-1-1406(2)"; in (3), changed "[sections 1 through 12]" to "this part". (Ch. 306)

35-1-1410 In (1)(d), changed "[section 11]" to "35-1-1411". (Ch. 306)

35-1-1411 Changed "[section 1] through [section 12]" to "35-1-1401 through 35-1-1412". (Ch. 306)

35-1-1412 In (4), changed "[sections 1 through 12]" to "this part". (Ch. 306)

TITLE 37

37-1-131 In (1)(b), changed "[section 1]" to "37-1-321". (Ch. 80)

37-1-134 In (1), changed "board must consider" to "board shall consider" and changed "balances must not exceed" to "balances may not exceed" - style. (Ch. 187)

37-1-141 In (2), changed "[section 5]" to "37-1-420". (Ch. 80)

37-1-306 In (5), changed "[section 1]" to "37-1-321". (Ch. 80)

37-1-309 In (1), changed "[section 1]" to "37-1-321". (Ch. 80)

37-1-313 In (2), changed "[section 1]" to "37-1-321". (Ch. 80)

37-1-321 In (1), (3), (4)(a)(i), changed "board, or the department" to "board, the department" - style, grammar. (Ch. 80)

37-1-403 In (1), changed "[section 1]" to "37-1-321". (Ch. 80)

37-1-407 In (2), changed "[section 1]" to "37-1-321". (Ch. 80)
37-1-420 In (5), changed "[section 1]" to "37-1-321". (Ch. 80)
37-3-301 In (4), changed "[the effective date of this act]" to "July 1, 2015". (Ch. 154)
37-3-305 In (1)(d)(iii), changed "or its successor" to "or its successors" - consistency. (Ch. 154)
37-3-356 In Section 11(4)(b), changed "executive secretary" to "executive officer" - name change. (Ch. 203)
37-3-357 Changed "[section 1]" to "37-3-356" and changed "executive secretary" to "executive officer" - name change. (Ch. 203)
37-8-452 In (1)(a), changed "Title 37, chapter 8, part 4" to "this part" - style. (Ch. 65)
37-19-828 In (1)(b), changed "must maintain an office in this state and be organized" to "shall maintain an office in this state and must be organized" - style. (Ch. 125)
37-22-102 In (6), changed "[section 5]" to "37-22-313". (Ch. 130)
37-22-305 In (3)(g), changed "an activity or service" to "activities or services" - consistency. (Ch. 130)
37-23-102 In (4), changed "[section 8]" to "37-23-213". (Ch. 130)
37-37-102 In (4), changed "[section 11]" to "37-37-205". (Ch. 130)
37-50-205 In (3), changed "[section 1]" to "37-50-209". (Ch. 427)
37-54-302 In (4)(a), at end, deleted "and" - style. (Ch. 303)
37-67-101 In (2), changed "[section 13]" to "37-67-328". (Ch. 4)
37-67-312 In two places, changed "[section 5]" to "37-67-323". (Ch. 4)
37-67-313 In three places, changed "[section 7]" to "37-67-325". (Ch. 4)
37-67-324 Reoutlined section - style; in (1)(b), changed "[section 5(1)(c)]" to "37-67-323(1)(c). (Ch. 4)
37-67-327 In (2), changed "shall be set" to "must be set" - style. (Ch. 4)
37-68-103 In (8), changed "This subsection (8)" to "This subsection" - style. (Ch. 14)
37-69-304 In (1)(a), changed "credit towards" to "credit toward" - style. (Ch. 90)

TITLE 39

39-11-103 In (10), changed "account in [section 1]" to "account provided for in 39-11-205" - style. (Ch. 85)
39-11-205 In (4), changed "must be retained and not revert" to "must be retained and may not revert" - clarity. (Ch. 85)
39-12-101 In (2), changed "[sections 14 through 17]" to "this chapter". (Ch. 368)
39-12-102 In introduction, changed "[sections 14 through 17]" to "this chapter"; in (2), changed "[sections 1 through 13] and [sections 14 through 17]" to "Title 53, chapter 6, part 13, and this chapter". (Ch. 368)
39-12-103 In (1), changed "[sections 1 through 13]" to "Title 53, chapter 6, part 13" and changed "[section 14]" to "39-12-101"; in (2)(a), (2)(b), changed "The department of labor and industry" to "The department" - consistent use of defined term; in (2)(c), changed "[section 7(6)(c)]" to "53-6-1307(6)(c)" and changed "[section 7(6)]" to "53-6-1307(6)"; in (3), changed "[section 11]" to "53-6-1316". (Ch. 368)
39-12-107 Changed "[sections 14 through 17]" to "this chapter". (Ch. 368)
39-29-201 Changed "[Sections 1 through 3]" to "This part". (Ch. 147)
39-29-202 In (1), (2), changed "[sections 1 through 3]" to "this part". (Ch. 147)
39-29-203 In (2), changed "[sections 1 through 3]" to "this part". (Ch. 147)
39-71-401 In (1), changed "[section 1]" to "39-71-442". (Ch. 315)
39-71-435 In (5), changed "[section 8]" to "50-71-128". (Ch. 365)
39-71-704 In (1)(g)(iii), changed "under subsection (1)(g)" to "under this subsection (1)(g)" - style. (Ch. 123)
39-71-736 In (1)(a), changed "32 hours or 4 days' loss of wages" to "32 hours or 4 days of loss of wages" - clarity. (Ch. 123)
39-71-1050 In (7)(b), changed "[section 8]" to "50-71-128". (Ch. 365)
39-71-2312 In (4), changed "state fund" to "the state fund" - consistency; in (5), changed "the insurer may not" to "that may not" - grammar. (Ch. 320)
39-71-2315 In (2), changed "[section 1]" to "33-1-115 and 39-71-2375". (Ch. 320)
39-71-2316 In (1)(f), changed "[the effective date of this act]" to "January 1, 2016"; in (1)(g), changed "the board adopt" to "the board may adopt" - grammar and changed "state fund" to "the state fund" - consistency. (Ch. 320)
39-71-2351 In (2), changed "[section 1]" to "33-1-115 and 39-71-2375". (Ch. 320)
39-71-2375 In (3)(a)(ii), changed "state fund's obligation" to "the state fund's obligation" - consistency; in (4), changed "State fund" to "The state fund" - consistency; in (5)(b) (two places), changed "state fund" to "the state fund" - consistency. (Ch. 320)
39-71-2901 In (4), changed "provided in subsection (7)" to "provided for in subsection (7)" - consistency. (Ch. 39)

TITLE 40

40-4-108 In (4)(b)(i), changed "and consent" to "and that the parties consent" - clarity. (Ch. 137)
40-4-210 In (6), changed "40-5-194" to "40-5-1065, 40-5-1067, and 40-5-1068" - to reflect renumbering. (Ch.

174)

40-4-217 In (2)(a), changed "proposed changed in residence" to "proposed change in residence" - grammar. (Ch. 111)

40-5-263 In (3)(a), (6), changed "part 1" to "part 10"- to reflect renumbering. (Ch. 174)

40-5-272 In (1), changed "this state, by a court" to "this state or by a court" - clarity; in (7), changed "40-5-145, 40-5-149, and 40-5-150" to "40-5-1008, 40-5-1012, and 40-5-1013" - to reflect renumbering. (Ch. 174)

40-5-315 In (7)(a), changed "40-5-184" to "40-5-1055" - to reflect renumbering. (Ch. 174)

40-5-403 In (8), changed "part 1" to "part 10" - to reflect renumbering. (Ch. 174)

40-5-404 In (1)(b), changed "part 1" to "part 10" - to reflect renumbering; in (2)(a), changed "40-5-180, 40-5-271" to "40-5-271, 40-5-1052" - to reflect renumbering; in (2)(b), changed "40-5-190" to "40-5-1061" - to reflect renumbering. (Ch. 174)

40-5-411 In (2), changed "40-5-184" to "40-5-1055" - to reflect renumbering. (Ch. 174)

40-5-431 In (1), changed "40-5-188 through 40-5-191" to "40-5-1059 through 40-5-1062" - to reflect renumbering. (Ch. 174)

40-5-906 In (10), (10)(c), changed "40-5-157, 40-5-291" to "40-5-291, 40-5-1046 through 40-5-1051" - to reflect renumbering. (Ch. 174)

40-5-909 In (6)(a), changed "40-5-103" to "40-5-1002" - to reflect renumbering. (Ch. 174)

40-5-1002 In (5)(b), changed "40-5-166" to "40-5-1028" - to reflect renumbering; in (16)(d), (17)(d), changed "[sections 6 through 18]" to "40-5-1073 through 40-5-1085". (Ch. 174)

40-5-1005 In (1), (2), (3), changed "40-5-101 through 40-5-152 and 40-5-157 through 40-5-196" to "40-5-1001 through 40-5-1004, 40-5-1008, 40-5-1010 through 40-5-1017, 40-5-1021 through 40-5-1039, 40-5-1042, 40-5-1043, 40-5-1046 through 40-5-1052, and 40-5-1055 through 40-5-1068" - to reflect renumbering; in (1), (3) (two places), changed "[sections 6 through 18]" to "40-5-1073 through 40-5-1085"; in (3) changed "[Sections 6 through 18]" to "Sections 40-5-1073 through 40-5-1085". (Ch. 174)

40-5-1008 In (2), changed "40-5-194" to "40-5-1065, 40-5-1067, and 40-5-1068" (to reflect renumbering) and changed "[section 4]" to "40-5-1069". (Ch. 174)

40-5-1009 Changed "40-5-149, 40-5-150, and [section 3]" to "40-5-1012, 40-5-1013, and 40-5-1018" - to reflect renumbering. (Ch. 174)

40-5-1014 In (3), changed "40-5-184 through 40-5-195 and [sections 4 and 5]" to "40-5-1055 through 40-5-1070" - to reflect renumbering; in (5), changed "40-5-149 or 40-5-150" to "40-5-1012 or 40-5-1013" - to reflect renumbering; in (6)(c), changed "40-5-181" to "40-5-1016" - to reflect renumbering. (Ch. 174)

40-5-1017 Changed "40-5-175" to "40-5-1036", changed "40-5-176" to "40-5-1037", changed "40-5-177" to "40-5-1038", and changed "40-5-157 through 40-5-166, 40-5-170 through 40-5-180, 40-5-183 through 40-5-195, and [sections 4 and 5]" to "40-5-1021 through 40-5-1039, 40-5-1042, 40-5-1046 through 40-5-1052, and 40-5-1055 through 40-5-1070" - to reflect renumbering. (Ch. 174)

40-5-1021 In (1), changed "40-5-158 through 40-5-166, 40-5-170 through 40-5-178, and 40-5-183" to "40-5-1021 through 40-5-1039" - to reflect renumbering. (Ch. 174)

40-5-1025 In (1), changed "40-5-158(2)" to "40-5-1021(2)" - to reflect renumbering. (Ch. 174)

40-5-1027 In (5), changed "40-5-178" to "40-5-1039" - to reflect renumbering. (Ch. 174)

40-5-1031 In (1), changed "40-5-172" to "40-5-1032" - to reflect renumbering. (Ch. 174)

40-5-1033 In (3), changed "40-5-184 through 40-5-195 and [sections 4 and 5]" to "40-5-1055 through 40-5-1070" - to reflect renumbering. (Ch. 174)

40-5-1042 In (3), changed "40-5-162" to "40-5-1025" - to reflect renumbering. (Ch. 174)

40-5-1047 In (2), changed "subsections (4) and (5)" to "40-5-1048 and subsection (3) of this section" - to reflect renumbering. (Ch. 174)

40-5-1051 In (1), changed "40-5-184 through 40-5-194 and [sections 4 and 5]" to "40-5-1055 through 40-5-1065 and 40-5-1067 through 40-5-1070" - to reflect renumbering. (Ch. 174)

40-5-1056 In (1), changed "[section 11]" to "40-5-1078"; in (1)(e), changed "40-5-172" to "40-5-1032" - to reflect renumbering. (Ch. 174)

40-5-1059 In (2)(b), changed "[section 12]" to "40-5-1079". (Ch. 174)

40-5-1060 In (1), changed "40-5-188" to "40-5-1059" and changed "40-5-190" to "40-5-1061" - to reflect renumbering. (Ch. 174)

40-5-1061 In (1)(g), changed "40-5-187" to "40-5-1058" - to reflect renumbering. (Ch. 174)

40-5-1063 Changed "40-5-184 through 40-5-191 and 40-5-271" to "40-5-1055 through 40-5-1062" - to reflect renumbering. (Ch. 174)

40-5-1064 Changed "40-5-194" to "40-5-1065, 40-5-1067, and 40-5-1068" - to reflect renumbering. (Ch. 174)

40-5-1065 In (1), changed "subsection (7)" to "40-5-1067" - to reflect renumbering; in (3), changed "40-5-151" to "40-5-1014" - to reflect renumbering; in (6), changed "40-5-145(2)" to "40-5-1008(2)" - to reflect renumbering. (Ch. 174)

40-5-1067 In (2), changed "this subsection (7)" to "this section", changed "40-5-101, 40-5-103, 40-5-143 through 40-5-152, 40-5-181, and 40-5-184 through 40-5-195, [sections 1 through 5]" to "40-5-1001 through 40-5-1005, 40-5-1008 through 40-5-1018, 40-5-1055 through 40-5-1070", and changed "Sections

40-5-153, 40-5-154, 40-5-158 through 40-5-180, 40-5-183, 40-5-196, and [sections 6 through 13]" to "Sections 40-5-1021 through 40-5-1039, 40-5-1042, 40-5-1043, 40-5-1052, 40-5-1073 through 40-5-1080, 40-5-1088, and 40-5-1089" - to reflect renumbering. (Ch. 174)

40-5-1069 In (1), changed "[section 16]" to "40-5-1083" and changed "40-5-194" to "40-5-1065, 40-5-1067, and 40-5-1068" - to reflect renumbering. (Ch. 174)

40-5-1070 Changed "40-5-184 through 40-5-191" to "40-5-1055 through 40-5-1062" - to reflect renumbering. (Ch. 174)

40-5-1073 In introduction, changed "[sections 6 through 18]" to "40-5-1073 through 40-5-1085"; in (2), (3), (5), changed "40-5-103(5)(d)" to "40-5-1002(5)(d)" - to reflect renumbering. (Ch. 174)

40-5-1074 Changed "[Sections 6 through 18]" to "Sections 40-5-1073 through 40-5-1085", in two places changed "[sections 6 through 18]" to "40-5-1073 through 40-5-1085", and changed "40-5-101 through 40-5-152 and 40-5-157 through 40-5-196" to "40-5-1001 through 40-5-1004, 40-5-1008, 40-5-1010 through 40-5-1017, 40-5-1021 through 40-5-1039, 40-5-1042, 40-5-1043, 40-5-1046 through 40-5-1052, and 40-5-1055 through 40-5-1068" - to reflect renumbering. (Ch. 174)

40-5-1076 In (1) changed "[sections 6 through 18]" to "40-5-1073 through 40-5-1085"; in (1)(d) changed "[section 13(2)(b), (2)(d), or (2)(i)]" to "40-5-1080(2)(b), (2)(d), or (2)(i)". (Ch. 174)

40-5-1077 In (2) changed "[sections 11 through 18]" to "40-5-1078 through 40-5-1085"; in (5), changed "[Sections 6 through 18]" to "Sections 40-5-1073 to 40-5-1085". (Ch. 174)

40-5-1078 In (1), changed "[sections 6 through 18]" to "40-5-1073 through 40-5-1085" and changed "40-5-184 through 40-5-195 and [sections 4 and 5]" to "40-5-1055 through 40-5-1070" - to reflect renumbering; in (2), changed "40-5-171 and 40-5-185(1)" to "40-5-1031 and 40-5-1056(1)" - to reflect renumbering; in (4), changed "[section 12]" to "40-5-1079". (Ch. 174)

40-5-1079 In (1), changed "[sections 6 through 18]" to "40-5-1073 through 40-5-1085" and changed "40-5-188 through 40-5-191" to "40-5-1059 through 40-5-1062" - to reflect renumbering; in (4), changed "[section 13]" to "40-5-1080". (Ch. 174)

40-5-1080 In (2)(b), changed "40-5-145" to "40-5-1008" - to reflect renumbering; in (2)(e), changed "[section 11]" to "40-5-1078"; in (2)(j), changed "[section 16]" to "40-5-1083"; in (3)(b) changed "[section 9]" to "40-5-1076". (Ch. 174)

40-5-1083 In (2), changed "[section 13(3)]" to "40-5-1080(3)". (Ch. 174)

40-5-1084 Changed "[sections 6 through 18]" to "40-5-1073 through 40-5-1085". (Ch. 174)

40-5-1085 Changed "[sections 6 through 18]" to "40-5-1073 through 40-5-1085". (Ch. 174)

40-5-1088 In (1), changed "40-5-154" to "40-5-1089" - to reflect renumbering. (Ch. 174)

TITLE 41

41-3-301 In (6), changed "[section 1]" to "41-3-305". (Ch. 376)

41-3-305 In (3)(a)(ii), changed "must sign and acknowledge" to "shall sign and acknowledge" - style. (Ch. 376)

41-3-1210 In introduction, changed "[sections 1 through 6]" to "this part". (Ch. 354)

41-3-1211 In (2), changed "[section 7]" to "41-3-209"; in (3), changed "[sections 1 through 6]" to "this part". (Ch. 354)

41-3-1213 Changed "[sections 1 through 6]" to "this part". (Ch. 354)

41-4-102 Changed "part 1" to "part 10" - to reflect renumbering. (Ch. 174)

TITLE 44

44-3-301 In (2), changed "which" to "that" - style; in (3), changed "will determine" to "shall determine" and changed "priority is given" to "priority must be given" - style. (Ch. 450)

44-4-1502 In (4), changed "[sections 12 through 14]" to "this part" - the prior reference contains less material than the new reference, but the material in the new reference does not affect the meaning of the reference; in (4), changed "[section 1]" to "45-5-701". (Ch. 285)

44-5-311 In (3), changed "[section 2], [section 3], [section 4], or [section 5]" to "45-5-702, 45-5-703, 45-5-704, or 45-5-705". (Ch. 285)

44-10-202 Reoutlined section - style; in (1)(c), changed "subsection (11)" to "subsection (2)" - to reflect renumbering; in (2), changed "curriculum" to "curriculum referred to in subsection (1)(c)" - clarity. (Ch. 331)

44-12-102 In (1), changed "[sections 1 through 5]" to "44-12-207 through 44-12-211". (Ch. 421)

44-12-208 In (1)(b), changed "[section 4(2)]" to "44-12-210(2)". (Ch. 421)

44-12-209 In (2) (two places), changed "[section 2(1)(b)]" to "44-12-208(1)(b)". (Ch. 421)

44-12-210 In (1), changed "[section 1]" to "44-12-207" and changed "44-12-205 and 44-12-206" to "44-12-212 and 44-12-513"- to reflect renumbering; in (4), changed "shall not be" to "is not" (style) and changed "[section 5]" to "44-12-211". (Ch. 421)

44-12-211 In (1), changed "[sections 1 through 4]" to "44-12-207 through 44-12-210". (Ch. 421)

44-12-212 In (1), (2), changed "[section 1]" to "44-12-207" and changed "[section 5]" to "44-12-211". (Ch. 421)

TITLE 45

45-5-513 In (1)(a), changed "[the effective date of this act]" to "May 5, 2015". (Ch. 412)

45-5-624 In (11)(b), changed "For purposes of" to "For the purposes of" - style; in (11)(b)(ii), changed "provided by an emergency medical service or health care facility" to "provided by a health care facility or an emergency medical service" - consistency. (Ch. 152)

45-5-701 In introduction, changed "[sections 1 through 10]" to "this part"; in (5), changed "[section 2, section 3, section 4, or section 5]" to "45-5-702, 45-5-703, 45-5-704, or 45-5-705". (Ch. 285)

45-5-706 In (1), (2), changed "[section 2, section 3, section 4, or section 5]" to "45-5-702, 45-5-703, 45-5-704, or 45-5-705". (Ch. 285)

45-5-707 In (1)(b), changed "[section 2, section 3, section 4, or section 5]" to "45-5-702, 45-5-703, 45-5-704, or 45-5-705". (Ch. 285)

45-5-708 Changed "[section 2, section 3, section 4, or section 5]" to "45-5-702, 45-5-703, 45-5-704, or 45-5-705" and changed "[section 11]" to "27-1-755". (Ch. 285)

45-6-328 In (5), changed "[sections 1 through 5] apply to" to "44-12-207 through 44-12-211 applies to" - grammar. (Ch. 421)

45-9-206 In (1), changed "44-12-205 and 44-12-206" to "44-12-212 and 44-12-213" - to reflect renumbering; in (2), changed "[section 3]" to "44-12-209"; in (3)(b), changed "(2)(a)" to "(3)(a)" - to reflect renumbering. (Ch. 421)

TITLE 46

46-16-222 In (1)(a)(i), (1)(a)(ii), changed "[section 2]" to "45-6-333". (Ch. 180)

46-18-111 In (1)(b), changed "[section 4], [section 5]" to "45-5-704, 45-5-705". (Ch. 285)

46-18-207 In (2)(a)(iii), changed "sex offender treatment program" to "sexual offender treatment program" - consistency. (Ch. 285)

46-18-235 In (1)(b), changed "44-12-206" to "44-12-213"- to reflect renumbering. (Ch. 421)

46-18-255 In (3), changed "[section 1]" to "45-5-513". (Ch. 412)

46-18-608 In (5), changed "[section 1]" to "45-5-701". (Ch. 295)

46-23-110 In (1), changed "[section 3]" to "2-6-1003". (Ch. 348)

46-23-201 In (1), changed "[section 1]" to "46-23-208". (Ch. 198)

46-23-202 Changed "[section 1]" to "46-23-208". (Ch. 198)

46-23-502 In (9)(a), changed "[section 4], or [section 5]" to "45-5-704, or 45-5-705". (Ch. 285)

46-23-520 In (2)(c), changed "[section 1]" to "45-5-513". (Ch. 412)

TITLE 50

50-12-101 Changed "[Sections 1 through 10]" to "This part". (Ch. 135)

50-12-102 In introduction, (3)(c), changed "[sections 1 through 10]" to "this part"; in (1), changed "[section 4]" to "50-12-104"; in (6), changed "[section 5]" to "50-12-105". (Ch. 135)

50-12-103 In (1), changed "[sections 1 through 10]" to "this part". (Ch. 135)

50-12-106 In (1), changed "[Sections 1 through 10] do" to "This part does"; in (2), changed "[sections 1 through 10]" to "this part". (Ch. 135)

50-15-111 In (3), changed "[section 1]" to "37-19-203". (Ch. 380)

50-31-103 In (17), changed "means a a retail" to "means a retail" - grammar. (Ch. 239)

50-32-502 In (4), changed "[section 3]" to "50-32-503". (Ch. 251)

50-50-102 In (18), changed "[section 2]" to "50-50-117"; in (21)(c)(xiii), changed "[section 3]" to "50-50-120". (Ch. 239)

50-50-116 In (1), changed "[section 2]" to "50-50-117". (Ch. 239)

50-50-121 In (6), changed "[section 1]" to "50-50-116". (Ch. 239)

50-50-201 In (1)(b)(i), changed "[section 3(2)(a)]" to "50-50-120(2)(a)". (Ch. 239)

50-50-205 In (6)(a), changed "[section 3]" to "50-50-120"; in (7), changed "charged a person" to "charged to a person" - grammar. (Ch. 239)

50-50-208 Changed "[section 2]" to "50-50-117". (Ch. 239)

50-50-215 In (1)(b), changed "[section 2]" to "50-50-117" and changed "[section 3]" to "50-50-120". (Ch. 239)

50-71-113 In (4), (5), changed "[section 8]" to "50-71-128". (Ch. 365)

50-71-119 In (3)(c), changed "[section 8]" to "50-71-128". (Ch. 365)

50-71-128 In (6)(b)(ii), (6)(b)(iii) (two places), changed "plan No. 3" to "plan No. 3, the state fund" - consistency. (Ch. 365)

50-72-106 In (3), changed "[section 8]" to "50-71-128". (Ch. 365)

50-73-107 In (3), changed "[section 8]" to "50-71-128". (Ch. 365)

TITLE 53

53-1-104 In (1)(a), changed "Montana state hospital" to "the Montana state hospital" - consistency. (Ch. 161)

53-6-196 In (1), (1)(a), (2)(a) (two places), (2)(b), (3), (4), changed "department of public health and human services" to "department" - consistent use of defined term. (Ch. 453)
53-6-402 In (14), changed "[section 1]" to "53-6-405"; in (15), changed "[section 2]" to "53-6-406". (Ch. 324)
53-6-405 In (3), changed "is not limited to" to "are not limited to" - grammar. (Ch. 324)
53-6-1301 Changed "[Sections 1 through 13], [sections 14 through 17], and [section 19]" to "This part, along with Title 39, chapter 12, and 25-3-106". (Ch. 368)
53-6-1303 In introduction, changed "[sections 1 through 13]" to "this part"; in (2), (4), changed "[sections 1 through 13] and [sections 14 through 17]" to "Title 39, chapter 12, and this part"; in (3), changed "[section 4]" to "53-6-1304". (Ch. 368)
53-6-1304 In (1), (2), changed "[sections 1 through 13]" to "this part"; in (2), (3), (5), changed "the department of public health and human services" to "the department" - consistent use of defined term. (Ch. 368)
53-6-1305 In (1), (3)(a), (6), changed "[section 4]" to "53-6-1304; in (1)(c), changed "[section 7]" to "53-6-1307"; in (1)(f), changed "[section 8]" to "53-6-1311"; in (3)(a)(ii), at end, deleted "or" - style; in (5)(a), changed "[sections 1 through 13] and [sections 14 through 17]" to "Title 39, chapter 12, and this part". (Ch. 368)
53-6-1306 In (1), changed "[sections 1 through 13]" to "this part". (Ch. 368)
53-6-1307 In (6)(c), changed "[sections 14 through 17]" to "Title 39, chapter 12". (Ch. 368)
53-6-1312 In (2)(b), changed "and" to "or" - clarity. (Ch. 368)
53-6-1313 In introduction, changed "[section 4]" to "53-6-1304", changed "[the effective date of this act]" to "the effective date of this section", and changed "[sections 1 through 13]" to "this part"; in (2), changed "[section 7]" to "53-6-1307". (Ch. 368)
53-6-1317 In (2)(a), (4)(h), changed "[section 4]" to "53-6-1304"; in (2)(f), changed "[section 18]" to "15-30-2660"; in (2)(i), (3), changed "[sections 1 through 13] and [sections 14 through 17]" to "Title 39, chapter 12, and this part". (Ch. 368)
53-6-1318 In (1), changed "[sections 1 through 13]" to "this part"; in (2), changed "[sections 14 through 17]" to "Title 39, chapter 12". (Ch. 368)
53-6-2101 In (2), changed "[sections 1 through 3]" to "this part". (Ch. 265)
53-6-2102 In (1), changed "[sections 1 through 3]" to "this part". (Ch. 265)
53-6-2103 In (5)(a), changed "[sections 1 through 3]" to "this part"; in (6), changed "[section 2(3)]" to "53-6-2102(3)". (Ch. 265)
53-20-161 In (1)(e), changed "consent;" to "consent; or" - consistency. (Ch. 444)
53-21-1108 In (5), changed "[section 2]" to "2-6-1002" and changed "[section 3]" to "2-6-1003". (Ch. 348)
53-25-103 In (5), changed "[section 5]" to "53-25-105"; in (14)(c), changed "[section 8]" to "53-25-111"; in (16), changed "[sections 1 through 15]" to "this part"; in (18), changed "[section 9]" to "53-25-112"; in (22), changed "[section 15]" to "53-25-121". (Ch. 436)
53-25-105 In (6)(a), changed "[section 9]" to "53-25-112"; in (6)(b), changed "[sections 1 through 15]" to "this part". (Ch. 436)
53-25-111 In (3)(b), changed "[section 9]" to "53-25-112". (Ch. 436)

TITLE 60

60-3-201 In (1), changed "15-70-343" to "15-70-403" - to reflect renumbering. (Ch. 220)
60-3-202 In two places, changed "15-70-343" to "15-70-403" - to reflect renumbering. (Ch. 220)

TITLE 61

61-5-105 In (2), changed "[section 1]" to "61-5-232". (Ch. 358)
61-5-212 In (1)(a)(i), changed "[section 1]" to "61-5-232". (Ch. 358)
61-5-232 In (3)(c), changed "that is issued" to "and that is issued" - clarity. (Ch. 358)
61-6-157 In (4), changed "[sections 1 through 20]" to "Title 2, chapter 6, parts 10 and 11" - the prior reference contains less material than the new reference, but the material in the new reference does not affect the meaning of the reference. (Ch. 348)
61-6-302 In (2)(b) (two places), changed "the card" to "the insurance card" - clarity, consistency; in (2)(d), changed "this subsection" to "subsection (2)(c)" - to reflect renumbering. (Ch. 146)
In (2)(b), changed "[section 1]" to "33-15-601". (Ch. 369)
61-8-326 In (2)(a), changed "subsection (b)" to "subsection (2)(b)" - clarity. (Ch. 255)
61-8-402 In (6)(a), changed "[section 1]" to "subsection (6)(b)"; in (6)(b), changed "61-8-402(6)" to "this subsection (6)". (Ch. 424)
61-8-421 In (2), changed "[sections 1 through 5]" to "44-12-207 through 44-12-211"; in (3)(a), changed "44-12-206" to "44-12-213"- to reflect renumbering; in (4), changed "44-12-205(3)" to "44-12-212(3)" - to reflect renumbering. (Ch. 421)
61-8-465 Reoutlined subsections (3), (4) - clarity; in (3)(b), changed "subsection (3)(b)" to "subsection (3)(a)(ii)" - to reflect reoutlining; in (4)(b), changed "subsection (4)(b)" to "subsection (4)(a)(ii)" - to reflect reoutlining; in (6), changed "excessive alcohol concentration, under" to "excessive alcohol

concentration, or under" - clarity. (Ch. 424)

61-8-725 In (2)(b), changed "90 miles per hour" to "90 miles an hour" - style. (Ch. 395)

61-10-154 In (5)(b) changed "summons" to "summonses" - grammar. (Ch. 3)
In (6)(c), (8), changed "part 3" to "part 4" - to reflect renumbering. (Ch. 220)

61-11-510 In (3)(b)(i), changed "[section 4]" to "2-6-1006". (Ch. 348)

61-12-206 In (5), changed "part 3" to "part 4" - to reflect renumbering. (Ch. 220)

61-12-1001 In introduction, changed "[sections 1 through 4]" to "this part"; in (2)(d), changed "subsection (2)(a) through (2)(d)" to "subsections (2)(a) through (2)(d)" - grammar. (Ch. 272)

61-12-1002 Changed "[section 4]" to "61-12-1004". (Ch. 272)

61-12-1004 In (2), changed "[Sections 1 through 4] do" to "This part does". (Ch. 272)

TITLE 67

67-1-301 In (3)(a), (3)(a)(i), changed "15-70-343(1)(c)" to "15-70-403(1)(c)" - to reflect renumbering; in (3)(a)(ii), (3)(c), changed "15-70-356(6)" to "15-70-425(6)" - to reflect renumbering; in (4), changed "15-70-356" to "15-70-425" - to reflect renumbering. (Ch. 220)

TITLE 69

69-8-402 In (2)(f), changed "subsection (2)" to "this subsection (2)" - clarity. (Ch. 252)

69-12-101 In (20), changed "shall not be deemed" to "may not be deemed" - style. (Ch. 456)

69-12-205 In (3), changed "[section 2]" to "69-12-341". (Ch. 456)

69-12-321 In (1)(b), changed "set not later than 60 days" to "set for not later than 60 days" - grammar. (Ch. 456)

69-12-343 In (4), changed "subsections (2) or (3)" to "subsection (2) or (3)" - grammar. (Ch. 456)

69-12-345 In (3) (two places), (4) (two places), changed "[section 4]" to "69-12-343"; in (3), changed "[Sections 4 through 6]" to "Sections 69-12-343 through 69-12-345" and changed "[sections 4 through 6]" to "69-12-343 through 69-12-345"; in (5), changed "[section 5]" to "69-12-344". (Ch. 456)

TITLE 71

71-3-810 In (2), changed "liens which have been preserved" to "liens that have been preserved" - style. (Ch. 348)

TITLE 72

72-7-101 Changed "[Sections 1 through 38]" to "This chapter". (Ch. 293)

72-7-102 In introduction, changed "[sections 1 through 38]" to "this chapter". (Ch. 293)

72-7-203 In introduction, (3), changed "[section 8]" to "72-7-204". (Ch. 293)

72-7-301 In (1)(b)(ii), changed "[section 14]" to "72-7-304". (Ch. 293)

72-7-307 In (1), changed "[section 16]" to "72-7-306". (Ch. 293)

72-7-502 In (2), changed "[section 35(3)]" to "72-7-504(3)" and changed "[the effective date of this act]" to "October 1, 2015". (Ch. 293)

72-7-503 In (2), changed "[the effective date of this act]" to "October 1, 2015". (Ch. 293)

72-7-603 In (1), (1)(a), (1)(b), (1)(c), (1)(d), (1)(e), (2), changed "[the effective date of this act]" to "October 1, 2015". (Ch. 293)

TITLE 75

75-5-702 In (9)(d), changed "receipt of written request" to "receipt of the written request" - grammar; in (9)(f) (two places), (9)(g) (two places), changed "[the effective date of this act]" to "April 27, 2015". (Ch. 319)

75-11-302 In (2), (14), changed "15-70-301" to "15-70-401" - to reflect renumbering; in (8), changed "15-70-341" to "15-70-402" - to reflect renumbering. (Ch. 220)

75-11-309 In (1)(d)(ii), changed "[section 5(4)(b)]" to "75-11-408(4)(b)". (Ch. 296)

75-11-314 In (5), changed "15-70-341, 15-70-344, 15-70-345, 15-70-351 through 15-70-355, 15-70-356(3), and 15-70-366" to "15-70-402, 15-70-410, 15-70-411, 15-70-416 through 15-70-418, 15-70-420, 15-70-421, 15-70-425(3), and 15-70-443" and changed "15-70-343, 15-70-348, 15-70-356(1), and 15-70-361" to "15-70-403, 15-70-412, 15-70-425(1), and 15-20-426" - to reflect renumbering. (Ch. 220)

75-11-401 Changed "[Sections 1 through 6]" to "This part". (Ch. 296)

75-11-403 In (1), (2), changed "[sections 1 through 6]" to "this part"; in (1), changed "federal Brownfields Revitalization Act" to "federal Brownfields Revitalization and Environmental Restoration Act of 2001" - consistency and to reflect correct name of act; in (2)(j), changed "[section 4]" to "75-11-407". (Ch. 296)

TITLE 76

76-5-1106	Changed "shall not be extended" to "may not be extended" - style; changed "[sections 1 through 5]" to "Title 13, chapter 1, part 5". (Ch. 49)
76-13-117	In (3), changed "[section 2]" to "76-13-118". (Ch. 425)
76-13-118	Changed "[section 1(2) and (4)]" to "76-13-117(2) and (4)". (Ch. 425)
76-15-303	In (1), changed "[sections 1 through 5]" to "Title 13, chapter 1, part 5". (Ch. 49)
76-15-304	In (2), changed "[sections 1 through 5]" to "Title 13, chapter 1, part 5". (Ch. 49)
76-15-312	In (1)(a), changed "as provided in (1)(b)" to "as provided in subsection (1)(b)" - style; in (4), changed "[sections 1 through 5]" to "Title 13, chapter 1, part 5". (Ch. 49)
76-15-506	In (2), changed "[sections 1 through 5]" to "Title 13, chapter 1, part 5". (Ch. 49)
76-15-605	In (4), changed "[sections 1 through 5]" to "Title 13, chapter 1, part 5". (Ch. 49)
76-15-706	In (1)(b), changed "planting of lands to" to "planting of lands with" - clarity. (Ch. 194)
76-15-1004	In (1)(a), (3)(c), changed "[section 4]" to "76-15-1006". (Ch. 155)
76-15-1005	In introduction, changed "[section 4]" to "76-15-1006". (Ch. 155)
76-15-1011	In (1), changed "[sections 3 and 4]" to "76-15-1005 and 76-15-1006". (Ch. 155)
76-22-103	In (10), changed "[section 1]" to "2-15-243". (Ch. 445)
76-22-104	In (1), changed "[section 8]" to "76-22-110"; in (3), changed "[section 6(2)]" to "76-22-105(2)"; in (3), (4), changed "[section 9]" to "76-22-111". (Ch. 445)
76-22-105	In (1)(d), (1)(g), changed "[section 7]" to "76-22-109"; in (1)(g), changed "[section 9]" to "76-22-111"; in (2), changed "[section 5(3)]" to "76-22-104(3)"; in (3), changed "[the effective date of this act]" to "May 7, 2015" and changed "[section 5]" to "76-22-104". (Ch. 445)
76-22-109	In (2)(a), (4), changed "[section 9]" to "76-22-111". (Ch. 445)
76-22-110	In (1), changed "[section 10]" to "76-22-112"; in (1)(k), (5), changed "[section 9]" to "76-22-111"; in (1)(l)(ii), changed "the habitat exchange" to "if the habitat exchange" (clarity) and changed "[section 7]" to "76-22-109"; in (3), changed "Grants must be awarded" to "Grants may be awarded" - style. (Ch. 445)
76-22-111	In (1)(b)(i), changed "[section 5]" to "76-22-104"; in (1)(b)(i), (1)(b)(ii), changed "[section 7]" to "76-22-109". (Ch. 445)

TITLE 80

80-7-1013	In (3), changed "[section 1]" to "80-7-1016". (Ch. 289)
80-7-1016	In (4), changed "[section 2]" to "80-7-1017". (Ch. 289)
80-7-1017	In (1), (4), changed "[section 3]" to "80-7-1018"; in (2), changed "[section 1]" to "80-7-1016"; in (4), changed "[sections 1 through 3]" to "80-7-1016 through 80-7-1018". (Ch. 289)
80-7-1018	In (1), (8), changed "[section 2]" to "80-7-1017"; in (9), changed "[sections 1 through 3]" to "80-7-1016 through 80-7-1018". (Ch. 289)

TITLE 81

81-1-112	In (4), changed "[section 1]" to "81-1-113". (Ch. 349)
81-2-115	In (1)(b), changed "[section 2]" to "2-6-1002". (Ch. 348)
81-4-207	In (3), changed "[sections 1 through 6]" to "Title 81, chapter 29, part 1". (Ch. 429)
81-4-208	In (3), changed "[sections 1 through 6]" to "Title 81, chapter 29, part 1". (Ch. 429)
81-22-208	In (1)(b), changed "cream is subject" to "cream are subject" - grammar. (Ch. 239)
81-29-101	In introduction, changed "[sections 1 through 6]" to "this part". (Ch. 429)
81-29-104	In (3), changed "[sections 2 and 5]" to "81-29-102 and 81-29-103". (Ch. 429)
81-29-105	In introduction, changed "[section 4]" to "81-29-104". (Ch. 429)
81-29-106	In (1), changed "[section 5]" to "81-29-103"; in (2), changed "[sections 1 through 6]" to "this part". (Ch. 429)

TITLE 82

82-4-335	In (5)(l), (5)(n), changed "[section 5]" to "82-4-376", changed "[section 6]" to "82-4-377", and changed "[section 8]" to "82-4-379". (Ch. 399)
82-4-336	In (13), changed "[section 6]" to "82-4-377". (Ch. 399)
82-4-337	In (1)(d)(iii), changed "[the effective date of this act]" to "October 1, 2015", changed "[section 5]" to "82-4-376", changed "[section 6]" to "82-4-377", and changed "[section 8]" to "82-4-379". (Ch. 399)
82-4-342	In (5)(k)(iii), changed "[section 5(2)(l) and (2)(dd)]" to "82-4-376(2)(l) and (2)(dd)". (Ch. 399)
82-4-375	In (1), changed "[the effective date of this act]" to "October 1, 2015"; in (3)(c), changed "[section 10]" to "82-4-381". (Ch. 399)
82-4-377	In (1), (10), changed "[section 5]" to "82-4-376". (Ch. 399)

82-4-379 In (2) (three places), changed "[the effective date of this act]" to "October 1, 2015". (Ch. 399)
82-4-380 In (1), changed "[section 5]" to "82-4-376" and changed "[section 6]" to "82-4-377". (Ch. 399)

TITLE 85

85-2-111 In (2), changed "[sections 1 and 2]" to "85-20-1901 and 85-20-1902". (Ch. 294)
85-2-114 In (8), changed "[section 2]" to "85-20-1902". (Ch. 294)
85-2-281 In (1), changed "provide reports to the water policy committee quarterly" to "provide quarterly reports to the water policy committee" - clarity. (Ch. 269)
85-2-301 In (5), changed "[section 2]" to "85-20-1902". (Ch. 294)
85-2-302 In (8), changed "[section 2]" to "85-20-1902". (Ch. 294)
85-2-306 In (9), changed "[section 2]" to "85-20-1902". (Ch. 294)
85-2-316 In (10)(b), changed "[the effective date of this act]" to "April 23, 2015". (Ch. 281)
85-2-427 In (16), changed "[section 2]" to "85-20-1902". (Ch. 294)
85-2-506 In (8), changed "[section 2]" to "85-20-1902". (Ch. 294)
85-5-110 In (1), changed "[section 2]" to "85-20-1902". (Ch. 294)
85-7-1702 In (1), changed "[sections 1 through 5]" to "Title 13, chapter 1, part 5"; in (2), changed "[section 2]" to "13-1-502". (Ch. 49)
85-7-1712 Changed "[sections 1 through 5]" to "Title 13, chapter 1, part 5". (Ch. 49)
85-7-1974 In (1)(a), changed "[sections 1 through 5]" to "Title 13, chapter 1, part 5". (Ch. 49)
85-7-2013 In (1)(a), changed "[sections 1 through 5]" to "Title 13, chapter 1, part 5". (Ch. 49)
85-8-302 In (1), changed "[section 2(4)]" to "13-1-502(4)" and changed "[sections 1 through 5]" to "Title 13, chapter 1, part 5". (Ch. 49)
85-8-306 In two places, changed "[section 2]" to "13-1-502". (Ch. 49)
85-8-624 In (3)(b), changed "[sections 1 through 5]" to "Title 13, chapter 1, part 5". (Ch. 49)
85-9-206 In (1)(c), changed "[sections 1 through 5]" to "Title 13, chapter 1, part 5". (Ch. 49)
85-9-302 In (1), changed "[sections 1 through 5]" to "Title 13, chapter 1, part 5". (Ch. 49)
85-9-408 In (3), (4), changed "[sections 1 through 5]" to "Title 13, chapter 1, part 5". (Ch. 49)
85-9-623 In (3), changed "[sections 1 through 5]" to "Title 13, chapter 1, part 5". (Ch. 49)
85-25-101 In introduction, changed "[sections 1 and 2]" to "this chapter". (Ch. 383)
85-25-102 In (1), changed "The department of natural resources and conservation" to "The department" - consistent use of defined term; in (4)(a), (4)(b), (6), changed "must" to "shall" - style; in (6), changed "roads, general operations" to "roads, and general operations" - grammar. (Ch. 383)

TITLE 87

87-1-270 In (2), changed "[section 2]" to "87-2-116". (Ch. 449)
87-1-290 In (2)(c), changed "[section 2]" to "87-2-116". (Ch. 449)
87-2-105 In (1), changed "[section 38]" to "87-2-810". (Ch. 449)
87-2-202 In (1)(two places), changed "[section 37(2)]" to "87-2-817(2)". (Ch. 449)
87-2-506 In (3), changed "[section 37(1)]" to "87-2-817(1)". (Ch. 449)
87-2-514 In (3), changed "[section 2]" to "87-2-116". (Ch. 449)
87-2-520 In (4)(a), changed "[section 38]" to "87-2-810". (Ch. 449)
87-2-706 In (2), changed "[section 37(1)]" to "87-2-817(1)". (Ch. 449)
87-2-711 In (1)(a), changed "[section 37(2)]" to "87-2-817(2)" and changed "[section 2]" to "87-2-116". (Ch. 449)
87-2-817 In (2)(a), changed "[section 2]" to "87-2-116". (Ch. 449)
87-6-921 Changed "[sections 36 and 37]" to "87-2-816 and 87-2-817". (Ch. 449)

TITLE 90

90-1-118 In (2), changed "[section 6]" to "30-20-206". (Ch. 440)
90-1-202 In (2), changed "[section 6]" to "30-20-206". (Ch. 440)
90-4-1102 In (1), changed "[section 1(3)(d)]" to "90-4-1110(3)(d)"; in (7), changed "[section 5(5)]" to "90-4-1114(5)"; in (9), changed "[section 4(2)]" to "90-4-1113(2)". (Ch. 344)
90-4-1109 Changed "[section 5(1)]" to "90-4-1114(1)". (Ch. 344)
90-4-1113 In (1), changed "[section 3]" to "90-4-1112"; in (3)(a), changed "must" to "shall" - style. (Ch. 344)
90-4-1114 In (6)(a), changed "[section 1(3)(d)]" to "90-4-1110(3)(d)". (Ch. 344)

THE ENABLING ACT

An Act to provide for the division of Dakota into two States and to enable the people of North Dakota, South Dakota, Montana and Washington to form constitutions and State governments and to be admitted into the Union on an equal footing with the original States, and to make donations of public lands to such States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

§ 1. That the inhabitants of all that part of the area of the United States now constituting the Territories of Dakota, Montana, and Washington, as at present described, may become the States of North Dakota, South Dakota, Montana, and Washington, respectively, as hereinafter provided.

Case Notes

Contemporaneous Construction: The Supreme Court in construing provisions of the state Constitution and of The Enabling Act, under which the former was adopted and the state admitted into the Union, will, in response to a contention that where the Constitution is in conflict with The Enabling Act the former must yield, reconcile, if possible, the provisions of both instruments since courts will with the greatest hesitation hold inoperative and invalid a provision of the state Constitution. The doctrine of contemporaneous construction only becomes effective when there is a reasonable doubt as to the meaning of the provision to be construed, and acquiescence for no length of time in a construction by coordinate branches of the government, which has the effect of nullifying a provision of the Constitution, will justify the courts in adopting such construction unless it is the only reasonable one. State ex rel. Haire v. Rice, 33 M 365, 83 P 874 (1906), affirmed in 204 U.S. 291 (1907).

Collateral References

We the People of Montana . . . The Workings of a Popular Government, James J. Lopach, Editor, Mountain Press Publishing Co., Missoula, 1983.

§ 2. The area comprising the Territory of Dakota shall, for the purposes of this act, be divided on the line of the seventh standard parallel produced due west to the western boundary of said Territory; and the delegates elected as hereinafter provided to the constitutional convention in districts north of said parallel shall assemble in convention, at the time prescribed in this act, at the city of Bismarck; and the delegates elected in districts south of said parallel shall, at the same time assemble in convention, at the city of Sioux Falls.

§ 3. That all persons who are qualified by the laws of said Territories to vote for representatives to the legislative assembly thereof, are hereby authorized to vote for and choose delegates to form conventions in said proposed States; and the qualifications for delegates to such conventions shall be such as by the laws of said Territories respectively persons are required to possess to be eligible to the legislative assemblies thereof; and the aforesaid delegates to form said conventions shall be apportioned within the limits of the proposed States, in such districts as may be established as herein provided, in proportion to the population in each of said counties and districts, as near as may be, to be ascertained at the time of making said apportionments by the persons hereinafter authorized to make the same, from the best information obtainable, in each of which districts three delegates shall be elected, but no elector shall vote for more than two persons for delegates to such conventions; that said apportionments shall be made by the governor, the chief justice, and the secretary of said Territories; and the governors of said Territories shall, by proclamation, order an election of the delegates aforesaid in each of said proposed States, to be held on the Tuesday after the second Monday in May, eighteen hundred and eighty-nine, which proclamation shall be issued on the fifteenth day of April, eighteen hundred and eighty-nine; and such election shall be conducted, the returns made, the result ascertained, and the certificates to persons elected to such convention issued in the same manner as is prescribed by the laws of the said Territories regulating elections therein for Delegates to Congress; and the number of votes cast for delegates in each precinct shall also be returned. The number of delegates to said conventions respectively shall be seventy-five; and all persons resident in said proposed States, who are qualified voters of said Territories as herein provided, shall be entitled to vote upon the election of delegates, and under such rules and regulations as said conventions may prescribe, not in conflict with this act, upon the ratification or rejection of the constitutions.

§ 4. That the delegates to the conventions elected as provided for in this act shall meet at the seat of government of each of said Territories, except the delegates elected in South Dakota, who shall meet at the city of Sioux Falls, on the Fourth day of July, eighteen hundred and eighty-nine, and, after organization, shall declare, on behalf of the people of said proposed States, that they adopt the Constitution of the United States; whereupon the said conventions shall be, and are hereby, authorized to form constitutions and State governments for said proposed States, respectively. The constitutions shall be republican in form, and make no distinction in civil or political rights on account of race or color, except as to Indians not taxed, and not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence. And said conventions shall provide, by ordinances irrevocable without the consent of the United and the people of said States:

First. That perfect toleration of religious sentiment shall be secured and that no inhabitant of said States shall ever be molested in person or property on account of his or her mode of religious worship.

Second. That the people inhabiting said proposed States do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States; that the lands belonging to citizens of the United States residing without the said States shall never be taxed at a higher rate than the lands belonging to residents thereof; that no taxes shall be imposed by the States on lands or property therein belonging to or which may hereafter be purchased by the United States or reserved for its use. But nothing herein, or in the ordinances herein provided for, shall preclude the said States from taxing as other lands are taxed any lands owned or held by any Indian who has severed his tribal relations, and has obtained from the United States or from any person a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any act of Congress containing a provision exempting the lands thus granted from taxation; but said ordinances shall provide that all such lands shall be exempt from taxation by said States so long and to such extent as such acts of Congress may prescribe.

Third. That the debts and liabilities of said Territories shall be assumed and paid by said States, respectively.

Fourth. That provision shall be made for the establishment and maintenance of systems of public schools, which shall be open to all the children of said States, and free from sectarian control.

Cross-References

Education and public lands, Art. X, Mont. Const.
Aid prohibited to sectarian schools, Art. X, sec. 6, Mont. Const.
Cession and retrocession of jurisdiction, Title 2, ch. 1, part 2.
Jurisdiction on Indian lands, Title 2, ch. 1, part 3.
Office of State Director of Indian Affairs, 2-15-217.
Limitations on creation of new counties when reservations involved, 7-2-2202.
State-Tribal Cooperative Agreements Act, Title 18, ch. 11, part 1.
Railroads on Indian and military reservations, 69-14-538.
Exchange or sale of state lands to tribal governments, 77-2-201, 77-2-306.
Preservation of Plains Indian history and culture — mine reclamation, 82-4-227.
Indian and federal water rights, Title 85, ch. 2, part 7.
Effect on Indians of Yellowstone River Compact, 85-20-101 (see Article VI).
Fort Peck-Montana Compact, Title 85, ch. 20, part 2.
Northern Cheyenne-Montana Compact, Title 85, ch. 20, part 3.
Chippewa Cree Tribe-Montana Compact, Title 85, ch. 20, part 6.
Crow Tribe-Montana Compact, Title 85, ch. 20, part 9.
Fort Belknap-Montana Compact, Title 85, ch. 20, part 10.
Agreement with Indians concerning hunting and fishing on Flathead Indian Reservation, 87-1-228.
Indian affairs — planning and coordination, Title 90, ch. 11.

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GENERAL

Initiative Banning Cyanide Mining — Reverse Condemnation Against State Not Justiciable in Federal Court: Initiative Measure No. 137, codified as 82-4-390, which banned the use of open-pit mining using cyanide leaching except as to mines operating with existing permits, could not be the basis of a reverse condemnation action in federal court because such an action is jurisdictionally barred by the 11th amendment to the U.S. Constitution. Eleventh amendment immunity cannot be avoided by the application of Ex parte Young, 209 US 123 (1908), since a reverse condemnation action is a form of retroactive relief and not a claim for prospective relief. Seven Up Pete Venture v. Schweitzer, 523 F3d 948 (9th Cir. 2008).

Interior Secretary Not Mandated to Place Land in Trust Status Upon Tribal Request: The Confederated Salish and Kootenai Tribes appealed from a District Court order in favor of the Secretary of the Interior, claiming that, upon the tribes' request, the provisions of the Flathead Act require the Secretary of the Interior to take a 40-acre tract in trust for the tribes. Affirming the District Court decision, the Ninth Circuit Court held that section 2 of the Flathead Act does not mandate, but only authorizes, the Secretary of the Interior to exercise discretion in acting upon tribal requests for land acquisition within the reservation boundaries. Confederated Salish & Kootenai Tribes v. U.S. ex rel. Secretary, 343 F3d 1193 (9th Cir. 2003).

Comity for Tribal Court Judgment Precluded — Prejudicial Closing Argument Offends Due Process: The owners of a construction corporation, who were enrolled members of the Blackfeet Tribe, filed an action against the Glacier Electric Cooperative to enforce a judgment obtained against the cooperative in tribal court. After the District Court granted summary judgment for the owners, the cooperative appealed, claiming that the District Court's recognition and enforcement of a tribal court judgment offended fundamental fairness and due process because the corporation's closing argument repeatedly appealed to racial and ethnic prejudice and included racially biased analogies and statements before a jury consisting entirely of tribal members. Although the cooperative failed to object in tribal court to the closing argument, the Ninth Circuit Court of Appeals reversed the District Court judgment and remanded the decision with instructions that the District Court enter a judgment for the cooperative, declining to recognize and enforce the tribal court judgment. Bird v. Glacier Elec. Co-op, Inc., 255 F3d 1136 (9th Cir. 2001).

State Execution of Search Warrant on Reservation Land for Off-Reservation Misconduct Valid — Tribal Court Jurisdiction Improper: State game wardens went onto Fallon Paiute-Shoshone Reservation land to serve state court and tribal court search warrants on Hicks, an enrolled member of the tribe, looking for evidence that Hicks had violated Nevada law by illegally killing a bighorn sheep off reservation. Hicks filed suit against the state and the wardens in tribal court, alleging trespass, abuse of process, and violation of constitutional rights under 42 U.S.C. 1983. After the tribal court ruled that it had jurisdiction over the tribal tort and federal civil rights claims, Nevada sought and received a declaratory judgment that the tribal court lacked jurisdiction over the claims. The District Court granted summary judgment, but held that the wardens had to exhaust their qualified immunity claims in tribal court. On appeal, the Ninth Circuit Court affirmed, concluding that the fact that Hicks's home was located on tribally owned reservation land was sufficient to support tribal jurisdiction over civil claims against nonmembers arising from activities on that land. The United States Supreme Court reversed, ruling that the tribal court did not have jurisdiction to adjudicate the state game wardens' alleged tortious conduct in executing a search warrant for an off-reservation crime. Applying its decision in Strate, the court ruled that as to nonmembers, a tribal court's inherent adjudicatory authority is at most as broad as the tribe's regulatory authority. The court stated that when nonmembers are concerned, the general rule outlined in Mont. v. U.S., establishing that the exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations cannot survive without express congressional delegation, applies to both Indian and non-Indian land. Although land ownership status is often a dispositive factor, tribal ownership alone is not enough to support regulatory jurisdiction over nonmembers. Tribal authority to regulate state officers in executing a process related to an off-reservation crime was not essential to tribal self-government or internal relations. Tribal courts are not courts of general jurisdiction, and their

inherent adjudicative jurisdiction over nonmembers is at most only as broad as their legislative jurisdiction. Because Congress has not granted tribal courts jurisdiction over 1983 claims and because the rule limiting tribal court jurisdiction over state officials for causes of actions relating to their official duties is clear, the state game wardens are not required to exhaust their claims in tribal court before bringing them to federal District Court. Nev. v. Hicks (U.S. June 25, 2001) (No. 99-1994).

Tribal Sovereign Immunity and Immunity of Tribal Officials — Action Against Tribe and Tribal Officials to Void Tax Liens Filed Off Reservation — Action Void Because of Tribe's Sovereign Immunity: After officials of the Crow Tribe filed tax liens with Big Horn County to collect a reservation resort tax against his on-reservation business, Thompson filed an action in the District Court for Big Horn County to void the tax liens. The Crow Tribe moved to dismiss, citing its sovereign immunity, but the District Court refused to dismiss the suit and subsequently voided the tribe's tax liens. The Supreme Court held that sovereign immunity is in the nature of a jurisdictional defense and may be raised at any time by a party or may be raised sua sponte by the court. The Supreme Court therefore addressed only the issue of the tribe's sovereign immunity, noting that immunity was dispositive of all issues raised by the tribe in its appeal. Relying upon Wippert v. Blackfeet Tribe, 260 M 93, 859 P2d 420 (1993), and Kiowa Tribe of Okla. v. Mfg. Technologies, Inc., 523 US 751 (1998), the Supreme Court ruled that as a matter of federal law, the Crow Tribe is immune from suit except in so far as that immunity has been waived by the U.S. Congress. In so holding, the Supreme Court noted that in the Kiowa Tribe decision, the U.S. Supreme Court rejected the idea that a tribe's sovereign immunity is confined to transactions that occur on an Indian reservation and to tribal government activities. The Montana Supreme Court held that it makes no difference that the Crow Tribe was alleged to have acted outside the scope of the tribe's sovereignty or beyond its authority in filing the tax liens in Big Horn County; the sovereign immunity of the tribe still applies. Relying upon other federal cases, including U.S. v. Yakima Tribal Court, 806 F2d 853 (9th Cir. 1986), the Montana Supreme Court also held that the tribe's sovereign immunity shields tribal officials as well as the tribe itself if those officials are acting in their official capacity and within the scope of their authority. Noting that there was nothing in the District Court record indicating that the tribal officials were acting other than in their official capacity and within the scope of their authority, the Supreme Court reversed and remanded to the District Court for dismissal of Thompson's lawsuit. Thompson v. Crow Tribe of Indians, 1998 MT 161, 289 M 358, 962 P2d 577, 55 St. Rep. 647 (1998).

Road Construction and Maintenance — No Tribal Jurisdiction: The Montana Department of Transportation constructs and maintains, with federal financial assistance, Highways 2, 66, and 191, which cross the Fort Belknap Reservation. The Fort Belknap Tribal Employment Rights Office (TERO) ordered the Department to cease work pending compliance with its TERO ordinance, which included an employment preference for tribal members, a $100 registration fee for each nonmember employee, and a $250 fine for nonregistered employees. The Department ceased work on the reservation and filed an action in District Court, seeking to enjoin the tribe from asserting regulatory jurisdiction over Department employees performing road construction and maintenance. In granting summary judgment for the Department, the court ruled that Montana had not consented to tribal regulation, nor has its historic immunity from suits by individuals been abrogated by the inherent sovereignty of the tribe. The tribe lacks the power to regulate the Department's governmental function of construction and maintenance of public roads pursuant to a cooperative agreement with the federal government within a federal highway system. The actions of the TERO directly implicate Montana's capacity to fulfill its sovereign responsibilities. As a result, the exercise of tribal sovereignty is inconsistent with the overriding interest of the national government. Dept. of Transportation v. Fort Belknap Indian Community Council, 22 MFR 461 (Nov. 13, 1997).

No Enforcement of Tribal Court Judgment in Federal Court — Lack of Jurisdiction Over Underlying Claim: A vehicle driven by Wilson, an enrolled Blackfeet member, collided with Marchington, a non-Indian, as she attempted to exit Highway 2, a state highway crossing the Blackfeet Reservation. Wilson sued Marchington in tribal court and obtained a judgment that was upheld on appeal by the Blackfeet Court of Appeals. Claiming that her judgment was entitled to full faith and credit or comity, Wilson sued in federal District Court to register the judgment. After the District Court granted summary judgment for Wilson, Marchington appealed. Relying on Strate v. A-1 Contractors, 520 US 438, 137 L Ed 2d 661, 117 S Ct 1404 (1997), the Ninth Circuit Court reversed, ruling that the tribal judgment was not entitled to recognition or enforcement because the tribal court lacked subject matter jurisdiction to entertain the underlying claim

against Marchington, a nonmember involved in an accident on a state highway. Wilson v. Marchington, 127 F3d 805 (9th Cir. 1997).

Attempt to Enjoin $250 Million Tribal Court Judgment Against Railroad — Exhaustion of Tribal Remedies Required: A jury in Crow Tribal Court awarded $250 million to five heirs of two Crow members who were killed when a Burlington Northern Railroad (BN) train hit their car at a railroad crossing on the Crow Reservation. Under the Crow Tribal Code, execution on the judgment was automatically stayed for 10 business days and BN was required to post bond in the amount of the verdict. BN refused to post bond and appealed the bond ruling to the Crow Court of Appeals. Before the tribal appellate court ruled on the bond question, BN sought and received a restraining order in federal District Court enjoining enforcement of the tribal court judgment, arguing that a federal court proceeding to enforce the judgment could provide its only opportunity to challenge the $250 million judgment. The district court ordered BN to post a $5 million bond as security for the injunction, retained jurisdiction, and stayed all further proceedings pending exhaustion of tribal remedies. On appeal, the Ninth Circuit Court dissolved the injunction, holding that under Nat'l Farmer's Union Ins. Co. v. Crow Tribe, 471 US 845 (1985), the District Court erred in exercising its jurisdiction since BN had not exhausted its remedies in the tribal courts or established that any exception to the exhaustion requirement applied. Burlington N. RR Co. v. Red Wolf, 106 F3d 868 (9th Cir. 1997). (Note: At the time of the Ninth Circuit Court decision, the United States Supreme Court had not yet ruled in Strate v. A-1 Contractors, 520 US 438, 137 L Ed 2d 661, 117 S Ct 1404 (1997). Following Strate, BN applied for and was granted a writ of certiorari to the U.S. Supreme Court, which vacated the Ninth Circuit Court's decision and remanded the case for further consideration pursuant to Strate.)

States' Rights and Indian Gaming — Congress Without Power to Abrogate States' Eleventh Amendment Sovereign Immunity Under Indian Commerce Clause: The Indian Gaming Regulatory Act (IGRA), enacted by Congress in 1988 pursuant to the Indian commerce clause, authorizes an Indian tribe to conduct certain gaming activities only under a valid compact between the tribe and the state in which gaming activities are located. The IGRA requires a state to negotiate and includes a remedial provision that allows a tribe to sue a state in federal court if the state fails to negotiate a Class III tribal gaming compact in good faith. Pursuant to this provision, the Seminole Tribe filed suit in federal court when the State of Florida refused to negotiate with the tribe over gaming operations. The District Court denied the state's motion to dismiss on the basis of sovereign immunity, ruling that Congress had the power to abrogate states' 11th amendment sovereign immunity with enactment of the IGRA. On appeal, the 11th Circuit Court reversed, ruling that Congress lacked the authority to abrogate a state's 11th amendment immunity from suit. On review, the U.S. Supreme Court affirmed the 11th Circuit Court decision, holding in a 5 to 4 decision that even though Congress unequivocally intended to subject states to suits in federal court under the IGRA, Congress lacked power under the Indian commerce clause to abrogate state sovereign immunity preserved by the 11th amendment. In reaching its decision, the court also explicitly overruled its earlier holding in Pa. v. Union Gas, 491 US 1 (1989), that Congress did have power to abrogate state 11th amendment sovereign immunity when legislating, pursuant to the interstate commerce clause. Thus, the decision appears to bar Congress from asserting any Article I powers to override states' 11th amendment immunity. The court further held that a tribe cannot sue state officers under the doctrine of Ex parte Young, which, in limited circumstances, permits suits for prospective injunctive relief to proceed in federal District Court against named state officials in order to enjoin a violation of federally granted rights. Seminole Tribe of Fla. v. Fla., 517 US 44, 134 L Ed 2d 252, 116 S Ct 1114 (1996).

Crow Tribe Hunting and Fishing Treaty Rights Repealed by Wyoming Statehood: After receiving a citation from a Wyoming game warden for killing elk on lands within the Big Horn National Forest without a Wyoming license, a Crow tribal member and Montana resident appealed, arguing that Article 4 of the Crow treaty of 1868 granted tribal members an unrestricted right to hunt on those "unoccupied lands of the United States" in Wyoming, which lands the tribe ceded under the treaty. Relying on the decision in Ward v. Race Horse, 163 US 504 (1896), which construed language in the 1869 Fort Bridger Treaty with the Bannock Indians, the 10th Circuit Court ruled that the treaty of 1868 reserved a temporary hunting right that was repealed by Wyoming's admission into the Union. Because lands within the Big Horn National Forest have been occupied since its establishment in 1887, the Crow Tribe and its members are subject to Wyoming game laws. Crow Tribe of Indians v. Repsis, 866 F. Supp. 520 (D.C. Wyo. 1994), affirmed, 73 F3d 982 (10th Cir. 1995).

Mineral Lands Leasing Act: The tribe filed suit to enjoin the Secretary of the Interior from proceeding with mineral leases without complying with federal law that required him to avoid,

minimize, or mitigate adverse impacts of such leases on the tribe. The District Court authorized an injunction but amended it to suspend rather than void the leases. On appeal, the Ninth Circuit Court ruled that District Courts have discretion to deny or grant injunctive relief upon a finding that the government is in violation of the Federal Coal Leasing Amendments Act of 1976. N. Cheyenne Tribe v. Hodel, 842 F2d 224 (9th Cir. 1988).

Gas Pipeline on Tribal Land: The Blackfeet Tribe sought to have five Montana Power Company rights-of-way that were granted for a pipeline over tribal land invalidated, contending that the Secretary of the Interior exceeded his authority by approving 50-year terms rather than 20-year terms. The court ruled that the 50-year term for natural gas pipeline rights-of-way, consented to by the tribe, was valid. Blackfeet Indian Tribe v. Mont. Power Co., 838 F2d 1055 (9th Cir. 1988).

State Not to Regulate Tribal Gambling: After tribes began conducting high-stakes bingo games on the reservation, California attempted to apply state law to govern the operation of bingo games. The U.S. Supreme Court stated that the test of whether the regulation was "prohibitory" or "regulatory" was whether the conduct violated state public policy. Since California allowed bingo and certain card games elsewhere, the state regulated rather than prohibited gambling in general and bingo in particular. Neither Public Law 280 nor the Organized Crime Control Act, 18 U.S.C. 1955, granted the state authority to regulate bingo games on the reservation. Calif. v. Cabazon Band of Mission Indians, 107 S Ct 1083 (1987).

Park Service to Enforce State Law Within Park on Reservation: The National Park Service regulation stated that laws and regulations of the state within whose exterior boundaries a national park area is located govern traffic and operation and use of vehicles. The National Park Service applied Montana traffic laws to an offense by a tribal member within the Bighorn Canyon Recreation Area even though the area was on the Crow Reservation. Enforcement against a tribal member of a regulation prohibiting possession of a loaded weapon in a motor vehicle did not infringe upon reserved hunting rights. US v. Sanders, 799 F2d 557 (9th Cir. 1986).

Administrative Law and Procedure — Indians: The validity of a cooperative agreement between the Secretary of the Interior and Montana Board of Oil and Gas Conservation which provided that applications for placement of oil and gas wells on lands held in trust for Indian tribes or their individual members would be considered initially by the Board, was ripe for review. The agreement was operating, was a final action by the Secretary, and had forced the tribes to significantly change their behavior. The tribes had exhausted their administrative remedies, the claim by the tribes that the Secretary had exceeded his statutory authority did not involve an issue in the Secretary's discretion, and the complaint should not have been dismissed without taking evidence to discover the scope of subdelegation by the Secretary. Assiniboine & Sioux Tribes v. Bd. of Oil & Gas Conserv., 792 F2d 782 (9th Cir. 1986).

Tribe Rescission of Joint Venture Agreement: Under the Indian Mineral Development Act of 1982, 25 U.S.C. 2101, et seq., the Blackfeet Indian Tribe had the authority to unilaterally rescind a proposed joint venture agreement with a mineral developer before the agreement was approved by the Secretary of the Interior, as the agreement was unenforceable. Quantum Exploration, Inc. v. Clark, 780 F2d 1457 (9th Cir. 1986).

Indian Mineral Rights: In an action brought by members of the Blackfeet Tribe claiming that the mineral rights to their land allotments were wrongfully reserved to the tribe, the federal Court of Appeals held that the tribe was immune from suit. Also, the 6-year Statute of Limitations for civil actions begun against the federal government barred the claims brought by tribe members under a provision of the Indian General Allotment Act, 25 U.S.C. 345. That provision allows federal courts to determine whether an Indian allottee has been deprived of rights connected with his allotment. In this case, the action alleging that the mineral rights to members' allotments were wrongfully reserved to the tribe was barred, as the claim related to action taken by the United States in 1922. Big Spring v. U.S. Bureau of Indian Affairs, 767 F2d 614 (9th Cir. 1985).

Distribution of Mine Reclamation Fund: Interior Department regulation to implement the formula of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1201, et seq., is a reasonable construction of the Act. The regulation provides that fees collected from mines beneficially owned by and for Indians, but outside their reservation, would go to the tribe, not the state of Montana. Mont. v. Clark, 749 F2d 740 (9th Cir. 1984).

Execution Upon Reservation: A judgment of a District Court rendered upon a commercial transaction conducted outside the exterior boundaries of a reservation is valid. The court, having jurisdiction, may execute upon wages earned on a reservation by a member of a tribe, and that process does not interfere with the tribe's right to make its own rules and be governed by them.

The subject matter of the suit was off-reservation in that the tribe provided no means of enforcing state court judgments, there was no method of attaching property, and the tribe was not subject to the full faith and credit clause. Until the tribe provides a means of enforcement, there is no interference with tribal jurisdiction. Little Horn Bank v. Stops, 170 M 510, 555 P2d 211 (1976).

Jurisdiction — Hunting and Fishing: The Flathead Tribe had jurisdiction to regulate fishing upon Crow Creek Reservoir, and violation of tribal ordinance requiring permit for fishing constituted federal offense. U.S. v. Zempel, 32 St. Rep. 1130 (D.C. Mont. 1975) (apparently not reported in Federal Supplement).

Montana Law on Reservations: The federal District Court for Montana will apply the substantive civil law of Montana in all nonfederal law cases involving reservation Indians and reservation transactions when there is no clearly ascertainable Indian law. Wippert v. Burlington N., Inc., 397 F. Supp. 73 (D.C. Mont. 1975).

Tribal Council Action: Failure of Legislature to take affirmative legislative action concerning either civil or criminal jurisdiction over Indians on Blackfeet Reservation, as permitted under 28 U.S.C. 1360, was not remedied by unilateral Tribal Council action, which provided that tribal and state courts have concurrent jurisdiction in all civil suits against members of Blackfeet Tribe. Kennerly v. District Court, 400 US 423, 27 L Ed 2d 507, 91 S Ct 480 (1971), distinguished in State ex rel. Iron Bear v. District Court, 162 M 335, 512 P2d 1292 (1973).

CRIMINAL LAW

Pursuit of Traffic Offender Onto Reservation Allowed — Good Faith Exception to Exclusionary Rule Applicable to Evidence Seized During Arrest of Tribal Member by Nontribal Officers on Reservation: Bird was observed by city police officer Olson driving recklessly in Cut Bank, but when Olson attempted to stop Bird, a chase ensued onto the Blackfeet Indian Reservation, where Bird was eventually stopped and held by the city police officer and an assisting county officer. When the officers were informed that Bird was an enrolled tribal member, they notified a tribal police officer, who arrested Bird and a passenger, and transported them off the reservation and back into Cut Bank in violation of the extradition provision of the Blackfeet Tribal Code. Bird was subsequently charged in City Court with reckless driving and was convicted. Bird appealed to District Court, moving to dismiss for lack of jurisdiction and to suppress evidence of activities and statements after the vehicle crossed onto the reservation. The District Court found that the city officer did not have jurisdiction to arrest Bird on the reservation and granted Bird's motion to suppress. The state appealed, and the Supreme Court reversed. Pursuant to U.S. v. Patch, 114 F3d 131 (9th Cir. 1997), under the doctrine of hot pursuit, once the officer observed an offense occur within his jurisdiction, he had authority to pursue the violator onto the reservation in order to make an arrest. Further, the evidence was erroneously suppressed because the good faith exception to the exclusionary rule, discussed in St. v. Nahee, 745 P2d 172 (Ariz. App. 1987), applied. The city and county officers acted in good faith reliance that the tribal officer would carry out the arrest and extradition in a manner conforming to tribal code procedures, and it was the tribal officer who neglected to follow the tribal code. The primary purpose of the exclusionary rule—to ensure that law enforcement is not rewarded by violating a defendant's constitutional rights and to deter such conduct in the future—would not be served by sanctioning the city and county officers for a mistake in which they had no part. Failure to follow tribal extradition procedures did not warrant exclusion of the evidence in this case. Cut Bank v. Bird, 2001 MT 296, 307 M 460, 38 P3d 804 (2001). See also State ex rel. Old Elk v. District Court, 170 M 208, 552 P2d 1394 (1976).

State Jurisdiction to Prosecute Indians for On-Reservation Liquor Law Violations Upheld: Montana filed charges against Indian grocery store owners for possessing and selling liquor without a state license within the boundaries of the Fort Peck Reservation. When the tribe filed suit in District Court, arguing that Montana could not criminally prosecute Indians for liquor violations, Montana filed a motion arguing that the 11th amendment barred the tribe's action and that federal law permitted the state to prosecute Indians for criminal violations of state liquor laws. The District Court granted the state's 11th amendment motion, but granted summary judgment for the tribe, ruling that the state had no jurisdiction to maintain the prosecutions. On appeal, the Ninth Circuit Court reversed, holding that pursuant to the interpretation of Rice v. Rehner, 463 US 713 (1983), Montana has jurisdiction to prosecute Indians who violate state liquor laws on an Indian reservation. Fort Belknap Indian Community of the Fort Belknap Indian Reservation v. Mazurek, 793 F. Supp. 949 (D.C. Mont. 1992), affirmed in part and reversed in part, 43 F3d 428 (9th Cir. 1994), certiorari denied, 516 US 806, 133 L Ed 2d 15, 116 S Ct 49 (1995).

Concurrent Jurisdiction — Certain Offenses: A Native American was charged with assaulting a federal officer, possession of a firearm by a convicted felon, and use of a firearm during a crime committed on the Fort Belknap Indian Reservation. As a general rule, tribal courts retain exclusive jurisdiction over crimes committed by Native Americans against other Native Americans in Indian country. However, federal courts have concurrent jurisdiction over offenses listed in the Indian Major Crimes Act, 18 U.S.C. 1153. Federal courts also retain jurisdiction over violations of federal laws of general nonterritorial applicability. U.S. v. Young, 936 F2d 1050 (9th Cir. 1991).

Tribal Courts — Criminal Jurisdiction Over Nonmember Indians: Duro, an enrolled member of a California tribe living on the Salt River Reservation with an enrolled member of that tribe, allegedly shot and killed a 14-year-old member of the tribe. After complaints were filed against Duro in both tribal court and federal District Court, the District Court dismissed and remanded the case to the California Department of Public Safety. After the tribal court dismissed Duro's motion for dismissal for lack of criminal jurisdiction, Duro petitioned and was granted a writ of habeas corpus and writ of prohibition from the District Court. On appeal, the court concluded that Oliphant v. Suquamish Tribe, 435 US 191, 98 S Ct 1011 (1978), which disclaimed tribal court jurisdiction over non-Indians, was not controlling since "non-Indians" meant those to whom the tribes originally submitted and who subsequently limited tribal sovereignty. The Ninth Circuit Court ruled that the District Court had erroneously concluded that tribal courts extend their criminal jurisdiction to Indians only on a racial basis. The determination of who is an Indian turns on numerous factors, of which race is only one. In ruling that the tribal court had criminal jurisdiction over Duro, the Ninth Circuit Court stated that tribal courts may define their criminal jurisdiction as federal courts do—by basing Indian statutes on a "totality of circumstances, including genealogy, group identification, and lifestyle". Duro v. Reina, 821 F2d 1358 (9th Cir. 1987).

Jurisdiction by State Over Crimes Committed Against Indians by Non-Indians Within Reservation: Where the defendants, two non-Indians, were charged with the theft of a calf belonging to an enrolled member of the Crow Indian Tribe and the theft occurred on a reservation, the District Court did not err in dismissing the charges against the defendants. As expressed in the dicta in St. v. Youpee, 103 M 86, 61 P2d 832 (1936), the general rule, to be followed by this state, is that states have no jurisdiction over crimes against Indians by non-Indians committed within the reservations. This is true unless the enrolled Indians have accepted state jurisdiction, and as no tribal consent had been given in this case by the Crow Tribe, the charges arising from the theft of the Indian's calf were properly dismissed. St. v. Greenwalt, 204 M 196, 663 P2d 1178, 40 St. Rep. 767 (1983).

Tribal Courts Not to Issue "Federal" Search Warrant: Because of involvement of federal agents in a search on an Indian reservation, the search was a federal search governed by Rule 41(a), Federal Rules of Criminal Procedure, and hence a search warrant must be issued by a federal court or state court of record. A tribal court is neither a federal court nor a state court as enumerated in 3-1-102; thus the warrants were invalid and subsequent evidence seized pursuant to the warrants is inadmissible. U.S. v. Messerly, 530 F. Supp. 751, 39 St. Rep. 183 (D.C. Mont. 1982).

Criminal Jurisdiction Over Tribal and Nontribal Indians: Campbell petitioned the federal court for a Writ of Habeas Corpus on the grounds that he is an Indian and therefore the State has no criminal jurisdiction over him. This contention fails for two reasons. First, Campbell is not a member of the Confederated Salish and Kootenai Tribes. Second, the United States permitted the assumption of jurisdiction by the State, and the Montana Supreme Court has held that jurisdiction was properly assumed. Writ denied. Campbell v. Crist, 491 F. Supp. 586 (D.C. Mont. 1980).

Indians — Habeas Corpus — Exhaustion of State Remedies: Federal habeas corpus relief was denied where petitioner claiming constitutional violations failed to exhaust state remedies in accordance with 28 U.S.C. 2254(b). Since a lack of state jurisdiction over the petitioner could also have been tested by state habeas corpus proceedings but was not, the habeas corpus complaint for lack of state jurisdiction was also denied. Campbell v. Crist, 36 St. Rep. 1690 (D.C. Mont. 1979) (apparently not reported in Federal Supplement).

Arrest of Indian on the Reservation Valid if Crime Committed off the Reservation: Petitioner, a Crow Indian, was arrested within the exterior boundaries of the Crow Reservation for a crime committed off the reservation. The court followed State ex rel. Old Elk v. District Court, 170 M 208, 552 P2d 1344 (1976), which held that the arrest of an Indian on a reservation for a crime committed off the reservation was a valid arrest. In re Little Light, 183 M 52, 598 P2d 572 (1979).

Assumption of Jurisdiction: Section 2-1-301 constitutes valid and binding consent of people of Montana pursuant to federal statute to assume jurisdiction over crimes committed by or against Indians on Indian territory. State ex rel. McDonald v. District Court, 159 M 156, 496 P2d 78 (1972).

Legislative Action Sufficient to Establish Jurisdiction: Federal statute providing for state jurisdiction over offenses committed by or against Indians on Indian reservations did not require constitutional amendment for valid and binding consent of people of Montana to assume jurisdiction; where Congress retained power to reassume federal jurisdiction through repeal of same statute, state legislative action was sufficient to establish jurisdiction. State ex rel. McDonald v. District Court, 159 M 156, 496 P2d 78 (1972).

Crime on Indian Reservation: Conviction of non-Indian for killing two bull elk on Crow Indian Reservation during season closed by state fish and game laws was not in conflict with act of Congress providing penalty for trespass to possessory rights of reservation Indians or in conflict with The Enabling Act providing that Indian lands shall remain under the absolute jurisdiction and control of Congress of United States. St. v. Danielson, 149 M 438, 427 P2d 689 (1967).

Crime off Indian Reservation: Where defendant, an enrolled adult tribal Indian owning land within Fort Peck Indian Reservation, was convicted of statutory rape upon another minor tribal member also owning land within the Reservation, but the crime was committed some 5 miles outside the Reservation, the Court properly took jurisdiction of the case against the defendant, as it is the location of the crime that determines the jurisdiction of the Court. St. v. Youpee, 103 M 86, 61 P2d 832 (1936).

Crime Committed Within Indian Reservation: Where enrolled adult member of Crow Indian Tribe sold peyote within the boundaries of the Crow Indian Reservation, which sale was a violation of state law, it was necessary to determine whether the land upon which the sale was made remained in the control of the United States, as the Congress has absolute jurisdiction over all land within a reservation, the title to which has not been extinguished by the United States. St. v. Big Sheep, 75 M 219, 243 P 1067 (1926).

DOMESTIC RELATIONS

Letter From Tribe Conclusive as to Tribal Membership of Children in Parental Termination Proceeding: During parental termination proceedings, a question arose as to whether two of the children involved might be Indian children by virtue of their father's tribal membership. In order to comply with the Indian Child Welfare Act of 1978 (ICWA), the state contacted the tribe to determine if the children were tribal members. The tribe responded by letter and stated that the children were not tribal members and were not eligible for membership based on blood quantum. Under In re Adoption of Riffle, 277 M 388, 922 P2d 510 (1996), the tribe's determination was conclusive, but even aside from the letter, testimony from the children's father and several social workers affirmed that the children were not eligible for tribal membership. Because the children could not be considered Indian children by definition, the ICWA did not apply to the termination proceedings. In re T.J.H., J.H., J.L., & A.L., 2003 MT 352, 318 M 528, 81 P3d 504 (2003). See also In re C.H., S.H., & D.H., 2003 MT 308, 318 M 208, 79 P3d 822 (2003).

Belated Notice of Possible Indian Heritage of Child Subject to State Parental Termination Proceedings — Notice to Tribe Required to Allow Future Tribal Involvement if Appropriate: Only after parental termination proceedings were completed did the mother raise the issue of the possible Indian heritage of one of her children and the possible applicability of the Indian Child Welfare Act of 1978 (ICWA). One purpose of ICWA is to afford tribes the opportunity to intervene by providing a tribe with notice before proceedings begin; but in this case, that purpose could not be honored because the District Court did not know or have reason to know of the child's possible heritage until after the termination hearing had concluded. Faced with a silent record and because the issue was not raised in the trial court, the Supreme Court declined to undermine the entire termination proceeding, but the court did order that notice be given to the tribe of which the child might be a member so that the tribe could intervene in any future proceedings if it was determined that the child was indeed an Indian child. In re C.H., S.H., & D.H., 2003 MT 308, 318 M 208, 79 P3d 822 (2003).

Indian Child Welfare Act Inapplicable to Child Ineligible for Membership in Federally Unrecognized Tribe: The state sought to terminate a mother's parental rights, but the mother contended that the Indian Child Welfare Act of 1978 (ICWA) should apply because the father of the child was an enrolled member of the Little Shell Band of Chippewa. The Supreme Court held that ICWA did not apply for two reasons: (1) the father qualified for membership in the Little Shell Band based on the minimum one-quarter blood quantum, but the child, having only one-

eighth blood quantum, did not qualify for enrollment, and tribal membership of an Indian child is required for ICWA to apply; and (2) ICWA applies only to federally recognized tribes, and as of the date of the proceeding, the Little Shell Band of Chippewa was not recognized by the U.S. Secretary of the Interior as eligible to receive services. In re C.H., S.H., & D.H., 2003 MT 308, 318 M 208, 79 P3d 822 (2003).

Jurisdiction Over Indian Divorce:

In 1979, the Northern Cheyenne appellate court issued an advisory opinion holding that the tribal court has exclusive jurisdiction over dissolution of marriage actions arising between members of the tribe residing within the reservation. The Supreme Court applied the doctrine of abstention as a matter of comity with the Northern Cheyenne Tribe. It held that there is no basis for the state to assume jurisdiction that would interfere with tribal self-government. The Supreme Court expressly overruled Bad Horse v. Bad Horse, 163 M 445, 517 P2d 893 (1974), because of the interpretation of tribal law in the advisory opinion. In re Limpy v. Limpy, 195 M 314, 636 P2d 266, 38 St. Rep. 1885 (1981).

State had jurisdiction over divorce action brought by an Indian plaintiff against an Indian defendant, both residing on an Indian reservation, since federal law has not preempted state activities in the area of marriage and divorce and the tribe had determined not to exercise jurisdiction in that area by virtue of a tribal enactment. State ex rel. Iron Bear v. District Court, 162 M 335, 512 P2d 1292 (1973), distinguished in Fisher v. District Court, 424 US 382, 47 L Ed 2d 106, 96 S Ct 943 (1976), overruled in In re Limpy v. Limpy, 195 M 314, 636 P2d 266, 38 St. Rep. 1885 (1981).

URESA Action — Personal Jurisdiction Over Tribal Member — Motion to Dismiss Improperly Denied:

Where the respondent had previously, in Colorado, married the appellant, an enrolled member of the Crow Indian Tribe living on the Crow Indian Reservation, and had been separated from him there and brought a URESA action in Colorado for enforcement of child support payments, the District Court erred in denying the appellant's motion to dismiss for lack of personal jurisdiction over the appellant. All of the appellant's off-reservation contacts are with Colorado, not with Montana. Under the reasoning of State ex rel. Flammond v. Flammond, 190 M 350, 621 P2d 471, 37 St. Rep. 1991 (1980), the court had neither subject matter nor personal jurisdiction. State ex rel. Three Irons v. Three Irons, 190 M 360, 621 P2d 476, 37 St. Rep. 2016 (1980).

The wife appealed the dismissal of her action seeking to enforce child support payments under URESA. The District Court ruled it had no jurisdiction, and the Supreme Court agreed there was neither subject matter jurisdiction nor personal jurisdiction. The husband was a Blackfeet Indian living on the reservation in Montana. Jurisdiction could not be found in federal enabling statutes because neither the tribe nor the state complied with them; there were no off-reservation acts in Montana sufficient to vest state courts with jurisdiction over the husband; and a reservation Indian's domicile on the reservation is not an in-state contact that grants jurisdiction to state courts. The father had not acquiesced in state jurisdiction and has challenged state court jurisdiction from the outset. The fact that there was no appeal from the tribal court, the only avenue open to the wife, to the federal court system was not an argument in favor of state court jurisdiction. There must be a legal basis supporting state jurisdiction. State ex rel. Flammond v. Flammond, 190 M 350, 621 P2d 471, 37 St. Rep. 1991 (1980).

Divorce Jurisdiction: The disclaimer of this section is not a disclaimer of government control, but a disclaimer by the state to a proprietary interest in a right or title to Indian lands. Therefore, this section does not prohibit state jurisdiction over divorce actions between Indian parties, both residing on an Indian reservation. Iron Bear v. District Court, 162 M 335, 512 P2d 1292 (1973).

Juvenile Delinquency: The Northern Cheyenne Reservation was not within the scope of Title 2, ch. 1, part 3, and in the absence of action by the state and the tribe in strict compliance with congressional requirements for transfer of jurisdiction, the Tribal Council could not waive to the District Court jurisdiction of juvenile delinquency on the reservation. Blackwolf v. District Court, 158 M 523, 493 P2d 1293 (1972), distinguished in State ex rel. Iron Bear v. District Court, 162 M 335, 512 P2d 1292 (1972).

PROPERTY AND ESTATES

Tribal Jurisdiction Over Nontribal Railroad for Ad Valorem Taxation — Application of Montana Versus U.S. Exception Requires Rule 56(f) Limited Discovery to Meet Motion for Summary Judgment: The tribes on the Fort Peck Indian Reservation (the tribes) appealed from a summary judgment by the U.S. District Court in favor of the Burlington Northern Santa Fe Railroad Co. (BN) finding that under the holding of the U.S. Supreme Court in Mont. v. U.S., 450 US 544 (1981), the tribes had no jurisdiction to impose an ad valorem tax upon the BN right-of-

way originally granted by Congress to BN's predecessor in interest. The Eighth Circuit Court of Appeals held that because under Strate v. A-1 Contractors, 520 US 438 (1997), a federally granted right-of-way is to be treated as non-Indian fee land, either of the two exceptions granting Indian jurisdiction over non-Indian fee land within a reservation that were discussed in the Mont. v. U.S. case must apply if the tribes were to lawfully collect the tax on BN. The court of appeals held that the first Mont. v. U.S. exception did not apply because there was no consent by BN to the exercise of tribal jurisdiction. The second exception, jurisdiction based upon conduct that threatens the political integrity, economic security, or health or welfare of the tribes, the court of appeals held, could be found to exist if the facts showed such a threat to exist in any of the trains that carried toxic or hazardous material across the reservation. However, because the District Court had denied the tribes' motion under Rule 56(f), Federal Rules of Civil Procedure, the tribes were unable to present sufficient facts demonstrating a threat as the basis for jurisdiction. The court of appeals therefore reversed the District Court and instructed it to allow such discovery as the tribes needed in order to demonstrate the required threat to the tribes posed by the existence of BN trains on the reservation. Burlington N. Santa Fe RR Co. v. Assiniboine & Sioux Tribes of the Fort Peck Reservation, 323 F3d 767 (9th Cir. 2003).

Tribal Jurisdiction Over BIA Road — BIA Road Considered Tribal Road Not Governed by State: Means, a member of the Northern Cheyenne Tribe, was injured when the car that he was driving on a Bureau of Indian Affairs (BIA) road on the Northern Cheyenne Indian Reservation struck a horse owned by McDonald, a tribal nonmember who ran a ranch within the reservation. McDonald filed an action in Federal District Court, and the court enjoined Means from pursuing a civil action in tribal court. The Eighth Circuit Court of Appeals noted that according to 25 CFR 170.1, White Mtn. Apache Tribe v. Bracker, 448 US 136 (1980), and U.S. v. Mitchell, 463 US 206 (1983), a road constructed by the BIA is considered an "Indian reservation road" held in trust for the use of the tribe. The court of appeals also considered those factors examined by the U.S. Supreme Court in Strate v. A-1 Contractors, 520 US 438 (1997), in determining whether the tribe had lost its right to exclude others and occupy the property on which the road was located and held that the tribe had not lost those rights, thereby retaining jurisdiction over the highway. McDonald v. Means, 300 F3d 1037, amended by 309 F3d 530 (2002).

Land Below High-Water Mark of Flathead Lake Tribal Property Not Subject to Distribution by Estate: When she died, Hobbs owned property on the south shore of Flathead Lake. Her will designated that three nieces divide one parcel of about 1 acre above the high-water mark and that a fourth niece and her husband, the Conrads, receive an adjacent 1.9-acre parcel from the high-water mark inland. A survey established the boundary between the parcels, but did not include any land below the high-water mark to the meander line of the lake. The District Court approved the survey, distributed the property, and closed the estate. The parties later became involved in a dispute over zoning and building regulations. The personal representative petitioned to reopen the estate for the purpose of filing a corrected survey and to distribute the portion of land lying below the high-water mark to the meander line, thereby increasing the acreage of both lots. The personal representative presented exhibits and affidavits verifying that Hobbs had paid taxes on the land out to the meander line. The Conrads objected on grounds that Hobbs's will specifically left land above the high-water mark and that because the estate did not own the land below the high-water mark, it could not be distributed to anyone. Nevertheless, the District Court approved the corrected survey and distributed the land below the high-water mark to the meander line between the heirs. The Supreme Court noted that the bed and banks of Flathead Lake within Indian reservation boundaries are held by the United States in trust for the tribes, and that any private title to Flathead Lake shore property extends only to the high-water mark. The District Court erroneously distributed the land below the high-water mark to the meander line, because the court did not have jurisdiction to distribute the tribal trust property. The estate could not distribute property that it did not own. In re Estate of Hobbs, 2002 MT 85, 309 M 308, 46 P3d 594 (2002), following Mont. Power Co. v. Rochester, 127 F2d 189 (9th Cir. 1942), and Confederated Salish & Kootenai Tribes of the Flathead Reservation v. Namen, 665 F2d 951 (9th Cir. 1982).

Escheat to Tribe of Allotments Unconstitutional as "Taking": In 1983, Congress enacted the Indian Land Consolidation Act (ILCA), which attempted to ameliorate the fractionation or multiple ownership of single parcels of Indian land occurring as a result of the federal policy of allotment of Indian land. Section 207 of the ILCA provided that all interests in land that constituted 2% or less of the total acreage of allotted land and earned less than $100 in the preceding year would, upon the death of the owner, "escheat" or be transferred to the tribe instead of passing to heirs. Section 207 made no provision for payment of compensation to any interest holder. Subsequently, the legitimacy of section 207 was tested in Hodel v. Irving when

Irving, an heir of members of the Oglala Sioux Tribe, filed an action alleging that section 207 effected a taking of property without just compensation. While Irving was still pending, Congress amended section 207. Youpee, an enrolled member of the Sioux and Assiniboine Tribes of the Fort Peck Reservation, died testate in 1990, devising several undivided interests in allotted trust lands, valued at $1,239, on reservations in Montana and North Dakota to his heirs, all enrolled tribal members. Pursuant to section 207, the Department of the Interior ruled that the land interests should escheat to the tribal governments at reservations in Montana and North Dakota. Youpee's heirs filed an action against the Department in District Court, alleging that section 207, as amended, constituted a taking of private property without just compensation. The District Court agreed and granted injunctive relief. On appeal, the Ninth Circuit Court affirmed. In affirming the Ninth Circuit Court decision, the United States Supreme Court ruled that Congress's amendments did not cure the constitutional deficiency in the original version of section 207. Section 207 amounted to the virtual abrogation of the right to pass on a certain type of property and an unconstitutional taking of land without just compensation. Babbitt v. Youpee, 519 US 234 (1997).

Indian Mineral Rights: In an action brought by members of the Blackfeet Tribe claiming that the mineral rights to their land allotments were wrongfully reserved to the tribe, the federal Court of Appeals held that the tribe was immune from suit. Also, the 6-year Statute of Limitations for civil actions begun against the federal government barred the claims brought by tribe members under a provision of the Indian General Allotment Act, 25 U.S.C. 345. That provision allows federal courts to determine whether an Indian allottee has been deprived of rights connected with his allotment. In this case, the action alleging that the mineral rights to members' allotments were wrongfully reserved to the tribe was barred, as the claim related to action taken by the United States in 1922. Big Spring v. U.S. Bureau of Indian Affairs, 767 F2d 614 (9th Cir. 1985).

District Court Jurisdiction Over Probate of and Claim and Delivery Action by Estate of Enrolled Tribal Indian: Where, following the death of an enrolled member of an Indian tribe, the decedent's wife petitioned the District Court to probate her deceased husband's estate and estate property consisting of a road grader was later unlawfully sold by the deceased's wife to her brother, the District Court erred in holding that it did not have jurisdiction over the claim and delivery action instituted on behalf of the estate to recover the road grader or its value. The fact that there is no federal treaty or statute preempting the jurisdiction of the District Court and the fact that the tribal court has not had and is not exercising jurisdiction over the case properly resulted in the District Court's taking jurisdiction of the probate of the estate. Because the action for claim and delivery is the enforcement process to recover property within the jurisdiction of the probate court, the District Court should have exercised subject matter jurisdiction over the claim and delivery action as well. Estate of Standing Bear v. Belcourt, 193 M 174, 631 P2d 285, 38 St. Rep. 1064 (1981).

Determination of Heirs of Intestate Indian Decedent: A determination, pursuant to 25 U.S.C. 372, by the Secretary of the Interior of the legal heirs of an Indian who dies intestate while holding an allotment of land before the expiration of the trust period, is final and conclusive. Crawford v. Andrus, 472 F. Supp. 853 (D.C. Mont. 1979).

State Subject Matter Jurisdiction: Defendant cannot claim state lacks subject matter jurisdiction when plaintiff seeks cancellation of a deed conveying land situated within exterior boundaries of Crow Indian Reservation after issuance of a fee patent, as federal restrictions terminate upon issuance freeing United States from its trustee duties and alter relationship of land and plaintiff to the state of Montana. Woodtick v. Crosby, 169 M 38, 544 P2d 812 (1976).

TORTS

Action by Tribal Nonmember Against Indian College for Negligence and Products Liability and for Spoliation of Evidence — Neither Claim Arising on Reservation — Tribal Court Jurisdiction Found: Smith, a nonmember of the Confederated Salish and Kootenai Tribes who was involved in a one-car accident on Highway 93 running through the Flathead Indian Reservation, sued for an injunction against the Flathead Reservation Tribal Court, alleging that it had no jurisdiction over his cross-claim against Salish and Kootenai College (SKC), the owner of the vehicle he was driving at the time of the accident. The federal District Court held that SKC was a tribal entity for purposes of jurisdiction and that the case arose on the reservation, so that the tribal court had jurisdiction. Then, in reliance solely on Williams v. Lee, 358 US 217 (1959), the District Court dismissed Smith's action for an injunction. The Ninth Circuit Court of Appeals held that the jurisdictional issue had to be analyzed in accordance with Montana v. U.S., 450 US 544 (1981), and the Court of Appeals' previous holding in Yellowstone County v. Pease, 96 F3d 1169 (9th Cir.

1996) (in which the Ninth Circuit held that a tribal court has no jurisdiction over a litigant if either one party is not a member of the tribe or the claim arose on nontribal land), because one of the parties to the claim was a nonmember of the tribe. The Court of Appeals, following Montana, analyzed the facts and determined that the claims for negligence and product liability and for spoliation of evidence did not arise on reservation land. However, Smith was acting as a plaintiff and availed himself of tribal court jurisdiction. Therefore, the decision of the District Court was affirmed. Smith v. Salish Kootenai College, 378 F3d 1048 (9th Cir. 2004), affirmed in 434 F3d 1127 (9th Cir. 2006).

Common-Law Recognition and Sovereignty of Little Shell Tribe — Suit Against Tribal Officials Barred: Plaintiffs were candidates in an election of the Little Shell Tribe of Indians and sued in Montana District Court for tort damages and injunctive relief against the incumbent candidates, claiming that plaintiffs had won the election. The District Court dismissed on grounds of lack of jurisdiction, and plaintiffs appealed. The Supreme Court noted that the tribe had been pursuing federal tribal recognition since the 1930s, but as yet, the tribe is not recognized by the federal government. Nevertheless, Montoya v. U.S., 180 US 261 (1901), establishes criteria for common-law recognition of a tribe. The court examined the Montoya criteria and held that the Little Shell Tribe satisfied each element of the test for common-law recognition, so the tribe is entitled to sovereignty. Tribal members are of the same or similar race, are united in a community, exist under one leadership or government, and inhabit a particular though sometimes ill-defined territory. Further, under Santa Clara Pueblo v. Martinez, 436 US 49 (1978), Indian tribes and their officials enjoy sovereign immunity from suit unless expressly limited by Congress. Thus, because the tribal officials in this case were acting in their official capacities, suit against them in state court was barred under the doctrine of sovereign immunity. Dismissal of the action by the District Court for lack of jurisdiction was affirmed. Koke v. Little Shell Tribe of Chippewa Indians of Mont., Inc., 2003 MT 121, 315 M 510, 68 P3d 814 (2003).

State Execution of Search Warrant on Reservation Land for Off-Reservation Misconduct Valid — Tribal Court Jurisdiction Improper: State game wardens went onto Fallon Paiute-Shoshone Reservation land to serve state court and tribal court search warrants on Hicks, an enrolled member of the tribe, looking for evidence that Hicks had violated Nevada law by illegally killing a bighorn sheep off reservation. Hicks filed suit against the state and the wardens in tribal court, alleging trespass, abuse of process, and violation of constitutional rights under 42 U.S.C. 1983. After the tribal court ruled that it had jurisdiction over the tribal tort and federal civil rights claims, Nevada sought and received a declaratory judgment that the tribal court lacked jurisdiction over the claims. The District Court granted summary judgment, but held that the wardens had to exhaust their qualified immunity claims in tribal court. On appeal, the Ninth Circuit Court affirmed, concluding that the fact that Hicks's home was located on tribally owned reservation land was sufficient to support tribal jurisdiction over civil claims against nonmembers arising from activities on that land. The United States Supreme Court reversed, ruling that the tribal court did not have jurisdiction to adjudicate the state game wardens' alleged tortious conduct in executing a search warrant for an off-reservation crime. Applying its decision in Strate, the court ruled that as to nonmembers, a tribal court's inherent adjudicatory authority is at most as broad as the tribe's regulatory authority. The court stated that when nonmembers are concerned, the general rule outlined in Mont. v. U.S., establishing that the exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations cannot survive without express congressional delegation, applies to both Indian and non-Indian land. Although land ownership status is often a dispositive factor, tribal ownership alone is not enough to support regulatory jurisdiction over nonmembers. Tribal authority to regulate state officers in executing a process related to an off-reservation crime was not essential to tribal self-government or internal relations. Tribal courts are not courts of general jurisdiction, and their inherent adjudicative jurisdiction over nonmembers is at most only as broad as their legislative jurisdiction. Because Congress has not granted tribal courts jurisdiction over 1983 claims and because the rule limiting tribal court jurisdiction over state officials for causes of actions relating to their official duties is clear, the state game wardens are not required to exhaust their claims in tribal court before bringing them to federal District Court. Nev. v. Hicks (U.S. June 25, 2001) (No. 99-1994).

Sovereign Immunity Bars Tort Action by Individual Against State in Tribal Court: Following a fatal accident on a state-maintained highway located within the exterior boundaries of the Blackfeet Reservation, Gilham, the mother of the victim, filed suit against the driver and the State of Montana, alleging negligence. After the Blackfeet Tribal Court entered a judgment against the state, Montana filed an action in federal District Court challenging the jurisdiction of the tribal

court. The District Court granted the state's motion, ruling that as a sovereign, Montana enjoys immunity from suit in tribal courts and that the waiver of immunity under Art. II, sec. 18, Mont. Const., waives Montana's immunity only from suit in Montana state courts. On appeal, the Ninth Circuit Court affirmed, ruling that states have retained their historic sovereign immunity from suits by individuals and that this immunity is not abrogated by the inherent powers of tribes. The waiver of immunity found in Art. II, sec. 18, Mont. Const., applies only to suits in Montana's own courts. Mont. v. Gilham, 133 F3d 1133 (9th Cir. 1998).

Accident Involving Hutterite Colony Member on Blackfeet Reservation — Tribal Court Jurisdiction Proper: Hofer, an employee of the Glendale Hutterite Colony who was returning along U.S. Highway 2 from a delivery for the Colony, collided with a vehicle driven by Connell, a tribal member. Connell sued Hofer and the Colony in Blackfeet Tribal Court, and the Colony moved to dismiss for lack of jurisdiction. When the tribal court denied the motion, Hofer filed a petition in District Court, alleging a lack of jurisdiction under the Strate and Wilson decisions. The District Court denied the petition, holding that unlike the defendants in either Strate or Wilson, Hofer was not simply traveling through a reservation on a public highway enroute to an off-reservation destination. The court noted that since Hofer is a resident of the Colony, which is located on the Blackfeet Reservation, and the Colony holds a permit to conduct business on the reservation, the Colony has a continuous and ongoing presence on the reservation. As a result, a question remains whether Hofer's conduct threatens or has some direct effect on the political integrity, economic security, health, or welfare of the tribe. Glendale Colony & Hofer v. Connell, 22 MFR 394 (Nov. 3, 1997).

Accident Involving Non-Indians on State Highway on Indian Land — Tribal Court Jurisdiction Improper: Fredericks, a non-Indian widow of a tribal member, filed suit in tribal court to recover for injuries received in a traffic accident on a 6-mile portion of state highway crossing the reservation in which Fredericks' vehicle collided with a gravel truck driven by a non-Indian and owned by A-1 Contractors, a non-Indian-owned business performing work within the boundaries of the reservation for a tribally owned corporation. Prior to the commencement of tribal court proceedings, A-1 Contractors filed an action in federal District Court, alleging that the tribal court lacked jurisdiction to adjudicate the claims. Relying on the United States Supreme Court's decisions in Nat'l Farmers Union and Iowa Mut., the District Court ruled that the tribal court had civil jurisdiction over the claims against A-1 Contractors. On appeal, a divided panel of the Eighth Circuit Court affirmed but was subsequently reversed in a rehearing en banc, ruling that under Mont. v. U.S., 450 US 544 (1981), the tribal court lacked subject matter jurisdiction over the claims. On appeal, the United States Supreme Court affirmed, ruling that the right-of-way across reservation land federally granted to North Dakota rendered the 6-mile stretch of road equivalent, for nonmember governance purposes, to alienated, non-Indian land. Absent a statute or treaty and the exceptions outlined in Mont. v. U.S., the civil authority of tribes and tribal courts does not extend to the actions of nonmembers arising out of accidents on state highways. Strate v. A-1 Contractors, 520 US 438, 137 L Ed 2d 661, 117 S Ct 1404 (1997), distinguished in McDonald v. Means, 309 F3d 530 (9th Cir. 2003) (ruling that a BIA road within the Indian reservation was a tribal road for purposes of determining tribal court jurisdiction over the accident). See also Boxx v. Long Warrior, 265 F3d 771 (9th Cir. 2001), ruling that exhaustion of tribal remedies is not required because under Strate and Montana exceptions, the tribal court lacked jurisdiction to hear a claim filed by an enrolled member who sustained injuries in an automobile accident occurring as a passenger in a vehicle driven by a non-Indian social acquaintance on non-Indian fee property located inside Crow Reservation boundaries.

Wrongful Death Claim Arising From On-Reservation Accident Involving Nonmembers — Tribal Court Jurisdiction Proper: When a nonmember reservation resident was killed in a motorcycle collision within the reservation boundaries by a vehicle driven by a non-Indian reservation resident, the deceased's mother, an enrolled member, filed a wrongful death and survivorship action in tribal court. After the tribal court denied the driver's motion to dismiss, the driver filed a motion to move the case to federal District Court, alleging that the tribal court lacked jurisdiction. When the District Court denied the motion, the driver appealed. On appeal, the Ninth Circuit Court affirmed, ruling that since the driver, by living on the reservation, had purposely been availed the privileges of conducting activities within the reservation, the tribes had a special interest in exercising jurisdiction over those who committed tortious acts within the reservation. Hinshaw v. Mahler, 42 F3d 1178 (9th Cir. 1994), certiorari denied, 513 US 988, 130 L Ed 2d 398, 115 S Ct 485 (1994), overruled concerning general propositions on tribal jurisdiction in Strate v. A-1 Contractors, 520 US 438, 137 L Ed 2d 661, 117 S Ct 1404 (1997).

Products Liability — "Reservation Affair" for Jurisdiction: A federal court action must be deferred in favor of a tribal court proceeding unless the assertion of tribal court jurisdiction is: (1) asserted with a desire to harass or is in bad faith; (2) patently beyond the tribal courts' jurisdiction; or (3) futile because of an inadequate opportunity to contest the issue. An automobile accident that occurred on the Blackfeet Indian Reservation and involved members of the Blackfeet Indian Tribe was the impetus for the products liability action. The action was a "reservation affair" for purposes of tribal court jurisdiction. The federal court was required to dismiss or abstain in favor of tribal court proceedings. Crawford v. Genuine Parts Co., Inc., 947 F2d 1405 (9th Cir. 1991).

Exhaustion of Remedies to Include Tribal Appellate Courts: An enrolled member of the Blackfeet Tribe sued a reservation-based and Indian-owned corporation and its owners to recover for injuries received by the tribal member while a corporation employee and sued the corporation's insurance carrier for bad faith. The tribal court denied the corporation's motion to dismiss for lack of jurisdiction, stating that under the Blackfeet code jurisdictional questions are not appealable by interlocutory order and that a final determination by the tribal court is necessary prior to appeal. Extending the exhaustion rule of Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 US 845, 85 L Ed 2d 818, 105 S Ct 2447 (1985), the court ruled that exhaustion of tribal court remedies includes review by the Blackfeet Appellate Court. If, on review, a federal court determines that the tribal court properly exercised jurisdiction, deference to the tribal court and comity preclude the federal court from relitigating those issues resolved in tribal court. Iowa Mut. Ins. Co. v. LaPlante, 107 S Ct 971 (1987).

Exhaustion of Tribal Court Remedies — Comity: Where an Indian contractor failed to exhaust his remedies in tribal court, considerations of comity prevented the District Court from considering a diversity action for breach of contract, brought by the contractor against a non-Indian corporation, involving work on tribal land. Wellman v. Chevron, U.S.A., Inc., 815 F2d 577 (9th Cir. 1987).

Exhaustion of Tribal Court Remedies: When a school district and its insurer sought a preliminary injunction to prevent an injured schoolboy from executing on a default judgment taken in Tribal Court against the school district, the federal District Court granted injunctive relief. On certiorari to the U.S. Supreme Court, the court held that the federal District Court could decide whether the Tribal Court exceeded its jurisdiction. However, before a claim for injunctive relief can be considered by the District Court, the parties must exhaust their Tribal Court remedies. The question of whether the Tribal Court could exercise civil subject matter jurisdiction over a non-Indian property owner in a personal injury suit was to be conducted first in Tribal Court before the question of injunctive relief could be considered by the federal District Court. Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 US 845, 85 L Ed 2d 818, 105 S Ct 2447 (1985).

Tribal Court Jurisdiction — Federal Court Remedy: School district and its insurer sought a preliminary injunction in federal court to prevent injured boy from executing on default judgment taken in Indian Tribal Court against the school district. Federal District Court enjoined execution and the tribal defendants appealed. On application for temporary stay pending consideration of a petition for certiorari, the U.S. Supreme Court held that where a petition for certiorari was likely to be granted and where applicants had reasonable probability for at least partial success on the merits, temporary stay would be continued pending disposition of the petition for certiorari. Nat'l Farmers Union Ins. Co. v. Crow Tribe, 468 US 1315, 82 L Ed 2d 901, 105 S Ct 7 (1984).

Jurisdiction — Highway Tort Cases: A vehicle driven by Larrivee, a non-Indian, collided with a vehicle driven by Morigeau, a member of the Confederated Salish and Kootenai Tribes. The accident occurred on Montana 200 located within the exterior boundaries of the Flathead Indian Reservation. Larrivee brought an action against Morigeau in state District Court. Morigeau argued that the state court lacked subject matter jurisdiction. The court found that Montana assumed partial jurisdiction over the Flathead Reservation pursuant to Public Law 280. Tribal Ordinance 40-A consented to the assumption by the state of jurisdiction over certain subjects, including jurisdiction over the "operation of motor vehicles upon . . . highways." The court found this to include civil jurisdiction in highway tort cases. Larrivee v. Morigeau, 184 M 187, 602 P2d 563 (1979).

TAXATION AND FINANCE

Tribal Tax on Nonmembers on Non-Indian Reservation Fee Land Invalid: The Navajo Nation enacted a hotel occupancy tax, which imposed an 8% tax upon any hotel room located within the exterior boundaries of the Navajo Nation Reservation. Although the legal incidence of the tax fell directly upon the guests, the owner or operator of the hotel was required to collect and

remit the tax to the Navajo Tax Commission. A nonmember hotel owner's suit challenging the tribe's authority under Mont. v. U.S. to impose the tax was rejected by both the Commission and the Navajo Supreme Court. On appeal, the District Court and the Tenth Circuit Court upheld the tribal tax ruling that because lodging by a nonmember guest constituted a consensual relationship, the tax fell under Montana's first exception. In reversing the lower courts' decisions, the United States Supreme Court invalidated the tax, ruling that Montana's general rule, rather than its two exceptions, applied to the tribe's attempt to tax nonmember activity occurring on non-Indian fee land. In analyzing the tribe's assertion that the court's earlier rulings in Montana and Strate did not restrict a tribe's power to impose revenue-raising taxes, the court ruled that Montana's general rule, which prohibits tribal civil authority over the conduct of nonmembers on non-Indian land within a reservation and not its two exceptions, was applicable because neither the hotel nor its guests had entered into a consensual relationship with the Navajo Nation to justify imposition of the tax nor had the tribe demonstrated that operation of a hotel on non-Indian fee land threatened or directly affected the tribe's political integrity, economic security, or health or welfare. Atkinson Trading Co., Inc. v. Shirley (U.S. May 29, 2001) (No. 00-454). See also Burlington N. & Santa Fe Ry. Co. v. Assiniboine & Sioux Tribes of the Fort Peck Indian Reservation (Cause No. CV-01-34-BLG-JDS) (D.C. Mont. 2001), holding that under Atkinson, generalized availability of tribal services is insufficient to sustain civil authority to tax a nonmember on non-Indian fee land.

Tribe Without Jurisdiction to Impose Ad Valorem Tax on Utility Property on Tribal or Trust Land Within Reservation Boundaries — Burlington Northern Overruled: The Crow Tribe enacted a Railroad and Utility Tax Code, which assessed a 3% tax on the full market value of right-of-way easements over reservation lands owned by an electrical cooperative. The cooperative, which was the primary provider of retail electrical services on the reservation, filed an action in federal court, claiming that the tribe had no regulatory jurisdiction to impose the tax on non-Indian fee land or to prohibit the cooperative from passing the utility tax through to Crow customers. In granting summary judgment to the cooperative, the Ninth Circuit Court of Appeals ruled that consistent with its rulings in Strate and Red Wolf, the cooperative's congressionally granted railroad right-of-way is the equivalent of non-Indian fee land. Without express authorization to impose the tax by federal statute or treaty, the tribe lacks civil jurisdiction to impose the tax on nonmember fee land unless it falls within one of the Montana exceptions. Although the tribe did enter into a consensual relationship with the cooperative to provide electrical services on the reservation, the Ninth Circuit Court of Appeals held that the Montana exceptions did not apply because the tribe had not identified any commercial dealing with Burlington Northern to justify the tax nor was the tax necessary to protect the integrity, economic security, or welfare of the tribe. In holding that the tribe lacks authority to impose the ad valorem tax against the cooperative, the Ninth Circuit Court of Appeals expressly overruled its earlier decision in Burlington N. RR Co. v. Blackfeet Tribe, 924 F2d 899 (9th Cir. 1991), which, in light of the reasoning in Strate, had failed to apply Montana and erroneously held that a congressionally granted right-of-way was an easement in which a tribe retained a continuing property interest. Big Horn County Elec. Co-op, Inc. v. Adams, 219 F3d 944 (9th Cir. 2000). See also Burlington N. & Santa Fe Ry. Co. v. Assiniboine & Sioux Tribes of the Fort Peck Indian Reservation (Cause No. CV-01-34-BLG-JDS) (D.C. Mont. 2001) (tribes lack authority to impose a 4% utility tax on a nonmember-owned right-of-way located on a reservation) (Burlington I). However, see Burlington N. Santa Fe RR Co. v. Assiniboine & Sioux Tribes of Fort Peck Reservation, 323 F3d 767 (9th Cir. 2003) (vacating that portion of the District Court's summary judgment in Burlington I to permit the tribes the opportunity for discovery to determine, when applying Montana's second exception, whether Burlington Northern's use of its right-of-way threatens serious harm to the health and welfare of the tribes).

Income Earned by Indians Residing Outside Indian Country Subject to State Tax: The Chickasaw Nation (tribe) challenged Oklahoma's authority to impose taxes on sales, income, motor fuel, and beer within Indian country. When the District Court granted summary judgment for the state on each of the taxes, the tribe appealed. The 10th Circuit Court subsequently upheld the sales and beer taxes, but held that the state's income taxes on wages and motor fuel taxes were invalid. On appeal, the United States Supreme Court modified the 10th Circuit Court's ruling, affirming that Oklahoma may not apply its motor fuel tax to fuel sold by the tribe in Indian country, but ruling that the state may tax the income, including wages from tribal employment, of both Indians and non-Indians residing outside Indian country. Okla. Tax Comm'n v. Chickasaw Nation, 31 F3d 964 (10th Cir. 1994), modified in 515 US 450, 132 L Ed 2d 400, 115 S Ct 2214 (1995).

State Coal Taxes Not Applicable to Crow Coal — Tribal Restitution Unwarranted:
In 1978, the Crow Tribe brought action against Montana, seeking declaratory and injunctive relief against the imposition of the state's 30% coal severance and gross proceeds taxes on tribally owned coal mined from the Crow Reservation and the "ceded strip" by non-Indian lessees. While the District Court dismissed the action (469 F. Supp. 154 (D.C. Mont. 1979)), the Ninth Circuit Court, on appeal by the tribe, reversed and remanded (650 F2d 1104 (9th Cir. 1981), as amended by 665 F2d 1390 (9th Cir. 1982) (Crow I)). On remand, the District Court upheld the state's application of taxes for coal mined in the "ceded strip", but it abstained from deciding whether taxes could be imposed on the reservation boundaries (657 F. Supp. 573 (D.C. Mont. 1985)). On appeal, the Ninth Circuit Court reversed, ruling that federal law and policy preempted state taxation and that the taxes infringed on tribal sovereignty. The court also held that the question of whether coal mined on the reservation would be subject to taxation was a justiciable controversy (819 F2d 895 (9th Cir. 1987) (Crow II)). On appeal by the state, the Supreme Court affirmed without opinion the decision of the Ninth Circuit Court (484 US 997 (1988)).

After Crow II, the District Court awarded the tribe over $23 million in severance taxes that the lessee Westmoreland had paid after 1982. The tribe then sought restitution of some $57 million in total taxes paid to the state and county between 1975 and 1982. The District Court denied the state's motion to dismiss the claim and certified an order for interlocutory appeal. After initially granting the leave to appeal, the Ninth Circuit Court dismissed the appeal, ruling that the state's argument concerning privity had been resolved against the state in Crow II. Crow Tribe of Indians v. Mont., 969 F2d 848 (9th Cir. 1992) (Crow III).

After trial, the District Court denied relief, ruling that the tribe was not entitled to restitution. On appeal, a three-judge panel of the Ninth Circuit Court reversed, concluding that the District Court's denial of equitable relief was erroneously based on considerations explicitly rejected in previous court decisions. The case was remanded to District Court for entry of an order directing the state and county to return the improperly collected taxes and for consideration by the court of the tribe's unresolved request for prejudgment interest. Crow Tribe of Indians v. Mont., 92 F3d 826 (9th Cir. 1996) (Crow IV), certiorari granted, 66 U.S. L.W. 3245 (U.S. Oct. 7, 1997) (No. 96-1984), reversed and remanded, 140 L Ed 2d 898, 118 S Ct 1650 (1998).

Tax on Tribe's Mineral Royalty Interests: Blackfeet Indian Tribe challenged application of certain Montana taxes on the tribe's royalty interests in oil and gas produced under leases issued by the tribe. The federal Court of Appeals held that the state could not tax the tribe's royalty interests under leases issued to non-Indian lessees pursuant to the Indian Mineral Leasing Act of 1938, 25 U.S.C. 396a, et seq. States may tax Indians only when Congress clearly has manifested its consent to such taxation. Blackfeet Tribe of Indians v. Mont., 729 F2d 1192 (9th Cir. 1984), affirmed in Mont. v. Blackfeet Tribe of Indians, 471 US 759, 85 L Ed 2d 753, 105 S Ct 2399 (1985).

Application of New Car Tax and Personal Property Tax to Indian Tribes and Individuals: The Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation and the enrolled members of those tribes residing on that reservation are exempt from payment of the new car sales tax imposed by 61-3-502 (now repealed) and the personal property tax imposed by 61-3-503; however, Indians residing on that reservation and not enrolled in either of the tribes are subject to the taxes. The Assiniboine & Sioux Tribes v. Mont., 568 F. Supp. 269, 40 St. Rep. 1318 (D.C. Mont. 1983).

State Taxation of Indian Trust Properties Valid — No Repeal by Implication Found: Where the plaintiff Indian tribe sought declaratory and injunctive relief against the levy and collection of certain taxes by the state and several counties on the production of oil and gas owned by the United States in trust for the plaintiff by non-Indian lessees within the boundaries of the plaintiff's reservation, the court held that the provisions of 25 U.S.C. 398 specifically authorized state taxation of oil and gas on tribal lands and that the provisions of the statute had not been impliedly repealed by 25 U.S.C. 396. The sovereign right asserted by the plaintiff to be free from state taxation has been controlled by Congress, and the plaintiff has not shown that there is such a repugnancy between the two federal statutes as to satisfy their burden of proving a congressional intent to repeal the former by enactment of the latter or that there is an ambiguity in the law which should be construed in favor of the plaintiff. Blackfeet Tribe v. St., 507 F. Supp. 446, 38 St. Rep. 238 (D.C. Mont. 1981).

Application of State Income Tax to Indians: State authority within the exterior boundaries of an Indian reservation is limited, and as provided in the Buck Act (4 U.S.C. 105 et seq.) unless by treaty, The Enabling Act, or other federal law there is an express cession of taxation authority by the federal government to the State, the State may not tax the income derived solely from reservation sources of an Indian living on an Indian reservation regardless of whether the Indian

is an enrolled member of a tribe of that reservation. LaRoque v. St., 178 M 315, 583 P2d 1059, 35 St. Rep. 1281 (1978).

Property and Income Taxation of Flathead Reservation Indians: This section, when read in conjunction with the Treaty of Hell Gate, 12 Stat. 975, the Buck Act, 4 U.S.C. 105, et seq., and the General Allotment Act, 25 U.S.C. 331, et seq., does not create a statutory basis permitting the state to tax Flathead reservation land held by Indians or Indian income from activities carried on within the boundaries of the reservation; therefore, no such power exists. Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation, 425 US 463, 48 L Ed 2d 96, 96 S Ct 1634 (1976).

Unrestricted Patent Lands Taxable by State: Where enrolled member of Blackfeet Tribe voluntarily accepted an unrestricted patent, thereby voluntarily relinquishing her privilege of tax exemption, the Court properly found that the property thereby became taxable by the state and any tax deed issued as a result of a failure to pay accrued taxes was a valid deed. Miline v. Leiphart, 119 M 263, 174 P2d 805 (1946).

Consent of United States to City Taxation To Be Presumed: In an action to restrain the city from taxing the real property of a minor Indian, unless the plaintiff can show otherwise by affirmative evidence, it would be assumed that the city had taken all necessary steps to tax the property and that the consent of the United States had been obtained. Ogle v. Town of Ronan, 112 M 394, 117 P2d 257 (1941).

State May Tax Production Under Lease of Trust Patent Indian Land: The Supreme Court held that the State Board of Equalization is authorized to tax the operator's net proceeds tax and the oil producers' license tax or gross production tax, but not the royalty owner's net proceeds tax, on oil and gas produced under a lease of trust patent Indian land. (Overruling Santa Rita Oil & Gas Co. v. St. Bd. of Equalization, 101 M 268, 54 P2d 117 (1936), with exception of the royalty owner's net proceeds tax, for the reason that the federal Supreme Court overruled its holdings upon which the state Court's former opinion was based.) Santa Rita Oil & Gas Co. v. St. Bd. of Equalization, 112 M 359, 116 P2d 1012 (1941).

Exemption From Taxation: Under subdivision 2 of section 4 of The Enabling Act and section 2 of Ordinance No. 1, state Constitution, the state is without power to tax land (or permanent improvements thereon) which is subject to a "trust patent" for an Indian allottee, the federal government retaining legal title in trust. Santa Rita Oil & Gas Co. v. St. Bd. of Equalization, 101 M 268, 54 P2d 117 (1936).

Land of an Indian allottee is exempt from taxation until issuance of fee patent. State ex rel. Jensen v. District Court, 103 M 461, 64 P2d 835 (1936).

Where Taxes on Lands of Indian Void: Where Indian lands had been allotted to a tribal Indian under a trust patent reserving the fee in the United States for a period of 25 years, and several months thereafter, a fee patent was issued by the general land office to such Indian without any application therefor and recorded without his knowledge or consent, resulting in sale of land for delinquent taxes, the taxes are illegal and void. State ex rel. Jensen v. District Court, 103 M 461, 64 P2d 835 (1936).

Operation and Effect:

As to the taxation of Indian lands held under trust patent, this section controls the general provisions of the state Constitution that property of the United States is exempt from taxation. British-American Oil Producing Co. v. St. Bd. of Equalization, 101 M 293, 54 P2d 129 (1936).

The Legislature has no power to impose a tax of any character upon any property or instrumentality of the federal government, and this immunity includes special assessments. Ford v. Great Falls, 46 M 292, 127 P 1004 (1912).

"Trust Patent" Indian Land Not Taxable by State: Under subdivision 2 of section 4 of The Enabling Act and subsection 2 of Ordinance No. 1, state Constitution, the state has no authority, without congressional consent, to tax land or permanent improvements thereon, held under a "trust patent" issued to an Indian allottee. Santa Rita Oil & Gas Co. v. St. Bd. of Equalization, 101 M 268, 54 P2d 117 (1936).

WATER

EPA Regulations Granting "Treatment as State" Status to Develop Water Standards Within Flathead Indian Reservation Upheld: In 1987, Congress added section 518(e) to the Clean Water Act, which authorized the Environmental Protection Agency (EPA) to permit Indian tribes "to be treated as a state" (TAS) for purposes of promulgating water quality standards. In 1992, the Confederated Salish and Kootenai Tribes (tribes) applied for TAS status for all surface waters within the Flathead Indian Reservation. Montana opposed the EPA's grant of TAS status to

the tribes because it would extend to lands and surface water within reservation boundaries owned in fee by nontribal members. After the EPA Director, upon determining that the tribes possessed inherent authority over nonmembers on fee land, approved the tribes' TAS application, Montana filed suit, arguing that the EPA's regulations granting TAS status to all sources of pollutant emissions within the boundaries of the Flathead Indian Reservation permitted the tribes to exercise broader authority over nonmembers than the inherent tribal powers recognized as necessary to self-governance. The District Court granted summary judgment to the EPA and tribes. In affirming the District Court decision, the Ninth Circuit Court, citing its previous holdings in Mont. v. U.S., 450 US 544 (1981), and Strate v. A-1 Contractors, 520 US 438, 137 L Ed 2d 661, 117 S Ct 1404 (1997), ruled that based upon the finding that the activities of the nonmembers posed such a serious and substantial threat to tribal health and welfare, the EPA's decision to grant the tribes TAS authority was valid and reflected the appropriate application of inherent tribal regulatory authority over nonconsenting nonmembers. Mont. v. U.S. Envtl. Protection Agency, 137 F3d 1135 (9th Cir. 1998), certiorari denied, 142 L Ed 2d 227, 119 S Ct 275 (1998).

Lack of NPDES Permits — Motion by Irrigation Districts to Intervene as of Right Properly Denied: In 1987, Congress added section 518(e) to the Clean Water Act, which authorized the Environmental Protection Agency to permit Indian tribes to be "treated as a state" (TAS) for purposes of promulgating water quality standards. The Flathead Joint Board of Control, two irrigation districts, and four individual irrigators who owned fee land on the reservation sought to intervene as of right, contending that the imposition of tribal water quality standards would violate their civil rights by subjecting them to tribal jurisdiction and would depress the value of their property. Because the intervenors held no National Pollutant Discharge Elimination System (NPDES) permits, they could not be subject to NPDES enforcement proceedings. TAS status does not confer enforcement authority on the tribes; it only allows the tribes to set the standards. Even if the tribes sought enforcement authority, NPDES permits would still be issued by the federal government and enforced in federal, not tribal, courts. Further, a speculative and purely economic interest did not create a protectable interest in litigation concerning a statute that regulates environmental rather than economic interests. Because the transfer of the right to establish water quality standards from the state to the tribes would have no immediate or foreseeable, demonstrable effect on the proposed intervenors, the application to intervene as of right was properly denied. Mont. v. U.S. Envtl. Protection Agency, 137 F3d 1135 (9th Cir. 1998), certiorari denied, 142 L Ed 2d 227, 119 S Ct 275 (1998).

State Water Court — Jurisdiction to Adjudicate Indian Reserved Water Rights: In an original proceeding to determine jurisdiction of the Water Court over Indian tribes and water flowing through state reservations, the Supreme Court held that Article I of the Montana Constitution does not bar state jurisdiction to adjudicate Indian reserved water rights. With the 1952 McCarran amendment, the U.S. Congress diminished the scope of absolute federal jurisdiction by allowing state courts concurrent jurisdiction to adjudicate federal water rights. In Colo. River Water Conserv. District v. U.S., 424 US 800, 47 L Ed 2d 483, 96 S Ct 1236 (1976), the U.S. Supreme Court held that the McCarran amendment applied to Indian water rights. The state legislature's enactment of the Water Use Act (Title 85, ch. 2) pursuant to Art. IX, sec. 3, Mont. Const., constitutes a valid and binding consent of the people of Montana to Congress' grant of state jurisdiction over Indian reserved water rights. State ex rel. Greely v. Confederated Salish & Kootenai Tribes, 219 M 76, 712 P2d 754, 42 St. Rep. 1856 (1985).

State Court Jurisdiction Over Federal and Indian Water Rights: The McCarran Amendment, 43 U.S.C. 666, granting state courts jurisdiction over the United States when the litigation involves a comprehensive adjudication of water rights, removed "whatever limitations the enabling acts or federal policy may have originally placed on state court jurisdiction" over the adjudication of Indian water rights in actions brought by the United States on behalf of an Indian tribe as well as in actions brought by an Indian tribe itself. Assuming that the state adjudication procedure is adequate and complies with state law, dismissal of adjudication actions filed in federal District Court out of deference to state adjudication proceedings was proper. Ariz. v. San Carlos Apache Tribe, 463 US 545, 77 L Ed 2d 837, 103 S Ct 3201 (1983), reversing N. Cheyenne Tribe v. Adsit, 668 F2d 1080 (9th Cir. 1982).

Indian Control Over Southern Half of Flathead Lake: The Confederated Salish and Kootenai Tribes have beneficial title to and hence may regulate non-Indian use of the southern half of Flathead Lake. Namen v. Confederated Salish & Kootenai Tribes, 665 F2d 951 (9th Cir. 1982), certiorari denied (with dissenting opinion), 459 US 977, 74 L Ed 2d 291, 103 S Ct 314 (1982).

Bighorn Riverbed — Title to Montana: The United States in its own right and as fiduciary on behalf of the Crow Tribe of Indians sought to quiet title to the bed and banks of the Bighorn River. The U.S. District Court (457 F. Supp. 599) declared the state of Montana owned the bed and banks. The 9th Circuit Court of Appeals reversed and remanded (604 F2d 1162). The Supreme Court held that the fact that the bed of a body of navigable water lies within the boundaries described by treaty with the Indians does not make the riverbed part of the conveyed land. There is a strong presumption against conveyance that must be overcome by express reference or clear and special wording. No such language was found in treaties with the Crow, and the Supreme Court held that title to the bed of the Bighorn River passed to Montana upon its admission to the Union. The court also found no inherent sovereignty in the tribe to regulate non-Indian hunting and fishing on the non-Indian lands within the reservation. Mont. v. U.S., 450 US 544, 67 L Ed 2d 493, 101 S Ct 1245 (1981), followed, as to method of analyses of jurisdictional issue, in Smith v. Salish Kootenai College, 378 F3d 1048 (9th Cir. 2004), affirmed in 434 F3d 1127 (9th Cir. 2006).

Bighorn River — No Indian Control: The treaty establishing the Crow Indian Reservation did not convey to the Indians beneficial ownership of the bed of the Bighorn River flowing through the reservation. Mont. v. U.S., 450 US 544, 67 L Ed 2d 493, 101 S Ct 1245 (1981).

Streams on Indian Reservations — Appropriations: By the treaty of May 7, 1868, between the United States and the Crow Indians, establishing the Crow Indian Reservation, the federal government impliedly reserved to itself the waters thereon for irrigation and other purposes for use by the Indians; hence they were not subject to appropriation by others. Anderson v. Spear-Morgan Livestock Co., 107 M 18, 79 P2d 667 (1938).

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§ 5. That the convention which shall assemble at Bismarck shall form a constitution and State government for a State to be known as North Dakota, and the convention which shall assemble at Sioux Falls shall form a constitution and State government for a State to be known as South Dakota: PROVIDED, That at the election for delegates to the constitutional convention in South Dakota, as hereinbefore provided, each elector may have written or printed on his ballot the words, "For the Sioux Falls constitution," or the words, "Against the Sioux Falls constitution," and the votes on this question shall be returned and canvassed in the same manner as for the election provided for in section three of this act; and if a majority of all votes cast on this question shall be "for the Sioux Falls constitution" it shall be the duty of the convention which may assemble at Sioux Falls, as herein provided, to resubmit to the people of South Dakota, for ratification or rejection, at the election hereinafter provided for in this act, the constitution formed at Sioux Falls and adopted November third, eighteen hundred and eighty-five, and also the articles and propositions separately submitted at that election, including the question of locating the temporary seat of government, with such changes only as relate to the name and boundary of the proposed State, to the reapportionment of the judicial and legislative districts, and such amendments as may be necessary in order to comply with the provisions of this act; and if a majority of the votes cast on the ratification or rejection of the constitution shall be for the constitution irrespective of the articles separately submitted, the State of South Dakota shall be admitted as a State in the Union under said constitution as hereinafter provided; but the archives, records and books of the Territory of Dakota shall remain at Bismarck, the capital of North Dakota, until an agreement in reference thereto is reached by said States. But if at the election for delegates to the constitutional convention in South Dakota a majority of all the votes cast at that election shall be "against the Sioux Falls constitution," then and in that event shall be the duty of the convention which will assemble at the city of Sioux Falls on the fourth day of July, eighteen hundred and eighty-nine, to proceed to form a constitution and State government as provided in this act the same as if that question had not been submitted to a vote of the people of South Dakota.

§ 6. It shall be the duty of the constitutional Conventions of North Dakota and South Dakota to appoint a joint commission, to be composed of not less than three members of each convention, whose duty it shall be to assemble at Bismarck, the present seat of government of said Territory, and agree upon an equitable division of all property belonging to the Territory of Dakota, the disposition of all public records, and also adjust and agree upon the amount of the debts and liabilities of the Territory, which shall be assumed and paid by each of the proposed States of North Dakota and South Dakota; and the agreement reached respecting the Territorial debts and liabilities shall be incorporated in the respective constitutions, and each of such States shall obligate itself to pay its proportion of said debts and liabilities the same as if they had been created by such States respectively.

§ 7. If the constitutions formed for both North Dakota and South Dakota shall be rejected by the people at the elections for the ratification or rejection of their respective constitutions as provided for in this act, the Territorial government of Dakota shall continue in existence the same as if this act had not been passed. But if the constitution formed for either North Dakota or South Dakota shall be rejected by the people, that part of the Territory so rejecting its proposed constitution shall continue under the territorial government of the present territory of Dakota, but shall, after the State adopting its constitution is admitted into the Union, be called by the name of the Territory of North Dakota or South Dakota, as the case may be: PROVIDED, That if either of the proposed States provided for in this act shall reject the constitution which may be submitted for ratification or rejection at the election provided therefor, the Governor of the Territory in which such proposed constitution was rejected shall issue his proclamation reconvening the delegates elected to the convention which formed such rejected constitution, fixing the time and place at which said delegates shall assemble; and when so assembled they shall proceed to form another constitution or to amend the rejected constitution, and shall submit such new constitution or amended constitution to the people of the proposed State for ratification or rejection, at such time as said convention may determine; and all the provisions of this act, so far as applicable, shall apply to such convention so reassembled and to the constitution which may be formed, its ratification or rejection, and to the admission of the proposed State.

§ 8. That the constitutional convention which may assemble in South Dakota shall provide by ordinance for resubmitting the Sioux Falls constitution of eighteen hundred and eighty-five, after having amended the same as provided in section five of this act, to the people of South Dakota for ratification or rejection at an election to be held therein on the first Tuesday in October, eighteen hundred and eighty-nine; but if said constitutional convention is authorized and required to form a new constitution for South Dakota it shall provide for submitting the same in like manner to the people of South Dakota for ratification or rejection at an election to be held in said proposed state on the said first Tuesday in October. And the constitutional conventions which may assemble in North Dakota, Montana, and Washington shall provide in like manner for submitting the constitutions formed by them to the people of said proposed States, respectively, for ratification or rejection at elections to be held in said proposed States on the said first Tuesday in October. At the elections provided for in this section the qualified voters of said proposed States shall vote directly for or against the proposed constitutions, and for or against any articles or propositions separately submitted. The returns of said elections shall be made to the secretary of each of said Territories, who, with the governor and chief justice thereof, or any two of them, shall canvass the same; and if a majority of the legal votes cast shall be for the constitution the governor shall certify the result to the President of the United States, together with a statement of the votes cast thereon and upon separate articles or propositions, and a copy of said constitution, articles, propositions, and ordinances. And if the constitutions and governments of said proposed States are republican in form, and if all the provisions of this act have been complied with in the formation thereof, it shall be the duty of the President of the United States to issue his proclamation announcing the result of the election in each, and thereupon the proposed States which have adopted constitutions and formed State governments as herein provided shall be deemed admitted by Congress, into the Union under and by virtue of this act on an equal footing with the original States from and after the date of said proclamation.

§ 9. That until the next general census, or otherwise provided by law, said States shall be entitled to one Representative in the House of Representatives of the United States, except South Dakota, which shall be entitled to two; and the Representatives to the Fifty-first Congress, together with the governors and other officers provided for in said constitutions, may be elected on the same day of the election for the ratification or rejection of the constitutions; and until said State officers are elected and qualified under the provisions of each constitution and the States, respectively, are admitted into the Union, the Territorial officers shall continue to discharge the duties of their respective offices in each of said Territories.

§ 10. That upon the admission of each of said States into the Union sections numbered sixteen and thirty-six in every township of said proposed States, and where such section, or any parts thereof, have been sold or otherwise disposed of by or under the authority of any act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said States for the support of common schools, such indemnity lands to be

selected within said States in such manner as the legislature may provide, with the approval of the Secretary of the Interior; PROVIDED, That the sixteenth and thirty-sixth sections embraced in permanent reservations for national purposes shall not, at any time, be subject to the grants nor to the indemnity provisions of this act, nor shall any lands embraced in Indian, military or other reservations of any character be subject to the grants or to the indemnity provisions of this act until the reservation shall have been extinguished and such lands be restored to, and become a part of, the public domain.

Cross-References

Management of school lands, Art. X, sec. 4, Mont. Const.

Disposition of income from lease of school lands, Art. X, sec. 5, Mont. Const.

School districts — property, Title 20, ch. 6, part 6.

Case Notes

Harvest-Level Accounting of Timber Sales Not Required: Plaintiff challenged the methodology used by the state Board of Land Commissioners in approving the harvest and sale of timber in state forests, asserting that 77-1-202 required harvest-level accounting. The District Court granted summary judgment to defendants, ruling that the statute did not require the Board to reconcile timber sale costs and benefits at the harvest level. On appeal, the Supreme Court noted that the statute, on its face, does not require accountings at all, but rather requires the Board to secure the largest measure of legitimate and reasonable advantage to the state. The court declined to insert what has been omitted from the statutory language, despite plaintiff's contention that a comprehensive economic evaluation was implicit in the statute. The court held that it could not be concluded that the Board has not secured or could not secure the largest measure of benefit from timber sales without harvest-level accounting, given the multiple purposes that the Board must fulfill with regard to school trust lands, the broad discretion and deference that the law provides to the Board in administering school trust lands, and current statutory accounting requirements. Thus, the Board is not legally required to conduct harvest-level review of timber sales and did not violate 77-1-202 when it decided to forego harvest-level financial reconciliation in a timber sale. Summary judgment was affirmed. Friends of the Wild Swan v. Dept. of Natural Resources and Conservation, 2005 MT 351, 330 M 186, 127 P3d 394 (2005). See also State ex rel. Thompson v. Babcock, 147 M 46, 409 P2d 808 (1966), and Montanans for Responsible Use of School Trust v. State ex rel. Bd. of Land Comm'rs, 1999 MT 263, 296 M 402, 989 P2d 800 (1999).

Operation and Effect: This is a general granting clause and shows clearly the interest of the Congress in the common schools of the newly admitted state. Texas Pacific Coal & Oil Co. v. St., 125 M 258, 234 P2d 452 (1951).

§ 11. That all lands granted by this act shall be disposed of only at public sale after advertising—tillable lands capable of producing agricultural crops for not less than ten dollars ($10.00) per acre, and lands principally valuable for grazing purposes for not less than five dollars ($5.00) per acre. Any of the said lands may be exchanged for other lands, public or private, of equal value and as near as may be of equal area, but if any of the said lands are exchanged with the United States such exchange shall be limited to surveyed, nonmineral, unreserved public lands of the United States within the state.

Except as otherwise provided herein, the said lands may be leased under such regulations as the legislature may prescribe. Leases for the production of minerals, including leases for exploration for oil, gas, and other hydrocarbons and the extraction thereof, shall be for such term of years and on such conditions as may be from time to time provided by the legislatures of the respective states; leases for grazing and agricultural purposes shall be for a term not longer than ten years; and leases for development of hydroelectric power shall be for a term not longer than fifty years.

The state may also, upon such terms as it may prescribe grant such easements or rights in any of the lands granted by this act, as may be acquired in privately owned lands through proceedings in eminent domain; provided, however, that none of such lands, nor any estate or interest therein, shall ever be disposed of except in pursuance of general laws providing for such disposition, nor unless the full market value of the estate or interest disposed of, to be ascertained in such manner as may be provided by law, has been paid or safely secured to the state.

With the exception of the lands granted for public buildings, the proceeds from the sale and other permanent disposition of any of the said lands and from every part thereof, shall constitute permanent funds for the support and maintenance of the public schools and the various state institutions for which the lands have been granted. Rentals on leased land,

proceeds from the sale of timber and other crops, interest on deferred payments on land sold, interest on funds arising from these lands, and all other actual income, shall be available for the acquisition and construction of facilities, including the retirement of bonds authorized by law for such purposes, and for the maintenance and support of such schools and institutions. Any state may, however, in its discretion, add a portion of the annual income to the permanent funds.

The lands hereby granted shall not be subject to pre-emption, homestead entry, or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be reserved for the purposes for which they have been granted.

Compiler's Comments

2001 Code Commissioner Correction: The code commissioner reinserted the third sentence of the fourth paragraph in sec. 11 upon discovery that the sentence was inadvertently deleted during printing of the 1967 congressional amendment to the second sentence, which was accepted by the State of Montana by sec. 1, Ch. 14, Sp. L. January 1992.

Most Recent Amendment: This section was last amended by the act of June 30, 1967, 81 Stat. 106. This amendment was accepted by the State of Montana by sec. 1, Ch. 14, Sp. L. January 1992.

Previous Amendments: This section was previously amended by the act of April 13, 1948, ch. 183, 62 Stat. 170. This amendment was accepted by the State of Montana by Sec. 1, Ch. 18, L. 1949.

This section was previously amended by the act of June 25, 1938, 52 Stat. 1198. This amendment was accepted by the State of Montana by Ch. 8, L. 1939.

This section was previously amended by the act of May 7, 1932, 47 Stat. 150. This amendment was accepted by the State of Montana by Ch. 84, L. 1933.

Cross-References

Public school fund, Art. X, sec. 2, Mont. Const.
Public school fund inviolate, Art. X, sec. 3, Mont. Const.
Public school fund revenue, Art. X, sec. 5, Mont. Const.
State university funds, Art. X, sec. 10, Mont. Const.
Administration and leasing of state lands, Title 77.

Case Notes

Accounting System Allowing Commingling of State Trust Revenue Constitutional: Plaintiff challenged the state's alleged improper commingling of state land trust assets, including rental and bonus payments on certain coal leases, into the general fund, asserting that the accounting system violated the state's duty to obtain full market value for school trust lands. The District Court concluded that plaintiff failed to prove financial harm to the school trust beneficiaries, particularly when the Legislature's appropriation to public schools far exceeded the combined money provided by the interest income and the bonus payments. On appeal, the Supreme Court affirmed. The state satisfied its trust obligations by demonstrating that its accounting system was sufficiently accurate and complete to allow plaintiff to ascertain that all trust revenue goes to benefit public schools, while plaintiff failed to carry its burden of proving that the state withheld either the interest income or the bonus payments or improperly diverted those funds to nontrust purposes. Thus, the state statutory scheme did not breach the state's trustee duty by requiring the deposit of interest income and bonus payments into the general fund. Montanans for Responsible Use of School Trust v. Darkenwald, 2005 MT 190, 328 M 105, 119 P3d 27 (2005), distinguishing Cobell v. Babbit, 52 F. Supp. 2d 11 (D.D.C. (1999). See also Montanans for Responsible Use of School Trust v. State ex rel. Bd. of Land Comm'rs, 1999 MT 263, 296 M 402, 989 P2d 800 (1999).

State Loan in Exchange for Full Market Value of Future Stream of Mineral Royalties Without Appraisal Not Violative of Fiduciary Duty to Preserve State Land Trust — Valuation of Future Stream Affirmed: Senate Bill No. 495 (2001) authorized the Department of Natural Resources and Conservation to borrow up to $75 million from the coal trust severance tax permanent fund for 30 years to buy mineral production royalties owned by the school trust in order to enhance short-term distributable revenue from the permanent fund for the benefit of public schools. Plaintiff asserted that this statutory scheme violated the state's school trust duties by using an arbitrary method of determining the appropriate discount rate and by not requiring an independent appraisal to determine full market value of the future royalty stream. The District Court concluded that the state's method of determining the appropriate discount rate was neither arbitrary nor a breach of the duty to obtain fair market value, and on appeal, the Supreme Court affirmed that the discount rate was reasonable and reflected the full market value of the future stream of mineral

royalties. Additionally, an independent appraisal was not necessary because when the state sells only an estate or interest in land, the state has ample power to determine the method by which to ascertain the full market value of the estate or interest. The State Board of Land Commissioners bears the task of ensuring that the trust receives full market value for state land interests, and the Supreme Court declined to substitute its opinion for that of the Land Board unless the Land Board's action is arbitrary. Plaintiff failed to show that the Senate Bill No. 495 financing scheme was unconstitutional beyond a reasonable doubt, and the Supreme Court affirmed that the state, by balancing the interests of present and future beneficiaries of the school trust through Senate Bill No. 495, fully complied with the Montana Constitution, The Enabling Act, and state statutes and thus did not violate its trust duties. Montanans for Responsible Use of School Trust v. Darkenwald, 2005 MT 190, 328 M 105, 119 P3d 27 (2005), following Toomey v. St. Bd. of Land Comm'rs, 106 M 547, 81 P2d 407 (1938), and State ex rel. Hughes v. St. Bd. of Land Comm'rs, 137 M 510, 353 P2d 331 (1960).

Failure to Distinguish Between Commercially Valuable and Nonvaluable Timber as Firewood on State Lands Violative of Trust Duty of Undivided Loyalty: Pursuant to 77-5-211, the state discretionarily issued free permits for the gathering of dead, down, or inferior wood from school trust lands for use as firewood. The District Court concluded that 77-5-211 authorizes the Department of Natural Resources and Conservation to act in violation of the school trust by allowing the Department to give away commercially valuable timber, in violation of its trust duty of undivided loyalty. The state argued on appeal that the District Court's conclusions were incorrect because the Department retained discretion to issue permits and because plaintiff failed to show that dead wood had commercial value in all instances. The Supreme Court affirmed, citing Wild W. Motors, Inc. v. Lingle, 224 M 76, 728 P2d 412, 43 St. Rep. 2030 (1986), in considering the state's duty of undivided loyalty as trustee of school trust lands, noting that a trustee must act with the utmost good faith toward the beneficiary and may not act in the trustee's own interest or in the interest of a third party. In failing to distinguish between commercially valuable timber and timber that lacks commercial value, the statute allows the Department to issue permits to third parties without charging them for any commercially valuable wood that they collect, violating both the mandate that full market value be obtained for school trust lands and the state's trust duty of undivided loyalty. Montanans for Responsible Use of School Trust v. State ex rel. Bd. of Land Comm'rs, 1999 MT 263, 296 M 402, 989 P2d 800, 56 St. Rep. 1065 (1999).

Market Value of State Land Rights-of-Way Set by Statute at 1972 Levels — Unconstitutionality: The plain language of 77-1-130 requires that full market valuations of right-of-way acreage for historic deeds on state trust lands be based on the median values for the classifications of land at 1972 levels, leaving the Department of Natural Resources and Conservation no choice but to use those levels instead of current market value. The state argued that pursuant to 40 A.G. Op. 24 (1983), the figures in 77-1-130 are merely a minimum above which the Department may charge full market value. However, the statutory language is mandatory rather than discretionary and violates the provisions of the Montana Constitution and The Enabling Act, which require the state to receive full market value for school trust lands, and thus is unconstitutional. Montanans for Responsible Use of School Trust v. State ex rel. Bd. of Land Comm'rs, 1999 MT 263, 296 M 402, 989 P2d 800, 56 St. Rep. 1065 (1999).

State Land Cabin Site Renewal Policy Not Violative of Obligation to Obtain Full Market Value: Plaintiff contended that 77-1-208 is facially invalid because the use of a cabin site renewal policy that did not employ competitive bidding was calculated to keep cabin site rental rates below full market value. However, nothing in the plain language of 77-1-208 abrogates the mandate that full market value be obtained for school trust lands. Plaintiff failed to show that the statute violates the duty of undivided loyalty or that the preference accorded lessees on cabin site leases on state lands resulted in renewal rates below market value. The statute legislatively establishes a method by which full market value is obtained, which is allowed pursuant to Jerke v. Dept. of State Lands, 182 M 294, 597 P2d 49 (1979), but the language of 77-1-208 nevertheless requires that full market value be obtained, by whatever method is used, and therefore on its face does not violate the trust. Thus, the District Court correctly held that the renewal preference in 77-1-208 does not violate the school trust requirements of the Montana Constitution or The Enabling Act of 1889. Montanans for Responsible Use of School Trust v. State ex rel. Bd. of Land Comm'rs, 1999 MT 263, 296 M 402, 989 P2d 800, 56 St. Rep. 1065 (1999).

State Land Cabin Site Rental Policy Violative of School Trust Obligation to Obtain Fair Market Value: The policy employed by the Department of Natural Resources and Conservation in renting cabin sites on state lands, in a manner that resulted in below-market rentals, violated the state's school trust obligations under the Montana Constitution and The Enabling Act

of 1889, even though 77-1-208 is facially valid because it requires that full market value be obtained. Montanans for Responsible Use of School Trust v. State ex rel. Bd. of Land Comm'rs, 1999 MT 263, 296 M 402, 989 P2d 800, 56 St. Rep. 1065 (1999), following State ex rel. Thompson v. Babcock, 147 M 46, 409 P2d 808 (1966), and Jerke v. Dept. of State Lands, 182 M 294, 597 P2d 49 (1979).

Statute Allowing State Lands to Remain Idle While Lessees Determine Value of Improvements — Unconstitutionality: Under 77-6-305, the value of improvements placed on the leasehold by a former lessee is required to be paid by the new lessee before the new lease may be issued if the former lessee chose not to remove the improvements. The District Court found the provision constitutional even though it might result in less revenue because of delay caused by lease delays, concluding that the Department of Natural Resources and Conservation must have latitude to administer school trust lands. The Supreme Court disagreed, holding that portion of 77-6-305 unconstitutional on its face. The state's discretion to administer the trust is broad, but not unlimited, and must conform to the requirements of the trust. The statute allows trust lands to idle indefinitely while former and new lessees determine the value of the improvements, which is inconsistent with the trust mandate that full market value be received for the lands. Montanans for Responsible Use of School Trust v. State ex rel. Bd. of Land Comm'rs, 1999 MT 263, 296 M 402, 989 P2d 800, 56 St. Rep. 1065 (1999).

Statute Allowing Uncompensated Time for Removing Improvements Violative of Full Benefit of Trust Lands and Trust Duty of Undivided Loyalty: Under 77-6-304, a former state land leaseholder was allowed up to 60 days to remove movable improvements without charge. The state contended that the statute does not violate any fiduciary duty, but merely allows the Department of Natural Resources and Conservation time to inventory improvements on state lands, with no quantifiable impact on the trust fund. Conceding that the policy could reduce potential profits to the trust, the District Court nevertheless found that: (1) nothing in the statute prevents the Department from charging former lessees for storage of improvements after termination of their leases; (2) the statute does not prevent a new lessee from moving onto trust land before the former lessee has removed the improvements; and (3) it was reasonably necessary for the Department to allow former lessees some extra time to remove improvements, especially in winter months when most agricultural leases expire. The Supreme Court disagreed, concluding that 77-6-304 plainly authorizes the Department to allow former lessees to remain free of charge on trust lands while removing improvements, denying the trust beneficiaries the full benefit of the trust lands and violating the duty of undivided loyalty by benefiting third parties to the detriment of the trust beneficiaries. The statute was declared unconstitutional on its face. Montanans for Responsible Use of School Trust v. State ex rel. Bd. of Land Comm'rs, 1999 MT 263, 296 M 402, 989 P2d 800, 56 St. Rep. 1065 (1999). See also Lassen v. Ariz. Highway Dept., 385 US 458, 17 L Ed 2d 515, 87 S Ct 584 (1967).

Leasing for Underground Storage:

The law authorizing the lease of state lands for underground storage of natural gas does not violate this section. State ex rel. Hughes v. St. Bd. of Land Comm'rs, 137 M 510, 353 P2d 331 (1960).

The 1953 amendment of 77-3-421 (formerly section 81-1702, R.C.M. 1947(part)) by Ch. 122, L. 1953, is not inconsistent with federal law. State ex rel. Johnson v. St. Bd. of Land Comm'rs, 348 US 961, 99 L Ed 750, 75 S Ct 524 (1955), reversing and remanding State ex rel. St. Bd. of Land Comm'rs, 128 M 462, 279 P2d 393 (1954), which had held that oil and gas leases issued under 77-3-421 (formerly section 81-1702, R.C.M. 1947(part)) as amended in 1953 for 20 years and "as long thereafter as oil and gas in paying quantities shall be produced" were not for a term of years and hence violative of section 11 of The Enabling Act.

Oil and Gas Leases: The amount bid over the minimum of 75 cents per acre as established in section 81-1703, R.C.M. 1947 (since repealed) is considered part of the rental and thus placed in the common school interest and income fund to be apportioned and distributed annually to the several school districts in the state as provided in Art. XI, sec. 5, 1889 Mont. Const. (substantially similar to Art. X, sec. 5, 1972 Mont. Const.). State ex rel. Dickgraber v. Sheridan, 126 M 447, 254 P2d 390 (1953).

Actions Arising Under Federal Law: The fact that the authority of the Legislature to enact certain statutes regulating oil and gas leases upon state lands is derived from The Enabling Act does not mean that a suit to enforce the state statute "arises under" the Constitution or laws of the United States, within the meaning of 28 U.S.C., § 1331. Cranston v. Aronson, 124 F. Supp. 453 (D.C. Mont. 1953).

Operation and Effect: The Enabling Act restrictions apply to mineral rights on state lands. A lease of the mineral rights by the state for a period of 5 years, made in 1925, with options to renew, cannot run in total more than 20 years, since Congress in 1921 amended section 11 of The Enabling Act by the act of Aug. 11, 1921, 42 Stat. 158 which limited such leases to 20 years and the amendment was accepted by Montana in 1927 by Ch. 108, L. 1927. Texas Pac. Coal & Oil Co. v. St., 125 M 258, 234 P2d 452 (1951).

Does Not Prohibit United States From Condemning School Lands for Public Works: The Enabling Act, prohibiting the state from disposing of school lands except at public sale after advertising, does not prohibit the United States from condemning school lands in connection with construction of project in program of public works (National Industrial Recovery Act. Secs. 202, 203(a), 40 U.S.C., 402, 403(a)). US v. St., 134 F2d 194 (1951).

Act Not Objectionable as Against This Provision: Treating 77-3-430 (formerly section 81-1702(4), R.C.M. 1947) authorizing the state land board to enter into pooling agreements relative to state lands for the extraction of natural gas, not as a lease but as a sale of an estate or interest therein, the limitation of this section that such lands cannot be sold except at public sale after advertising, has application only where the land as a whole is sold, not merely an interest or estate therein, such as the gas or oil therein, is disposed of. Toomey v. St. Bd. of Land Comm'rs, 106 M 547, 81 P2d 407 (1938).

Disposition of School Land Grant Funds: Article XI, sec. 12, 1889 Mont. Const. (now Art. X, sec. 10, 1972 Mont. Const.), providing that funds of state institutions of learning shall be devoted to "maintenance" and "perpetuation" of respective institutions and sections 11, 14, and 17 of The Enabling Act were held not to prohibit use for erection of normal school buildings of income from a land grant for state normal schools, nor limit such use to payment of ordinary operating expenses. State ex rel. Blume v. St. Bd. of Educ., 97 M 371, 34 P2d 515 (1934).

Farm Loan Act Not in Conflict: The "primary" plan of the Farm Loan Act, providing for investment by State Board of Land Commissioners of state funds in farm mortgages, does not conflict with this section of The Enabling Act. St. v. Stewart, 53 M 18, 161 P 309 (1916).

§ 12. That upon the admission of each of said states into the Union, in accordance with the provisions of this act, fifty sections of unappropriated public lands within such states, to be selected and located in legal subdivisions as provided in section 10 of this act, shall be, and are hereby, granted to said states for public buildings at the capital of said states for legislative, executive, and judicial purposes, including construction, reconstruction, repair, renovation, furnishings, equipment, and any other permanent improvement of such buildings and the acquisition of necessary land for such buildings, and the payment of principal and interest on bonds issued for any of the above purposes.

Compiler's Comments

Amendment: This section was last amended by the act of February 26, 1957, 71 Stat. 5. This amendment was accepted by the state of Montana by Ch. 209, L. 1957.

Cross-References

Legislative Branch, Art. V, Mont. Const.
Executive Branch, Art. VI, Mont. Const.
Office and residence of Executive Branch officers, Art. VI, sec. 1, Mont. Const.
Judicial Branch, Art. VII, Mont. Const.
Custodial care of capitol buildings and grounds, 2-17-811.

Case Notes

Operation and Effect Before Amendment: Capitol land grant funds may be used to repair, renovate, or reconstruct an old building and install a roll call voting machine in the chambers of the House of Representatives. State ex rel. Morgan v. Bd. of Examiners, 131 M 188, 309 P2d 336 (1957), specifically overruling Bryant v. Bd. of Examiners, 130 M 512, 305 P2d 340 (1956).

Veterans and Pioneers Memorial Building, a Public Building: Ch. 79, L. 1941 (repealed), providing for sale of bonds for erection of Montana Veterans and Pioneers Memorial Building and payable in part from income of capitol building land grant, held not to violate sections 12 and 17 of The Enabling Act since proposed building will be useful and beneficial to the executive and legislative departments and is intended for housing of Historical Society, a department of the state government. Willett v. St. Bd. of Examiners, 112 M 317, 115 P2d 287 (1941).

Farm Loan Act Not in Conflict: The "primary" plan of the Farm Loan Act, providing for investment by State Board of Land Commissioners of state funds in farm mortgages, does not conflict with this section of The Enabling Act. St. v. Stewart, 53 M 18, 161 P 309 (1916).

§ 13. That five per centum of the proceeds of the sales of public lands lying within said States which shall be sold by the United States subsequent to the admission of said States into the Union, after deducting all the expenses incident to the same, shall be paid to the said States, to be used as a permanent fund, the interest of which only shall be expended for the support of common schools within said States, respectively.

Cross-References

Public school fund, Art. X, sec. 2, Mont. Const.; Title 20, ch. 9, part 6.
Public school fund inviolate, Art. X, sec. 3, Mont. Const.
Public school fund revenue, Art. X, sec. 5, Mont. Const.
State university funds, Art. X, sec. 10, Mont. Const.
Public land trust — disposition, Art. X, sec. 11, Mont. Const.
Percentage of coal tax proceeds allocated to local impact and education trust fund account, 15-35-108.
Public school fund as separate investment fund, 17-6-203.

§ 14. That the lands granted to the Territories of Dakota and Montana by the act of February eighteenth, eighteen hundred and eighty-one, entitled "An act to grant lands to Dakota, Montana, Arizona, Idaho and Wyoming for university purposes," are hereby vested in the States of South Dakota, North Dakota, and Montana, respectively, if such States are admitted into the union, as provided in this act, to the extent of the full quantity of seventy-two sections to each of said States, and any portion of said lands that may not have been selected by either of said Territories of Dakota or Montana may be selected by the respective States aforesaid; but said act of February eighteenth, eighteen hundred and eighty-one, shall be so amended as to provide that none of said lands shall be sold for less than ten dollars per acre, and the proceeds shall constitute a permanent fund to be safely invested and held by said States severally, and the income thereof be used exclusively for university purposes. And such quantity of the lands authorized by the fourth section of the act of July seventeenth, eighteen hundred and fifty-four, to be reserved for university purposes in the Territory of Washington, as, together with the lands confirmed to the vendees of the Territory by the act of March fourteenth, eighteen hundred and sixty-four, will make the full quantity of seventy-two entire sections, are hereby granted in the like manner to the State of Washington for the purpose of a university in said State. None of the lands granted in this section shall be sold at less than ten dollars per acre; but said lands may be leased in the same manner as provided in section eleven of this act. The schools, colleges and universities provided for in this act shall forever remain under the exclusive control of the said States, respectively, and no part of the proceeds arising from the sale or disposal of any lands herein granted for educational purposes shall be used for the support of any sectarian or denominational schools, college or university. The section of land granted by the act of June sixteenth, eighteen hundred and eighty, to the Territory of Dakota, for an asylum for the insane shall, upon admission of the said State of South Dakota into the Union, become the property of said State.

Cross-References

Aid prohibited to sectarian schools, Art. X, sec. 6, Mont. Const.
State university funds, Art. X, sec. 10, Mont. Const.

Case Notes

"University Purposes" Construed to Include Pledging Funds to Erect Building at University:

The Supreme Court held that the State Board of Education had the power to pledge income and interest derived from land grant fund of University as security for repayment of loan made to it for erection of a journalism building under Ch. 133, L. 1935 (omitted), as the term "university purposes" includes the erection of necessary buildings. State ex rel. Wilson v. St. Bd. of Educ., 102 M 165, 56 P2d 1079 (1936).

The State Board of Education may pledge a portion of income from a University land grant to repay bonds issued for erection of a chemistry and pharmacy building at State University. State ex rel. Dragstedt v. St. Bd. of Educ., 103 M 336, 62 P2d 330 (1936).

Disposition of School Land Grant Funds: Section 12, Article XI, 1889 Mont. Const. (now Art. X, sec. 10, 1972 Mont. Const.), providing that funds of state institutions of learning shall be devoted to "maintenance" and "perpetuation" of respective institutions and sections 11, 14, and 17 of The Enabling Act were held not to prohibit use for erection of normal school buildings of income from a land grant for the state normal schools, nor limit such use to payment of ordinary operating expenses. State ex rel. Blume v. St. Bd. of Educ., 97 M 371, 34 P2d 515 (1934).

§ 15. That so much of the lands belonging to the United States as have been acquired and set apart for the purpose mentioned in "An act appropriating money for the erection of a penitentiary in the Territory of Dakota," approved March second, eighteen hundred and eighty-one, together with the buildings thereon, be, and the same is hereby granted, together with any unexpended balances of the moneys appropriated therefor by said act, to said State of South Dakota for the purposes therein designated; and the States of North Dakota and Washington shall, respectively, have like grants for the same purpose, and subject to like terms and conditions as provided in said act of March second, eighteen hundred and eighty-one, for the Territory of Dakota. The penitentiary at Deer Lodge City, Montana, and all lands connected therewith and set apart and reserved therefor, are hereby granted to the State of Montana.

Case Notes

Farm Loan Act Not in Conflict: The "primary" plan of the Farm Loan Act, providing for investment by State Board of Land Commissioners of state funds in farm mortgages, does not conflict with this section of enabling act. St. v. Stewart, 53 M 18, 161 P 309 (1916).

§ 16. That ninety thousand acres of land, to be selected and located as provided in section ten of this act, are hereby granted to each of said States, except to the State of South Dakota, to which one hundred and twenty thousand acres are granted, for the use and support of agricultural colleges in said States, as provided in the acts of Congress making donations of lands for such purpose.

§ 17. That in lieu of the grant of land for purposes of internal improvement made to new States by the eighth section of the act of September fourth, eighteen hundred and forty-one, which act is hereby repealed as to the States provided for by this act, and in lieu of any claim or demand by the said States, or either of them, under the act of September twenty-eight, eighteen hundred and fifty, and section twenty-four hundred and seventy-nine of the Revised Statutes, making a grant of swamp and overflowed lands to certain States, which grant it is hereby declared is not extended to the States provided for in this act, and in lieu of any grant of saline lands to said States, the following grants of land are hereby made, to-wit:

To the State of South Dakota: For the school of mines, forty thousand acres; for the reform school, forty thousand acres; for the deaf and dumb asylum, forty thousand acres; for the agricultural college, forty thousand acres; for the university, forty thousand acres; for State normal schools, eighty thousand acres; for public buildings at the capital of said State, fifty thousand acres, and for such other educational and charitable purposes as the legislature of said State may determine, one hundred and seventy-five thousand acres; in all five hundred thousand acres.

To the State of North Dakota: A like quantity of land as is in this section granted to the State of South Dakota, and to be for like purposes, and in like proportion as far as practicable.

To the State of Montana: For the establishment and maintenance of a school of mines, one hundred thousand acres; for State normal schools, one hundred thousand acres; for agricultural colleges, in addition to the grant hereinbefore made for that purpose, fifty thousand acres; for the establishment of a state reform school, fifty thousand acres; for the establishment of a deaf and dumb asylum, fifty thousand acres; for public buildings at the capital of the State, in addition to the grant hereinbefore made for that purpose, one hundred and fifty thousand acres.

To the State of Washington: For the establishment and maintenance of a scientific school, one hundred thousand acres; for State normal schools, one hundred thousand acres; for public buildings at the State capital, in addition to the grant hereinbefore made for that purpose, one hundred thousand acres; for State charitable, educational, penal, and reformatory institutions, two hundred thousand acres.

That the States provided for in this act shall not be entitled to any further or other grants of land for any purpose than as expressly provided in this Act. And the lands granted by this section shall be held, appropriated, and disposed of exclusively for the purposes herein mentioned, in such manner as the legislatures of the respective States may severally provide.

Case Notes

Disposition of State Land Grant Funds: Capitol land grant funds may be used to repair, renovate, or reconstruct an old building and install roll call voting machine in the chambers of the House of Representatives. State ex rel. Morgan v. Bd. of Examiners, 131 M 188, 309 P2d 336 (1957), specifically overruling Bryant v. Bd. of Examiners, 130 M 512, 305 P2d 340 (1956).

Veterans and Pioneers Memorial Building a Public Building: Chapter 79, L. 1941 (repealed), providing for sale of bonds for erection of Montana Veterans and Pioneers Memorial Building and payable in part from income of capital building land grant held not to violate sections 12 and 17

of The Enabling Act since proposed building will be useful and beneficial to the Executive and legislative departments and is intended for housing of Historical Society, a department of the state government. Willett v. Bd. of Examiners, 112 M 317, 115 P2d 287 (1941).

School Lands and Funds Devoted to Maintenance and Perpetuation:

The Supreme Court held that Ch. 3, L. 1905, authorizing the state Board of Land Commissioners to issue and sell bonds, the proceeds to be applied to the erection, furnishing and equipment of an addition to the State Normal School at Dillon, and pledging as security, for the payment of the principal and interest on such bonds, funds realized from the sale and leasing of the lands granted by the United States under this section of The Enabling Act (100,000) acres for State Normal School purposes) and licenses received from permits to cut timber thereon, is void because in violation of section 12, Article XI, of the state Constitution providing that only the interest from investments of such funds together with the rents from leased lands shall be so used. State ex rel. Haire v. Rice, 33 M 365, 83 P 874 (1906), affirmed in 204 US 291 (1907).

Section 12, Art. XI, of the state Constitution providing that funds of state institutions of learning shall be devoted to "maintenance" and "perpetuation" of respective institutions and sections 11, 14, and 17 of The Enabling Act were held not to prohibit use, for erection of normal school buildings, of income from a land grant for state normal schools, nor limit such use to payment of ordinary operating expenses. State ex rel. Blume v. St. Bd. of Educ., 97 M 371, 34 P2d 515 (1934).

Farm Loan Act Not in Conflict: The "primary" plan of the Farm Loan Act, providing for investment by state Board of Land Commissioners of state funds in farm mortgages does not conflict with this section of The Enabling Act. State v. Stewart, 53 M 18, 161 P 309 (1916).

§ 18. That all mineral lands shall be exempted from the grants made by this act. But if sections sixteen and thirty-six, or any subdivisions or portion of any smallest subdivision thereof in any township shall be found by the Department of the Interior to be mineral lands, said States are hereby authorized and empowered to select, in legal subdivisions, an equal quantity of other unappropriated lands in said States, in lieu thereof, for the use and for the benefit of the common schools of said States.

Case Notes

Construction: This section must be read with reference to section 14 of the Organic Act of the Territory of Montana. The words "shall be found" and "in lieu thereof" show that this section applies to lands known to be mineral at the time of survey and clear listing. As soon as the survey identified the land and it was not then mineral, it went to the state for the common school fund. The land passed and with it the after-discovered minerals. Texas Pac. Coal & Oil Co. v. St., 125 M 258, 234 P2d 452 (1951).

§ 19. That all lands granted in quantity or as indemnity by this act shall be selected, under the direction of the Secretary of the Interior, from the surveyed, unreserved, and unappropriated public lands of the United States within the limits of the respective States entitled thereto. And there shall be deducted from the number of acres of land donated by this act for specific objects to said States the number of acres in each heretofore donated by Congress to said Territories for similar objects.

§ 20. That the sum of twenty thousand dollars, or so much thereof as may be necessary, is hereby appropriated, out of any money in the Treasury not otherwise appropriated, to each of said Territories for defraying the expenses of the said conventions, except to Dakota, for which the sum of forty thousand dollars is so appropriated, twenty thousand dollars each for South Dakota and North Dakota, and for the payment of the members thereof, under the same rules and regulations and at the same rates as are now provided by law for the payment of the Territorial legislatures. Any money hereby appropriated not necessary for such purpose shall be covered into the treasury of the United States.

§ 21. That each of said States, when admitted as aforesaid, shall constitute one judicial district, the names thereof to be the same as the names of the States, respectively; and the circuit and district courts therefor shall be held at the capital of such State for the time being, and each of said districts shall, for judicial purposes, until otherwise provided, be attached to the eighth judicial circuit, except Washington and Montana, which shall be attached to the ninth judicial district. There shall be appointed for each of said districts, one district judge, one United States attorney, and one United States marshal. The judge of each of said districts shall receive a yearly salary of three thousand, five hundred dollars payable in four equal installments, on the first days of January, April, July, and October of each year, and shall reside in the district. There shall be appointed clerks of said courts in each district, who

shall keep their offices at the capital of said State; the regular term of said courts shall be held in each district at the place aforesaid, on the first Monday in April and the first Monday in November of each year, and only one grand jury and one petit jury shall be summoned in both said circuit and district courts. The circuit and district courts for each of said districts, and the judges thereof, respectively, shall possess the same powers and jurisdiction, and perform the same duties required to be performed by other circuit and district courts and judges of the United States, and shall be governed by the same laws and regulations. The marshal, district attorney, and clerks of the circuit and district court of each of said districts, and all other officers and persons performing duties in the administration of justice therein, shall severally possess the powers and perform the duties lawfully possessed and required to be performed by similar officers in other districts of the United States; and shall, for the services they may perform, receive the fees and compensation allowed by law to other similar officers and persons performing similar duties in the state of Nebraska.

§ 22. That all cases of appeal or writ of error heretofore prosecuted and now pending in the Supreme Court of the United States upon any record from the supreme court of either of the Territories mentioned in this act, or that may hereafter lawfully be prosecuted upon any record from either of said courts may be heard and determined by said Supreme Court of the United States. And the mandate of execution or of further proceedings shall be directed by the Supreme Court of the United States to the circuit or district court hereby established within the State succeeding the Territory from which such record is or may be pending, or to the supreme court of such State, as the nature of the case may require: PROVIDED, That the mandate of execution or of further proceedings shall, in cases arising in the Territory of Dakota, be directed by the Supreme Court of the United States to the circuit or district court of the district of South Dakota, or to the supreme court of the State of South Dakota, or to the circuit or district court of the district of North Dakota, or to the supreme court of the State of North Dakota, or to the supreme court of the Territory of North Dakota, as the nature of the case may require. And each of the circuit, district, and State courts, herein named, shall, respectively, be the successor of the supreme court of the Territory, as to all such cases arising within the limits embraced within the jurisdiction of such courts, respectively, with full power to proceed with the same, and award mesne or final process therein; and that from all judgments and decrees of the supreme court of either of the Territories mentioned in this act, in any case arising within the limits of any of the proposed States prior to admission, the parties to such judgment shall have the same right to prosecute appeals and writs of error to the Supreme Court of the United States as they shall have had by law prior to the admission of said State into the Union.

§ 23. That in respect to all cases, proceedings, and matters now pending in the supreme or district courts of either of the Territories mentioned in this act at the time of the admission into the Union of either of the States mentioned in this act, and arising within the limits of any such State, whereof the circuit or district courts by this act established might have had jurisdiction under the laws of the United States had such courts existed at the time of the commencement of such cases, the said circuit and district courts, respectively, shall be the successors of said supreme and district courts of said Territory; and in respect to all other proceedings and matters pending in the supreme or district cases courts of any of the Territories mentioned in this act at the time of the admission of such Territory into the Union, arising within the limits of said proposed State, the courts established by such State shall, respectively, be the successors of said supreme and district Territorial courts; and all the files, records, indictments, and proceedings relating to any such cases, shall be transferred to such circuit, district, and State courts, respectively, and the same shall be proceeded with therein in due course of law; but no writ, action, indictment, cause or proceeding now pending, or that prior to the admission of any of the States mentioned in this act, shall be pending in any Territorial court in any of the Territories mentioned in this act, shall abate by the admission of any such State into the Union, but the same shall be transferred and proceeded with in the proper United States circuit, district or State court, as the case may be; PROVIDED, HOWEVER, That in all civil actions, causes and proceedings, in which the United States is not a party, transfer shall not be made to the circuit and district courts of the United States, except upon written request of one of the parties to such action or proceedings filed in the proper court; and in the absence of such request such cases shall be proceeded with in the proper State courts.

§ 24. That the constitutional conventions may, by ordinance, provide for the election of officers for full State governments, including members of the legislatures and Representatives

in the Fifty-first Congress; but said State governments shall remain in abeyance until the States shall be admitted into the Union, respectively, as provided in this act. In case the constitution of any of said proposed States shall be ratified by the people, but not otherwise, the legislature thereof may assemble, organize, and elect two Senators of the United States; and the governor and secretary of state of such proposed State shall certify the election of the Senators and Representatives in the manner required by law; and when such State is admitted into the Union, the Senators and Representatives shall be entitled to be admitted to seats in Congress, and to all the rights and privileges of Senators and Representatives of other States in the Congress of the United States; and the officers of the State governments formed in pursuance of said constitutions, as provided by the constitutional conventions, shall proceed to exercise all the functions of such State officers; and all laws in force made by said Territories, at the time of their admission into the Union, shall be in force in said States, except as modified or changed by this act or by the constitutions of the States, respectively.

§ 25. That all acts or parts of acts in conflict with the provisions of this act, whether passed by the legislatures of said Territories or by Congress, are hereby repealed. [Approved February 22, 1889, 25 Stat. 676.]

Compiler's Comments

Acceptance of Congressional Amendments to The Enabling Act: (1) The State of Montana hereby accepts the amendment to Section Eleven of the Act approved February 22, 1889 (25 Stat. 676), relating to the admission into the Union of the States of North Dakota, South Dakota, Montana, and Washington, approved by the President of the United States May 7, 1932, which amendment reads as follows:

"BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That Section Eleven of the Act approved February 22, 1889 (25 Stat. 676), be, and the same is hereby amended to read as follows:

'That all lands granted by this Act shall be disposed of only at public sale after advertising—tillable lands capable of producing agricultural crops for not less than Ten Dollars ($10.00) per acre, and lands principally valuable for grazing purposes for not less than Five Dollars ($5.00) per acre. Any of the said lands may be exchanged for other lands, public or private, of equal value and as near as may be of equal area, but if any of the said lands are exchanged with the United States such exchange shall be limited to surveyed, nonmineral, unreserved public lands of the United States within the state.

The said lands may be leased under such regulations as the Legislature may prescribe; but leases for grazing and agricultural purposes shall not be for a term longer than five (5) years; mineral leases, including leases for exploration for oil and gas and the extraction thereof, for a term not longer than twenty (20) years; and leases for development of hydro-electric power for a term not longer than fifty (50) years.

The state may also upon such terms as it may prescribe grant such easements or rights in any of the lands granted by this Act, as may be acquired in privately owned lands through proceedings in eminent domain; provided, however, that none of such lands, nor any estate or interest therein, shall ever be disposed of except in pursuance of general laws providing for such disposition, nor unless the full market value of the estate or interest disposed of, to be ascertained in such manner as may be provided by law, has been paid or safely secured to the state.

With the exception of the lands granted for public buildings, the proceeds from the sale and other permanent disposition of any of the said lands and from every part thereof, shall constitute permanent funds for the support and maintenance of the public schools and the various state institutions for which the lands have been granted. Rentals on leased lands, interest on deferred payments on lands sold, interest on funds arising from these lands, and all other actual income, shall be available for the maintenance and support of such schools and institutions. Any state may, however, in its discretion, add a portion of the annual income to the permanent funds.

The lands hereby granted shall not be subject to preemption, homestead entry, or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be reserved for the purposes for which they have been granted.'

Sec. 2. Anything in the said Act approved February 22, 1889, inconsistent with the provisions of this Act is hereby repealed.

Approved May 7, 1932."

(2) The state of Montana hereby accepts the amendment to section eleven of the act approved February 22, 1889, (25 Stat. 676), relating to the admission into the Union of the States of North

Dakota, South Dakota, Montana and Washington, approved by the President of the United States June 25, 1938, (Public Law 742—75th Congress), which amendment reads as follows:

"BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That so much of the second paragraph of section 11 of the act relating to the admission into the Union of the States of North Dakota, South Dakota, Montana, and Washington, approved February 22, 1889, as amended, as reads 'but leases for grazing and agricultural purposes shall not be for a term longer than five years,' is amended to read as follows; 'but leases for grazing and agricultural purposes shall not be for a term longer than ten years.'" Approved June 25, 1938.

(3) The state of Montana hereby accepts the amendment to section eleven of the act approved February 22, 1889 (25 Stat. 676), relating to the admission into the Union of the states of North Dakota, South Dakota, Montana and Washington, approved by the President of the United States, April 13, 1948, (Public Law 480—80th Congress), which amendment reads as follows:

"Be it Enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, that the second paragraph of Section 11 of the Act relating to the admission into the Union of the States of North Dakota, South Dakota, Montana and Washington, approved February 22, 1889, as amended, is amended to read as follows: 'Except as otherwise provided herein, the said lands may be leased under such regulations as the legislature may prescribe. Leases for the production of minerals, including leases for exploration for oil, gas, and other hydrocarbons and the extraction thereof, shall be for such term of years and on such conditions as may be from time to time provided by the legislatures of the respective states; leases for grazing and agricultural purposes shall be for a term not longer than ten years; and leases for development of hydroelectric power shall be for a term not longer than fifty years.' Approved April 13, 1948."

(4) The state of Montana hereby accepts the amendment to section twelve of The Enabling Act approved February 22, 1889, (25 Stat. 676), relating to the admission into the Union of the states of North Dakota, South Dakota, Montana and Washington, approved by the President of the United States, February 26, 1957, (Public Law 6, 85th Congress), which amendment reads as follows:

"BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, that section 12 of the act relating to the admission into the Union of the States of North Dakota, South Dakota, Montana and Washington, approved February 22, 1889, is amended to read as follows: 'That upon the admission of each of said States into the Union, in accordance with the provisions of this act, fifty sections of unappropriated public lands within such States, to be selected and located in legal subdivisions as provided in section 10 of this act, shall be, and are hereby, granted to said States for public buildings at the capital of said States for legislative, executive and judicial purposes, including construction, reconstruction, repair, renovation, furnishings, equipment, and any other permanent improvement of such buildings and the acquisition of necessary land for such buildings, and the payment of principal and interest on bonds issued for any of the above purposes.'

Sec. 2. This act shall take effect as of February 22, 1889. Approved February 26, 1957."

(5) The State of Montana hereby accepts the amendment to section 11 of the Act approved February 22, 1889 (25 Stat. 676), relating to the admission into the Union of the States of North Dakota, South Dakota, Montana, and Washington, approved by the President of the United States, June 30, 1967, (Public Law 90-41), which amendment reads as follows:

"BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That the second sentence of the fourth paragraph of section 11 of the Act entitled "An Act to provide for the division of Dakota into two States and to enable the people of North Dakota, South Dakota, Montana, and Washington to form constitutions and State governments and to be admitted into the Union on an equal footing with the original States, and to make donations of public lands to such States", approved February 22, 1889 (25 Stat. 676), as amended, is amended to read as follows: Rentals on leased land, proceeds from the sale of timber and other crops, interest on deferred payments on land sold, interest on funds arising from these lands, and all other actual income, shall be available for the acquisition and construction of facilities, including the retirement of bonds authorized by law for such purposes, and for the maintenance and support of such schools and institutions. Approved June 30, 1967."

ORDINANCE NO. I
FEDERAL RELATIONS

Be it Ordained:

First. That perfect toleration of religious sentiment shall be secured and that no inhabitant of the state of Montana shall ever be molested in person or property, on account of his or her mode of religious worship.

Second. That the people inhabiting the said proposed state of Montana, do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes, and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States, that the lands belonging to citizens of the United States, residing without the said state of Montana, shall never be taxed a higher rate than the lands belonging to residents thereof; that no taxes shall be imposed by the said state of Montana on lands or property therein belonging to, or which may hereafter be purchased by the United States or reserved for its use. But nothing herein contained shall preclude the said state of Montana from taxing as other lands are taxed any lands owned or held by any Indian who has severed his tribal relations and has obtained from the United States or from any person a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any act of congress containing a provision exempting the lands thus granted from taxation, but said last named lands shall be exempt from taxation by said state of Montana so long and to such extent as such act of congress may prescribe.

Cross-References

Jurisdiction on Indian lands, Title 2, ch. 1, part 3.

Case Notes

Wrongful Death Claim Arising From On-Reservation Accident Involving Nonmembers — Tribal Court Jurisdiction Proper: When a nonmember reservation resident was killed in a motorcycle collision within the reservation boundaries by a vehicle driven by a non-Indian reservation resident, the deceased's mother, an enrolled member, filed a wrongful death and survivorship action in tribal court. After the tribal court denied the driver's motion to dismiss, the driver filed a motion to move the case to federal District Court, alleging that the tribal court lacked jurisdiction. When the District Court denied the motion, the driver appealed. On appeal, the Ninth Circuit Court affirmed, ruling that since the driver, by living on the reservation, had purposely been availed the privileges of conducting activities within the reservation, the tribes had a special interest in exercising jurisdiction over those who committed tortious acts within the reservation. Hinshaw v. Mahler, 42 F3d 1178 (9th Cir. 1994), certiorari denied, 115 S Ct 485 (1994), overruled concerning general propositions on tribal jurisdiction in Strate v. A-1 Contractors, 520 US 438, 137 L Ed 2d 661, 117 S Ct 1404 (1997).

Exhaustion of Remedies to Include Tribal Appellate Courts: An enrolled member of the Blackfeet Tribe sued a reservation-based and Indian-owned corporation and its owners to recover for injuries received by the tribal member while a corporation employee and sued the corporation's insurance carrier for bad faith. The tribal court denied the corporation's motion to dismiss for lack of jurisdiction, stating that under the Blackfeet code jurisdictional questions are not appealable by interlocutory order and that a final determination by the tribal court is necessary prior to appeal. Extending the exhaustion rule of Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 US 845, 85 L Ed 2d 818, 105 S Ct 2447 (1985), the court ruled that exhaustion of tribal court remedies includes review by the Blackfeet Appellate Court. If, on review, a federal court determines that the tribal court properly exercised jurisdiction, deference to the tribal court and comity preclude the federal court from relitigating those issues resolved in tribal court. Iowa Mut. Ins. Co. v. LaPlante, 107 S Ct 971 (1987).

Tribal Courts — Criminal Jurisdiction Over Nonmember Indians: Duro, an enrolled member of a California tribe living on the Salt River Reservation with an enrolled member of that tribe, allegedly shot and killed a 14-year-old member of the tribe. After complaints were filed against Duro in both tribal court and federal District Court, the District Court dismissed and remanded the case to the California Department of Public Safety. After the tribal court dismissed Duro's motion for dismissal for lack of criminal jurisdiction, Duro petitioned and was granted a writ of habeas corpus and writ of prohibition from the District Court. On appeal, the court concluded

that Oliphant v. Suquamish Tribe, 435 US 191, 98 S Ct 1011 (1978), which disclaimed tribal court jurisdiction over non-Indians, was not controlling since "non-Indians" meant those to whom the tribes originally submitted and who subsequently limited tribal sovereignty. The Ninth Circuit Court ruled that the District Court had erroneously concluded that tribal courts extend their criminal jurisdiction to Indians only on a racial basis. The determination of who is an Indian turns on numerous factors, of which race is only one. In ruling that the tribal court had criminal jurisdiction over Duro, the Ninth Circuit Court stated that tribal courts may define their criminal jurisdiction as federal courts do—by basing Indian statutes on a "totality of circumstances, including genealogy, group identification, and lifestyle". Duro v. Reina, 821 F2d 1358 (9th Cir. 1987).

Indians — Habeas Corpus — Exhaustion of State Remedies: Federal habeas corpus relief was denied where petitioner claiming constitutional violations failed to exhaust state remedies in accordance with 28 U.S.C. 2254(b). Since a lack of state jurisdiction over the petitioner could also have been tested by state habeas corpus proceedings but was not, the habeas corpus complaint for lack of state jurisdiction was also denied. Campbell v. Crist, 36 St. Rep. 1690 (D.C. Mont. 1979) (apparently not reported in Federal Supplement).

Jurisdiction — Highway Tort Cases: A vehicle driven by Larrivee, a non-Indian, collided with a vehicle driven by Morigeau, a member of the Confederated Salish and Kootenai Tribes. The accident occurred on Montana 200 located within the exterior boundaries of the Flathead Indian Reservation. Larrivee brought an action against Morigeau in state District Court. Morigeau argued that the state Court lacked subject matter jurisdiction. The Court found that Montana assumed partial jurisdiction over the Flathead Reservation pursuant to Public Law 280. Tribal Ordinance 40-A consented to the assumption by the state of jurisdiction over certain subjects, including jurisdiction over the "operation of motor vehicles upon . . . highways." The Court found this to include civil jurisdiction in highway tort cases. Larrivee v. Morigeau, 184 M 187, 602 P2d 563 (1979).

Arrest of Indian on the Reservation Valid if Crime Committed off the Reservation: Petitioner, a Crow Indian, was arrested within the exterior boundaries of the Crow Reservation for a crime committed off the reservation. The court followed State ex rel. Old Elk v. District Court, 170 M 208, 552 P2d 1344 (1976), which held that the arrest of an Indian on a reservation for a crime committed off the reservation was a valid arrest. In re Little Light, 183 M 52, 598 P2d 572 (1979).

Determination of Heirs of Intestate Indian Decedent: A determination, pursuant to 25 U.S.C. § 372, by the Secretary of the Interior of the legal heirs of an Indian who dies intestate while holding an allotment of land before the expiration of the trust period, is final and conclusive. Crawford v. Andrus, 472 F. Supp. 853 (D.C. Mont. 1979).

Disclaimer as to Indian Population: The disclaimer provision is not applicable where the issue does not concern Indian lands. State ex rel. Iron Bear v. District Court, 162 M 335, 512 P2d 1292 (1973).

Operation and Effect: Neither a constitutional amendment nor a referendum was required, but a legislative act was sufficient on behalf of the people to assume jurisdiction of crimes by or against Indians committed in Indian country, pursuant to federal statute reserving to Congress power to resume federal jurisdiction by repeal of the statute. State ex rel. McDonald v. District Court, 159 M 156, 496 P2d 78 (1972).

State May Tax Production Under Lease of a Trust Patent Indian Land: The Supreme Court held that the State Board of Equalization is authorized to tax the operator's net proceeds tax and the oil producers' license tax or gross production tax, but not the royalty owner's net proceeds tax, on oil and gas produced under a lease of trust patent Indian land. (Overruling Santa Rita Oil & Gas Co. v. St. Bd. of Equalization, 101 M 268, 54 P2d 117 (1936), with the exception of the royalty owner's net proceeds tax, for the reason that the federal Supreme Court overruled its holdings upon which the state Court's former opinion was based.) Santa Rita Oil & Gas Co. v. St. Bd. of Equalization, 112 M 359, 116 P2d 1012 (1941).

Streams on Indian Reservations — Appropriations: By the treaty of May 7, 1868, between the United States and the Crow Indians, establishing the Crow Indian Reservation, the federal government impliedly reserved to itself the waters thereon for irrigation and other purposes for use by the Indians; hence they were not subject to appropriation by others. Anderson v. Spear-Morgan Livestock Co., 107 M 18, 79 P2d 667 (1938).

Exemption From Taxation:

Under subdivision 2 of section 4 of The Enabling Act and section 2 of Ordinance No. 1, state Constitution, the state is without power to tax land (or permanent improvements thereon) which

is subject to a "trust patent" for an Indian allottee, the federal government retaining legal title in trust. Santa Rita Oil & Gas Co. v. St. Bd. of Equalization, 101 M 268, 54 P2d 117 (1936).

Land of an Indian allottee is exempt from taxation until issuance of fee patent. State ex rel. Jensen v. District Court, 103 M 461, 64 P2d 835 (1936).

Operation and Effect:

The Legislature has no power to impose a tax of any character upon any property or instrumentality of the federal government, and this immunity includes special assessments. Ford v. Great Falls, 46 M 292, 127 P 1004 (1912).

As to the taxation of Indian lands held under trust patent, this section controls the general provisions of the state Constitution that property of the United States is exempt from taxation. British-American Oil Producing Co. v. St. Bd. of Equalization, 101 M 293, 54 P2d 129 (1936).

Where Taxes on Lands of Indian Void: Where Indian lands had been allotted to a tribal Indian under a trust patent reserving the fee in the United States for a period of 25 years, and several months thereafter, a fee patent was issued by the general land office to such Indian without any application therefor and recorded without his knowledge or consent, resulting in sale of land for delinquent taxes, the taxes are illegal and void. State ex rel. Jensen v. District Court, 103 M 461, 64 P2d 835 (1936).

Crime Committed Within Indian Reservation: Where enrolled adult member of Crow Indian Tribe sold peyote within the boundaries of the Crow Indian Reservation, which sale was a violation of state law, it was necessary to determine whether the land upon which the sale was made remained in the control of the United States, as the Congress has absolute jurisdiction over all land within a reservation, the title to which has not been extinguished by the United States. St. v. Big Sheep, 75 M 219, 243 P 1067 (1926).

Third. That the debts and liabilities of said territory of Montana shall be assumed and paid by said state of Montana.

Fourth. That provision shall be made for the establishment and maintenance of a uniform system of public schools, which shall be open to all the children of said state of Montana and free from sectarian control.

Case Notes

Operation and Effect: This section does not prohibit the enactment of a law classifying school districts for the purposes of the election of trustees according to population, but the classification must be reasonable and uniform in its operation and effect on all districts. State ex rel. Bray v. Long, 21 M 26, 52 P 645 (1898).

Fifth. That on behalf of the people of Montana, we in convention assembled, do adopt the constitution of the United States.

Sixth. That the ordinances in this article shall be irrevocable without the consent of the United States and the people of said state of Montana.

Seventh. The state hereby accepts the several grants of land from the United States to the state of Montana, mentioned in an act of congress, entitled "An act to provide for the division of Dakota into two states, and to enable the people of North Dakota, South Dakota, Montana and Washington, to form constitutions and state governments, and to be admitted into the Union on an equal footing with the original states, and to make donations of public lands to such states." Approved February 22, 1889, upon the terms and conditions therein provided.

Case Notes

Authority of County to Dedicate Public Road on Public Land Prior to Statehood: Defendants contended that plaintiff county had no authority to dedicate a public road over a school section of state land and requested summary judgment on the issue. Summary judgment was denied, and on appeal, the Supreme Court affirmed. The road was established several months before Montana statehood, at a time when the land was still under the authority of the federal government. Because the land had not yet been conveyed to the state, the Board of County Commissioners had authority under sec. 2477, Revised Statutes of the United States (1866), to create roads across the section of federal land. Powell County v. 5 Rockin' MS Angus Ranch, Inc., 2004 MT 337, 324 M 204, 102 P3d 1210 (2004). See also Peterson v. Baker, 81 P 681 (Wash. 1905), and U.S. v. Wyo., 195 F. Supp. 692 (D.C. Wyo. 1961).

Operation and Effect:

The state accepted public lands from the United States only upon the terms of The Enabling Act, and these terms were, in part, to the effect that the lands, surveyed or unsurveyed, should be reserved for school purposes only. State ex rel. Galen v. District Court, 42 M 105, 112 P 706 (1910).

The provision of section 7 of Ordinance No. 1, with relation to grants of land made by the United States to the state; of section 1, Article XVII, of the Constitution, providing the manner of disposal of such land; and of sections 2 and 12, Article XI, providing that the school fund derived from the proceeds of such land shall be guaranteed against loss or diversion, are limitations upon the power of disposal of school land by the Legislature. Newton v. Weiler, 87 M 164, 286 P 133 (1930).

ORDINANCE NO. II
ELECTIONS

Be it Ordained by the Convention assembled to form a Constitution for the State of Montana:

First. That an election shall be held throughout the territory of Montana on the first Tuesday of October, 1889, for the ratification or rejection of the constitution framed and adopted by this convention.

Second. At said election the constitution framed and adopted by this convention shall be submitted to the people of the territory for their ratification or rejection, and all persons who are then qualified electors under the laws of this territory, shall be qualified to vote for the ratification or rejection thereof.

Third. Said elections shall be held at the several polling places and precincts throughout the territory appointed for the holding of elections under the laws of the territory, and shall be conducted in the manner prescribed by the laws of the territory regulating elections. The boards of the county commissioners of the several counties of the territory shall appoint judges and clerks of such elections in each of said polling places and precincts in the same manner as is now required by law for the appointment of judges and clerks of general elections in the territory.

Fourth. Each elector voting at said election shall have written or printed upon the ticket he may deposit in the ballot box, the words "for the constitution" or "against the constitution."

Fifth. The votes cast at said election for the adoption or rejection of said constitution shall be canvassed by the canvassing boards of the respective counties not later than fifteen days after said election, or sooner, if the returns from all of the precincts shall have been received and in the manner prescribed by the laws of the territory of Montana for canvassing the votes at general elections in said territory, and the returns of said election shall be made to the secretary of the territory, who with the governor, and the chief justice of the territory, or any two of them shall constitute a board of canvassers who shall meet at the office of the secretary of the territory on, or before, the thirtieth day after the election, and canvass the votes so cast and declare the result.

Sixth. That on the first Tuesday in October, 1889, there shall be elected by the qualified electors of Montana, a governor, a lieutenant-governor, a secretary of state, an attorney general, a state treasurer, a state auditor, a state superintendent of public instruction, one chief justice, and two associate justices of the supreme court, a judge for each of the judicial districts established by this constitution, a clerk of the supreme court, and a clerk of the district court in and for each county of the state, and the members of the legislative assembly provided for in this constitution. The terms of offices so elected shall begin when the state shall be admitted into the Union and shall end on the first Monday in January, 1893, except as otherwise provided.

Seventh. There shall be elected at the same time one representative in the fifty-first congress of the United States.

Eighth. The votes for the above officers shall be returned and canvassed as is provided by law, and returns shall be made to the secretary of the territory and canvassed in the same manner and by the same board as is the vote upon the constitution, except as to the clerk of the district court.

Ninth. There shall also be elected at the same time the following county and township officers: Three county commissioners, one clerk of the board of commissioners and ex-officio recorder, one sheriff, one county treasurer, one county superintendent of common schools, one county surveyor, one county assessor, one coroner, one public administrator, one county attorney, two justices of the peace, and two constables for each township. The terms of office for the above named officers shall begin upon the admission of the state and end upon the first Monday of January, A. D. 1893, except as to county treasurer, whose term shall begin on the first Monday in March succeeding his election, and end on the first Monday of March, A. D. 1893, and also as to county commissioners, whose terms are otherwise provided for in this constitution.

Tenth. The votes for the above county and township officers and for clerk of the district court, shall be returned and canvassed and certificates of election to said officers issued as is now provided by law.

Eleventh. Notice of the election for the adoption or rejection of this constitution, and for state, district, county and township officers shall be given by the clerks of the several boards of county commissioners in the same manner as notice of general elections for delegate to congress and county officers is required to be given by the existing laws of the territory.

Twelfth. That the provisions of this ordinance shall apply only to the election and to the officers elected on the first Tuesday of October, 1889.

THE CONSTITUTION OF THE STATE OF MONTANA

Constitution Compiler's Comments

History of Adoption: Chapter 65, L. 1969, submitted to the electors a question as to whether a constitutional convention should be called in accordance with Art. XIX, sec. 8, 1889 Mont. Const., "to revise, alter, or amend" the Constitution. At the general election of November 3, 1970, the electors approved the calling of a constitutional convention by a vote of 133,482 for the convention and 71,643 against.

Pursuant to the mandate of Art. XIX, sec. 8, 1889 Mont. Const., the 42nd Legislative Assembly, by Ch. 296, L. 1971, provided for the selection of delegates and for the convening of a constitutional convention. Chapter 296 was amended in some respects by Ch. 1, 1st Ex. L. 1971.

Delegates to the Constitutional Convention were nominated on September 14, 1971, and elected on November 2, 1971. Delegates were elected in the same manner and from the same districts as members of the House of Representatives, based on section 43-106.7, R.C.M. 1947 (now repealed).

After an organizational session on November 29, 1971, the Constitutional Convention convened in plenary session on January 17, 1972. On March 22, 1972, the Convention adopted an entirely new Constitution, then adjourned sine die on March 24, 1972.

The proposed Constitution was submitted to the electors in a special election of June 6, 1972. The result, as certified by the Secretary of State, was 116,415 votes for the new Constitution and 113,883 against.

Three alternate propositions were separately submitted to the electors on June 6, 1972. The first would have restated Art. V of the new Constitution so as to create a unicameral rather than a bicameral legislature. This proposition was defeated with a vote of 95,259 for a unicameral legislature and 122,425 for a bicameral legislature.

A second proposition, separately submitted, reworded Art. III, sec. 9, of the new Constitution so as to permit the people or the Legislature to authorize gambling. This proposition carried with a vote of 139,382 for and 88,743 against gambling.

The third proposition, separately submitted, would have added to Art. II, sec. 28, of the new Constitution a sentence abolishing capital punishment. This proposition was defeated with a vote of 147,023 for the death penalty and 77,733 against.

After the election of June 6, 1972, a question arose as to whether the new Constitution had been approved by "a majority of the electors voting at the election", as required by Art. XIX, sec. 8, 1889 Mont. Const. An original proceeding for declaratory judgment was brought in the Montana Supreme Court to determine this question. On August 18, 1972, the Supreme Court held in a three-to-two decision that the new Constitution had been approved by the required majority of the electors and would become effective according to its terms. State ex rel. Cashmore v. Anderson, 160 M 175, 500 P2d 921 (1972). Rehearing was denied on September 25, 1972.

A petition to the U.S. Supreme Court for a Writ of Certiorari to the Supreme Court of Montana was denied without comment by an order entered February 20, 1973, sub nom., Burger v. Anderson, 410 US 931, 93 S Ct 1372 (1973). Thereafter an action for declaratory judgment was filed in the U.S. District Court for the District of Montana, which action sought a declaration that the adoption of the new Constitution was in violation of the 14th amendment to the United States Constitution, Art. IV, sec. 4, U.S. Const., and the Voting Rights Act of 1965 (42 U.S.C. 1973). Plaintiffs alleged that they had been misled so as to have believed at the time of the election that an elector's failure to vote on the issue of adoption of the new Constitution was to have constituted a vote against adoption if the elector participated in the election by voting on other issues on the ballot. The federal District Court, sitting as a three-judge panel, dismissed the plaintiff's petition and held that the electors were neither deprived of their right to vote nor subjected to a debasement or dilution of their votes as a result of their mistaken understanding of the effect of not voting on the adoption of the new Constitution. Burger v. Judge, 364 F. Supp. 504 (D.C. Mont. 1973), affirmed on December 3, 1973, in 414 US 1058 (1973).

Transition and Adoption Schedule: For the text of the Transition Schedule and Adoption Schedule for implementing the 1972 Montana Constitution, see Constitution text and annotations under Transition Schedule.

Editing and Publishing: Chapter 373, L. 1977, provided for the editing and publishing of the proceedings of the 1972 Constitutional Convention and created a three-member committee to supervise the editing and publishing. The committee terminated upon delivery to the Executive Director of the Legislative Council (now Legislative Services Division) of 1,000 copies of the

proceedings. House Bill 160, L. 1977, appropriated money to the Legislative Council for the expenses of editing and publishing the proceedings of the 1972 Constitutional Convention.

Constitutional Convention References: The compiler has included cross-references for each section to pertinent parts of the verbatim transcripts of the 1971-1972 Montana Constitutional Convention.

Constitution Case Notes

DECISIONS UNDER 1972 CONSTITUTION

Test and Nature of Review of Question of Constitutional Law: A lower court's resolution of a question of constitutional law is a conclusion of law that the Supreme Court reviews to determine whether the conclusion is correct, and the review is plenary. Schuff v. A.T. Klemens & Son, 2000 MT 357, 303 M 274, 16 P3d 1002, 57 St. Rep. 1499 (2000).

DECISIONS UNDER 1889 CONSTITUTION

Operation and Effect: The Preamble of the Constitution is not the source of any substantive power. Jacobson v. Mass., 197 US 11, 49 L Ed 643, 25 S Ct 358 (1905).

Constitution Law Review Articles

Keeping Faith With the Vision: Interpreting a Constitution for This and Future Generations, Nelson, 71 Mont. L. Rev. 299 (2010).

Technology's Future Impact on State Constitutional Law: The Montana Example, Kende, 64 Mont. L. Rev. 273 (2003).

The Montana Constitution: A National Perspective, Tarr, 64 Mont. L. Rev. 1 (2003).

Interpretations of the Montana Constitution: Sometimes Socratic, Sometimes Erratic, Goetz, 51 Mont. L. Rev. 289 (1990).

Some Comments on Our Experience as a Constitutional Society, Harris, 51 Mont. L. Rev. 275 (1990).

The 1972 Montana Constitution in a Contemporary Context, Fritz, 51 Mont. L. Rev. 270 (1990).

The 1972 Montana Constitution in Historical Context, Roeder, 51 Mont. L. Rev. 260 (1990).

What Is the Nature of the Montana Constitution?, Forsell, 15 Mont. L. Rev. 93 (1954).

ARTICLE I
COMPACT WITH THE UNITED STATES

Article Convention Notes

Makes it clear that the new constitution does not affect any agreements made with the United States Government when Montana first became a state.

Article Case Notes

Termination of Parental Rights to Indian Children — Tribal Court to Affirmatively Decline Case Prior to State Court Proceedings — Jurisdiction Transfer Hearing Required Prior to Ruling on Jurisdictional Transfer of Children: The District Court erred in terminating the parental rights of a mother of four Indian children without first holding a jurisdiction transfer hearing under the Indian Child Welfare Act (ICWA) after the mother requested the matter be transferred to tribal court at the outset of the proceedings. The Supreme Court ruled that a tribal court, and not the tribe, must affirmatively decline to accept a case before a state court can proceed with termination of parental rights to Indian children. A District Court must hold a jurisdiction transfer hearing before it grants or denies a request for a jurisdictional transfer of Indian children to tribal custody. In re J.W.C., L.W.C., K.W.C., and C.W.C., 2011 MT 312, 363 Mont. 85, 265 P.3d 1265.

Analysis for Jurisdiction of District Court Over Tribal Member and Tribal Property: The correct analysis in both regulatory and adjudicatory actions involving tribal members or lands is whether the exercise of jurisdiction by a state court or regulatory body is preempted by federal law or, if not, whether it infringes on tribal self-government. If either element is met, a state may not assume civil jurisdiction or take regulatory action over Indian people or their territories within the boundaries of their reservations. In re Estate of Big Spring, 2011 MT 109, 360 Mont. 370, 255 P.3d 121, overruling Iron Bear v. District Court, 162 Mont. 335, 512 P.2d 1292 (1973), in its entirety and In re Marriage of Skillen, 1998 MT 43, 287 Mont. 399, 956 P.2d 1, in part and overruling numerous cases to the extent they followed the principles of Iron Bear or Skillen.

No Subject Matter Jurisdiction for District Court in Probate for Tribal Member — Jurisdiction Presumptively With Tribal Court — Proceedings Before District Court Void: The District Court erred when it assumed subject matter jurisdiction over the probate of an enrolled Blackfeet Tribal member's estate when all of the decedent's estate property was located within the exterior boundaries of the Blackfeet Reservation. The Supreme Court overruled Iron Bear and held that civil jurisdiction over non-Indians and Indians on reservation lands presumptively lies in the tribal court. Absent express congressional limitation, the tribe maintained sovereign power and exclusive jurisdiction over the probate of the decedent. A state court has an independent obligation to determine whether it has jurisdiction in a case involving an Indian person and Indian Country. The court declared void the 7 years of proceedings before the District Court with reference to the decedent's estate. In re Estate of Big Spring, 2011 MT 109, 360 Mont. 370, 255 P.3d 121, overruling Iron Bear v. District Court, 162 Mont. 335, 512 P.2d 1292 (1973), in its entirety and In re Marriage of Skillen, 1998 MT 43, 287 Mont. 399, 956 P.2d 1, in part and overruling numerous cases to the extent they followed the principles of Iron Bear or Skillen.

Termination of Parental Rights Under ICWA: A mother argued that the failure to hold an expert hearing under the Indian Child Welfare Act before the children were removed from her home did not satisfy the requirements of 25 U.S.C. 1912(e). The Supreme Court held that the District Court did not abuse its discretion by terminating the mother's parental rights because the termination was conducted according to the requirements of state and federal statutes and that the record clearly supported the District Court's findings of facts and conclusions of law. In re A.S. and T.S., 2011 MT 69, 360 Mont. 55, 253 P.3d 799.

Jurisdiction of Montana Courts' Over Tribal Member: Montana courts have jurisdiction over a tribal member whose actions involve significant contacts with the state outside reservation boundaries. By taking a constitutional oath of office to support, protect, and defend the Montana Constitution, a justice of the peace made himself subject to Montana courts when running for elective tribal office. Judicial Standards Comm'n v. Not Afraid, 2010 MT 285, 358 Mont. 532, 245 P.3d 1116.

Valid Memorandum of Agreement Allowing State to Investigate Child Abuse Allegations on Reservation and Pursue Substantiation Proceedings Against Tribal Member: The Assiniboine and Sioux Tribes of the Fort Peck Reservation entered a memorandum of agreement with the Bureau of Indian Affairs and the Montana Department of Public Health and Human Services (DPHHS), allowing DPHHS to place Indian children with enrolled tribal members living on the reservation. DPHHS subsequently placed a Minnesota Indian child with the child's great-aunt Hanna on the Fort Peck Reservation, but the placement was terminated after DPHHS received reports that the child was being abused or neglected. DPHHS subsequently initiated an investigation into the cause of the abuse and issued a substantiated report that Hanna had abused or neglected the child. Hanna moved for a fair hearing, and because no criminal charges had been filed, DPHHS began the fair hearing process. Hanna then moved to dismiss the substantiation proceeding on jurisdictional grounds. The hearings officer held that the tribe maintained exclusive jurisdiction over Indian youth and that DPHHS's substantiation proceedings interfered with tribal sovereignty. DPHHS appealed the decision in District Court, arguing that pursuant to the memorandum of agreement, DPHHS had jurisdiction to issue the substantiated report under state law and policy because DPHHS had licensed Hanna as a kinship foster care provider in the first place. The District Court agreed and reversed the hearings officer's decision. On appeal, the Supreme Court affirmed. The purpose of the agreement was to allow eligible Indian children on the Fort Peck Reservation to receive services and foster care maintenance payments, and the agreement was a valid, federally authorized agreement. Under the agreement, DPHHS was assigned the responsibility of investigating allegations of abuse and neglect, documenting conclusions of the investigation in a final report, and making the final decision about an individual's licensing status, and the agreement did not contemplate tribal jurisdiction regarding these issues. Therefore, DPHHS had jurisdiction to pursue substantiation proceedings against Hanna. In re Fair Hearing of Hanna, 2010 MT 38, 355 Mont. 236, 227 P.3d 596.

Medical Negligence — Right of Tribal Member to Pursue State Court Action Against Nontribal Member — State Court Jurisdiction: The plaintiff alleged medical negligence against a medical clinic that cared for the plaintiff's husband, who was a member of the Confederated Salish and Kootenai Tribes. The plaintiff was not a tribal member, the clinic was not affiliated with a tribe, and the acts took place both on and off the reservation. The District Court held that state courts do not have jurisdiction on the Confederated Salish and Kootenai Reservation over actions for medical negligence. The plaintiff appealed, and the Supreme Court reversed. The court noted that it is well established under both state and federal law that tribal members may bring civil

actions against nontribal members in state court, and that tribal autonomy and self-government are not impeded when a state allows an Indian to seek relief in state court against a non-Indian for a claim arising in Indian country. This right of access to courts applies to residents of each Montana Indian reservation. Therefore, the plaintiff was not precluded from bringing the medical negligence action in state court and the state court had jurisdiction to hear the case. Morigeau v. Gorman, 2010 MT 36, 355 Mont. 225, 225 P.3d 1260. See also State ex rel. Iron Bear v. District Court, 162 Mont. 335, 512 P.2d 1292 (1973), and Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'r, 476 US 877 (1986).

Mother's Stipulation That Child Be Adjudicated Youth in Need of Care Prior to Determination of Child's Status as Indian — Parental Termination Proceedings Not Invalidated: The state petitioned for termination of a mother's parental rights based on her lack of progress with the court-ordered treatment plan. The state recognized the child's Indian status and notified the Blackfeet Tribe. The tribe's motion to intervene in order to monitor the proceedings was granted, and the mother's parental rights were terminated the following day after the mother stipulated to adjudication of the child as a youth in need of care. The mother subsequently appealed on grounds that it was error to terminate her parental rights prior to a determination that the child was subject to the Indian Child Welfare Act (ICWA). The Supreme Court disagreed and affirmed. The District Court complied with ICWA in finding by clear and convincing evidence that the child was a youth in need of care and that the child's best interests would be served by termination of the parent-child relationship. The fact that the court accepted the mother's stipulation before definitively establishing the child's Indian status did not invalidate the proceedings. The District Court was affirmed. In re J.M., 2009 MT 332, 353 M 64, 218 P3d 1213 (2009).

Risk of Possible Trauma to Child Insufficient Good Cause to Avoid ICWA Placement Preferences: Three Indian children were placed with a Montana foster family, and after the parents' rights were terminated, the foster family moved to intervene for permanent placement of the children with the foster family. The Department of Public Health and Human Services subsequently determined that permanent placement of the children would be more appropriate with a non-Indian family in Spokane, Washington, because placement with the Washington family would more closely achieve the purposes and policies of the Indian Child Welfare Act (ICWA), in that the Spokane family had previously adopted one of the children's full-blood siblings, two other siblings had been adopted by another family in Spokane, and numerous other family members of the children, including their birth mother and birth father, also resided in Spokane. A District Court denied the Montana family's motion, holding that placement with the Spokane family was in the children's best interests and allowed the greatest opportunity for continued contact with other family members. The Montana family appealed on grounds that there was a possibility that the children could experience trauma from a transfer of custody or develop an attachment disorder, but the Supreme Court affirmed. Absent testimony that it was certain that the children would experience trauma from a transfer of custody or develop an attachment disorder, the risk that the children might develop such problems in the future was simply too nebulous and speculative a standard on which to determine that good cause existed to avoid the ICWA placement preference with family or extended family. There was substantial credible evidence that the Spokane family fit within the ICWA definition of extended family, and the District Court did not abuse its discretion in finding that good cause did not exist to deviate from the ICWA placement preference or in placing the children with the Spokane family. In re M.B., E.B., & B.B., 2009 MT 97, 350 M 76, 204 P3d 1242 (2009). See also In re C.H., 2000 MT 64, 299 M 62, 997 P2d 776 (2000).

Waiver of Sovereign Immunity by United States Regarding Water Rights Limited to State Adjudications: A plain reading of 43 U.S.C. 666, known as the McCarran amendment, indicates that the United States has waived its sovereign immunity so that it may be joined as a defendant when it is a necessary party in cases seeking to adjudicate or administer water rights in state courts. The waiver extends to Indian tribes, providing consent to determine federal reserved water rights held by tribes in state court cases. However, the waiver is not for purposes of private suits against the United States or Indian tribes but is limited to comprehensive state adjudications of water rights. Confederated Salish & Kootenai Tribes v. Clinch, 2007 MT 63, 336 M 302, 158 P3d 377 (2007).

Water Use Changes — Interaction of State Regulatory Authority and Tribal Self-Government: There are two general and overlapping approaches to analyzing the interaction of state regulatory authority and tribal self-government. The first takes the perspective of the tribe and seeks to identify the scope of authority that the tribe possesses (see Mont. v. U.S., 450 US 544 (1981)), while the second takes the perspective of the state and seeks to prescribe the limits of the state's

power (see White Mtn. Apache Tribe v. Bracker, 448 US 136 (1980)). In cases adjudicating water rights, the weight of the state's interest depends in large part on the extent to which waterways or aquifers transcend the exterior boundaries of Indian country. In the case at bar, the District Court enjoined the state from processing a change of use application for a state water right. The question on appeal was whether the state had sovereign authority to process a change of use application concerning two appropriative water rights owned by non-Indians on the Flathead Reservation to allow a change from irrigation to recreation so that the owners could operate a waterski pond. Whether the change would adversely affect the tribe and whether assertion of regulatory authority by the state would have a direct effect on the tribes were legal conclusions. The Supreme Court concluded that the state's authority was not preempted by federal or tribal interests because neither the federal government nor the tribe asserted regulatory authority over the owner's water rights, so the state was not preempted from reviewing the change application. The Legislature acted within its constitutional prerogative in enacting 85-2-402, providing that no presumption is to work against a water right holder who seeks a change of use and providing that the state should be able to process change of use applications. The record was not clear whether the use change would adversely affect the tribe; however, the Supreme Court found no compelling reason to deprive the state water right holders of the opportunity to prove by a preponderance of the evidence that the proposed change in use, not amount, would not adversely affect the use of other water rights, including the tribe's reserved rights. Therefore, the injunction was removed, and the case was remanded to the District Court for a determination of whether the state had sovereign authority to conduct change of use proceedings and, if so, to allow the owners to attempt to prove that the proposed change in use would not adversely affect the use of other water rights, including the tribe's reserved rights. Confederated Salish & Kootenai Tribes v. Clinch, 2007 MT 63, 336 M 302, 158 P3d 377 (2007).

No Absolute Right to Counsel in Tribal Court — Tribal DUI Conviction Properly Considered for Purposes of Charging Felony DUI in State Court: Walker was charged with felony DUI based on four prior convictions. Walker challenged two of the prior convictions—one in Justice's Court in Garfield County and one in tribal court on the Fort Belknap Indian Reservation—and asserted that in both cases, no confirmation had been made regarding Walker's right to counsel. The Supreme Court did not address the Garfield County conviction because the tribal court was dispositive. The standards of tribal law rather than federal or state constitutional law applied to the Fort Belknap case. Congress extended many of the protections in the federal Bill of Rights to Native Americans in the Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. 1301, et seq., but ICRA does not contain a provision extending the right to counsel to tribal court proceedings. Thus, no absolute right to counsel exists in tribal court unless a tribe provides for that right. Walker could cite no tribal code provision extending him the right to counsel in 1992 when the case was heard and therefore could not argue the irregularity of the tribal court case on right to counsel grounds. The District Court did not err in applying the tribal court conviction to Walker's accumulated prior convictions for purposes of charging felony DUI under 61-8-731. St. v. Walker, 2007 MT 34, 336 M 56, 153 P3d 614 (2007), following St. v. Spotted Eagle, 2003 MT 172, 316 M 370, 71 P3d 1239 (2003).

Negligence Claim by Nonmember Against Montana Bar Located Within Flathead Reservation — No Tribal Jurisdiction Found — Error in District Court Dismissal on Jurisdictional Grounds: Zempel, a nontribal member who was repeatedly served alcoholic beverages by bartenders at Tiny's Tavern of Charlo (TTC), a Montana corporation located within the Flathead Reservation, was injured in a one-car accident when another TTC patron attempted to drive him home. Zempel filed a negligence action against TTC and its tribal-member owner, Liberty, alleging that TTC and Liberty acted negligently in continuing to serve Zempel alcohol and allowing another intoxicated patron to drive him home. Liberty argued that TTC, an Indian-owned business, was entitled to tribal jurisdiction. When the District Court dismissed the claims on jurisdictional grounds, Zempel appealed. The Montana Supreme Court held that the jurisdictional issue had to be analyzed under the guidelines adopted in Strate v. A-1 Contractors, 520 US 438 (1997), which established that tribal adjudicatory civil jurisdiction does not extend to a civil suit involving nonmembers unless one of the two exceptions outlined in Montana v. U.S. is present. The court held that the first Montana exception did not apply because TTC's alleged negligence in serving alcoholic beverages to Zempel and failing to prevent an intoxicated patron from attempting to drive him home did not involve a consensual relationship with the tribe or tribal members because the tribal constitution does not allow corporations to obtain memberships. The second exception, tribal jurisdiction based upon conduct that threatens the political integrity, economic security, or health or welfare of the tribe, did not apply because TTC's alleged negligence in serving alcoholic

beverages to Zempel and failing to prevent another intoxicated patron from attempting to drive him home, although potentially dangerous to individual tribal members, did not pose a threat to tribal self-government. Because TTC failed to demonstrate a qualifying consensual relationship or a threat to tribal self-government to overcome the Montana general rule prohibiting tribal jurisdiction, the District Court erred in dismissing Zempel's claim against TTC and Liberty on jurisdictional grounds. Zempel v. Liberty, 2006 MT 220, 333 M 417, 143 P3d 123 (2006).

Action by Tribal Nonmember Against Indian College for Negligence and Products Liability and for Spoliation of Evidence — Neither Claim Arising on Reservation — Tribal Court Jurisdiction Found: Smith, a nonmember of the Confederated Salish and Kootenai Tribes who was involved in a one-car accident on Highway 93 running through the Flathead Indian Reservation, sued for an injunction against the Flathead Reservation Tribal Court, alleging that it had no jurisdiction over his cross-claim against Salish and Kootenai College (SKC), the owner of the vehicle he was driving at the time of the accident. The federal District Court held that SKC was a tribal entity for purposes of jurisdiction and that the case arose on the reservation, so that the tribal court had jurisdiction. Then, in reliance solely on Williams v. Lee, 358 US 217 (1959), the District Court dismissed Smith's action for an injunction. The Ninth Circuit Court of Appeals held that the jurisdictional issue had to be analyzed in accordance with Montana v. U.S., 450 US 544 (1981), and the Court of Appeals' previous holding in Yellowstone County v. Pease, 96 F3d 1169 (9th Cir. 1996) (in which the Ninth Circuit held that a tribal court has no jurisdiction over a litigant if either one party is not a member of the tribe or the claim arose on nontribal land), because one of the parties to the claim was a nonmember of the tribe. The Court of Appeals, following Montana, analyzed the facts and determined that the claims for negligence and product liability and for spoliation of evidence did not arise on reservation land. However, Smith was acting as a plaintiff and availed himself of tribal court jurisdiction. Therefore, the decision of the District Court was affirmed. Smith v. Salish Kootenai College, 378 F3d 1048 (9th Cir. 2004), affirmed in 434 F3d 1127 (9th Cir. 2006).

Failure of District Court to Determine Indian Status of Children Prior to Termination of Parental Rights Warranting Reversal: Absent a conclusive determination from the affected tribes, it was reversible error for the District Court to terminate a mother's parental rights without definitely resolving the threshold question of whether the children were Indian children within the meaning of the Indian Child Welfare Act. In this case, the District Court was presented with insufficient evidence regarding the children's status because of the mother's failure to present crucial evidence regarding the children's possible tribal affiliation and the tribe's delay in intervening. However, the tribe's right to intervene was not impaired by the delay, and the court should not have proceeded absent a conclusive determination that the children were not tribal members. In re A.G., W.G., T.A., & J.A., 2005 MT 81, 326 M 403, 109 P3d 756 (2005).

Standards Applicable to Termination of Indian Parental Rights — Active Department Efforts to Provide Services Required: The District Court terminated the parental rights of an Indian father after the children were removed from the father's custody a fourth time because of the father's abuse and neglect. The father appealed on grounds that: (1) the state did not make active efforts to provide remedial services; (2) the District Court relied on expert testimony based on the Department file rather than personal interviews; and (3) it was error not to grant the father's request for an extension of temporary legal custody. The Supreme Court affirmed on all issues. The father left no phone number or address with the social worker and moved multiple times. Without any involvement, the father prevented the Department from making active efforts at providing more intensive services. Second, the federal Indian Child Welfare Act requires testimony from a qualified expert witness, but does not require a specific form of that testimonial evidence or personal interviews, and a District Court need not conform its decision to a particular piece of evidence or a particular expert's report or testimony as long as a reasonable person could have found beyond a reasonable doubt that continued custody by an Indian parent or custodian is likely to result in serious emotional or physical damage to the child. Last, the District Court did not abuse its discretion in refusing to extend temporary custody because the Department had already provided active efforts and did not need more time to assist the father in attaining his goals. The District Court had an accurate perspective on the father's parenting abilities, and refusal to extend the temporary placement did not make the court's decision any less reasonable. In re A.N. & M.N., 2005 MT 19, 325 M 379, 106 P3d 556 (2005). See also In re Marriage of McKenna, 2000 MT 58, 299 M 13, 996 P2d 386 (2000), and In re D.S.B., 2013 MT 112, 370 Mont. 37, 300 P.3d 702.

Sufficient Evidence That ICWA Standards Met in Terminating Parental Rights — Termination Affirmed Absent Abuse of Discretion: An Indian father contended that the state

did not present sufficient evidence under the federal Indian Child Welfare Act of 1978 (ICWA) to warrant termination of his parental rights. The Supreme Court determined that: (1) there was sufficient evidence that continued custody of the children was likely to result in serious emotional or physical damage to the children; (2) the evidence was supported by testimony from qualified experts; (3) active but unsuccessful efforts had been made to provide remedial services and rehabilitative programs to prevent the breakup of the Indian family; and (4) the children had lived in foster care a sufficient time to create the presumption under 41-3-604 that the children's best interests would be served by terminating parental rights. The ICWA requirements having been followed, parental rights were properly terminated. In re S.R., R.R., & G.R. Jr., 2004 MT 227, 322 M 424, 97 P3d 559 (2004).

Doctrine of Abstention Properly Applied by District Court Over Matter Subject to Tribal Court Jurisdiction: Defendants who were enrolled tribal members brought suit in tribal court, seeking damages for plaintiff's failure to timely close the purchase of real and personal property described in a buy-sell agreement. Plaintiff was also a tribal member who resided on the reservation. The tribal court concluded that it had subject matter and personal jurisdiction over the litigation. Plaintiff contended that the tribal court did not have jurisdiction, and while the matter was pending in tribal appellate court, filed the present action in state District Court, alleging various claims based on or arising out of buy-sell agreements. The District Court dismissed the state action, and plaintiff appealed. The Supreme Court noted that Montana courts are open to all Montana citizens, including Indian citizens, who may sue in state court as long as Congress has not expressly retained jurisdiction in the United States, particularly if the Indian is a Montana citizen and the matter does not interfere with tribal self-government. Conversely, the court also recognized the sovereignty of a tribe to maintain the right of self-government and to control the internal relations of tribal members and recognized that tribal courts have jurisdiction over tribal members conducting business on tribal land with other tribal members. Thus, because the tribal court exercised jurisdiction and because the subject matter of plaintiff's state suit was based on or arose from the same sales agreements that were the subject of the tribal court case, the District Court properly exercised the doctrine of abstention and deferred to the tribal court opinion on the basis of comity. Dismissal of the state suit by the District Court was affirmed. Nielsen v. Brocksmith Land & Livestock, Inc., 2004 MT 101, 321 M 37, 88 P3d 1269 (2004). See also State ex rel. Stewart v. District Court, 187 M 209, 609 P2d 290 (1980), In re Marriage of Limpy, 195 M 314, 636 P2d 266 (1981), and Agri W. v. Koyama Farms, Inc., 281 M 167, 933 P2d 808 (1997).

At-Large Voting System Invalid as Discriminatory: Blaine County, located in north central Montana, is vast and sparsely populated. Its 7,009 residents are spread out over 4,638 square miles, which places the county in the top 5% of counties nationwide in terms of size. American Indians constitute 45.2% of the population and 38.8% of the voting age population, while whites make up 52.6% of the population and 59.4% of the voting age population. The American Indian population is geographically concentrated, with 80% of the county's American Indians residing on the Fort Belknap Reservation. Despite their geographic concentration, no American Indians were ever elected to the Blaine County Commission under the at-large voting system. Under the at-large voting system, the Blaine County Commission consisted of three Commissioners, each of whom was required to reside in one of three different residential districts. Each Commissioner was elected by a majority vote of the entire county, not just by voters in the Commissioner's residential district. The Commissioners served 6-year staggered terms, so that each even-numbered year, one Commissioner stood for election. The United States brought an action under section 2 and section 12(d) of the Voting Rights Act of 1965, challenging the county's at-large voting system. The United States sought a declaration that the existing at-large voting system violated section 2. The United States also sought an injunction to prevent the county from using at-large voting in future elections and to require the county to submit a new districting plan for the District Court's approval. The Supreme Court applied section 2 to multimember districts in Thornburg v. Gingles, 478 US 30 (1986). In that case, the court held that when plaintiffs challenge at-large voting schemes under section 2, they must prove at a minimum that "a bloc voting majority must usually be able to defeat candidates supported by a politically cohesive, geographically insular minority group". Broken down, this test has three requirements known as the "Gingles factors": (1) compactness; (2) cohesive minority voting; and (3) a bloc voting majority that can usually defeat the minority preferred candidate. If the plaintiff establishes these three factors, the court then must consider whether under the totality of circumstances, the at-large voting system operates to prevent the minority group from participating equally in the political process and electing representatives of its choice. The evidence presented in this case established

that Blaine county's at-large voting system violated section 2. U.S. v. Blaine County, 363 F3d 897 (9th Cir. 2004).

Letter From Tribe Conclusive as to Tribal Membership of Children in Parental Termination Proceeding: During parental termination proceedings, a question arose as to whether two of the children involved might be Indian children by virtue of their father's tribal membership. In order to comply with the Indian Child Welfare Act of 1978 (ICWA), the state contacted the tribe to determine if the children were tribal members. The tribe responded by letter and stated that the children were not tribal members and were not eligible for membership based on blood quantum. Under In re Adoption of Riffle, 277 M 388, 922 P2d 510 (1996), the tribe's determination was conclusive, but even aside from the letter, testimony from the children's father and several social workers affirmed that the children were not eligible for tribal membership. Because the children could not be considered Indian children by definition, the ICWA did not apply to the termination proceedings. In re T.J.H., J.H., J.L., & A.L., 2003 MT 352, 318 M 528, 81 P3d 504 (2003). See also In re C.H., S.H., & D.H., 2003 MT 308, 318 M 208, 79 P3d 822 (2003).

Belated Notice of Possible Indian Heritage of Child Subject to State Parental Termination Proceedings — Notice to Tribe Required to Allow Future Tribal Involvement if Appropriate: Only after parental termination proceedings were completed did the mother raise the issue of the possible Indian heritage of one of her children and the possible applicability of the Indian Child Welfare Act of 1978 (ICWA). One purpose of ICWA is to afford tribes the opportunity to intervene by providing a tribe with notice before proceedings begin; but in this case, that purpose could not be honored because the District Court did not know or have reason to know of the child's possible heritage until after the termination hearing had concluded. Faced with a silent record and because the issue was not raised in the trial court, the Supreme Court declined to undermine the entire termination proceeding, but the court did order that notice be given to the tribe of which the child might be a member so that the tribe could intervene in any future proceedings if it was determined that the child was indeed an Indian child. In re C.H., S.H., & D.H., 2003 MT 308, 318 M 208, 79 P3d 822 (2003).

Indian Child Welfare Act Inapplicable to Child Ineligible for Membership in Federally Unrecognized Tribe: The state sought to terminate a mother's parental rights, but the mother contended that the Indian Child Welfare Act of 1978 (ICWA) should apply because the father of the child was an enrolled member of the Little Shell Band of Chippewa. The Supreme Court held that ICWA did not apply for two reasons: (1) the father qualified for membership in the Little Shell Band based on the minimum one-quarter blood quantum, but the child, having only one-eighth blood quantum, did not qualify for enrollment, and tribal membership of an Indian child is required for ICWA to apply; and (2) ICWA applies only to federally recognized tribes, and as of the date of the proceeding, the Little Shell Band of Chippewa was not recognized by the U.S. Secretary of the Interior as eligible to receive services. In re C.H., S.H., & D.H., 2003 MT 308, 318 M 208, 79 P3d 822 (2003).

No Absolute Right to Counsel in Tribal Court: Congress, through its plenary authority over Indian tribes, afforded many of the protections of the Bill of Rights to Indians when it passed the federal Indian Civil Rights Act of 1968 (ICRA). However, the constitutional right to counsel was not provided for in the ICRA. Therefore, unless otherwise provided by tribal law, a criminal defendant has no absolute right to counsel in tribal court. The Blackfeet tribe has not elected to guarantee criminal defendants the right to counsel, so a defendant in tribal court is entitled to counsel only at the defendant's own expense. St. v. Spotted Eagle, 2003 MT 172, 316 M 370, 71 P3d 1239 (2003), following Settler v. Lameer, 507 F2d 231 (9th Cir. 1974), and distinguishing U.S. v. Ant, 882 F2d 1389 (9th Cir. 1989).

Common-Law Recognition and Sovereignty of Little Shell Tribe — Suit Against Tribal Officials Barred: Plaintiffs were candidates in an election of the Little Shell Tribe of Indians and sued in Montana District Court for tort damages and injunctive relief against the incumbent candidates, claiming that plaintiffs had won the election. The District Court dismissed on grounds of lack of jurisdiction, and plaintiffs appealed. The Supreme Court noted that the tribe had been pursuing federal tribal recognition since the 1930s, but as yet, the tribe is not recognized by the federal government. Nevertheless, Montoya v. U.S., 180 US 261 (1901), establishes criteria for common-law recognition of a tribe. The court examined the Montoya criteria and held that the Little Shell Tribe satisfied each element of the test for common-law recognition, so the tribe is entitled to sovereignty. Tribal members are of the same or similar race, are united in a community, exist under one leadership or government, and inhabit a particular though sometimes ill-defined territory. Further, under Santa Clara Pueblo v. Martinez, 436 US 49 (1978), Indian tribes and their officials enjoy sovereign immunity from suit unless expressly limited by Congress. Thus,

because the tribal officials in this case were acting in their official capacities, suit against them in state court was barred under the doctrine of sovereign immunity. Dismissal of the action by the District Court for lack of jurisdiction was affirmed. Koke v. Little Shell Tribe of Chippewa Indians of Mont., Inc., 2003 MT 121, 315 M 510, 68 P3d 814 (2003).

Tribal Jurisdiction Over Nontribal Railroad for Ad Valorem Taxation — Application of Montana Versus U.S. Exception Requires Rule 56(f) Limited Discovery to Meet Motion for Summary Judgment: The tribes on the Fort Peck Indian Reservation (the tribes) appealed from a summary judgment by the U.S. District Court in favor of the Burlington Northern Santa Fe Railroad Co. (BN) finding that under the holding of the U.S. Supreme Court in Mont. v. U.S., 450 US 544 (1981), the tribes had no jurisdiction to impose an ad valorem tax upon the BN right-of-way originally granted by Congress to BN's predecessor in interest. The Eighth Circuit Court of Appeals held that because under Strate v. A-1 Contractors, 520 US 438 (1997), a federally granted right-of-way is to be treated as non-Indian fee land, either of the two exceptions granting Indian jurisdiction over non-Indian fee land within a reservation that were discussed in the Mont. v. U.S. case must apply if the tribes were to lawfully collect the tax on BN. The court of appeals held that the first Mont. v. U.S. exception did not apply because there was no consent by BN to the exercise of tribal jurisdiction. The second exception, jurisdiction based upon conduct that threatens the political integrity, economic security, or health or welfare of the tribes, the court of appeals held, could be found to exist if the facts showed such a threat to exist in any of the trains that carried toxic or hazardous material across the reservation. However, because the District Court had denied the tribes' motion under Rule 56(f), Federal Rules of Civil Procedure, the tribes were unable to present sufficient facts demonstrating a threat as the basis for jurisdiction. The court of appeals therefore reversed the District Court and instructed it to allow such discovery as the tribes needed in order to demonstrate the required threat to the tribes posed by the existence of BN trains on the reservation. Burlington N. Santa Fe RR Co. v. Assiniboine & Sioux Tribes of the Fort Peck Reservation, 323 F3d 767 (9th Cir. 2003).

Tribal Jurisdiction Over BIA Road — BIA Road Considered Tribal Road Not Governed by State: Means, a member of the Northern Cheyenne Tribe, was injured when the car that he was driving on a Bureau of Indian Affairs (BIA) road on the Northern Cheyenne Indian Reservation struck a horse owned by McDonald, a tribal nonmember who ran a ranch within the reservation. McDonald filed an action in Federal District Court, and the court enjoined Means from pursuing a civil action in tribal court. The Eighth Circuit Court of Appeals noted that according to 25 CFR 170.1, White Mtn. Apache Tribe v. Bracker, 448 US 136 (1980), and U.S. v. Mitchell, 463 US 206 (1983), a road constructed by the BIA is considered an "Indian reservation road" held in trust for the use of the tribe. The court of appeals also considered those factors examined by the U.S. Supreme Court in Strate v. A-1 Contractors, 520 US 438 (1997), in determining whether the tribe had lost its right to exclude others and occupy the property on which the road was located and held that the tribe had not lost those rights, thereby retaining jurisdiction over the highway. McDonald v. Means, 300 F3d 1037, amended by 309 F3d 530 (2002).

Guidelines for Determining Whether Indian Tribe Has Waived Sovereign Immunity in Contract — Inapplicability of Statute of Frauds to Question of Subject Matter Jurisdiction: Plaintiff contended that he signed a 7-year contract with the Crow Tribe to provide consulting services and to act as a program manager for the planning and construction of a power plant on tribal property and that the tribe breached the contract and failed to pay him. The tribe moved to dismiss on grounds that the District Court lacked personal and subject matter jurisdiction because of the tribe's sovereign immunity. The District Court denied the motion but reserved the right to readdress the issue of subject matter jurisdiction. Following further discovery, neither party could produce a signed copy of the alleged contract. The District Court concluded that because the alleged contract was for employment for more than 1 year, the statute of frauds applied and noted that although plaintiff's performance would normally create an exception to the statute of frauds pursuant to the court's equitable powers, to exercise that power in this case would circumvent the tribe's sovereign immunity in contravention of federal law. The District Court further concluded that although there was an express agreement that was partially performed and that the agreement contained a waiver of tribal immunity from suit in state court, as indicated by affidavits submitted by plaintiff and the tribal presiding officer, because of the fact that a signed copy of the contract was not produced, there was insufficient evidence to overcome the presumption against waiver of tribal immunity, so the action was dismissed for lack of jurisdiction. Plaintiff appealed, and the Supreme Court reversed. The Montana statute of frauds in 28-2-903 limits the enforceability of certain contracts but does not affect a District Court's subject matter jurisdiction, so a District Court need not consider the statute of frauds

when determining subject matter jurisdiction; furthermore, the court does not need to invoke its equitable powers to find jurisdiction. Rather, the question facing the District Court was whether the tribe clearly and unequivocally waived its sovereign immunity. The Supreme Court found that plaintiff's complaint alleged sufficient facts that, if true, would vest the District Court with subject matter jurisdiction. The tribe produced no evidence to refute the affidavits or to controvert the recollections of the affiants. Absent any factual issue to resolve, the Supreme Court concluded that plaintiff presented undisputed evidence proving the establishment of a contract that included an unequivocal waiver of sovereign immunity, so dismissal of the complaint by the District Court on jurisdictional grounds constituted reversible error. Bradley v. Crow Tribe of Indians, 2003 MT 82, 315 M 75, 67 P3d 306 (2003). On remand, the District Court again granted Bradley's motion for summary judgment after holding that the tribe's motion to alter or amend was denied because the court did not rule on the motion within 60 days. The Supreme Court held that because there is no provision in former Rule 56, M.R.Civ.P. (now superseded), for entry of summary judgment by default, denial of the tribe's motion was erroneous, and because questions of fact existed regarding contract ambiguity and damages, the case was again reversed and remanded for further consideration. Bradley v. Crow Tribe of Indians, 2005 MT 309, 329 M 448, 124 P3d 1143 (2005).

Expert Witness in Indian Child Welfare Proceeding — Cultural Knowledge of Particular Tribe Not Required: Federal law does not define "qualified expert witness" or provide criteria for determining whether a person is qualified to testify as an expert under the Indian Child Welfare Act of 1978 (ICWA), although federal guidelines do allow expert testimony of a professional person having substantial education and experience in the area of the professional's specialty. In the present case, the state called an expert who: (1) was a Blackfeet tribal member with knowledge of Blackfeet culture; (2) worked closely with Indian families while conducting home studies and writing reports relating to adoption and foster care placement of Indian children in Montana; (3) was a teacher in Minnesota and was exposed to the culture of other tribes; (4) worked for the state as a family resource specialist; and (5) was trained and certified by the state as a qualified ICWA expert witness. The father of the Indian youth in need of care objected that the state's witness was not qualified because the witness had no knowledge of the Confederated Tribes of Siletz Indians of Oregon. The objection was overruled, and the father appealed. The Supreme Court affirmed. It is not necessary that an expert witness in an ICWA case have knowledge of the cultural standards of a particular tribe. The determination of whether the witness is sufficiently qualified remains within the discretion of the trial court, and it was not an abuse of that discretion for the District Court to accept the state's witness in this case. In re M.R.G., 2003 MT 60, 314 M 396, 66 P3d 312 (2003), followed in In re K.S., D.S., & C.S., 2003 MT 212, 317 M 88, 75 P3d 325 (2003).

Closure to Nontribal Member of Big Game Hunting on Indian Reservation Not Violative of Equal Protection Guarantee: Fish, Wildlife, and Parks Commission regulations limited hunting on Indian reservations to tribal members only. Shook, who was not a tribal member, killed a whitetail buck on private property on the Flathead Indian Reservation. Shook did not own the property, nor was the property owned by a tribal member. Shook was convicted of hunting in a closed area and appealed on grounds that the closure was an unconstitutional violation of equal protection because it distinguished between tribal and nontribal members on the basis of race. The state and tribes countered that laws that distinguish between persons based on tribal membership have long been held constitutional because the distinction is political rather than racial. The District Court agreed with the state and the tribes, and the Supreme Court affirmed. As set out in Morton v. Mancari, 417 US 535 (1974), laws that afford special treatment for Indians are constitutional as long as those laws can be rationally tied to the fulfillment of the unique federal obligation toward Indians. Federal Indian law is binding on the state; therefore, the state constitutional equal protection guarantee must allow for state classifications based on tribal membership if those classifications can be rationally tied to the governmental obligation toward Indians. The state has a duty to regulate hunting by nontribal members in a way that recognizes Indian hunting privileges protected by federal law; thus, the regulation was an entirely rational way for the state to fulfill that duty by preserving wildlife populations for hunting by Indians and was not violative of equal protection guarantees. St. v. Shook, 2002 MT 347, 313 M 347, 61 P3d 863 (2002).

Exercise of Original Supreme Court Jurisdiction Based on Statewide Importance of Tribal Water Rights: The Confederated Salish and Kootenai Tribes petitioned the Supreme Court to exercise original jurisdiction in a case involving the use of ground water on the Flathead Indian Reservation. The Supreme Court found this to be an appropriate case in which to exercise

original jurisdiction because: (1) the petition implicated constitutional water rights issues under Art. IX, sec. 3, Mont. Const.; (2) tribal water rights are of statewide importance; (3) the decisive issue was purely legal or constitutional; and (4) the normal litigation process was inadequate. Confederated Salish & Kootenai Tribes v. Stults, 2002 MT 280, 312 M 420, 59 P3d 1093 (2002), following In re Application for Beneficial Water Use Permit, 278 M 50, 923 P2d 1073 (1996), and Confederated Salish & Kootenai Tribes v. Clinch, 1999 MT 342, 297 M 448, 992 P2d 244 (1999).

Issuance of Permits for Ground Water on Indian Reservations Precluded Until Tribes' Federally Reserved Water Rights Defined and Quantified: The Department of Natural Resources and Conservation (DNRC) granted a permit for the use of ground water on the Flathead Indian Reservation. Despite prior holdings in In re Application for Beneficial Water Use Permit, 278 M 50, 923 P2d 1073 (1996), and Confederated Salish & Kootenai Tribes v. Clinch, 1999 MT 342, 297 M 448, 992 P2d 244 (1999), that the state does not have jurisdiction to issue new use permits prior to formal adjudication of the tribes' reserved water rights, DNRC contended that this case was distinguishable because the tribes' federally reserved water right concerning ground water is legally uncertain. However, the only federal authority cited by either party, Tweedy v. Tex. Co., 286 F. Supp. 383 (D.C. Mont. 1968), supported the conclusion that there is no distinction between surface water and ground water for purposes of determining what water rights are reserved because those rights are necessary to the purpose of an Indian reservation. Further, neither of the prior state cases excluded ground water. The tribes contended that as a sovereign nation, they should not be required to defend their water rights in piecemeal fashion before a hostile forum and that pursuant to 85-2-311 and the prior case law, the ground water permit was illegal. The Supreme Court agreed with the tribes and vacated the permit, finding no reason to limit the scope of the prior holdings by excluding ground water from the tribes' federally reserved water rights in this case. Two statutory methods for comprehensively adjudicating Indian reserved water rights already exist—a general inter sese adjudication or negotiations with the Montana Reserved Water Rights Compact Commission. Therefore, the tribes should not be required to defend their water rights by participating in the DNRC hearings process. Thus, DNRC cannot determine whether water is available on the Flathead Reservation, whether surface water or ground water, because DNRC cannot determine whether the issuance of permits would affect existing water rights until the tribes' preeminent water rights are defined and quantified. Confederated Salish & Kootenai Tribes v. Stults, 2002 MT 280, 312 M 420, 59 P3d 1093 (2002).

Imposition of Corporate License Tax on Tribally Chartered Corporation Conducting Business Entirely on Indian Reservation Considered Infringement of Tribal Sovereignty and Self-Government Authority: The Department of Revenue sought to impose the state corporate license tax on Flat Center Farms, Inc. (Flat Center). The District Court found that the tax may not be imposed on an Indian-owned corporation that does business entirely within the boundaries of an Indian reservation. The state appealed, but the Supreme Court affirmed. Flat Center was incorporated pursuant to the laws of Montana and chartered by the Fort Peck Tribe as a tribal corporation, with its sole business activity consisting of farming located entirely within the exterior boundaries of the Fort Peck Reservation. The corporation was wholly Indian owned, the beneficiaries of the corporate income were ultimately Indians, and the assets generating the income were Indian trust lands. The longstanding rule set out in Mescalero Apache Tribe v. Jones, 411 US 145 (1973), is that a state is without power to tax reservation lands and Indian income generated from on-reservation activities without the express authorization of Congress. Further, under Williams v. Lee, 358 US 217 (1959), the exercise of state jurisdiction over activities occurring entirely on Indian lands is an infringement on inherent tribal authority and is contrary to principles of self-government and tribal sovereignty. Nevertheless, the state contended that, as a nontribal member with a corporate identity distinct from its stockholders, Flat Center did not enjoy the shield from state taxation afforded to tribes and tribal members. However, under LaRoque v. St., 178 M 315, 583 P2d 1059 (1978), tribal membership is not essential to a determination of whether income earned on a reservation is taxable. Flat Center did not "carry on business in the state" because all of its activities were conducted in Indian country, so its income was not earned in Montana. The state's taxation authority is statutorily limited based on the situs of the activity from which income is earned. Thus, the District Court correctly concluded that the corporation license tax may not be imposed on a tribally chartered corporation that does business entirely within a reservation. Flat Center Farms, Inc. v. Dept. of Revenue, 2002 MT 140, 310 M 206, 49 P3d 578 (2002).

Lack of District Court Jurisdiction Over Breach of Contract Dispute Regarding Work Performed Within Indian Reservation: The District Court held that it lacked subject matter jurisdiction over a breach of contract dispute between two Montana corporations and a non-

Indian minority shareholder of one of the corporations for work performed within the boundaries of the Flathead Indian Reservation, concluding that the tribal court had sole jurisdiction to hear all commercial disputes arising on the reservation involving a tribal defendant and that any allegation of fraud or impropriety involving tribal policy for giving preference to Indian-owned businesses necessarily implicated tribal self-government. Plaintiff appealed, contending that a corporation, even if Indian-owned, is neither an "Indian" nor a "tribal member" for purposes of determining subject matter jurisdiction and that the matter was nothing more than one Montana corporation bringing a claim for money damages against another Montana corporation and did not call into question any tribal act. The District Court correctly applied the three-part test in State ex rel. Iron Bear v. District Court, 162 M 335, 512 P2d 1292 (1973), in determining whether a state court may assume subject matter jurisdiction when tribal adjudicatory sovereignty over a civil dispute arising on a reservation is involved. The test involves consideration of whether: (1) federal treaties and statutes preempt state jurisdiction; (2) exercise of state jurisdiction would interfere with reservation self-government; and (3) the tribal court is currently exercising jurisdiction or has exercised it in a manner that preempts state jurisdiction. Pursuant to U.S. Supreme Court case law, if either of the first two prongs of the test is established, the state lacks jurisdiction. In analyzing the second prong of the test, the court applied Milbank Mut. Ins. Co. v. Eagleman, 218 M 58, 705 P2d 1117 (1985), which states that a tribe's interest in self-government for civil matters arising within a reservation can be implicated if a state or federal court resolves a dispute that impinges on a tribe's right to adjudicate controversies arising within the province of tribal courts or if the dispute itself calls into question the validity or propriety of an act fairly attributable to the tribe as a governmental body. In the context of this case, the questions then became: (1) whether the subcontractor was an Indian-owned business for preference purposes under its subcontract with the general contractor; and (2) whether the subcontractor committed fraud upon the tribe or otherwise violated the tribe's preference policy to the detriment of plaintiff. Concluding that the answers to both questions clearly implicated tribal court jurisdiction and policymaking authority, the court concluded that it could not assert jurisdiction without violating the policy favoring tribal self-government or interfering with the tribe's sovereignty. The Supreme Court agreed. To assume jurisdiction and decide whether a corporation had committed fraud upon the tribe or a contractor in privity with the tribe or to decide whether or not a corporation should be considered Indian-owned in spite of a prior determination by the tribe would require the District Court to impinge upon the tribe's right to adjudicate controversies arising within the province of the tribe's own courts. Further, even if the District Court were to assume that all of plaintiff's allegations were true, a hearing on the jurisdictional question was unnecessary because the court could not assume subject matter jurisdiction as a matter of law, so the court did not err by issuing its order rather than conducting a hearing on the question. Gen. Constructors, Inc. v. Chewculator, Inc., 2001 MT 54, 304 M 319, 21 P3d 604 (2001). In In re Estate of Big Spring, 2011 MT 109, 360 Mont. 370, 255 P.3d 121, the Supreme Court overruled Iron Bear in its entirety and Gen. Constructors, Inc. v. Chewculator, Inc. to the extent it relied on Iron Bear.

Taxation of Tribal Lands Allowed by Change in Federal Law — Inherent Court Power to Dissolve Injunction When Law Upon Which Injunction Based Changed by Subsequent Judicial Interpretation: In 1989, Jefferson, a member of the Crow Tribe, challenged Big Horn County's authority to impose and collect real property taxes on reservation land owned in fee simple by enrolled tribal members and requested that the District Court permanently enjoin Big Horn County from assessing and collecting taxes on Crow Reservation lands in the county. In 1990, while Jefferson's complaint was pending, the Ninth Circuit Court decided Confederated Tribes & Bands of the Yakima Nation v. County of Yakima, 903 F2d 1207 (9th Cir. 1990) (Yakima), which concluded that the Indian General Allotment Act of 1887 (GAA), 25 U.S.C. 349, manifested Congress's unmistakably clear intent to permit states to tax land allotted under the GAA. The District Court then applied Yakima later in 1990 and ruled in favor of Jefferson, holding that because Jefferson's land was never subject to the GAA, it was not taxable by the county. The court required Big Horn County to refund taxes paid under protest and remove Crow Tribe members from the tax rolls, stating that the declaratory ruling established a future tax-exempt status for land located within the Crow Reservation that was owned by Crow tribal members and not subject to the GAA. About 7 years later, the county moved to dissolve the 1990 decision on grounds that subsequent federal cases had established that alienable land owned by enrolled tribal members was subject to state ad valorem taxes even if it had not been patented in fee subject to the GAA. The county cited Cass County, Minn. v. Leech Lake Band of Chippewa Indians, 524 US 103, 141 L Ed 2d 90, 118 S Ct 1904 (1998) (Leech Lake), in which the U.S. Supreme Court rejected the Yakima rationale and held that when Congress made reservation lands freely alienable,

it was unmistakably clear that Congress intended that land to be taxable by state and local governments unless a contrary intent was clearly manifested. The District Court then dissolved that portion of its 1990 decision that had granted a future tax-exempt status to tribal members, who appealed to the Montana Supreme Court on grounds that the doctrine of res judicata barred the District Court from vacating its decision. The state responded that the 1990 decision was a form of injunctive relief that the District Court could modify or dissolve pursuant to Santa Rita Oil & Gas Co. v. St. Bd. of Equalization, 112 M 224, 114 P2d 521 (1941) (Santa Rita). The Supreme Court found that the 1990 order was not strictly a declaratory judgment, but rather an injunction containing both retrospective and prospective relief, that 15-1-404 did not preclude the District Court from ordering injunctive relief, and that the court's declaratory judgment could not exempt Jefferson's property from future taxation without a further order of injunctive relief. Under Santa Rita, a court has inherent power to modify or dissolve perpetual injunctive relief based on a subsequent change in the judicial interpretation of a law. The judicial interpretation of the law upon which the 1990 relief was based was changed by Leech Lake; thus, the District Court did not err when it vacated the injunctive portion of its 1990 judgment. Jefferson v. Big Horn County, 2000 MT 163, 300 M 284, 4 P3d 26, 57 St. Rep. 682 (2000).

Insufficient Good Cause to Allow Deviation From Adoption Placement Standards of Indian Child Welfare Act: When the Indian child in this matter was 12 weeks old, she was admitted to the hospital with 16 fractured ribs in various stages of healing and several bruises. The attending physician determined that the injuries were a result of abuse, and the child was placed in foster care with a non-Indian family. The District Court held that the child's extraordinary physical and emotional needs constituted good cause to deviate from the Indian Child Welfare Act of 1978 (ICWA) placement provisions regarding adoptive placement with tribal extended family members. The District Court decided that the federal statutory factors were merely examples rather than an exhaustive list of circumstances of good cause and instead applied the Montana best interests of the child standard, concluding that nine extraordinary physical and emotional needs existed, including the child's strong emotional bond with the non-Indian foster family, that warranted deviation from the ICWA. The Supreme Court reversed, finding that the District Court's conclusion was an incorrect application of the law. The ICWA guidelines in 25 U.S.C. 1915(a) provide that a determination of good cause to avoid the placement preferences must be based on one or more of three stated factors, which are the only circumstances constituting good cause. The ICWA guidelines will be strictly applied and liberally construed in favor of a result that is consistent with the preferences in that Act. The emotional attachment between a non-Indian custodian and an Indian child does not necessarily outweigh the interests of the tribe and the child in having the child raised in an Indian community, nor does the child's emotional attachment to foster parents constitute an extraordinary emotional need sufficient to establish good cause to avoid the ICWA placement preferences. In re C.H., 2000 MT 64, 299 M 62, 997 P2d 776, 57 St. Rep. 300 (2000). See also In re Custody of S.E.G., 521 NW 2d 357 (Minn. 1994).

Dismissal of Petition for Temporary Investigative Authority Without Review of Guardianship Action — Harmless Error in Light of Requirements of Indian Child Welfare Act: In compliance with 41-3-403 (renumbered 41-3-423), the District Court ordered a show cause hearing at which to consider a petition for temporary investigative authority (TIA) regarding two Indian children. At the hearing, the Deputy County Attorney offered an order and memorandum from a previously dismissed guardianship proceeding as evidence. The court did not admit the documentation as evidence, but took judicial notice of it. However, at the end of the hearing, the court dismissed the petition for TIA without reviewing any records from the guardianship proceeding and ordered the Department of Public Health and Human Services to immediately place the children with their father. The mother contended that it was error to dismiss the petition without reviewing the guardianship file. In order for courts to grant TIA petitions when Indian children are involved, the requirements of the Indian Child Welfare Act must be met. Under 25 U.S.C. 1912, active efforts must be made to provide remedial services and rehabilitation programs to prevent the breakup of the Indian family. In addition, any finding that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child must be based on the testimony of qualified expert witnesses. Because these requirements were not met, the court could not have granted TIA even if it had reviewed the guardianship file, so its failure to do so, if erroneous, was harmless. In re M.P.M. & A.R.M., 1999 MT 78, 294 M 87, 976 P2d 988, 56 St. Rep. 327 (1999).

Error in Placing Custody With One Parent Following Dismissal of Petition for Temporary Investigative Authority: In compliance with 41-3-403 (renumbered 41-3-423), the District Court ordered a show cause hearing at which to consider a petition for temporary investigative authority

(TIA) regarding two Indian children. At the end of the hearing, the court dismissed the petition for TIA and ordered the Department of Public Health and Human Services to immediately place the children with their father. The Department argued on appeal that the court exceeded its authority in ordering transfer of custody to the father after the petition for TIA was dismissed. The Supreme Court held that when the District Court vacated the orders issued following filing of the petition for TIA, it did not have authority to place custody with the father because nothing in the statutory framework or legislative intent authorizes the placement of a child with one parent, as opposed to the other, following dismissal of a petition for TIA. The order transferring custody to the father was reversed. In re M.P.M. & A.R.M., 1999 MT 78, 294 M 87, 976 P2d 988, 56 St. Rep. 327 (1999).

Conditions of Tribal Affiliation Applicable to Indian Hiring Preference — Status of Individual Indian Not Controlling: Schmasow claimed that the Native American Center (NAC) should have hired her as executive director pursuant to an Indian employment preference provision, 25 U.S.C. 450e(b), that was contained in the NAC's contract with the Indian Health Service. The NAC instead hired Shield, another Indian, but Schmasow contended that Shield did not qualify for the employment preference because he was a member of the Little Shell Chippewa Tribe, which is not a federally recognized tribe listed by the U.S. Secretary of the Interior under 25 U.S.C. 479a-1. The District Court concluded that Shield was eligible for the preference, and Schmasow appealed. In affirming the District Court, the Supreme Court held that in order to satisfy the definitions of Indian and Indian tribe in the preference law, one must establish that the hired person's tribe is itself eligible for the health care benefits and that the status of an individual Indian is not controlling. The Little Shell Chippewa Tribe fits the definition of Indian tribe because it is part of an Indian community that receives federal Indian funding for special programs and services, even though it is not a federally recognized tribe. Because Shield was an enrolled member of the Little Shell Chippewa Tribe, he satisfied the definition of Indian and was eligible for the hiring preference. Schmasow v. Native Am. Center, 1999 MT 49, 293 M 382, 978 P2d 304, 56 St. Rep. 198 (1999).

Full Faith and Credit Afforded Out-of-State Renewable Child Support Judgment — Res Judicata Applicable: Article IV, sec. 1, U.S. Const., provides that full faith and credit be given in each state to the public acts, records, and judicial proceedings of every other state. As restated in Baker v. Gen. Motors Corp., 522 US 222, 139 L Ed 2d 580, 118 S Ct 657 (1998), a final judgment in one state, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land. When issues of jurisdiction have been determined by one court, the doctrine of res judicata precludes a second court from considering jurisdiction as long as the first court fully and fairly considered the issue, and that judgment, as to jurisdiction, is entitled to full faith and credit in the second court. In the present case, a Utah renewable child support judgment, in which the Utah court established jurisdiction of the parties, was entitled to full faith and credit in Montana, despite contentions by the husband that he no longer had minimum contacts with Utah after moving to Montana. The jurisdiction arguments raised before the Montana Supreme Court were identical to the arguments that were previously raised, fairly considered, and finally decided in Utah, precluding relitigation by the Montana court under res judicata. In re Child Support of Mason, 1998 MT 192, 290 M 253, 964 P2d 743, 55 St. Rep. 803 (1998), followed with regard to full faith and credit of a judgment by an out-of-state court following full and fair consideration of jurisdiction in Genuine Parts Co. v. Rascal's Auto Parts, Inc., 2008 MT 313, 346 M 56, 192 P3d 1153 (2008).

Tribal Sovereign Immunity and Immunity of Tribal Officials — Action Against Tribe and Tribal Officials to Void Tax Liens Filed Off Reservation — Action Void Because of Tribe's Sovereign Immunity: After officials of the Crow Tribe filed tax liens with Big Horn County to collect a reservation resort tax against his on-reservation business, Thompson filed an action in the District Court for Big Horn County to void the tax liens. The Crow Tribe moved to dismiss, citing its sovereign immunity, but the District Court refused to dismiss the suit and subsequently voided the tribe's tax liens. The Supreme Court held that sovereign immunity is in the nature of a jurisdictional defense and may be raised at any time by a party or may be raised sua sponte by the court. The Supreme Court therefore addressed only the issue of the tribe's sovereign immunity, noting that immunity was dispositive of all issues raised by the tribe in its appeal. Relying upon Wippert v. Blackfeet Tribe, 260 M 93, 859 P2d 420 (1993), and Kiowa Tribe of Okla. v. Mfg. Technologies, Inc., 523 US 751 (1998), the Supreme Court ruled that as a matter of federal law, the Crow Tribe is immune from suit except in so far as that immunity has been waived by the U.S. Congress. In so holding, the Supreme Court noted that in the Kiowa Tribe decision, the U.S. Supreme Court rejected the idea that a tribe's sovereign immunity is confined to transactions

that occur on an Indian reservation and to tribal government activities. The Montana Supreme Court held that it makes no difference that the Crow Tribe was alleged to have acted outside the scope of the tribe's sovereignty or beyond its authority in filing the tax liens in Big Horn County; the sovereign immunity of the tribe still applies. Relying upon other federal cases, including U.S. v. Yakima Tribal Court, 806 F2d 853 (9th Cir. 1986), the Montana Supreme Court also held that the tribe's sovereign immunity shields tribal officials as well as the tribe itself if those officials are acting in their official capacity and within the scope of their authority. Noting that there was nothing in the District Court record indicating that the tribal officials were acting other than in their official capacity and within the scope of their authority, the Supreme Court reversed and remanded to the District Court for dismissal of Thompson's lawsuit. Thompson v. Crow Tribe of Indians, 1998 MT 161, 289 M 358, 962 P2d 577, 55 St. Rep. 647 (1998).

Road Construction and Maintenance — No Tribal Jurisdiction: The Montana Department of Transportation constructs and maintains, with federal financial assistance, Highways 2, 66, and 191, which cross the Fort Belknap Reservation. The Fort Belknap Tribal Employment Rights Office (TERO) ordered the Department to cease work pending compliance with its TERO ordinance, which included an employment preference for tribal members, a $100 registration fee for each nonmember employee, and a $250 fine for nonregistered employees. The Department ceased work on the reservation and filed an action in District Court, seeking to enjoin the tribe from asserting regulatory jurisdiction over Department employees performing road construction and maintenance. In granting summary judgment for the Department, the court ruled that Montana had not consented to tribal regulation, nor has its historic immunity from suits by individuals been abrogated by the inherent sovereignty of the tribe. The tribe lacks the power to regulate the Department's governmental function of construction and maintenance of public roads pursuant to a cooperative agreement with the federal government within a federal highway system. The actions of the TERO directly implicate Montana's capacity to fulfill its sovereign responsibilities. As a result, the exercise of tribal sovereignty is inconsistent with the overriding interest of the national government. Dept. of Transportation v. Fort Belknap Indian Community Council, 22 MFR 461 (Nov. 13, 1997).

Accident Involving Hutterite Colony Member on Blackfeet Reservation — Tribal Court Jurisdiction Proper: Hofer, an employee of the Glendale Hutterite Colony who was returning along U.S. Highway 2 from a delivery for the Colony, collided with a vehicle driven by Connell, a tribal member. Connell sued Hofer and the Colony in Blackfeet Tribal Court, and the Colony moved to dismiss for lack of jurisdiction. When the tribal court denied the motion, Hofer filed a petition in District Court, alleging a lack of jurisdiction under the Strate and Wilson decisions. The District Court denied the petition, holding that unlike the defendants in either Strate or Wilson, Hofer was not simply traveling through a reservation on a public highway enroute to an off-reservation destination. The court noted that since Hofer is a resident of the Colony, which is located on the Blackfeet Reservation, and the Colony holds a permit to conduct business on the reservation, the Colony has a continuous and ongoing presence on the reservation. As a result, a question remains whether Hofer's conduct threatens or has some direct effect on the political integrity, economic security, health, or welfare of the tribe. Glendale Colony & Hofer v. Connell, 22 MFR 394 (Nov. 3, 1997).

Accident Involving Non-Indians on State Highway on Indian Land — Tribal Court Jurisdiction Improper: Fredericks, a non-Indian widow of a tribal member, filed suit in tribal court to recover for injuries received in a traffic accident on a 6-mile portion of state highway crossing the reservation in which Fredericks's vehicle collided with a gravel truck driven by a non-Indian and owned by A-1 Contractors, a non-Indian-owned business performing work within the boundaries of the reservation for a tribally owned corporation. Prior to the commencement of tribal court proceedings, A-1 Contractors filed an action in federal District Court, alleging that the tribal court lacked jurisdiction to adjudicate the claims. Relying on the United States Supreme Court's decisions in Nat'l Farmers Union and Iowa Mut., the District Court ruled that the tribal court had civil jurisdiction over the claims against A-1 Contractors. On appeal, a divided panel of the Eighth Circuit Court affirmed but was subsequently reversed in a rehearing en banc, ruling that under Mont. v. U.S., 450 US 544 (1981), the tribal court lacked subject matter jurisdiction over the claims. On appeal, the United States Supreme Court affirmed, ruling that the right-of-way across reservation land federally granted to North Dakota rendered the 6-mile stretch of road equivalent, for nonmember governance purposes, to alienated, non-Indian land. Absent a statute or treaty and the exceptions outlined in Mont. v. U.S., the civil authority of tribes and tribal courts does not extend to the actions of nonmembers arising out of accidents on state highways. Strate v. A-1 Contractors, 520 US 438, 137 L Ed 2d 661, 117 S Ct 1404 (1997).

Escheat to Tribe of Allotments Unconstitutional as "Taking": In 1983, Congress enacted the Indian Land Consolidation Act (ILCA), which attempted to ameliorate the fractionation or multiple ownership of single parcels of Indian land occurring as a result of the federal policy of allotment of Indian land. Section 207 of the ILCA provided that all interests in land that constituted 2% or less of the total acreage of allotted land and earned less than $100 in the preceding year would, upon the death of the owner, "escheat" or be transferred to the tribe instead of passing to heirs. Section 207 made no provision for payment of compensation to any interest holder. Subsequently, the legitimacy of section 207 was tested in Hodel v. Irving when Irving, an heir of members of the Oglala Sioux Tribe, filed an action alleging that section 207 effected a taking of property without just compensation. While Irving was still pending, Congress amended section 207. Youpee, an enrolled member of the Sioux and Assiniboine Tribes of the Fort Peck Reservation, died testate in 1990, devising several undivided interests in allotted trust lands, valued at $1,239, on reservations in Montana and North Dakota to his heirs, all enrolled tribal members. Pursuant to section 207, the Department of the Interior ruled that the land interests should escheat to the tribal governments at reservations in Montana and North Dakota. Youpee's heirs filed an action against the Department in District Court, alleging that section 207, as amended, constituted a taking of private property without just compensation. The District Court agreed and granted injunctive relief. On appeal, the Ninth Circuit Court affirmed. In affirming the Ninth Circuit Court's decision, the United States Supreme Court ruled that Congress's amendments did not cure the constitutional deficiency in the original version of section 207. Section 207 amounted to the virtual abrogation of the right to pass on a certain type of property and an unconstitutional taking of land without just compensation. Babbitt v. Youpee, 519 US 234 (1997).

No Enforcement of Tribal Court Judgment in Federal Court — Lack of Jurisdiction Over Underlying Claim: A vehicle driven by Wilson, an enrolled Blackfeet member, collided with Marchington, a non-Indian, as she attempted to exit Highway 2, a state highway crossing the Blackfeet Reservation. Wilson sued Marchington in tribal court and obtained a judgment that was upheld on appeal by the Blackfeet Court of Appeals. Claiming that her judgment was entitled to full faith and credit or comity, Wilson sued in federal District Court to register the judgment. After the District Court granted summary judgment for Wilson, Marchington appealed. Relying on Strate v. A-1 Contractors, 520 US 438, 137 L Ed 2d 661, 117 S Ct 1404 (1997), the Ninth Circuit Court reversed, ruling that the tribal judgment was not entitled to recognition or enforcement because the tribal court lacked subject matter jurisdiction to entertain the underlying claim against Marchington, a nonmember involved in an accident on a state highway. Wilson v. Marchington, 127 F3d 805, (9th Cir. 1997).

Attempt to Enjoin $250 Million Tribal Court Judgment Against Railroad — Exhaustion of Tribal Remedies Required: A jury in Crow Tribal Court awarded $250 million to five heirs of two Crow members who were killed when a Burlington Northern Railroad (BN) train hit their car at a railroad crossing on the Crow Reservation. Under the Crow Tribal Code, execution on the judgment was automatically stayed for 10 business days and BN was required to post bond in the amount of the verdict. BN refused to post bond and appealed the bond ruling to the Crow Court of Appeals. Before the tribal appellate court ruled on the bond question, BN sought and received a restraining order in federal District Court enjoining enforcement of the tribal court judgment, arguing that a federal court proceeding to enforce the judgment could provide its only opportunity to challenge the $250 million judgment. The District Court ordered BN to post a $5 million bond as security for the injunction, retained jurisdiction, and stayed all further proceedings pending exhaustion of tribal remedies. On appeal, the Ninth Circuit Court dissolved the injunction, holding that under Nat'l Farmer's Union Ins. Co. v. Crow Tribe, 471 US 845 (1985), the District Court erred in exercising its jusrisdiction since BN had not exhausted its remedies in the tribal courts or established that any exception to the exhaustion requirement applied. Burlington N. RR Co. v. Red Wolf, 106 F3d 868 (9th Cir. 1997). (Note: At the time of the Ninth Circuit Court's decision, the United States Supreme Court had not yet ruled in Strate v. A-1 Contractors, 520 US 438, 137 L Ed 2d 661, 117 S Ct 1404 (1997). Following Strate, BN applied for and was granted a writ of certiorari to the U.S. Supreme Court, which vacated the Ninth Circuit Court's decision and remanded the case for further consideration pursuant to Strate.

Sale of Trust Lands Within Flathead Reservation — No Jurisdiction Found for Purposes of Breach of Contract, Fraud, and Negligent Misrepresentation: Neuman, an enrolled member of the Confederated Salish and Kootenai Tribes, sought assistance from the Bureau of Indian Affairs (BIA) to clear the title to trust land within the Flathead Reservation so that Neuman could sell it. He also engaged a real estate broker. Both Neuman and prospective buyers, the Krauses, made

considerable efforts to consummate the sale, but Neuman was informed by the BIA that there was a substantial cloud on the title. Neuman therefore terminated the listing agreement, and the Krauses sued for damages, alleging breach of contract, fraud, constructive fraud, fraud in the inducement, and negligent misrepresentation. The District Court, on the recommendation of a special master and after applying the test laid out in State ex rel. Iron Bear v. District Court, 162 M 335, 512 P2d 1292 (1973), found a lack of subject matter jurisdiction. The Supreme Court held that 25 U.S.C. 345 and 28 U.S.C. 1353 vest exclusive jurisdiction in the federal courts over disputes involving allotted lands within Indian reservations and that 28 U.S.C. 1360 preempted its jurisdiction. The Supreme Court also held that the Krauses' lawsuit was a dispute involving title to allotted lands even though the action was a tort claim and breach of contract claim because all of the Krauses' claims could not be separated from questions of title to Indian trust lands. Noting that it had already held in In re Marriage of Wellman, 258 M 131, 852 P2d 559 (1993), that an attempt by state courts to adjudicate rights in Indian trust land for the purpose of money damages was precluded by federal law, the Supreme Court held that it made no difference that the Krauses had deleted from their complaint a prayer for specific performance. The claims could still not be separated from the issue of title to Indian lands. Krause v. Neuman, 284 M 399, 943 P2d 1328, 54 St. Rep. 937 (1997). In In re Estate of Big Spring, 2011 MT 109, 360 Mont. 370, 255 P.3d 121, the Supreme Court overruled Iron Bear in its entirety and Krause v. Neuman to the extent it relied on the Iron Bear test.

Previous Assumption of Jurisdiction by Tribal Court — Jurisdiction Improperly Sustained by State District Court: It was error for a state District Court to sustain jurisdiction when a tribal court had previously assumed jurisdiction over the parties and the subject matter by issuing a temporary restraining order against plaintiff. Abstention, as a matter of comity, was exercised by the Supreme Court in holding that jurisdiction was retained in the tribal court. Agri W. v. Koyama Farms, Inc., 281 M 167, 933 P2d 808, 54 St. Rep. 118 (1997), following State ex rel. Stewart v. District Court, 187 M 209, 609 P2d 290 (1980), In re Marriage of Limpy, 195 M 314, 636 P2d 266 (1981), and In re Marriage of Wellman, 258 M 131, 852 P2d 559 (1993).

Applicability of State Coal Taxes to Crow Coal — Crow Cases:

In 1978, the Crow Tribe brought action against Montana, seeking declaratory and injunctive relief against the imposition of the state's 30% coal severance and gross proceeds taxes on tribally owned coal mined from the Crow Reservation and the "ceded strip" by non-Indian lessees. While the District Court dismissed the action (469 F. Supp. 154 (D.C. Mont. 1979)), the Ninth Circuit Court, on appeal by the tribe, reversed and remanded (650 F2d 1104 (9th Cir. 1981), as amended by 665 F2d 1390 (9th Cir. 1982) (Crow I)). On remand, the District Court upheld the state's application of taxes for coal mined in the "ceded strip", but it abstained from deciding whether taxes could be imposed on the reservation boundaries (657 F. Supp. 573 (D.C. Mont. 1985)). On appeal, the Ninth Circuit Court reversed, ruling that federal law and policy preempted state taxation and that the taxes infringed on tribal sovereignty. The court also held that the question of whether coal mined on the reservation would be subject to taxation was a justiciable controversy (819 F2d 895 (9th Cir. 1987) (Crow II)). On appeal by the state, the Supreme Court affirmed the decision of the Ninth Circuit Court (108 S Ct 685 (1988)).

After Crow II, the District Court awarded the tribe over $23 million in severance taxes that the lessee Westmoreland had paid after 1982. The tribe then sought restitution of some $57 million in total taxes paid to the state and county between 1975 and 1982. The District Court denied the state's motion to dismiss the claim and certified an order for interlocutory appeal. After initially granting the leave to appeal, the Ninth Circuit Court dismissed the appeal, ruling that the states argument concerning privity had been resolved against the state in Crow II. Crow Tribe of Indians v. Mont., 969 F2d 848 (9th Cir. 1992) (Crow III).

After trial, the District Court denied relief, ruling that the tribe was not entitled to restitution. On appeal, a three-judge panel of the Ninth Circuit Court reversed, concluding that the District Court's denial of equitable relief was erroneously based on considerations explicitly rejected in the previous court decisions. The case was remanded to District Court for entry of an order directing the state and county to return the improperly collected taxes and for consideration by the court of the tribe's unresolved request for prejudgment interest. Crow Tribe of Indians v. Mont., 92 F3d 826 (9th Cir. 1996) (Crow IV), certiorari granted, 66 U.S.L.W. 3245 (U.S. Oct 7, 1997)(No.96-1984).

Authority of Tribal Police to Investigate Violations of State and Federal Law — State Jurisdiction on Reservation Not to Preclude Power of Tribal Police: With respect to crimes committed by non-Indians in Indian country, prosecution must be accomplished by either the state or federal government and the state may assume criminal jurisdiction over such crimes with

the consent of the affected tribe. However, simply because the state has jurisdiction over these cases does not mean that tribal police officers are precluded from investigating and gathering evidence of reservation offenses and then turning that evidence over to the proper jurisdiction with authority to prosecute the crime. Tribes have authority to enact ordinances regulating the conduct of their members and to employ officers to enforce those ordinances and to keep the peace. Tribal police officers have authority to restrain non-Indians who commit offenses within the exterior boundaries of the reservation and to eject them by turning them over to the proper authorities. Further, under Ortiz-Barraza v. U.S., 512 F2d 1176 (9th Cir. 1975), tribal police officers also have authority to investigate violations of state and federal law. As set out in St. v. Zackuse, 253 M 305, 833 P2d 143 (1992), the fact that a criminal investigation was conducted by a tribal law enforcement officer has no relevance in determining jurisdiction of the case. The fact that admissible evidence was gathered by peace officers employed by a jurisdiction without authority to prosecute does not render the evidence inadmissible per se for use by a jurisdiction that does have authority to prosecute. St. v. Haskins, 269 M 202, 887 P2d 1189, 51 St. Rep. 1474 (1994).

Lack of Subject Matter Jurisdiction Over Tribe — Motion for Relief From Judgment Not Subject to Time Constraints: After protracted litigation involving a tribal security interest in cows of tribal members, the Blackfeet Tribe filed a motion for relief from judgment pursuant to former Rule 60(b)(4), M.R.Civ.P. (now superseded), based upon a contention that the District Court lacked jurisdiction. No response to the motion was ever made by the District Court. Eighteen months later, the Blackfeet Tribe then filed a motion to dismiss for lack of subject matter jurisdiction, and the District Court granted the motion approximately 6 years later. The Supreme Court held that even though under normal circumstances the motion was considered denied after 45 days and the District Court would then have lost jurisdiction, the ability of a party to invoke the rules concerning subject matter jurisdiction transcend normal procedural consideration. Thus, the Blackfeet Tribe's motion to dismiss was not subject to time constraints. The fact that it was filed 18 months after judgment was entered and the fact that the District Court took 6 years to rule on the motion did not deprive the District Court of jurisdiction. Wippert v. The Blackfeet Tribe, 260 M 93, 859 P2d 420, 50 St. Rep. 973 (1993), overruled in part by Green v. Gerber, 2013 MT 35, 369 Mont. 20, 303 P.3d 729. See also In re Marriage of Skillen, 1998 MT 43, 287 M 399, 956 P2d 1, 55 St. Rep. 147 (1998), overruled in In re Estate of Big Spring, 2011 MT 109, 360 Mont. 370, 255 P.3d 121.

Loan of Money by Tribe and Tribe's Defense of Legal Action Not Constituting Waiver of Sovereign Immunity: In 1977, the Blackfeet Tribe credit committee loaned Wipperts money and took a security interest on Wipperts' cows. After default and levy on the cows, Wipperts filed a declaratory judgment action against the tribe, which the tribe defended. The District Court held that the Blackfeet Tribe did not waive its sovereign immunity by loaning the money or defending the action. The Supreme Court affirmed, holding that the loan was made by a committee under the powers of the tribal council. The tribal council acts in its corporate status pursuant to sections 16 and 17 of the federal Indian Reorganization Act. That Act authorizes two distinct legal entities, one governed by a constitution and the other governed by a corporate charter. Citing Kennerly v. U.S., 721 F2d 1252 (9th Cir. 1983), the Supreme Court held that in assuming the powers authorized by the Act, the tribal council did not waive its sovereign immunity in the express terms required by Santa Clara Pueblo v. Martinez, 436 US 49 (1978), nor did the tribe waive its sovereign immunity by defending the legal action against it, as it had no choice but to defend against the declaratory judgment action. Wippert v. The Blackfeet Tribe, 260 M 93, 859 P2d 420, 50 St. Rep. 973 (1993), overruled in part on other grounds by Green v. Gerber, 2013 MT 35, 369 Mont. 20, 303 P.3d 729.

Marriage Dissolution Brought by Tribal Member Against Non-Indian Spouse — Jurisdiction to Apportion Indian Trust Land: Wife who was a member of the Blackfeet Tribe sought a marriage dissolution in state court from her husband who was a non-Indian. The District Court granted the dissolution but held it did not have jurisdiction to apportion the parties' marital estate, which consisted of about 4,000 acres of Indian trust land on the Blackfeet Reservation, and granted wife's motion to dismiss. On appeal, husband contended that the state court had jurisdiction, relying on a provision in the Blackfeet Tribal Law and Order Code that all divorces must be consummated in accordance with Montana law. However, that provision did not cede jurisdiction to the state but merely governed the tribal court's choice of law. While the state has an interest in ensuring the existence of a forum in which marital property within its borders may be apportioned upon a dissolution, that interest is met by the availability of an alternative forum in the Blackfeet Tribal Court. The state's interest in the property and proceedings is inconsequential compared with the

federal and tribal interests at stake. Therefore, the District Court did not err in concluding that it lacked jurisdiction to adjudicate the disposition of the Indian trust land that was the parties' only significant marital asset. In re Marriage of Wellman, 258 M 131, 852 P2d 559, 50 St. Rep. 462 (1993), following White Mountain Apache v. Bracker, 448 US 136, 65 L Ed 2d 665, 100 S Ct 2578 (1980), and N. Mex. v. Mescalero Apache Tribe, 462 US 324, 76 L Ed 2d 611, 103 S Ct 2375 (1983), and distinguishing Sheppard v. Sheppard, 655 P2d 895 (Idaho 1982). In re Marriage of Wellman was followed as to lack of jurisdiction over trust lands, in context of sale of real property, in Krause v. Neuman, 284 M 399, 943 P2d 1328, 54 St. Rep. 937 (1997).

Gambling — Non-Indian Defendants for Crimes Committed on Reservation — Criminal Law Jurisdiction — Standing: The state has jurisdiction over non-Indian defendants for crimes committed on the reservation when there is no Indian victim. Non-Indian defendants do not have standing to raise the argument that the action of the state interferes with the self-government of the Blackfeet Reservation. The state has authority to regulate gambling by non-Indians on the Blackfeet Reservation. State ex rel. Poll v. District Court, 257 M 512, 851 P2d 405, 50 St. Rep. 387 (1993).

No Federal or Tribal Recognition as Indian — Not Indian for Purposes of Criminal Jurisdiction: Defendant who was adopted by an Indian parent but who failed to submit proof that his adoptive parent's tribe recognized him as an Indian and who is not an enrolled member of any Indian tribe and receives no federal benefits as an Indian is not an Indian for purposes of criminal jurisdiction. State ex rel. Poll v. District Court, 257 M 512, 851 P2d 405, 50 St. Rep. 387 (1993).

Jurisdiction Over Off-Reservation Income of Indian Living on Reservation: The Department of Social and Rehabilitation Services (now Department of Public Health and Human Services) attached off-reservation unemployment benefit income of an enrolled tribal member living on the reservation for payment of a child support obligation. The Supreme Court held that the collection action was a quasi in rem action and that the state had jurisdiction over the benefits because they were located within the territorial limits of the state and jurisdiction was not based on the presence of the tribal member. First v. St., 247 M 465, 808 P2d 467, 48 St. Rep. 261 (1991).

Two-Prong Test Adopted for Determining Indian Status: In a criminal case, the defendant argued that his conviction should be overturned on the basis that he was an Indian and the state did not have jurisdiction to prosecute him. The Supreme Court specifically adopted the two-prong test for determining Indian status established in U. S. v. Rogers, 45 US 567, 11 L Ed 1105 (1846), in ruling that the defendant was not an Indian. The test adopted by the court was: (1) the defendant must have a significant amount of Indian blood; and (2) the defendant must have federal or tribal recognition as an Indian. St. v. LaPier, 242 M 335, 790 P2d 983, 47 St. Rep. 760 (1990), followed in State ex rel. Poll v. District Court, 257 M 512, 851 P2d 405, 50 St. Rep. 387 (1993).

Exclusive Jurisdiction Over Indian Child Under Indian Child Welfare Act: Provisions of the Indian Child Welfare Act of 1978 (25 U.S.C. 1901, et seq.) concerning jurisdiction over Indian child custody proceedings place exclusive jurisdiction in the Indian tribe if an Indian child is a ward of the tribal court, regardless of the residence or domicile of the child. In this adoption proceeding, it was error on the part of the District Court to determine that Montana had concurrent jurisdiction over the child at issue because the tribal court previously had found her a ward of the tribal court. In re M.R.D.B., 241 M 455, 787 P2d 1219, 47 St. Rep. 303 (1990). See also In re Marriage of Skillen, 1998 MT 43, 287 M 399, 956 P2d 1, 55 St. Rep. 147 (1998).

Lack of Jurisdiction in Civil Dispute Arising Between Indians on Reservation: In the absence of an express directive giving the state jurisdiction over tribal members, the state courts of Montana do not have subject matter jurisdiction over a civil dispute, brought by an Indian alleging tortious conduct by another Indian, arising on the reservation where both are members of the same tribe. Liberty v. Jones, 240 M 16, 782 P2d 369, 46 St. Rep. 1905 (1989). See also Balyeat Law, PC v. Pettit, 1998 MT 252, 291 M 196, 967 P2d 398, 55 St. Rep. 1038 (1998) (the state has no jurisdiction over an action to collect a debt for medical bills arising out of transactions, either on or off the reservation, brought by a non-Indian creditor against an enrolled tribal member residing on a reservation whose spouse incurred the debt but who engaged in no significant off-reservation contacts so as to subject herself to state jurisdiction).

State Jurisdiction to Punish Criminal Violations of State Liquor Laws by Indians in Indian Country: Under the holding in Rice v. Rehner, 463 US 713 (1983), and 18 U.S.C. 1161, the state has the power to enforce state criminal statutes against Indians for violations of state law relating to the sale or possession of liquor within Indian reservations. Brown v. District Court, 238 M 248, 777 P2d 877, 46 St. Rep. 1242 (1989).

Non-Indian Owner of Pipeline Located on Reservation Without Standing to Raise Federal Preemption Issue of Tribal Self-Government: A non-Indian company that owned a pipeline on a reservation argued that the state's tax interfered with the tribes' rights of self-government and was therefore preempted by the federal constitution. The Supreme Court ruled that while the company had standing by virtue of its taxpayer status to challenge the property tax, it did not have a sufficient personal stake in the self-government interests of the tribes to argue the federal preemption issue of tribal self-government. N. Border Pipeline Co. v. St., 237 M 133, 772 P2d 839, 46 St. Rep. 668 (1989), followed in Hagener v. Wallace, 2002 MT 109, 309 M 473, 47 P3d 847 (2002).

Preemption Clause Not Violated by State Tax on Pipeline Located on Reservation and Owned by Non-Indian Company: The state sought to collect property tax from a non-Indian company that owned a pipeline located on a reservation. The pipeline was on trust property held by the federal government for the benefit of several tribes. The Supreme Court found that the specific federal regulations cited by the company represented only slight federal and tribal interests and did not of themselves preempt the state's tax. The court also found that much of the revenue generated by the tax was used by the state to fund education of tribal members, to maintain roads, and to undertake certain law enforcement duties for some crimes by non-Indians on the reservation and for any vandalism to the pipeline. The court ruled that the state's interest in funding the school districts and in providing local services outweighed the federal or tribal interests asserted by the company. N. Border Pipeline Co. v. St., 237 M 133, 772 P2d 839, 46 St. Rep. 668 (1989).

Property Tax on Pipeline Owned by Non-Indians and Located on Reservation Not in Violation of Federal Due Process Clause or Indian Commerce Clause: The Supreme Court ruled that the property tax at issue was assessed based on the value of the pipeline found within the state and that the revenue obtained was used to provide governmental services to the tribes and the pipeline owner, thus creating a sufficient nexus to withstand a due process challenge. The court went on to find that the allegations of the pipeline owner that the tax would create future injury to tribal revenue did not rise to the level of undue discrimination or burden on Indian enterprise and therefore did not render the tax void under the Indian commerce clause. N. Border Pipeline Co. v. St., 237 M 133, 772 P2d 839, 46 St. Rep. 668 (1989).

Property Tax on Pipeline Owned by Non-Indians and Located on Reservation Not in Violation of The Enabling Act: Montana's tax on a non-Indian company that owned a pipeline on a reservation does not violate The Enabling Act because under the Act the state gives up its proprietary rights to Indian lands but not its governmental or regulatory authority. N. Border Pipeline Co. v. St., 237 M 133, 772 P2d 839, 46 St. Rep. 668 (1989).

Jurisdiction of Victimless Crime by Non-Indian on Reservation: The District Court held that state courts do not have jurisdiction over the crime of failing to report an accident when the incident occurred within the reservation, the driver was a non-Indian, and the property belonged to an Indian. The Supreme Court found that the offense should be analyzed as a victimless crime for purposes of determining jurisdiction because the alleged criminal act was failure to discharge a reporting duty, not infliction of damage upon property belonging to an Indian. Under the authority of U.S. v. Wheeler, 435 US 313, 55 L Ed 2d 303, 98 S Ct 1079 (1978), Draper v. U.S., 164 US 240, 41 L Ed 419, 17 S Ct 107 (1896), and 18 U.S.C. 1152, federal and tribal interests in providing a federal forum failed to outweigh the state's strong interest in public safety. The policy of providing a federal forum when criminal prosecutions pit the interests of non-Indian offenders against Indian victims was not furthered where, as here, the connection to destruction of Indian property was only tangential to the crime charged; therefore, the state's interests controlled. St. v. Thomas, 233 M 451, 760 P2d 96, 45 St. Rep. 1627 (1988), followed in St. v. Haskins, 269 M 202, 887 P2d 1189, 51 St. Rep. 1474 (1994).

Tribal Court Jurisdiction: The tribal court in which an action is brought should be permitted to determine its own jurisdiction. Tribal remedies should be exhausted before jurisdiction is reviewed by a federal court. State courts are divested of jurisdiction if its exercise will interfere with tribal sovereignty and self-government. Iowa Mut. Ins. Co. v. LaPlante, 480 US 9, 94 L Ed 2d 10, 107 S Ct 971 (1987). See also Wellman v. Chevron U.S.A., Inc., 815 F2d 577 (9th Cir. 1987).

State Water Court — Jurisdiction to Adjudicate Indian Reserved Water Rights: In an original proceeding to determine jurisdiction of the Water Court over Indian tribes and water flowing through state reservations, the Supreme Court held that this article of the Montana Constitution does not bar state jurisdiction to adjudicate Indian reserved water rights. With the 1952 McCarran amendment, the U.S. Congress diminished the scope of absolute federal jurisdiction by allowing state courts concurrent jurisdiction to adjudicate federal water rights. In Colo. River Water Conserv. District v. U.S., 424 US 800 (1976), the U.S. Supreme Court held

that the McCarran amendment applied to Indian water rights. The state legislature's enactment of the Water Use Act (Title 85, ch. 2) pursuant to Art. IX, sec. 3, Mont. Const., constitutes a valid and binding consent of the people of Montana to Congress' grant of state jurisdiction over Indian reserved water rights. State ex rel. Greely v. Confederated Salish & Kootenai Tribes, 219 M 76, 712 P2d 754, 42 St. Rep. 1856 (1985), followed in Blackfeet Indian Nation v. Hodel, 634 F. Supp. 646, 43 St. Rep. 863 (D.C. Mont. 1986). As to reserved fishery waters, see Joint Bd. of Control of the Flathead, Mission, & Jocko Irrigation Districts v. U.S., 832 F2d 1127 (9th Cir. 1987).

Civil Controversy Between Indian and Non-Indian — No Jurisdiction: In a civil dispute between a non-Indian and an enrolled member of the Fort Peck Sioux and Assiniboine Tribes, arising within the boundaries of the reservation, the District Court's exercise of jurisdiction interferes with tribal sovereignty and the right to self-government of the tribes. Subject matter jurisdiction over civil litigation between Indians and non-Indians arising out of conduct on an Indian reservation is governed by the three-part test of State ex rel. Iron Bear v. District Court, 162 M 335, 512 P2d 1292 (1973). Under that test, before a District Court can assume jurisdiction in any matter submitted to it, it must determine subject matter jurisdiction by considering: (1) whether the applicable federal treaties and statutes have preempted state jurisdiction; (2) whether the exercise of state jurisdiction would interfere with tribal self-government; and (3) whether the tribal court is currently exercising jurisdiction or has exercised jurisdiction in such a manner as to preempt state jurisdiction. The first and second elements are disjunctive; if either is present, as in the present case, the state lacks subject matter jurisdiction. Milbank Mut. Ins. Co. v. Eagleman, 218 M 58, 705 P2d 1117, 42 St. Rep. 1393 (1985). In In re Estate of Big Spring, 2011 MT 109, 360 Mont. 370, 255 P.3d 121, the Supreme Court overruled Iron Bear in its entirety and Milbank Mut. Ins. Co. v. Eagleman to the extent it relied on the Iron Bear test.

State Taxation — Congressional Consent Required: State taxation of tribal income from activities carried on within boundaries of the reservation is impermissible unless Congress has expressly consented to the imposition of the tax. Blackfeet Tribe of Indians v. Mont., 729 F2d 1192 (9th Cir. 1984).

Application of New Car Tax and Personal Property Tax to Indian Tribes and Individuals: The Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation and the enrolled members of those tribes residing on that reservation are exempt from payment of the new car sales tax imposed by 61-3-502 (now repealed) and the personal property tax imposed by 61-3-503; Indians residing on that reservation and not enrolled in either of the tribes are subject to the taxes. The Assiniboine & Sioux Tribes v. Mont., 568 F. Supp. 269, 40 St. Rep. 1318 (D.C. Mont. 1983).

Indian Water Rights — State Court Jurisdiction: The McCarran Amendment, 43 U.S.C. 666, grants state courts jurisdiction over the United States when litigation involves comprehensive adjudication of water rights and the United States is a necessary party. In Article I of the constitution, Montana expressly disclaims jurisdiction over Indian lands. Whatever limitation the enabling acts of federal policy may have originally placed on state court jurisdiction over Indian water rights, those limitations were removed by the McCarran Amendment. Concurrent federal proceedings brought by Indian tribes are likely to be duplicative and wasteful and subject to dismissal under rule that waiver of sovereign immunity of the U.S. as to comprehensive state water rights adjudications provides state courts with jurisdiction to adjudicate Indian water rights held in trust by the U.S. The U.S. District Courts properly deferred to pending state proceedings. Ariz. v. San Carlos Apache Tribe of Ariz., 103 S Ct 3201, 77 L Ed 2d 837 (1983), reversing N. Cheyenne Tribe v. Adsit, 668 F2d 1080 (9th Cir. 1982); followed in Blackfeet Indian Nation v. Hodel, 634 F. Supp. 646, 43 St. Rep. 863 (D.C. Mont. 1986).

Bighorn Riverbed — Title to Montana: The United States in its own right and as fiduciary on behalf of the Crow Tribe of Indians sought to quiet title to the bed and banks of the Bighorn River. The U.S. District Court (457 F.Supp. 599) declared the state of Montana owned the bed and banks. The 9th Circuit Court of Appeals reversed and remanded (604 F2d 1162). The Supreme Court held that the fact that the bed of a body of navigable water lies within the boundaries described by treaty with the Indians does not make the riverbed part of the conveyed land. There is a strong presumption against conveyance that must be overcome by express reference or clear and special wording. No such language was found in treaties with the Crow, and the Supreme Court held that title to the bed of the Bighorn River passed to Montana upon its admission to the Union. The Court also found no inherent sovereignty in the tribe to regulate non-Indian hunting and fishing on the non-Indian lands within the reservation. Mont. v. U.S., 450 US 544, 101 S Ct 1245 (1981). See also Burlington N. Santa Fe RR Co. v. Assiniboine & Sioux Tribes of the Fort Peck Reservation, 323 F3d 767 (9th Cir. 2003), containing a discussion of Mont. v. U.S. as it relates to jurisdiction over non-Indian fee lands consisting of railroad federally chartered right-

of-way. See also Smith v. Salish Kootenai College, 378 F3d 1048 (2004), affirmed in 434 F3d 1127 (9th Cir. 2006), applying the Mont. v. U.S. factors to tort claims on a reservation.

URESA Action — Personal Jurisdiction Over Tribal Member — Motion to Dismiss Improperly Denied: Where the respondent had previously married the appellant, an enrolled member of the Crow Indian Tribe living on the Crow Indian Reservation, in Colorado and had been separated from him there and brought a Uniform Reciprocal Enforcement of Support Act (URESA) action in Colorado for enforcement of child support payments, the District Court erred in denying the appellant's motion to dismiss for lack of personal jurisdiction over the appellant. All of the appellant's off-reservation contacts are with Colorado, not with Montana. Under the reasoning of State ex rel. Flammond v. Flammond, 190 M 350, 621 P2d 471, 37 St. Rep. 1991 (1980), the court had neither subject matter nor personal jurisdiction. State ex rel. Three Irons v. Three Irons, 190 M 360, 621 P2d 476 (1980).

Application of State Income Tax to Indians: State authority within the exterior boundaries of an Indian reservation is limited, and since the Buck Act (4 U.S.C. 105, et seq.) provides that unless by treaty, The Enabling Act, or other federal law there is an express cession of taxation authority by the federal government to the state, the state may not tax the income derived solely from reservation sources of an Indian living on an Indian reservation regardless of whether the Indian is an enrolled member of a tribe of that reservation. LaRoque v. St., 178 M 315, 583 P2d 1059, 35 St. Rep. 1281 (1978), followed in St. v. Bird, 252 M 438, 829 P2d 941, 49 St. Rep. 339 (1992), with regard to lack of state authority to impose individual income taxes on enrolled tribal member residing within reservation who was employed mining coal in "ceded strip", in accord with Crow Tribe v. Mont., 650 F2d 1104 (9th Cir. 1981), and with Crow Tribe v. Mont., 819 F2d 895 (9th Cir. 1987).

Execution Upon Reservation: A judgment of a District Court rendered upon a commercial transaction conducted outside the exterior boundaries of a reservation is valid. The court, having jurisdiction, may execute upon wages earned on a reservation by a member of a tribe, and that process does not interfere with the tribe's right to make its own rules and be governed by them. The subject matter of the suit was off-reservation in that the tribe provided no means of enforcing state court judgments, there was no method of attaching property, and the tribe was not subject to the full faith and credit clause. Until the tribe provides a means of enforcement, there is no interference with tribal jurisdiction. Little Horn Bank v. Stops, 170 M 510, 555 P2d 211 (1976).

State Subject Matter Jurisdiction: Defendant cannot claim state lacks subject matter jurisdiction when plaintiff seeks cancellation of a deed conveying land situated within exterior boundaries of Crow Indian Reservation after issuance of a fee patent, as federal restrictions terminate upon issuance freeing United States from its trustee duties and alter relationship of land and plaintiff to the state of Montana. Woodtick v. Crosby, 169 M 38, 544 P2d 812 (1976).

Jurisdiction — Hunting and Fishing: The Flathead Tribe had jurisdiction to regulate fishing upon Crow Creek Reservoir, and violation of tribal ordinance requiring permit for fishing constituted federal offense. U.S. v. Zempel, 32 St. Rep. 1130 (D.C. Mont. 1975) (apparently not reported in Federal Supplement).

Montana Law on Reservations: The federal District Court for Montana will apply the substantive civil law of Montana in all nonfederal law cases involving reservation Indians and reservation transactions when there is no clearly ascertainable Indian law. Wippert v. Burlington N., Inc., 397 F. Supp. 73 (D.C. Mont. 1975).

Article Attorney General's Opinions

Light Vehicle Registration Fee Not Assessable Against Certain Indian-Owned Vehicles or Vehicles Owned by Nonresident Active Duty Military Personnel: Although designated as a fee, the light vehicle registration fee enacted by referendum in 1999 actually functions as a three-tiered, value-based annual motor vehicle tax. The fee is not related to the cost of administering the vehicle registration system, and fee revenue is distributed in essentially the same manner as the sales taxes and value taxes that it replaced. Thus, sharing many of the salient characteristics of and being substantively indistinguishable from the taxes that it replaced, the fee is functionally a tax and, like the taxes that it replaced, may not be levied against tribally owned vehicles or vehicles owned by enrolled tribal members residing on their reservations or against the personal vehicles of nonresident active duty military personnel stationed in Montana. 48 A.G. Op. 24 (2000). See also 39 A.G. Op. 45 (1981).

Eligibility for Coal Impact Grants: "Local governmental units" eligible to receive impact grants from the Coal Board under 90-6-205 and 90-6-206 include counties, incorporated cities and towns, consolidated local governments, school districts, and any other statutorily created government unit or district empowered to exercise delegated sovereign powers over a defined

geographical region of the state, such as county water and sewer districts, rural improvement districts that include areas of more than one county and have separate governing bodies (counties may apply for grants to pay for rural improvement district expenses), and special improvement districts within cities, towns, and consolidated units. Opinion No. 74, Volume 36, of the Official Opinions of the Attorney General is overruled except that portion excluding Indian tribes from impact grant eligibility. (See 1983 amendment made by Ch. 690, to 90-6-205, inserting federally recognized Indian tribes.) 37 A.G. Op. 22 (1977).

Application of Streambed Act on Indian Reservations: The Natural Streambed and Land Preservation Act of 1975 does not apply to projects constructed by Indians within the reservations, but projects constructed by non-Indians on non-Indian land within a reservation may be regulated by the state if it does not interfere with tribal self-government. 37 A.G. Op. 15 (1977).

Applicability of Strip-Mining and Reclamation Law: The Montana Strip and Underground Mine Reclamation Act is not applicable to the prospecting for, mining by strip-mining methods, or removal of coal on lands within the Northern Cheyenne Indian Reservation covered by a coal lease from the tribe. 35 A.G. Op. 54 (1973).

Article Law Review Articles

A Non-Indian Entity Is Polluting Indian Waters: "Water" Your Rights to the Waters and "Water" Ya Gonna Do About It?, Hanlon, 69 Mont. L. Rev. 173 (2008).

Smith v. Salish Kootenai College: Self-Determination as Governing Principle or Afterthought in Tribal Civil Jurisdiction Jurisprudence?, Ducheneaux, 68 Mont. L. Rev. 211 (2007).

"I'm an Indian Outlaw, Half Cherokee and Choctaw": Criminal Jurisdiction and the Question of Indian Status, Meyring, 67 Mont. L. Rev. 177 (2006).

Indian Aboriginal and Reserved Water Rights, an Opportunity Lost, Carter, 64 Mont. L. Rev. 377 (2003).

The Challenge of "Differentiated Citizenship": Can State Constitutions Protect Tribal Rights?, Tsosie, 64 Mont. L. Rev. 199 (2003).

The Next Chapter in the Taking of Judicial Power From the Tribes: Burlington Northern Railroad Company v. Red Wolf, Griffith, 62 Mont. L. Rev. 339 (2001).

The End (of This Discussion) of Tribal Sovereignty, Jensen, 60 Mont. L. Rev. 35 (1999).

The Constitution of the United States Applies to Indian Tribes: A Reply to Professor Jensen, Poore, 60 Mont. L. Rev. 17 (1999).

The Continuing Vitality of Tribal Sovereignty Under the Constitution, Jensen, 60 Mont. L. Rev. 3 (1999).

The Constitution of the United States Applies to Indian Tribes, Poore, 59 Mont. L. Rev. 51 (1998).

Tribal Courts and the Federal Judiciary: Opportunities and Challenges for a Constitutional Democracy, Pommersheim, 58 Mont. L. Rev. 313 (1997).

Accommodating Indian Religions: The Proposed 1993 Amendment to the American Indian Religious Freedom Act, Simpson, 54 Mont. L. Rev. 19 (1993).

Crow Tribe v. Montana: New Limits on State Intrusion Into Reservation Rights, New Lessons for State and Tribal Cooperation, Bellis, 50 Mont. L. Rev. 133 (1989).

State Regulation in Indian Country: The Supreme Court's Marketing Exemptions Concept, A Judicial Sword Through the Heart of Tribal Self-Determination, Fredericks, 50 Mont. L. Rev. 49 (1989).

Criminal Jurisdiction in Montana Indian Country, Wilson, 47 Mont. L. Rev. 513 (1986).

Federalism and State Constitutions: The New Doctrine of Independent and Adequate State Grounds, Elison and NettikSimmons, 45 Mont. L. Rev. 177 (1984).

Adjudication of Indian Water Rights: Implementation of the 1979 Amendments to the Water Use Act, Lamb, 41 Mont. L. Rev. 73 (1980).

Comments on Indian Water Rights, Morrison, 41 Mont. L. Rev. 39 (1980).

State v. Stasso: Off-Reservation Hunting Rights, Beck, 39 Mont. L. Rev. 323 (1978).

Oliphant v. Schlie: Tribal Criminal Jurisdiction of Non-Indians, Mitchell, 38 Mont. L. Rev. 339 (1977).

Epilogue in Spite of the Law: A Social Comment on the Impact of Kennerly and Crow Tribe, Schwechten, 33 Mont. L. Rev. 317 (1972).

Jurisdiction and the Indian Credit Problem: Considerations for a Solution, Mudd, 33 Mont. L. Rev. 307 (1972).

State Civil Power Over Reservation Indians, Sullivan, 33 Mont. L. Rev. 291 (1972).

Regulatory Jurisdiction on Indian Reservations in Montana, Carter, 5 Pub. Land L. Rev. 147 (1984).

Namen II: Do the Tribes Have the Authority to Regulate Non-Indian Riparian Rights on Flathead Lake, Flies, 4 Pub. Land L. Rev. 170 (1983).

Northern Cheyenne Tribe v. Adsit, Vogel, 4 Pub. Land L. Rev. 157 (1983).

In the Aftermath of the Bighorn River Decision: Montana has Title, Indian Law Doctrines Are Clouded, and Trust Questions Remain, Arnott, 2 Pub. Land L. Rev. 1 (1981).

ARTICLE II
DECLARATION OF RIGHTS

Article Compiler's Comments

Prospective Operation: Section 3 of the Transition Schedule implementing the 1972 Montana Constitution provides: "Section 3. Prospective operation of declaration of rights. Any rights, procedural or substantive, created for the first time by Article II shall be prospective and not retroactive."

Former Constitutional Provision: This article is similar to Art. III, 1889 Mont. Const.

Section 1. Popular sovereignty.

Convention Notes

Identical to 1889 Constitution. Expresses the philosophy that government is founded on the will of the people and is for their good.

Compiler's Comments

Former Constitutional Provision: This section is similar to Art. III, sec. 1, 1889 Mont. Const.

Case Notes

DECISIONS UNDER 1972 CONSTITUTION

Preliminary Pleadings — Public's Right to Know: In a defamation case, an affirmative defense based on the privilege under 27-1-804(4) extends to newspaper accounts of preliminary pleadings. The Supreme Court acknowledged that the public has a right to know what happens in the judicial system, including the filing of civil suits. Cox v. Lee Enterprises, Inc., 222 M 527, 723 P2d 238, 43 St. Rep. 1476 (1986), followed, with respect to Commission on Practice investigation, in Lence v. Hagadone Inv., 258 M 433, 853 P2d 1230, 50 St. Rep. 601 (1993).

Classification of Existing Form of Government: The classification of the existing form of government under 7-3-111 through 7-3-114 is not an imposition of any particular form of government upon a local body but rather complies with the constitutional mandates of Art. XI, Mont. Const. Schuman v. Study Comm'n of Yellowstone County, 176 M 313, 578 P2d 291 (1978).

DECISIONS UNDER 1889 CONSTITUTION

Fundamental Part of State Law: Article III, sec. 1, 1889 Mont. Const., was a fundamental part of state law and served a legitimate function in aiding courts to arrive at a correct result. Cottingham v. St. Bd. of Examiners, 134 M 1, 328 P2d 907 (1958), overruled on other grounds in State ex rel. Ward v. Anderson, 158 M 279, 491 P2d 868 (1971).

People Presumed to Know Law in Exercising Power: The resignation of the Governor and assumption of his duties and powers by the Lieutenant Governor do not create a vacancy in the office of Governor and were not in violation of Art. III, sec. 1, 1889 Mont. Const., declaring that all political power is vested in and derived from the people, as depriving them of the right of electing a Governor, since they must be presumed to have known the law and to have chosen the Lieutenant Governor with knowledge that at any time during his term he might be called upon to discharge the duties of Governor for the residue of the latter's term. State ex rel. Lamey v. Mitchell, 97 M 252, 34 P2d 369 (1934).

Applies to Nomination of Candidates: The guarantee of Art. III, sec. 1, 1889 Mont. Const., referred as well to the right of naming candidates for public office as it did to the right of electors to vote for the candidates at the polls. State ex rel. Mills v. Stewart, 64 M 453, 210 P 465 (1922); State ex rel. Metcalf v. Wileman, 49 M 436, 143 P 565 (1914); State ex rel. Scharnikow v. Hogan, 24 M 383, 62 P 583 (1901).

Law Review Articles

Eighty Years of Indian Voting: A Call to Protect Indian Voting Rights, Jackson, 65 Mont. L. Rev. 269 (2004).

Section 2. Self-government.

Convention Notes

No change except in grammar. Gives Montanans the right to govern themselves and to determine their form of government.

Compiler's Comments

Former Constitutional Provision: This section is similar to Art. III, sec. 2, 1889 Mont. Const.

Case Notes

DECISIONS UNDER 1972 CONSTITUTION

Legislative Resolution in Excess of Initiative Power: In this original proceeding for a Writ of Injunction, plaintiffs sought an order declaring a constitutional initiative void and unconstitutional. The initiative, if adopted by the voters, would have amended the Montana Constitution to direct the 1985 Legislature to adopt a resolution requesting Congress to call a constitutional convention for the sole purpose of adopting a balanced budget amendment. It also would have required that if the resolution was not adopted within 90 legislative days, the Legislature would remain in session without pay until the resolution was adopted. The Supreme Court, in granting injunctive relief, held that although the initiative was in form a constitutional amendment, it was in substance a legislative resolution. The initiative power conferred by the Montana Constitution does not include the power to enact a legislative resolution. The electorate cannot circumvent the constitution by indirectly doing that which can be done directly. State ex rel. Harper v. Waltermire, 213 M 425, 691 P2d 826, 41 St. Rep. 2212 (1984).

Classification of Existing Form of Government: The classification of the existing form of government under 7-3-111 through 7-3-114 is not an imposition of any particular form of government upon a local body but rather complies with the constitutional mandates of Art. XI, Mont. Const. Schuman v. Study Comm'n of Yellowstone County, 176 M 313, 578 P2d 291 (1978).

DECISIONS UNDER 1889 CONSTITUTION

Fundamental Part of State Law: Article III, sec. 2, 1889 Mont. Const., was a fundamental part of state law and served a legitimate function in aiding courts to arrive at a correct result. Cottingham v. St. Bd. of Examiners, 134 M 1, 328 P2d 907 (1958).

Section 3. Inalienable rights.

Convention Notes

Revises 1889 constitution by adding three rights, relating to environment, basic necessities, and health. The last sentence is also new and provides that in accepting rights people have obligations.

Compiler's Comments

Former Constitutional Provision: This section is similar to Art. III, sec. 3, 1889 Mont. Const.

Case Notes

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DECISIONS UNDER 1972 CONSTITUTION

Same-Sex Couples Seeking Declaratory and Injunctive Relief for Rights Afforded Married Couples — Relief Exceeds Bounds of Justiciable Controversy — Remanded to Allow Plaintiffs to Amend Complaint: Six same-sex couples filed suit against the state seeking declaratory and injunctive relief in order to receive protections and benefits equal to those provided to married couples under state law. Although they claimed that Montana's statutory scheme denied them several rights under Article II of the Montana Constitution — among them, the rights to equal protection, due process, and dignity — the plaintiffs did not seek a declaration that particular statutes were unconstitutional. The District Court granted the state's motion to dismiss, concluding that the matter exceeded the bounds of a justiciable controversy and that to grant the plaintiffs the broad injunction and declaratory judgment they sought would not terminate the controversy giving rise to the proceeding. On appeal, the Supreme Court affirmed the dismissal

but remanded the matter to the District Court to allow the plaintiffs the opportunity to amend their complaint to identify the statutes they claim violate their constitutional rights. Donaldson v. St., 2012 MT 288, 367 Mont. 228, 292 P.3d 364.

Leasing State Land Mineral Interests Without Environmental Review — No Violation of Right to Clean and Healthful Environment: Plaintiffs sought declaratory rulings that the State Land Board wrongfully failed to conduct environmental studies required by the Montana Constitution prior to entering leases with the coal company. Section 77-1-121(2) expressly exempts the State Land Board from conducting any environmental review under the Montana Environmental Policy Act (MEPA) prior to issuing a lease as long as the lease is subject to further state permitting regulations. The Supreme Court held that because the leases did not remove any action by the coal company from environmental review or regulation provided by Montana law, such environmental review was only deferred from the leasing stage to the permitting stage. The terms of the leases required the coal company to comply with all applicable state and federal laws and specifically with Montana laws regarding mine siting and reclamation as well as with the provisions of MEPA. Because the leases themselves did not allow for any degradation of the environment, the act of issuing the leases without environmental review under 77-1-121(2), did not violate Article II, section 3, or Article IX, section 1, 2, or 3, of the Montana Constitution. N. Plains Resource Council v. Mont. Bd. of Land Comm'rs, 2012 MT 234, 366 Mont. 399, 288 P.3d 169.

Right to Employment — Selling Medical Marijuana for Profit Not Fundamental Right: The District Court determined that medical marijuana is a legal product in Montana with an established licensing and distribution system and that consequently a statutory prohibition on accepting money for it implicates the fundamental right to pursue employment. On appeal, the Supreme Court reversed the District Court and determined the right to employment does not grant a right to or property interest in any particular job or employment. Moreover, the Legislature, in its exercise of the state's police powers, was permitted to circumscribe a right to protect the public health and welfare. Mont. Cannabis Indus. Ass'n v. St., 2012 MT 201, 366 Mont. 224, 286 P.3d 1161, following Wadsworth v. St., 275 Mont. 287, 911 P.2d 1165 (1996), and Wiser v. St., 2006 MT 20, 331 Mont. 28, 129 P.3d 133.

Right to Seek Health — Access to Medical Marijuana Not Fundamental Right: The District Court determined that denying medical marijuana providers compensation and limiting the number of cardholders that each provider can serve substantially implicated the fundamental right to seek health in a lawful manner because such restrictions deny access to medical marijuana. On appeal, the Supreme Court reversed the District Court and determined that the right to obtain and reject medical treatment does not give an individual a fundamental affirmative right to access any drug, regardless of its legality. Moreover, the right to seek health is circumscribed by the state's police powers to protect the public's health and welfare. Mont. Cannabis Indus. Ass'n v. St., 2012 MT 201, 366 Mont. 224, 286 P.3d 1161, citing Wiser v. St., 2006 MT 20, 331 Mont. 28, 129 P.3d 133.

No Showing That District Court Punished Respondent for Exercising Right to Enjoy and Defend Liberty: In a contested petition for an order of protection, the District Court did not base its decision to grant the petition on the respondent's mere pursuit of his legal right to enjoy and defend his liberty. Respondent's behavior in the courtroom was not indicative of his interest in defending himself, but, rather, was indicative of his interest in pursuing the petitioner. Respondent failed to establish that the District Court punished him for exercising his constitutional rights. Jordan v. Kalin, 2011 MT 142, 361 Mont. 50, 256 P.3d 909.

Arranger Liability — Intent Not Required: Although intentional acts are required to prove arranger joint and several liability under a similar federal law relating to disposal of hazardous substances, the provisions of 75-10-715 do not mention intent — the section uses broader terms. Title 75, chapter 10, part 7, must be read as a whole, and both the statutory analysis and the policy rationale espoused under Art. II, sec. 3, of the Montana Constitution, 75-10-701, and 75-10-706 provide for broad arranger liability. A showing of intent to dispose of a hazardous substance is not necessary. State ex rel. Dept. of Environmental Quality v. BNSF Ry. Co., 2010 MT 267, 358 Mont. 368, 246 P.3d 1037.

Civil, Private, and Attractive Nuisance and Trespass Claims Against Shooting Range — Opportunity to Further Develop Certain Claims Allowed on Remand: After an individual defendant transferred property to defendant ranch company and helped the ranch develop a shooting range on the property, plaintiff neighbors brought multiple claims alleging that operation of the shooting range in close proximity to a subdivision and elementary school constituted a public nuisance, private nuisance, attractive nuisance, trespass, and a violation of various constitutional

provisions. The District Court dismissed all claims and plaintiffs appealed. Citing Barnes v. Thompson Falls, 1999 MT 77, 294 Mont. 76, 979 P.2d 1275, the Supreme Court noted that the Legislature explicitly exempted shooting ranges from civil nuisance liability, so plaintiffs' public nuisance claims were properly dismissed. Regarding the private nuisance claims, the District Court should have focused on injury to specific plaintiffs rather than dismissing the claims as related to all plaintiffs. The trespass claims concerned noise from the shooting range invading plaintiffs' property and thus took the form of intangible trespass. The District Court prematurely dismissed the trespass claims by failing to recognize that an intangible invasion supported by actual damages may support a trespass action, and plaintiffs should have been allowed to develop evidence and facts demonstrating actual damages. Plaintiffs should also have been allowed to develop facts of an actual threat of irreparable injury in support of the attractive nuisance claims. Lastly, plaintiffs failed to show how common law or statutory remedies would not adequately address any potential damages or to demonstrate how the constitutional provisions in question directly addressed the conduct of private parties, so the constitutional claims were properly dismissed. The case was remanded to allow plaintiffs the opportunity to develop their trespass and public, private, and attractive nuisance claims. Tally Bissell Neighbors, Inc. v. Eyrie Shotgun Ranch, LLC, 2010 MT 63, 355 Mont. 387, 228 P.3d 1134.

Waiver of Right to Examine Results of Police Employment Background Investigation: When Lee applied for employment with the Missoula Police Department, he signed a release that provided that any background information provided to the Department would be confidential. After Lee's application was denied, he petitioned the District Court for disclosure of the results of the background information on grounds of his constitutional right to know. The court concluded that Lee had validly waived his right to know by signing the release and denied Lee's request for the information. Lee appealed, but the Supreme Court affirmed. For a waiver of the right to know to be effective, the waiver must be voluntary, intelligent, and knowing. When evaluating a waiver of the right to know, courts should inquire simply whether language in the waiver fully and effectively apprised a person in practical terms that the person is giving up any right or ability to examine certain information held by a public body or governmental agency. In this case, whether or not Lee personally knew that he had a constitutional right to know, the waiver informed him in practical terms that he was waiving any such right by agreeing to the terms of the release. Lee v. Missoula Police Dept., 2008 MT 186, 343 M 487, 187 P3d 609 (2008).

Nonapplicability of Constitutional Tort Theory When Adequate Remedy Exists Under Statutory or Common Law: Plaintiffs brought a common-law action against defendant for restoration damages related to environmental damage caused by defendant's refinery. The trial court held defendant strictly liable for conducting an abnormally dangerous activity and instructed the jury to award monetary damages pursuant to this section for any constitutional tort violating the fundamental right to a clean and healthful environment. Defendant appealed the application of the constitutional tort theory. The Supreme Court noted that Dorwart v. Caraway, 2002 MT 240, 312 M 1, 58 P3d 128 (2002), recognized that common-law causes of action that are intended to regulate relationships among and between individuals may not always be adequate to redress the type of damage caused by the invasion of constitutional rights by government actors and that, as a result, recognition of a constitutional tort was necessary in the absence of any other remedy. However, in the present case, the Supreme Court also adopted Restatement (Second) of Torts 929 to allow for recovery of restoration damages, which served to ensure restoration of a clean and healthful environment. Absent a showing that restoration costs were inadequate to address potential damages caused by defendant's contamination, it was error for the trial court to instruct the jury on the constitutional tort theory when adequate remedies existed under statutory or common law. Sunburst School District No. 2 v. Texaco, Inc., 2007 MT 183, 338 M 259, 165 P3d 1079 (2007), followed in Shammel v. Canyon Resources Corp., 2007 MT 206, 338 M 541, 167 P3d 886 (2007).

Failure to Provide Notice of Child Abuse Substantiation Hearing Not Affecting Employment as Physical Therapy Assistant — No Prejudice to Substantial Rights: When Dowell applied to work at a day-care center, the Department of Public Health and Human Services (DPHHS) denied the request, without a substantiation hearing, based on Dowell's previous child abuse and neglect proceedings. The District Court affirmed. On appeal, Dowell contended that the DPHHS's failure to provide her with timely notice prejudiced her constitutional right to subsequent employment as a physical therapy assistant. Under 2-4-704, judicial review of an agency decision must be confined to the record that was brought before the agency. Implications on licensure as a physical therapist are determined by the Board of Physical Therapists, not the DPHHS, and Dowell provided no evidence that the substantiation determination by the DPHHS impacted

employment as a physical therapist, so Dowell's substantial rights were not affected. The District Court was affirmed. Dowell v. Dept. of Public Health and Human Services, 2006 MT 55, 331 M 305, 132 P3d 520 (2006).

Partial Denture Rule Not Violative of Denturists' Right to Pursue Employment: Denturist plaintiffs challenged the rule of the Board of Dentistry, promulgated pursuant to 37-29-403, requiring dentist referrals before denturists may perform partial denture work, on grounds that the rule violated the constitutional right of denturists to pursue employment. Relying on Wadsworth v. St., 275 M 287, 911 P2d 1165 (1996), plaintiffs contended that they had a fundamental right to practice denturity free of regulation. Although Wadsworth did demonstrate plaintiffs' fundamental right to pursue denturity as a profession, it did not mean that denturists have a right to practice denturity free of all regulations. The partial denture rule does not bar denturity, and plaintiffs may pursue their profession as long as their patient obtains a dentist referral. Although a person does have a fundamental right to pursue employment, one does not have the right to practice a profession free of state regulation promulgated to protect the public welfare. The Supreme Court declined to apply strict scrutiny review, and plaintiffs' employment infringement argument failed. Wiser v. St., 2006 MT 20, 331 M 28, 129 P3d 133 (2006).

Initiative Banning Cyanide Mining Not Unconstitutional Taking or Impairment of Contract — Opportunity to Apply for Mining Permit Not Property Right: Plaintiffs had an operating permit pending for a cyanide leach pit gold mine when voters passed Initiative Measure No. 137 (I-137) that prohibited cyanide mining in Montana. Plaintiffs sued on grounds that I-137 interfered with their property right in the permit, constituted an unconstitutional regulatory taking for which they should be compensated, and violated the contract clause in Art. II, sec. 31, Mont. Const. The District Court found for the state on all issues, and plaintiffs appealed, but the Supreme Court affirmed. Plaintiffs' mere opportunity to seek a mining permit did not constitute a property right, given the state's wide discretion to reject the application even without the passage of I-137. Further, I-137 did not constitute a taking because plaintiffs had not yet obtained a right to mine that the initiative took away. Moreover, even though the District Court incorrectly held that plaintiffs' corporate mining agreement was not substantially impaired by I-137, the court nonetheless correctly concluded that there was no contract clause violation because I-137 was reasonably related to the legitimate and significant public purpose of protecting the environment. Seven Up Pete Venture v. St., 2005 MT 146, 327 M 306, 114 P3d 1009 (2005).

Oil Well Not Considered Mine to Which Right-of-Way May Be Obtained Through Eminent Domain — No Condemnation Power of Private Individuals and Corporation Except Through Legislative Grant — Condemnation Statutes Strictly Construed: Plaintiff filed a federal action seeking to condemn an access easement and right-of-way across defendant's ranch land for access to drill and operate oil wells. The federal District Court certified two questions to the Montana Supreme Court regarding whether: (1) exploration and development of a federal oil and gas lease are considered a mine that constitutes a public use under 70-30-102; and (2) 82-2-201 grants the owner of a federal oil and gas lease the power, as the owner of a "mining claim", to condemn a right-of-way across land of another for access to explore and develop the lease. The Supreme Court answered both questions in the negative. Private individuals and corporations, like state agencies, have no inherent power of eminent domain, so their authority to condemn derives only from a legislative grant. Public uses for which the power of eminent domain are granted must be interpreted pursuant to the plain language set forth by the Legislature and may not be implied. Because eminent domain interferes with the fundamental constitutional right to the private ownership of real property, any statute that allows condemnation of private property must be strictly construed, giving the statute its plain interpretation but favoring the person's fundamental rights. Under the plain meaning of 70-30-102, oil wells are not considered mines to which rights-of-way for roads may be obtained through eminent domain proceedings. Further, exploration and development of a federal oil and gas lease are not a mine that constitutes a public use, so the owner of an oil and gas lease has no power under 82-2-201 to condemn a right-of-way. McCabe Petroleum Corp. v. N Bar Ranch, LLC, 2004 MT 73, 320 M 384, 87 P3d 995 (2004), following St. v. Aitchison, 96 M 335, 30 P2d 805 (1934), and Bozeman v. Vaniman, 264 M 76, 869 P2d 790 (1994), and distinguishing Mid-Northern Oil Co. v. Walker, 65 M 414, 211 P 353 (1922), Rice Oil Co. v. Toole County, 86 M 427, 284 P 145 (1930), and Mont. Talc Co. v. Cyprus Mines Corp., 229 M 491, 748 P2d 444 (1987).

Good Cause Required for Court-Ordered Medical Examination — Scope of Medical Examination Rule: Pursuant to former Rule 35, M.R.Civ.P. (now superseded), the District Court ordered plaintiff to undergo an extensive independent medical examination by an expert 750 miles away. The examination would have subjected plaintiff to burdensome, painful, invasive,

elective, and potentially harmful procedures. After accepting supervisory control, the Supreme Court reversed. Former Rule 35 does not permit any proposed examination simply because a plaintiff puts the plaintiff's physical or mental condition at issue. A District Court must consider whether good cause for a proposed examination has been demonstrated because of the constitutional protections afforded to a person's right to privacy, safety, health, and happiness. Good cause for an examination may not constitute good cause for a specific examination requested by a defendant. Further, bringing a suit to recover for personal injury may place a plaintiff's physical or mental condition at issue, but it does not waive the inalienable right to the integrity of and personal control over the plaintiff's body. In determining whether there is good cause, the court should consider both the location and the nature of the examination. Requiring a party to travel any farther than necessary is an abuse of discretion, and out-of-state examinations should be viewed with disfavor when an adequate examination can be conducted in Montana. Here, the District Court abused its discretion in ordering plaintiff to undergo a potentially invasive, painful, and burdensome examination at a distant location when the same test was available in Montana. Simms v. District Court, 2003 MT 89, 315 M 135, 68 P3d 678 (2003).

Commercial Versus Noncommercial Speech — Analysis to Determine Validity of Commercial Speech Restriction — Local Government Billboard Prohibitions Not Overreaching: Plaintiff petitioned for a declaratory judgment requesting that city and county zoning regulations for off-premises signs and billboards be declared unconstitutional and violative of the state Outdoor Advertising Act. The petition was denied and plaintiff appealed. The Supreme Court noted that under Metromedia, Inc. v. San Diego, 453 US 490 (1981), commercial and noncommercial speech enjoy different constitutional free speech protections, and that commercial speech is afforded less constitutional protection than noncommercial speech. Commercial speech may be regulated in situations in which noncommercial speech may not. In determining the validity of a commercial speech restriction, pursuant to Cent. Hudson Gas & Elec. v. Pub. Serv. Comm'n, 447 US 557 (1980): (1) commercial speech must concern a lawful activity and may not be misleading to be protected; (2) there must be a substantial government interest for adopting a commercial speech regulation; (3) if the speech is protected and a substantial government interest exists, the regulation must directly advance the asserted government objective; and (4) the regulation must reach no further than to achieve that objective. Despite subsequent holdings related to other forms of media, Metromedia remains the controlling law in billboard cases. Here, the first prong of the Metromedia test was not disputed. With regard to the second prong, the parties conceded that aesthetics and safety constituted substantial government interests. Further, the ordinances in question directly advanced the government's goal of reducing visual blight and traffic hazards, meeting the third prong of the test. Last, because the ordinances prohibited billboards only in residential areas and restricted billboard use in commercially zoned areas, speech was restricted no more than necessary to achieve the government objectives, so the fourth prong of the test was also met. Thus, the validity of the zoning ordinances was affirmed. Mont. Media, Inc. v. Flathead County, 2003 MT 23, 314 M 121, 63 P3d 1129 (2003).

Local Ordinance Restricting Billboards Not Considered Unconstitutional Prior Restraint on Commercial Speech: Under Desert Outdoor Advertising, Inc. v. Moreno Valley, 103 F3d 814 (9th Cir. 1996), an ordinance or regulation that subjects protected speech to prior restraint without narrow, objective, and definite standards to guide permitting officials violates the federal constitutional right to free speech. The law may not condition the exercise of free speech on the unbridled discretion of permitting officials. In the case at bar, city and county ordinances governing billboards provided objective guidelines for the issuance of billboard permits that allowed permitting officials little discretion in deciding whether to grant a permit and thus did not create an unconstitutional prior restraint on speech. Mont. Media, Inc. v. Flathead County, 2003 MT 23, 314 M 121, 63 P3d 1129 (2003).

Local Ordinances Restricting Billboards Not Unconstitutionally Vague: Plaintiff contended that city and county zoning ordinances regulating billboards were vague and subject to inconsistent and arbitrary application. The Supreme Court cited Broers v. Dept. of Revenue, 237 M 367, 773 P2d 320 (1989), for the holding that a noncriminal statute or regulation is vague if a person of common intelligence must guess at its meaning, but is not vague simply because it can be dissected or subjected to different interpretations. The court went on to analyze the various provisions of the ordinances regarding political signs, holiday signs, and the distinction between offsite signs and billboards, but found that plaintiff failed to demonstrate that any of the definitions were unconstitutionally vague. Mont. Media, Inc. v. Flathead County, 2003 MT 23, 314 M 121, 63 P3d 1129 (2003).

Board of County Commissioners Compelled to Follow Clear Statutory Language and Allow Gravel Pit in Nonresidential Area: Plaintiff owned agricultural property adjacent to a school and sought to develop a gravel pit on the property. Plaintiff applied for the appropriate special review with the Board of County Commissioners. The Board determined that a gravel pit would interfere with surrounding property uses and would violate the rights of people who lived and attended school nearby to a clean and healthful environment, citing 82-4-431 and 82-4-432 as authority for the Board's right to deny the special review. Plaintiff argued that under 76-1-113 and 76-2-209, local planning boards may not prevent the operation of a gravel pit in a nonresidential area. The District Court concluded that plaintiff accurately construed the statutes and that the Board could not deny a gravel pit in a nonresidential area. The Supreme Court affirmed. The Board ruled as if either 76-2-209 did not exist or the statute unconstitutionally deprived residents of a clean and healthful environment, but as an Executive Branch agency, the Board violated the separation of powers doctrine by ruling on the constitutionality of the statute. The statutory language was clear and unambiguous, and the Board was compelled to follow the legal mandate and allow the gravel pit. Further, because the statutes were clear, the District Court was not required to reach the constitutional question and did not err in failing to address the constitutionality of the statute. Merlin Myers Revocable Trust v. Yellowstone County, 2002 MT 201, 311 M 194, 53 P3d 1268 (2002). See also St. v. Still, 273 M 261, 902 P2d 546 (1995), and Goldman Sachs v. District Court, 2002 MT 83, 309 M 289, 46 P3d 606 (2002).

Purpose of Alternative Livestock Transfer Regulations — Quarantine Exception to Commerce Clause Applicable: The Wallaces, licensed alternative livestock ranchers, sought to reduce the size of their elk herd by transferring about 500 elk to the Crow Indian Reservation for release into the wild. The Department of Fish, Wildlife, and Parks requested and received an injunction prohibiting any transfer of elk to tribal lands, and the Wallaces appealed, asserting that the injunction violated Art. I, sec. 8, clause 3, of the U.S. Constitution, known as the commerce clause. The Wallaces contended that prohibiting the transfer of alternative livestock to a recipient that is not licensed by the state constituted extraterritorial application of Montana's regulatory scheme to foreign nations, other states, and Indian nations in violation of federal law. The Supreme Court found that this case falls within the quarantine exception to the traditional commerce clause analysis. The quarantine exception recognizes that states may have a local interest in protecting public safety as a competing value when reviewing state burdens on interstate commerce. With the alarming spread of serious wildlife diseases throughout the country, the state has a compelling interest to enact regulations to ensure that alternative livestock cannot simply roam into Montana and threaten native populations. Because elk released on the Crow Indian Reservation could migrate back into Montana, the restrictions regarding transfer of alternative livestock in 87-4-414 fall squarely within the quarantine exception to the commerce clause. Thus, the permanent injunction was affirmed. Hagener v. Wallace, 2002 MT 109, 309 M 473, 47 P3d 847 (2002). See also Bowman v. Chicago & NW. Ry. Co., 125 US 465 (1888).

Unenforceability of Buy-Sell Agreement on Grounds of Impossibility or Impracticality of Performance — Requiring Performance of Contract With Potential for Environmental Degradation Unconstitutional: Cape-France Enterprises (Cape-France) entered a buy-sell agreement with Peed (now deceased) and Moore to purchase some property near Bozeman for a subdivision. Before the subdivision could be completed, water needed to be procured for the site. According to the agreement, as buyers, Peed and Moore were responsible to bring water to the property, but because city water was not available, a well needed to be drilled. However, the presence of a pollution plume was discovered near the land. After the subdivision process was commenced, the Department of Environmental Quality notified Cape-France that: (1) the plume may have advanced under the property; (2) a subdivision would not be approved unless a well was drilled and tested; (3) a well could be drilled, but if testing showed pollution in the water, treatment would be extensive; and (4) if drilling or pumping of the water caused expansion of the pollution, then Cape-France, as owner of the property, would be held liable for cleanup costs. On cross-motions for summary judgment, the District Court held that the buy-sell agreement could be rescinded on the basis of mutual mistake of fact and impossibility or impracticality of performance and that specific performance would not be granted. The Supreme Court affirmed. A court may determine that an act is impossible in legal contemplation when it is not practicable, when the act can be done only at an excessive, unreasonable, and unbargained-for cost. The doctrine of impossibility or impracticability is applied when, aside from the object of a contract being unlawful, the public policy underlying the strict performance of the contract is outweighed by the senselessness of requiring performance. The doctrine is not limited to cases of literal impossibility but may also be applied in cases that present a potential for substantial and unbargained-for damages. In this

case, requiring Cape-France to go forward with the performance of the contract when there was a very real possibility of substantial environmental degradation and resultant financial liability for cleanup was not in the public interest or in the interests of the contracting parties and was not in accord with the guarantee of a clean and healthful environment in this section or the mandate to maintain and improve a clean and healthful environment for present and future generations in Art. IX, sec. 1, Mont. Const. Thus, rescission of the contract was proper. Cape-France Enterprises v. Estate of Peed, 2001 MT 139, 305 M 513, 29 P3d 1011 (2001). See also Smith v. Zepp, 173 M 358, 567 P2d 923 (1977), and Mont. Envtl. Information Center v. Dept. of Environmental Quality, 1999 MT 248, 296 M 207, 988 P2d 1236 (1999).

No Departmental Authority to Modify Sentence During Term of Sentence Through Special Probationary Conditions: Field was sentenced to 16 years in prison with 8 years suspended for felony deviate sexual conduct. After serving a portion of the sentence, Field was placed on probation. The sentencing judge attempted to incorporate conditions that might be imposed on probation by providing that any agent of the Montana Probation and Parole Bureau (now Department of Corrections) was authorized to arrange and establish rules necessary for Field's probation and to modify, increase, or reduce the requirements of the rules. Based on that authority, 4 years after the sentence, a Department probation officer added a handwritten special parole condition that Field not be alone with minor children. When Field violated the special condition, the probationary sentence was revoked. As amended in 1995, 46-18-801 allows a sentencing judge to incorporate by reference conditions of parole established by the Department at the time that the sentence is imposed, but does not authorize a judge to grant to the Department the power to modify a sentence by imposing subsequent constitutional infringements, such as a restriction on the freedom of association, after the judgment and sentence have been signed. Here, no evidence was offered that the special condition imposed on Field was a standard Department rule at the time of sentencing, and nothing in the sentence allowed for the special condition that Field not be alone with a minor; therefore, Field's incarceration for parole violation was premised on a violation of a special condition that was never imposed by a court. Reversing, the Supreme Court held that sentencing of a defendant to an abridgment of a constitutionally protected interest must be performed by the District Court and articulated at the time of sentencing, not modified by a probation officer 4 years after a sentence is imposed. St. v. Field, 2000 MT 268, 302 M 62, 11 P3d 1203, 57 St. Rep. 1123 (2000).

Arbitrary, Blanket Exclusion of Certain Activities From Nondegradation Review Unconstitutional as Applied — Actual Danger Not Required — Degradation of Environment Sufficient to Implicate Fundamental Rights: The District Court erred when it held that the fundamental right to a clean and healthy environment is not implicated unless there is a finding of actual injury and that mere degradation of water quality, absent actual injury, is not sufficient to implicate the fundamental right or to require strict scrutiny analyses. The right to a clean and healthful environment contained in this section is fundamental. Therefore, as applied to the facts of this case, to the extent that 75-5-317(2)(j) arbitrarily excludes certain activities from nondegradation review without regard to the nature or volume of the substance being discharged, it violates the environmental rights guaranteed by Art. IX, sec. 1, Mont. Const, and this section. (See 1999 amendments.) The intention of the framers of the constitution was to provide language and protections that are both anticipatory and preventative. The delegates did not intend to merely prohibit that degree of environmental degradation that can be conclusively linked to ill health or physical endangerment. Mont. Envtl. Information Center v. Dept. of Environmental Quality, 1999 MT 248, 296 M 207, 988 P2d 1236, 56 St. Rep. 964 (1999).

Fundamental Right to Clean and Healthful Environment — Strict Scrutiny of Compelling State Interest and Nondegradation Policy: The right to a clean and healthful environment contained in this section is fundamental. Any statute or rule implicating that right will be strictly scrutinized and will survive scrutiny only if the state establishes a compelling state interest and its action is closely tailored to effectuate that interest and is the least onerous path that can be taken to meet the state's objectives. Because rights provided for in Art. IX, sec. 1, Mont. Const., are not found in the declaration of rights, a statute implicating Art. IX, sec. 1, rights would normally be subject to a middle-tier scrutiny test. However, those rights guaranteed by this section and those rights provided for in Art. IX, sec. 1, were intended by the constitution's framers to be interrelated and interdependent, so state action under either section is subject to strict scrutiny. Mont. Envtl. Information Center v. Dept. of Environmental Quality, 1999 MT 248, 296 M 207, 988 P2d 1236, 56 St. Rep. 964 (1999). See also Butte Community Union v. Lewis, 219 M 426, 712 P2d 1309, 43 St. Rep. 65 (1986), and Wadsworth v. St., 275 M 287, 911 P2d 1165, 53 St. Rep. 146 (1996).

Standing to Challenge Mining Activity With Arguably Adverse Environmental Impact: Plaintiffs' uncontroverted allegations of a violation of their right to a clean and healthful environment established their standing to challenge mine water discharge activities that had an arguably adverse impact on the headwaters of the Blackfoot River in which they fished and recreated and that was a source of their drinking water. Mont. Envtl. Information Center v. Dept. of Environmental Quality, 1999 MT 248, 296 M 207, 988 P2d 1236, 56 St. Rep. 964 (1999), following Missoula City-County Air Pollution Control Bd. v. Bd. of Envtl. Review, 282 M 255, 937 P2d 463, 54 St. Rep. 338 (1997), and Gryczan v. St., 283 M 433, 942 P2d 112, 54 St. Rep. 699 (1997).

Deletion of Hanging as Form of Capital Punishment Not Denial of Ability to Present Argument Regarding Cruel and Unusual Punishment: Pursuant to the version of 46-19-103 that was in effect at the time that Langford was sentenced for execution, he affirmatively elected that death be imposed by hanging rather than lethal injection. Langford appealed to the District Court for a declaration that execution by hanging was cruel and unusual punishment that violated the eighth amendment to the U.S. Constitution. The District Court denied the motion, holding that Langford's choice of hanging rendered the cruel and unusual punishment argument moot. Langford appealed to the appropriate federal courts for a writ of habeas corpus, applying the same argument. During the pendency of Langford's federal habeas corpus proceedings, the Montana Legislature met and amended 46-19-103 by removing the hanging option, rendering the federal proceedings moot and nonjusticiable. Langford asserted that the amendment to 46-19-103 violated numerous constitutional provisions by denying him the ability to present the cruel and unusual punishment argument to the federal courts. The Supreme Court found no merit in Langford's argument that the state Attorney General advised the Legislature to amend 46-19-103 in order to deny Langford the grounds for appeal, because the Attorney General supported but did not initiate the legislation. Further, the court did not agree with Langford's assertion that the amendment rendered the time that Langford spent in pursuing the cruel and unusual punishment argument retroactively useless and chargeable to the state as a form of cruel and unusual punishment in itself, because the eighth amendment argument was not the only claim that Langford pursued. Therefore, the entire time could not be charged to the state as being related to the amendment to 46-19-103. Having concluded that Langford failed to establish any constitutional violations, his petition for writ of injunction staying his execution was denied. Langford v. St., 287 M 107, 951 P2d 1357, 54 St. Rep. 1522 (1997).

Grant of Petition to Dispose of Evidence Held No Denial of Constitutional Rights — Inclusion of Additional Property for Restitution — Order to Dispose of Property Held Not to Impose Restitution Obligation: Woods was convicted of writing a bad check for $3,830. However, Woods continued to write other bad checks totaling over $30,000, even as of the time that his probation officer was preparing his presentence investigation. The investigation showed that the bad checks had been used to purchase merchandise and to obtain cash. After sentencing, which included a requirement for restitution, the state filed a petition for destruction of evidence, requesting that it be allowed to return the merchandise to the rightful owners, to apply the value of that property to satisfy Woods's obligation to make restitution, and to destroy other property that had been seized as evidence. The District Court granted the petition but stayed enforcement pending appeal. Woods contended that the District Court order granting the petition violated his rights under Art. II, sec. 4, 15, 17, and 22, Mont. Const., and this section and under the 5th, 8th, and 14th amendments to the United States Constitution. The Supreme Court held that Woods had waived his right to object to restitution, even restitution in an amount greater than $3,830, because Woods promised to make restitution in response to the recommendation of his probation officer that Woods make restitution in an amount in the "tens of thousands of dollars". The Supreme Court held, contrary to Woods's claim that the state misinterpreted the District Court order as to the amount of restitution, that the District Court had ordered Woods to make "full restitution" and that the order included the amounts over and above the $3,830 involved in the underlying conviction for writing a bad check. Woods also objected to the timing of the state's petition, arguing that he was not required to make restitution until he was released from jail. In response, the Supreme Court pointed out that Woods misconstrued the purpose of the state's petition; all the state wanted to do was receive permission from the District Court to return the merchandise to its rightful owners and apply the value to Woods's obligation for restitution. For this reason, the Supreme Court held that the District Court did not err when it granted the state's petition. St. v. Woods, 286 M 355, 951 P2d 981, 54 St. Rep. 1445 (1997).

Private School Student Not Entitled to Participate in Public School Extracurricular Events: The Kapteins sought an order requiring the Conrad School District to allow their daughter,

a private school student, to play on the public school basketball team. The Supreme Court stated that participation in extracurricular activities is not a fundamental right but is subject to constitutional protection and would be subject to a middle-tier analysis of the rights infringed versus the governmental interest served by the infringement. The Supreme Court held that in the present case, it was unable to conclude that a private student's interest in participating in extracurricular activities was more important than the school district's policy decision that, in order to effectively integrate academics and extracurricular activities, the district needed to restrict participation to those students enrolled in the public school system. Kaptein v. Conrad School District, 281 M 152, 931 P2d 1311, 54 St. Rep. 106 (1997).

Opportunity to Pursue Employment — Fundamental Right: The opportunity to pursue employment, while not specifically enumerated as a fundamental constitutional right under this section, is, notwithstanding, necessarily encompassed within it and is itself a fundamental right because it is a right "without which other constitutionally guaranteed rights would have little meaning". Wadsworth v. St., 275 M 287, 911 P2d 1165, 53 St. Rep. 146 (1996).

Licensing Drivers — Legitimate Exercise of Police Power of State — Ability to Drive on Public Roads Not Fundamental Right: Requiring drivers to be licensed by the state is a justifiable, reasonable, and desirable exercise of the police power of the state. The ability to drive a motor vehicle on a public highway is not a fundamental right. The right to travel granted by the state and federal constitutions is separate from the right or privilege to operate a motor vehicle on the public highways and does not include the ability to ignore the laws governing the use of the public highways. St. v. Skurdal, 235 M 291, 767 P2d 304, 45 St. Rep. 2394 (1988).

Probable Cause to Stop for Speeding — No Infringement of Liberty Interest: Defendant was stopped and charged by a highway patrol officer with speeding and operating a motor vehicle without a valid driver's license following the officer's visual observation of the speed of defendant's vehicle, confirmed by a radar reading. Defendant refuses to procure and carry a driver's license on various constitutional grounds. His right to liberty was not violated when the officer stopped and detained him because the officer had probable cause to believe defendant was speeding. Defendant's further contention that his liberty interest was infringed because he was not engaged in commercial travel when he was stopped is baseless in law. St. v. Skurdal, 235 M 291, 767 P2d 304, 45 St. Rep. 2394 (1988).

Constitutionality of 2.0 Grade Average Rule — Extracurricular Activities Not Fundamental Right: In determining whether the District Court erred in holding that participation in extracurricular activities is not a fundamental right, the Supreme Court applied the middle-tier level of constitutional analysis recognized in Butte Community Union v. Lewis, 219 M 426, 712 P2d 1309, 43 St. Rep. 65 (1986), and concluded that the 2.0 rule did not violate the Montana Constitution because: (1) the right to extracurricular participation is not enumerated in the constitutional Declaration of Rights; and (2) government interests in developing the full educational potential in each person and providing a basic system of quality public education by enactment of the 2.0 rule outweigh a student's interest in participating in existing extracurricular activities. State ex rel. Bartmess v. Bd. of Trustees, 223 M 269, 726 P2d 801, 43 St. Rep. 1713 (1986), followed in Kaptein v. Conrad School District, 281 M 152, 931 P2d 1311, 54 St. Rep. 106 (1997), holding that a private school student has no right to participate in public school extracurricular activities.

Restriction of Welfare Benefits Based on Age — Constitutionality — Middle-Tier Test — Equal Protection Analysis: Although a right to welfare is not contained in the Declaration of Rights of the Montana Constitution, Art. XII, sec. 3(3), directs the Legislature to provide necessary assistance to the misfortunate. The Supreme Court held that a benefit lodged in the Montana Constitution is an interest whose abridgment requires something more than a rational relationship to a governmental objective and that a classification which abridges welfare benefits is subject to a heightened scrutiny under an equal protection analysis. The court developed its own middle-tier test for determining the constitutionality of HB 843 (Ch. 670, L. 1985), a bill which restricted or denied general assistance benefits to able-bodied persons under the age of 50 who do not have minor dependent children. The court held that a finding that HB 843 is constitutional required the state to demonstrate two factors: (1) that its classification of welfare recipients on the basis of age was reasonable; and (2) that state interest in such classification was more important than the people's interest in obtaining welfare benefits. The state failed to show that misfortunate people under age 50 are more capable of surviving without assistance than people over age 50 or that broad generalizations based on age are reasonable rather than arbitrary. Also, the trial record did not show the state to be in such a financially unsound position that the welfare benefit, granted constitutionally, could be abrogated. Therefore, the Supreme Court found unconstitutional the

provisions of HB 843 which denied or restricted welfare benefits based on age. Butte Community Union v. Lewis, 219 M 426, 712 P2d 1309, 43 St. Rep. 65 (1986).

Right to Welfare — Not Fundamental Right: The District Court held that Art. XII, sec. 3(3), Mont. Const., established a fundamental right to welfare for the aged, infirm, or misfortunate. The Supreme Court found that in order to be fundamental, a right must be found within the Declaration of Rights in the Montana Constitution or be a right "without which other constitutionally guaranteed rights would have little meaning" (quoting In re C.H., 210 M 184, 683 P2d 931, 41 St. Rep. 997 (1984)). Article XII, sec. 3, is not part of the Declaration of Rights; Art. II, sec. 3, is the only section in the Declaration of Rights which could arguably create a right to welfare. The official committee comment to Art. II, sec. 3, states: "The intent . . . is not to create a substantive right for all the necessities of life to be provided by the public treasury" (vol. II, p. 627, 1972 Con. Con. Committee Reports). The Supreme Court further found that the right to welfare is not a right upon which constitutionally guaranteed rights depend. Therefore, since neither of the above conditions were met, the right to welfare was held not to be a fundamental right under the Montana Constitution. Butte Community Union v. Lewis, 219 M 426, 712 P2d 1309, 43 St. Rep. 65 (1986) , followed in Wadsworth v. St., 275 M 287, 911 P2d 1165, 53 St. Rep. 146 (1996).

"Stop and Frisk" by Private Security Guard Held Proper: A "stop and frisk" by a private security guard of a suspected thief on the hotel grounds was justifiable as an action taken to protect the hotel and its occupants against trespassers in the process of committing an offense, since a person has the right to use any necessary force to protect himself or his employer or his employer's property from wrongful injury. St. v. Bradford, 210 M 130, 683 P2d 924, 41 St. Rep. 962 (1984).

Environmental Impact Statement Not Given Constitutional Status: An EIS was not required before granting a permit under the Hard Rock Mining Act (HRMA) because the 60-day period was a woefully inadequate period for the preparation of a proper EIS, the same reason that an EIS was not required in Flint Ridge Dev. Co. v. Scenic Rivers Ass'n, 426 US 776 (1976). Furthermore, the statutory requirement of an EIS was not given constitutional status by the enactment of Art. II, sec. 3, and Art. IX, sec. 1, Mont. Const., subsequent to the Montana Environmental Policy Act and HRMA. Kadillak v. The Anaconda Co., 184 M 127, 602 P2d 147 (1979).

Compelling State Interest in Protecting Against Burglary: When police officers discovered marijuana after entering defendant's home believing that a burglary was in progress, the Supreme Court rejected defendant's contention, based on the "right of privacy", that there is no compelling state interest justifying intrusion into a private home to prevent a burglary. Such compelling state interest exists by virtue of state enforcement of its criminal laws for the benefit and protection of other fundamental rights of its citizens, as in the protection of a citizen's home and its contents from unlawful intrusion. State ex rel. Zander v. District Court, 180 M 548, 591 P2d 656 (1979).

Constitutionality of Motor Vehicle Junkyard Licensing: Section 75-10-511, which requires that motor vehicle wrecking facilities and graveyards be licensed, is not unconstitutional, ex post facto, or violative of due process requirements but a valid exercise of police power broad enough to include aesthetic considerations underlying the shielding requirement. St. v. Bernhard, 173 M 464, 568 P2d 136 (1977), followed in State ex rel. Dept. of Health and Environmental Sciences v. Green, 227 M 299, 739 P2d 469, 44 St. Rep. 1099 (1987).

DECISIONS UNDER 1889 CONSTITUTION

INALIENABLE RIGHTS

Interspousal Tort Immunity: Neither sec. 3 nor sec. 6, Art. III, 1889 Mont. Const., in effect providing, respectively, that all persons are born equally free, have certain inalienable rights, etc., and that courts of justice shall be open to every person and a speedy remedy afforded for every injury to person or property, can be said to have any applicability in determining whether the Legislature has by statute abrogated the age-old common-law doctrine that neither spouse has the right to maintain a personal tort action against the other. Conley v. Conley, 92 M 425, 15 P2d 922 (1932), but see Miller v. Fallon County, 222 M 214, 721 P2d 342, 43 St. Rep. 1185 (1986).

IMPAIRMENT OF VESTED RIGHTS

Rental of School Buildings: Held, that Ch. 48, L. 1929 (since repealed), authorizing the Board of County High School Trustees to rent a school building for public dances is not violative of Art. III, sec. 3, 1889 Mont. Const., as permitting a branch of the state government to enter into unfair competition with a citizen who pays taxes on property used for such purposes and hence cannot

compete with those in charge of tax-exempt property kept up at public expense. Article III, sec. 3, 1889 Mont. Const., prohibits the enactment of a law which would impair vested rights but does not insure to a person first in the field a monopoly in any line of business. Young v. Bd. of Trustees, 90 M 576, 4 P2d 725 (1931).

Limitation on Legislative Power: Article III, sec. 3 and 27, 1889 Mont. Const., imply, if they do not express, a prohibition against the power of the Legislature to enact a law whose effect would be the impairment of a vested right. State ex rel. Altop v. Billings, 79 M 25, 255 P 11 (1927); Hinds v. Wilcox, 22 M 4, 55 P 355 (1898).

DEFENSE OF LIFE AND LIBERTY

Right to Kill Game in Defense of Person or Property: Under Art. III, sec. 3 and 13, 1889 Mont. Const., legal justification may always be interposed as a defense by a person charged with killing a wild animal contrary to law, and the general law on the right to use force must be construed in pari materia with fish and game laws when found inoperative, otherwise the latter would be unconstitutional as denying an inalienable right. St. v. Rathbone, 110 M 225, 100 P2d 86 (1940).

PROPERTY RIGHTS

Right to Acquire Property — Retail Installment Sales Act: The Montana Retail Installment Sales Act is constitutional both before and after the 1971 amendments making it applicable to revolving charge accounts. The act did not interfere with the right to acquire property guaranteed by Art. III, sec. 3, 1889 Mont. Const., since the legislative classifications in the Act are constitutionally permissible. Cecil v. Allied Stores Corp., 162 M 491, 513 P2d 704 (1973).

County Printing: On the authority of Hersey v. Neilson, 47 M 132, 131 P 30 (1913), and Stange v. Esval, 67 M 301, 215 P 807 (1923), held that section 4482, R.C.M. 1921 (since repealed), requiring the contract for county printing to be let to a newspaper published in the particular county continuously for a period of 1 year immediately preceding its letting, is not void as in violation of the 5th and 14th amendments to the federal Constitution, as depriving the county of the right to contract and granting a person a privilege or immunity not granted to another, or of Art. V, sec. 26, 1889 Mont. Const., prohibiting the enactment of special or class legislation, or of Art. III, sec. 3 and 27, 1889 Mont. Const., as denying the county the right to contract and depriving it of property without due process of law. State ex rel. Woare v. Bd. of Comm'rs, 70 M 252, 225 P 389 (1924).

Teachers' Pensions: Sections 1113 through 1132, R.C.M. 1935 (since repealed), providing for teachers' pensions, was not invalid as in contravention of Art. III, sec. 3, 1889 Mont. Const. Trumper v. School District, 55 M 90, 173 P 946 (1918).

Due Process Required: The 1889 Constitution of this state guaranteed to everyone the right to pursue happiness and to acquire, possess, and protect property in all lawful ways. This provision secured the right to peaceable possession and to free ingress to and egress from property. The rights thus secured could not be invaded, unless the public health, morals, or safety or the general welfare required interference or the owner was deprived of his rights by due process of law. Iverson v. Dilno, 44 M 270, 119 P 719 (1911).

Tenancy in Common: The amendment approved February 28, 1899, to 70-19-202 (formerly 93-2829, R.C.M. 1947), relating to property held in tenancy in common, impaired the vested rights of cotenants whose estates were in existence at the time the amendment became operative and was repugnant to Art. III, sec. 3 and sec. 27, 1889 Mont. Const. Butte & Boston Consol. Min. Co. v. Mont. Ore Purchasing Co., 25 M 41, 63 P 825 (1901).

BUSINESS REGULATIONS

Airline Passenger Tax: Sections 1-829 through 1-832, R.C.M. 1947 (now repealed), imposing a tax on each passenger emplaning on a common air carrier at a Montana airport, were repugnant to Art. III, sec. 3, 1889 Mont. Const., in creating an unreasonable and undue discrimination. NW. Airlines, Inc. v. Joint City-County Airport Bd., 154 M 352, 463 P2d 470 (1970).

Gasoline Tax Refund: Motorboat operator could not raise due process or equal protection objections to gasoline tax statute making no provision for nonhighway use refund since statute made gasoline dealer the taxpayer rather than the consumer, and consumer, as motorboat operator, was not proper representative of all nonhighway users. Harvey v. Blewett, 151 M 427, 443 P2d 902 (1968).

Right to Engage in Business — Nonresident Contractors' License Fee: Chapter 277, L. 1965, providing for nonresident contractors' license fees, was invalid under Art. III, sec. 3, 1889 Mont. Const., since, by imposing a 1% tax on gross receipts rather than on profits, it could have deprived contractors of their right to engage in business as protected by the provisions of this section. State

ex rel. Schultz-Lindsay Constr. Co. v. St. Bd. of Equalization, 145 M 380, 403 P2d 635 (1965), distinguished in Kiewit Sons' Co. v. St. Bd. of Equalization, 161 M 160, 505 P2d 102 (1973).

Inhibition on Police Power — Unreasonably Discriminatory Tax: Article III, sec. 3 and 27, 1889 Mont. Const., served to inhibit the police power in this state, and Ch. 153, L. 1961, which discriminatorily restrained the use of trading stamps or other redeemable devices in retail business by imposing an unreasonably high and prohibitive tax, was unconstitutional under these sections. Garden Spot Market, Inc. v. Byrne, 141 M 382, 378 P2d 220 (1963).

Photographic Examiners Act: Sections 66-1701, et seq., R.C.M. 1947 (now repealed), known as the Photographic Examiners Act, was unconstitutional as it violated Art. III, sec. 3 and 27, 1889 Mont. Const., and section 1 of 14th amendment to the Constitution of the United States. St. v. Gleason, 128 M 485, 277 P2d 530 (1954).

Denial of Due Process: Section 2620.45, R.C.M. 1935 (now repealed), levying a tax on dealers in oleomargarine, was in violation of this section in that it denied the right to carry on a lawful business without due process of law. Brackman v. Kruse, 122 M 91, 199 P2d 971 (1948).

Unfair Practices Act: The Unfair Practices Act, Title 30, ch. 14, part 2, was held not in conflict with Art. III, sec. 3, 1889 Mont. Const. Under its police power the state may by legislative action adopt whatever economic policy, looking to the curbing of unrestrained and harmful competition and protecting the public against monopolies, may reasonably be deemed to protect the public welfare, and the courts are without authority to override it. Assoc. Merchants of Mont. v. Ormesher, 107 M 530, 86 P2d 1031 (1939).

Motor Vehicle Transportation: While every person has the right to travel upon a public highway and transport his property thereon, use of it for the purpose of carrying on the business of motor vehicle transportation is not a vested right but a mere privilege or license which the Legislature may grant or withhold in its discretion or grant upon such conditions as it sees fit to impose. Hence Ch. 154, L. 1923 (since repealed), regulating such business, is not open to the constitutional objections that it takes private property for public use without due process of law or denies to the people the right of enjoying their property. Willis v. Buck, 81 M 472, 263 P 982 (1928); St. v. Johnson, 75 M 240, 243 P 1073 (1926).

HEALTH AND SAFETY

Fruit Inspectors: The statutes authorizing the state inspector of fruit pests to destroy infected fruit are valid. Colvill v. Fox, 51 M 72, 149 P 496 (1915).

Attorney General's Opinions

Strong Public Interest in Compliance: The purpose of the Montana Subdivision and Platting Act contained in 76-3-102 is in accord with the inalienable right of all Montanans to "a clean and healthful environment" (Art. II, sec. 3, Mont. Const.). The unauthorized approval of the Board of County Commissioners of a certificate of survey cannot, by itself, overcome the strong public interest in compliance with the provisions of the subdivision and platting law. 38 A.G. Op. 106 (1980).

Marriage License Denial — Default in Support: A judicial opinion concerning the constitutionality of 40-1-211, MCA (now repealed), should be sought before denying a license to marry under that section. 37 A.G. Op. 159 (1978).

Law Review Articles

The Poacher, the Sovereign Citizen, the Moonlighter, and the Denturists: A Practical Guide to Inalienable Rights in Montana, Bourguignon, 77 Mont. L. Rev. 5 (2016).

Going With the Flow: The Montana Court's Conservative Approach to Constitutional Interpretation, Tuholske, 72 Mont. L. Rev. 237 (2011).

Spatial Inequality as Constitutional Infirmity: Equal Protection, Child Poverty and Place, Pruitt, 71 Mont. L. Rev. 1 (2010).

A Non-Indian Entity Is Polluting Indian Waters: "Water" Your Rights to the Waters and "Water" Ya Gonna Do About It?, Hanlon, 69 Mont. L. Rev. 173 (2008).

A Battle of Public Goods: Montana's Clean and Healthful Environment Provision and the School Trust Land Question, Sienkiewicz, 67 Mont. L. Rev. 65 (2006).

Murky Waters: Private Action and the Right to a Clean and Healthful Environment—An Examination of Cape-France Enterprises v. Estate of Peed, Naber, 64 Mont. L. Rev. 357 (2003).

Taking Liberties: Analysis of In Re Mental Health of K.G.F., Dahl, 64 Mont. L. Rev. 295 (2003).

Constitutionalizing the Environment: The History and Future of Montana's Environmental Provisions, Thompson, 64 Mont. L. Rev. 157 (2003).

MEIC v. DEQ: An Inadequate Effort to Address the Meaning of Montana's Environmental Provisions, Horwich, 62 Mont. L. Rev. 269 (2001).

The Effect of the Environmental Policy Acts on Pre-Existing Agency Authority, Tobias and McLean, 41 Mont. L. Rev. 177 (1980).

Section 4. Individual dignity.

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DECISIONS UNDER 1972 CONSTITUTION

EQUAL PROTECTION GENERALLY

Allegation of Unequal Treatment and Unequal Opportunity Sufficient for Standing: A plaintiff's allegation that a hospital's billing practices and the Montana Preferred Provider Agreements Act violated Montana antitrust laws and the Montana Constitution by discriminating against her on the basis of uninsured status was sufficient for plaintiff to pursue her claim. The Supreme Court reasoned that alleged unequal treatment and unequal opportunity to obtain a benefit is an injury for standing purposes. Gazelka v. St. Peter's Hosp., 2015 MT 127, 379 Mont. 142, 347 P.3d 1287.

Department of Revenue Properly Phased in Increases — Property Tax — Plain Reading of Statute: The petitioners filed for declaratory judgment and writ of mandate based on the Department of Revenue's 2009 reclassification of their agricultural property. The petitioners argued that the Department failed to correctly phase in increases under 15-7-111 and that the subsection used by the Department only applied to reclassification of property among different classes. Following a remand from the Supreme Court based on class action certification, the District Court granted the Department's motion for summary judgment. On appeal, the Supreme Court affirmed, holding that 15-7-111 was not ambiguous, that the Department followed the plain language of the statute, that the Department's failure to promulgate rules did not have a substantive effect on the proceeding, and that the petitioner's equal protection concerns were not valid. Lucas Ranch, Inc., v. Dept. of Revenue, 2015 MT 115, 379 Mont. 28, 347 P.3d 1249.

Prohibition on Same-Sex Marriage Unconstitutional: Under the due process and equal protection clauses of the 14th amendment to the United States Constitution, same-sex couples have a fundamental right to marry. A state is required to license a marriage between same-sex couples and to recognize a same-sex marriage validly performed out of state. A state law that provides otherwise is unconstitutional. Obergefell v. Hodges, 576 US __, 135 S. Ct. 2584 (2015).

Statute Denying Benefits Due to Incarceration — Constitutional — No Violation of Equal Protection: The plaintiffs filed suit against the State Fund for wrongfully denying them partial disability benefits due to their incarceration. They alleged that 39-71-744 of the Workers' Compensation Act violated their right to equal protection. The Workers' Compensation Court rejected their claim that the statute allowing the denial of benefits during incarceration violated their rights to equal protection because no similarly situated class existed. On appeal, the Supreme Court disagreed and concluded there was a similarly situated class. However, in applying the rational basis test, the Supreme Court concluded that allowing incarcerated claimants to collect benefits during their incarceration would undercut a principal objective of the Act. Therefore, because the statute rationally advances the governmental interests of the Act, it is constitutional. Goble v. Mont. St. Fund, 2014 MT 99, 374 Mont. 453, 325 P.3d 1211.

Six-Year Appraisal Cycle — No Violation of Equal Protection Rights When Property Value Significantly Decreases at Beginning of Cycle: The value of the taxpayer's property significantly declined in the year following its tax appraisal. After the Department of Revenue refused to conduct a midcycle reevaluation of the property, the taxpayer challenged the constitutionality of the 6-year tax cycle, arguing that the Department should conduct a midcycle reevaluation to

relieve it from paying taxes based on an inflated value of the property and that the failure to do so subjected the taxpayer to disparate treatment in violation of its equal protection rights. The District Court agreed and ordered the Department to conduct a midcycle reevaluation. The Department appealed and the Supreme Court reversed, concluding that a 6-year cyclical plan of reappraisal does not violate a taxpayer's rights when the property depreciates in value during the cycle because the Montana Constitution requires only a periodic attainment of equality of tax treatment. The court also determined that the District Court had improperly exercised legislative authority in ordering the Department to conduct a reevaluation. Covenant Inv., Inc. v. Dept. of Revenue, 2013 MT 215, 371 Mont. 186, 308 P.3d 54.

Failure to Inform Defendant of Illegal Plea Bargain Offer — No Ineffective Assistance of Counsel: The prosecutor contacted the defendant's attorney with a plea bargain offer that imposed a separate sentence for both the defendant's persistent offender status and the underlying crime. The defendant's attorney refused the offer on the basis that it was illegal and did not inform the defendant of the offer. The defendant argued that his attorney's actions constituted ineffective assistance of counsel and that he would have accepted the offer and received a lesser sentence. The Supreme Court held that the remedy with respect to the plea offer if there had been ineffective assistance of counsel would be to have the state re-offer the plea bargain, but in this case that was not possible since the sentence under the offer would have been illegal. Rose v. St., 2013 MT 161, 370 Mont. 398, 304 P.3d 387.

Employee's Equal Protection Claim Dismissed Based on Mootness — Employer Not Vicariously Liable if Employees Not Liable: An employee who filed a negligence action against a former corporate employer as well as other employees of the corporation claimed that 39-71-413 violated the equal protection clause provided for under Art. II, sec. 4, Mont. Const., by treating employees of a partnership differently from employees of a corporation. The Supreme Court held that the employee's constitutional question was moot since the jury in the District Court trial determined that the other employees were not liable, thereby making it impossible for the corporate employer to be vicariously liable. Alexander v. Bozeman Motors, Inc., 2012 MT 301, 367 Mont. 401, 291 P.3d 1120, citing Allmaras v. Yellowstone Basin Properties, 248 Mont. 477, 812 P.2d 770 (1991).

Same-Sex Couples Seeking Declaratory and Injunctive Relief for Rights Afforded Married Couples — Relief Exceeds Bounds of Justiciable Controversy — Remanded to Allow Plaintiffs to Amend Complaint: Six same-sex couples filed suit against the state seeking declaratory and injunctive relief in order to receive protections and benefits equal to those provided to married couples under state law. Although they claimed that Montana's statutory scheme denied them several rights under Article II of the Montana Constitution — among them, the rights to equal protection, due process, and dignity — the plaintiffs did not seek a declaration that particular statutes were unconstitutional. The District Court granted the state's motion to dismiss, concluding that the matter exceeded the bounds of a justiciable controversy and that to grant the plaintiffs the broad injunction and declaratory judgment they sought would not terminate the controversy giving rise to the proceeding. On appeal, the Supreme Court affirmed the dismissal but remanded the matter to the District Court to allow the plaintiffs the opportunity to amend their complaint to identify the statutes they claim violate their constitutional rights. Donaldson v. St., 2012 MT 288, 367 Mont. 228, 292 P.3d 364.

Mother's Fundamental Right to Travel — Move from Utah to Montana Not Required: The District Court permitted a mother to move her children from Montana to Utah under certain conditions. Subsequently, the father moved to amend the parenting plan to move the children back to Montana, arguing that the mother was not following the conditions set forth in the District Court's order. The District Court concluded that the children could stay in Utah with the mother. On appeal, the Supreme Court determined that the father did not prove that moving the children back to Montana was in their best interest and that doing so would interfere with the mother's fundamental right to travel. Hood v. Hood, 2012 MT 158, 365 Mont. 442, 282 P.3d 671, citing In re Marriage of Cole, 224 Mont. 207, 729 P.2d 1276 (1986), and In re Custody of D.M.G. & T.J.G., 1998 MT 1, 287 Mont. 120, 951 P.2d 1377.

Shackling of Defendant — Modification of Herrick Test — Remanded for Evidentiary Hearing: Immediately prior to his trial, and in front of the venire, the defendant refused to take his seat after repeated requests by the judge. The District Court found him in contempt and instructed the sheriff to arrest him. After a brief break, the trial commenced with the defendant being shackled in his chair while the state conducted voir dire. The defendant then asked to be released from his shackles to represent himself and remained unshackled for the remainder of the trial. The jury found the defendant guilty of two of the four counts against him and the defendant appealed. In considering whether the District Court abused its discretion in having the defendant shackled,

the Supreme Court considered the two-step test in St. v. Herrick, 2004 MT 323, 324 Mont. 76, 101 P.3d 755: whether the restraint was needed to maintain security and whether the court utilized less restrictive methods prior to restraint. Because the record was silent with regard to whether the District Court utilized less restrictive means first, the Supreme Court concluded that the second prong of Herrick had not been satisfied. The Supreme Court, given the silent record, could not properly determine whether the violation was harmless and remanded the case to the District Court to determine whether the violation was harmless in light of the defendant's right to remain free of physical restraints. St. v. Hartsoe, 2011 MT 188, 361 Mont. 305, 258 P.3d 428.

Denial of Rehabilitation Benefits Based on Social Security Entitlement — Violation of Equal Protection: The plaintiff, a 77-year-old workers' compensation claimant, was denied rehabilitation benefits in accordance with 39-71-710 based exclusively on his age-based eligibility to receive Social Security retirement benefits. The Workers' Compensation Court ruled in favor of the plaintiff. In affirming the lower court, the Supreme Court held that 39-71-710 violated the right to equal protection because the statute created two classes of similarly situated persons, distinguished only by age. The court further concluded that cost-containment of the workers' compensation system alone is not sufficient to justify disparate treatment between the classes and that the automatic denial of rehabilitation benefits to those eligible for Social Security benefits did not rationally relate to any legitimate governmental interest. Caldwell v. MACo Workers' Compensation Trust, 2011 MT 162, 361 Mont. 140, 256 P.3d 923 (distinguishing Satterlee v. Lumberman's Mut. Cas. Co., 2009 MT 368, 353 Mont. 265, 222 P.2d 566).

No Violation of Due Process Right to Be Free From Bodily Restraints in Civil Commitment Hearing When Record Demonstrates Restraints Are Needed: The District Court did not err in requiring T.J.F. to appear before it at a bench trial without a jury, during a civil commitment proceeding, in full restraints. Testimony regarding T.J.F.'s verbal outbursts and violent physical behavior established the need for restraints in order to maintain orderly conduct of the court's proceedings. In re Mental Health of T.J.F., 2011 MT 28, 359 Mont. 213, 248 P.3d 804.

Prescription of Different Psychiatric Medicines Not Cruel and Unusual Punishment or Denial of Dignity: After Wilson was incarcerated at the Montana State Prison, he was prescribed two psychiatric drugs different from the three drugs that were originally prescribed to keep him psychiatrically stable. The District Court found that the reason for the denial was a professional difference of opinion between the prescribing physician and the prison psychiatrist as to the medical value of one of the drugs in a prison setting and that the prison had a policy not to allow the use of one of the originally prescribed drugs by prisoners because of its potential for abuse. Based upon a record of numerous hearings and much testimony, the Montana Supreme Court found that the prison had not deprived Wilson of one of the basic necessities of life and that the prison was not deliberately indifferent to Wilson's medical care or to the standards adopted by the Montana Supreme Court, based upon decisions by the U.S. Supreme Court, in Quigg v. Slaughter, 2007 MT 76, 336 Mont. 474, 154 P.3d 1217, and Walker v. St., 2003 MT 134, 316 Mont. 103, 68 P.3d 872. Wilson v. St., 2010 MT 278, 358 Mont. 438, 249 P.3d 28.

No Demonstration Beyond a Reasonable Doubt That the Statute is Unconstitutional: Plaintiffs argued that 39-71-413 of the Workers Compensation Act violated various Montana constitutional provisions including the right to equal protection, the prohibition against legislation conferring any irrevocable grant of special privileges, franchises, or immunities, and the prohibition against special legislation. Statutes are presumed to be constitutional, and the court concluded that the plaintiffs failed to meet their burden of demonstrating beyond a reasonable doubt that 39-71-413 is unconstitutional. Alexander v. Bozeman Motors, Inc., 2010 MT 135, 356 Mont. 439, 234 P.3d 880.

Consideration of Parent's Motives When Parent Moves Children: Unless a District Court finds that a parent's decision to move exemplifies a willful and consistent attempt to frustrate or deny the other parent contact with the children, the decision to move cannot be held against the moving parent or considered as being against the best interests of the children. The District Court committed a clear abuse of discretion in considering the move in its adoption of the amended final parenting plan. In re Marriage of Plaisted-Harman, 2010 MT 100, 356 Mont. 218, 232 P.3d 888.

Failure of Counsel to Move for Dismissal or Reduced Charges Based on Lack of Physical Evidence — Record-Based Claim Subject to Postconviction Review: Taylor contended on appeal that trial counsel was ineffective in failing to move for dismissal or reduction of a rape charge based on the absence of rape examination evidence. However, the record showed no explanation of the reasons for counsel's omissions. Therefore, consideration of the issue was not appropriate for direct appeal, but rather was best suited for postconviction review. The Supreme Court

declined to address why counsel chose to proceed as he did and dismissed Taylor's appeal of this issue without prejudice. St. v. Taylor, 2010 MT 94, 356 Mont. 167, 231 P.3d 79.

City Council Denial of Subdivision Exemption Not Violative of Constitutional Protections: The Missoula City Council denied plaintiffs' applications for exemptions from subdivision requirements, and plaintiffs appealed on grounds that denial of the applications constituted violations of constitutional rights of equal protection and public participation, was a taking, and was a tortious violation of the city council's statutory duties. The District Court granted summary judgment for the city on all the claims and plaintiffs appealed, but the Supreme Court affirmed. The equal protection argument was merely a bald assertion that was largely unclear and poorly supported, failing to demonstrate a discriminatory purpose, and was properly dismissed on summary judgment. The takings claim failed because plaintiffs never possessed a right to obtain an exemption, but instead only lost the opportunity to obtain an exemption, and the discretion to grant or deny the exemption was properly exercised by the city council. Plaintiffs raised the public participation claim in District Court but failed to discuss the issue in briefs on appeal, so the Supreme Court declined to consider the issue. The claim of a tortious violation of the city council's statutory duties also failed as a cognizable negligence claim because plaintiffs failed to prove that the council's actions damaged plaintiffs. Roe v. Missoula, 2009 MT 417, 354 M 1, 221 P3d 1200 (2009). See also Gudmundsen v. State ex rel. Mont. St. Hosp. Warm Springs, 2009 MT 56, 349 M 297, 203 P3d 813 (2009).

DUI Punishment Statutes Not Violative of Equal Protection: Blue contended that the statutory scheme for DUI sentencing, allowing different punishments for the first through third offenses and felony sentencing for a fourth DUI, violated equal protection under the Montana Constitution. The Supreme Court disagreed. The Montana Constitution does not include a right to be sentenced without regard to prior convictions. The assumption that a prior offender is a greater danger to the public is reasonable. Under Montana law, even if the highest degree of equal protection analysis was applied requiring the state to show a compelling interest in the DUI punishment statutes, that interest exists as a matter of law. Therefore, the DUI statutes withstood analysis and do not violate the constitutional guarantee of equal protection. St. v. Blue, 2009 MT 304, 352 M 382, 217 P3d 82 (2009).

City Commission Denial of Application for Site Plan Not Violative of Due Process or Equal Protection — Summary Judgment Proper: Plaintiff sought to build several mini-stores in a Bozeman area that was zoned as a neighborhood business district, but the City Commission denied the building application. Plaintiff sued the city on grounds that the Commission violated plaintiff's constitutional right to due process by arbitrarily and capriciously deciding to consider the application rather than allowing the decision to be made by the planning director, and by denying the application. The District Court concluded that the zoning ordinance gave the Commission broad discretion in granting applications for site plan approval and that because plaintiff had no protected interest in the application, plaintiff was prevented from establishing a substantive due process or equal protection claim. The Commission was held to have followed proper procedures, and because no material facts were in dispute, summary judgment was granted to the city. On appeal, the Supreme Court affirmed. A constitutional substantive due process analysis was inapplicable in this case because plaintiff did not allege that the zoning ordinance was unconstitutional. Likewise plaintiff did not allege that the Commission treated plaintiff's application differently from applications of others owning property in the zoning district, so any equal protection claim failed as well. The City Commission considered the relevant criteria and stated its reason why plaintiff's site plan did not conform to the zoning regulations, and it was within the discretion of the Commission to reclaim and pass on plaintiff's application. Town & Country Foods, Inc. v. Bozeman, 2009 MT 72, 349 M 453, 203 P3d 1283 (2009). See also Raisler v. Burlington N. RR Co., 219 M 254, 717 P2d 535 (1985).

Application of Right to Counsel Not Violative of Equal Protection: Schneider argued that the U.S. and Montana Supreme Courts' interpretation of the right to counsel violated the right to equal protection. The Supreme Court disagreed. Although some people may enjoy the right to counsel while others do not, application of the right to counsel to certain persons and not others does not create a protected class of two similarly situated classes of person who are treated differently, so the equal protection clause does not apply. St. v. Schneider, 2008 MT 408, 347 M 215, 197 P3d 1020 (2008).

Constitutionality of Montana Medicaid "No Corporation, No Trust" Rule: A provision of the Montana Medicaid Manual adopted by the Department of Public Health and Human Services (DPHHS) established a "no corporation, no trust" rule providing that property held in a trust or owned by a corporation is not owned by a filing/assistance unit, so no personal property exclusions

could be applied to trust or corporation property regardless of whether any member of the filing/assistance unit was a trust beneficiary or corporate shareholder. In order to circumvent the rule and reduce countable resources to qualify for Medicaid services for his wife, plaintiff traded a one-third interest in a corporation for a truck to be used by plaintiff for business purposes and self-support, thus converting the countable corporate interest into an excludable interest. Plaintiff later contended that the "no corporation, no trust" rule violated equal protection under the state constitution because no rational basis existed for discriminating between whether an asset is countable or excludable based on the form of ownership and because neither the goal of controlling Montana Medicaid costs nor any other professional reason provided a rational basis for the discrimination. The Supreme Court applied the rational basis test and agreed. The court noted a 2008 DPHHS rule that apparently permits an exclusion for property essential for self-support that is owned by a limited liability company, while still disallowing an exclusion for property owned by a corporation such as plaintiff's. Therefore, DPHHS's premise that a rational basis existed for excluding plaintiff's corporate property could not withstand scrutiny, and the court concluded that the "no corporation, no trust" rule as applied to plaintiff violated the right to equal protection. Timm v. Dept. of Public Health and Human Services, 2008 MT 126, 343 M 11, 184 P3d 994 (2008).

Medicaid — Disallowance of Offset of Countable Resources by Amount of Accumulated Nursing Home Costs Affirmed: The District Court upheld a decision by the Board of Public Assistance affirming a decision by a hearings examiner not to offset plaintiffs' countable resources by the amount of their accumulated nursing home care expenses. The court reasoned that because federal law does not allow a deduction for incurred medical expenses in resource determinations, equal protection did not apply. On appeal, plaintiffs asserted that failure to allow the offset had no rational basis and therefore violated equal protection. However, plaintiffs provided no authority showing that federal law requires states to use resource spend down in administering Medicaid, so the equal protection claim was without merit and the District Court was affirmed. Timm v. Dept. of Public Health and Human Services, 2008 MT 126, 343 M 11, 184 P3d 994 (2008), distinguishing Deaconess Medical Center of Billings, Inc. v. Dept. of Social and Rehabilitation Services, 222 M 127, 720 P2d 1165 (1986).

No Error in Appraising Fair Market Value of Electric Generation Assets Differently When Owned by Different Utilities — Equal Protection Constitutionality of Unit Method of Property Valuation Affirmed: Defendant utility company appealed a District Court decision regarding the equality of the state's tax assessments, claiming that the state deprived the utility of equal protection by failing to properly equalize defendant's property tax burden with other comparable electric generation facilities in Montana. The Department of Revenue explained that the relatively higher appraisal values of defendant's properties arose from the fact that the different companies had different total market values as a unit, so their individual properties also had different market values despite the fact that the individual properties might be physically similar. The Supreme Court noted that the unit method of valuation was held to pass constitutional equal protection scrutiny in W. Union Tel. Co. v. St. Bd. of Equalization, 91 M 310, 7 P2d 551 (1932), and the court declined to revisit the issue of the constitutionality of the method itself. The court held that there is nothing constitutionally significant in the bare fact that the Department of Revenue appraises the fair market value of the same electric generation assets differently when those assets are owned by different utilities. The basic rule of equal protection is that persons that are similarly situated with respect to a legitimate governmental purpose of law must receive like treatment. The first prerequisite of a meritorious equal protection claim is that the state had adopted a classification that affects two or more similarly situated groups in an unequal manner. Here, the District Court's determination that defendant failed to establish that the state's use of the unit method of valuation deprived defendant of equal protection was affirmed. Dept. of Revenue v. PPL Mont., LLC, 2007 MT 310, 340 M 124, 172 P3d 1241 (2007).

Gross Negligence Standard of Care in Snowmobile Liability Law Violative of Equal Protection — Ordinary Standard of Care Applicable to Snowmobile Liability: Musselman was severely injured in a snowmobile accident on U.S. Forest Service land, and Musselman's guardian sued the Forest Service under the Federal Tort Claims Act. The Forest Service argued that its decision not to mark the trail was discretionary under federal law and that Montana's snowmobile liability statutes relieved the Forest Service from a duty to warn of the hazardous trail because a snowmobile area operator had no duty under 23-2-653(3) to eliminate, alter, control, or lessen the risk inherent in the sport of snowmobiling. The federal District Court rejected both affirmative defenses and concluded that neither the gross negligence standard of liability in 23-2-653 nor the willful or wanton conduct standard of liability in 70-16-302 applied, but rather that the

ordinary care standard of liability in 27-1-701 applied, and apportioned liability between the Forest Service and the snowmobilers. The case was appealed to the Ninth Circuit Court, which affirmed in all respects except the determinative question of which standard of care applied. Three questions were certified to the Montana Supreme Court for resolution, including whether the gross negligence standard of care in 23-2-653 was constitutional and, if not, whether the willful or wanton conduct standard of liability in 70-16-302 or the ordinary care standard of liability in 27-1-701 applied. The Supreme Court concluded that the same rationale applied to skiers in Brewer v. Ski-Lift, Inc., 234 M 109, 762 P2d 226 (1988), also applied to snowmobile area operators. The gross negligence standard of care in 23-2-653 is overbroad, extends beyond its stated purpose, fails to pass rational basis review, and violates the equal protection clause in Art. II, sec. 4, Mont. Const. The remainder of the snowmobile area operator law was left intact. The general recreational use willful or wanton conduct standard of liability in 70-16-302 was held inapplicable. Rather, the ordinary care standard of liability in 27-1-701 governed the Forest Service's actions in this case. Oberson v. U.S. Dept. of Agriculture, Forest Serv., 2007 MT 293, 339 M 519, 171 P3d 715 (2007).

Constitutionality of Persistent Felony Offender Statutes: Shults contended that the persistent felony offender (PFO) statutes were unconstitutional on their face in violation of double jeopardy, equal protection, and cruel and unusual punishment or as they applied to Shults's case. The Supreme Court disagreed. First, the PFO statutes do not constitute double jeopardy because a sentence as a habitual criminal is not viewed as a new jeopardy (see Gryger v. Burke, 334 US 728 (1948)). Second, Shults was not able to show that the PFO statutes classify two or more similarly situated groups in an unequal manner and thus failed to meet the first threshold of a meritorious equal protection claim. Last, a sentence that is within maximum statutory guidelines and that is not so disproportionate as to shock the conscience or outrage the moral sense of the community is not considered cruel and unusual punishment. Shults's sentence was within statutory parameters, and in light of Shults's 18-year criminal history and repeated failure to conform his behavior to societal norms despite having numerous opportunities to do so, the sentence could not be seen as so disproportionate as to shock the conscience or outrage the moral sense of the community and thus was not considered cruel and unusual punishment. St. v. Shults, 2006 MT 100, 332 M 130, 136 P3d 507 (2006).

State Control Over Financial Consequences of Pension Plan Associated With Public Employment — Retirement Policy Rationally Related to Government Interest: Plaintiff challenged the statutory scheme governing the eligibility for public pensions for employees who work for a school district, retire, and then work for the University System. The District Court held that the statutory proscription in 19-21-202 that prevents a retired teacher from receiving benefits from a state-sponsored retirement program while remaining an employee and contributing member of another private retirement program violated the constitutional right to equal protection. On appeal, the Supreme Court applied the rational basis test and reversed. There remains nothing irrational about the state deciding that at any one time, a public employee should not be both drawing a new salary and accruing a public pension and receiving an old public pension. When the job and its associated pension plan involve public employment, the state's interest in and control over the financial consequences are a legitimate exercise of the constitutional mandate in Art. VIII, sec. 15, Mont. Const., and the District Court incorrectly held that the statutory scheme was an equal protection violation. Farrier v. Teachers' Retirement Bd., 2005 MT 229, 328 M 375, 120 P3d 390 (2005).

Failure of Legislature to Define Quality Education — Inability of Court to Determine That Education System Adequately Funded: The District Court held that the state system of funding public education was unconstitutional under Art. X, sec. 1(3), Mont. Const., but did not violate the equal protection clause in this section. On appeal, the Supreme Court held that because the Legislature has not defined what "quality" means, it was not possible to conclude that the current funding system was designed to provide a quality education. Although deferring to the Legislature to provide a definition of a quality education, given the unchallenged findings of the District Court regarding Art. X, sec. 1(3), Mont. Const., the Supreme Court nevertheless concluded that whatever definition the Legislature devises, the current system was not sufficiently grounded in principles of quality to be considered constitutional. Because the unconstitutionality of the present funding system was affirmed, the Supreme Court held that the District Court need not have addressed the equal protection issue, so the District Court was directed to vacate its conclusion that the present system did not violate equal protection. Columbia Falls Elementary School District No. 6 v. St., 2005 MT 69, 326 M 304, 109 P3d 257 (2005). In Stroebe v. St., 2006 MT 19, 331 M 23, 127 P3d 1051 (2006), plaintiffs also challenged the constitutionality of Montana's system of funding

public schools. The District Court granted the state's motion for summary dismissal on grounds that the equitable funding challenge was not currently justiciable. On appeal, the Supreme Court noted that plaintiffs' issues had been previously addressed in Columbia Falls, id., and that the circumstances under which plaintiffs brought the present case had sufficiently changed under Columbia Falls, so that rendering another decision while the funding system was undergoing legislative reform would not only interfere with the Columbia Falls decision but would decide a question that was essentially moot. The equitable funding challenge was therefore not currently justiciable, and the appeal was dismissed.

Award of Attorney Fees at Variance With Contingency Agreement Permissible—Constitutionality of Workers' Compensation Hourly Attorney Fee Rule: Bustell entered a contingency fee agreement with the attorney handling her workers' compensation claim. Bustell's claim was found to be compensable, and the Workers' Compensation Court held that Bustell was entitled to attorney fees. However, the court awarded fees based on the hourly attorney fee provisions in 39-71-614 rather than on the contingent fee agreement. On appeal, Bustell contended that the hourly fee rule violated due process by failing to protect a claimant's net benefits, particularly claimants who enter a contingency fee agreement, and by shifting the burden of paying attorney fees from the insurer to the claimant. Bustell also asserted that the rule violated equal protection by preventing her from seeking reasonable attorney fees as compared to other similarly situated claimants. Section 39-71-614 was enacted in response to the holding in Wight v. Hughes Livestock, Inc., 204 M 98, 664 P2d 303 (1983), which created a strong presumption in favor of the reasonableness of a contingent fee contract, and the section was intended to eliminate any question that the basis for determining attorney fees would be an hourly fee to be determined in the judge's discretion. Bustell failed to overcome the presumption of constitutionality, and the Workers' Compensation Court correctly found no due process violation. Bustell's equal protection claim also failed. There are not two legitimate classes for an equal protection challenge because every claimant is treated equally under the statutes. The amount of fees awarded is not relevant to any discriminatory treatment of the claimants themselves. Bustell v. AIG Claims Serv., Inc., 2004 MT 362, 324 M 478, 105 P3d 286 (2004).

Former Statute of Repose Precluding Redress Under Former Occupational Disease Act: Hardgrove was employed by W.R. Grace until 1984. About 14 years later, Hardgrove discovered that he had been exposed to asbestos while employed and filed an occupational disease claim 1 month and 1 day after discovering the problem. The employer's insurer refused to cover the claim. The District Court concluded that Hardgrove's claim was barred under 39-72-403(3) (subsection (3) deleted in 1985 and section now repealed) and that the statute violated neither the constitutional equal protection clause nor the full legal redress clause. On appeal, the Supreme Court affirmed after characterizing 39-72-403(3) (now repealed) as a statute of repose. As distinguished from a statute of limitations, which limits the time within which a claimant may pursue a right, a statute of repose extinguishes the existence of the underlying right itself and establishes the absolute time beyond which no party is liable if the statutory period for bringing the claim can lapse before the action accrues. A court may equitably toll a statute of limitations, but only a legislative mandate can toll a statute of repose. In this case, the statute of repose extinguished Hardgrove's right to the cause of action 3 years after Hardgrove finished work, so the claim filed 14 years later was barred and Hardgrove had no right to legal redress under the former Occupational Disease Act of Montana (now repealed and merged with Workers' Compensation Act). Without deciding whether Hardgrove had a legal remedy outside the former Act, the Supreme Court nevertheless affirmed that 39-72-403(3) (now repealed) as a statute of repose that did not violate the constitutional equal protection and full redress provisions. Hardgrove v. Transp. Ins. Co., 2004 MT 340, 324 M 238, 103 P3d 999 (2004).

Shackling of Defendant at Trial to Ensure Security of Courtroom — No Due Process Violation: At Herrick's attempted deliberate homicide trial, the trial court agreed to provide additional security measures, including leg shackles, reasoning that the jury was not likely to see the shackles while Herrick was seated. Following conviction, Herrick appealed on grounds that the use of shackles violated his due process right to a fair trial. The Supreme Court noted that the due process clause of the U.S. Constitution entitles a criminal defendant to appear before a jury free of shackles and other physical restraints and concluded that the Montana Constitution does not provide more protection with regard to shackling than the U.S. Constitution. However, that right is not absolute, and a trial judge's decision to shackle a defendant is not unconstitutional per se (see Morgan v. Bunnell, 24 F3d 49 (9th Cir. 1994)). The Supreme Court adopted the two-part test in Morgan for determining whether a trial court has abused its discretion in restraining a defendant at trial. Under that test, the trial court must be persuaded by compelling

circumstances that some measure is needed to maintain the security of the courtroom and must pursue less restrictive alternatives before imposing physical restraints. In this case, the trial court satisfied both parts of the test. The facts presented compelling circumstances to support the court's exercise of its broad discretion in determining that additional security was necessary, and the court took great care to prevent the jury from being aware that Herrick's ankles were shackled. Nothing indicated that the jury saw the leg restraints at any time, so Herrick's rights to individual dignity, a fair trial, and due process were not violated. St. v. Herrick, 2004 MT 323, 324 M 76, 101 P3d 755 (2004), distinguishing St. v. Finch, 975 P2d 967 (Wash. 1999), and followed in St. v. Merrill, 2008 MT 143, 343 M 130, 183 P3d 56 (2008), to the extent that keeping a defendant shackled during trial without establishing compelling circumstances for security measures constitutes a violation of the defendant's constitutional due process rights. See St. v. Hartsoe, 2011 MT 188, 361 Mont. 305, 258 P.3d 428. See also Ill. v. Allen, 397 US 337 (1970).

Lack of Remorse Not Sole Sentence Enhancement Factor — Incest Sentence Affirmed: Defendant contended that the sentencing court erred in augmenting a sentence for incest simply because defendant did not show remorse or admit guilt. The Supreme Court noted that St. v. Shreves, 2002 MT 333, 313 M 252, 60 P3d 991 (2002), prohibits enhancement of a sentence solely because a defendant is not remorseful or refuses to be accountable for the defendant's conduct. However, in this case, the sentencing court did not rely solely on defendant's attitude in enhancing the incest sentence but also considered defendant's risk of reoffending, risk to society, prospects for rehabilitation, character, background, history, and mental and physical functioning. Thus, Shreves was distinguishable, and the sentence was affirmed. St. v. J.C., 2004 MT 75, 320 M 411, 87 P3d 501 (2004).

"Class of One" Equal Protection Law Not Established at Time of Discharge From Public Employment — Saucier Test — Official Entitled to Qualified Immunity: Losleben was terminated from state employment in 1999, and following an unsuccessful grievance, Losleben filed a complaint in District Court, alleging that his former supervisors violated his right to equal protection by engaging in a vindictive and spiteful campaign to terminate his employment. Two supervisors were subsequently dismissed from the suit, and the District Court granted the third supervisor qualified immunity, concluding that Losleben's equal protection claim for a "class of one" was not clearly established at the time of the alleged misconduct. Losleben appealed. Traditionally, a person bringing an equal protection claim must show intentional discrimination because of membership in a particular class, not merely that the person was treated unfairly as an individual. However, in Village of Willowbrook v. Olech, 528 US 562 (2000), the U.S. Supreme Court concluded that an equal protection claim may be brought by a claimant as a "class of one" even though the claimant is not a member of a traditionally recognized protected class. The court subsequently held in Saucier v. Katz, 533 US 194 (2001), that a two-part test is to be applied in determining whether state officials are entitled to qualified immunity: (1) when taken in a light most favorable to the party asserting injury, do the facts alleged show that an official's conduct violated a constitutional right; and (2) if so, was the right clearly established at the time that it was allegedly infringed. The District Court in this case erred by not applying the first step of the Saucier test, but because only the qualified immunity issue was certified to the Supreme Court, it was assumed that a constitutional violation could have occurred, so the Supreme Court proceeded to the second step of the Saucier analysis. The law in effect when Losleben was terminated in 1999, prior to Olech, did not recognize an equal protection "class of one" claim, so any equal protection right held by Losleben at that time was not well enough established to impute knowledge of it to Losleben's supervisor. Thus, the District Court properly granted the supervisor qualified immunity and dismissed the supervisor from the case. Losleben v. Oppedahl, 2004 MT 5, 319 M 269, 83 P3d 1271 (2004).

No Constitutional Right to Privacy for Nonhuman Entities — Protection of Trade Secrets Under Other Constitutional and Statutory Schemes: Montana's constitutional individual privacy exception to the public's right to know is limited to natural human individuals only and does not apply to nonhuman entities such as corporations. However, nothing in Art. II, sec. 9, Mont. Const., requires disclosure of trade secrets and other confidential proprietary information when that data is protected from disclosure elsewhere in the state or federal constitution or by statute. Great Falls Tribune v. Mont. Pub. Serv. Comm'n, 2003 MT 359, 319 M 38, 82 P3d 876 (2003), overruling Mtn. States Tel. & Tel. v. Dept. of Public Service Regulation, 194 M 277, 634 P2d 181 (1981), and its progeny to the extent that those decisions relied on the constitutional balancing test of the right to individual privacy against the public's right to examine documents or observe governmental deliberations as a basis of protecting trade secrets and other confidential proprietary information of nonhuman entities.

Assignment of Particular Work Position Not Considered Marital or Sex-Plus Discrimination: Three temporary seasonal positions at the Department of Natural Resources and Conservation (DNRC) were eliminated, including Beaver's position, and three permanent seasonal positions were created, including two 8-month positions and one 6-month position. Beaver was given the 6-month position and later sued DNRC for marital and sex-plus discrimination, based in part on the comment by a supervisor that Beaver did not have to worry about getting the 6-month position because she had recently been married and now had a new husband to support her. DNRC contended that the positions were offered based on experience and training, and it was within the discretion of the District Court to determine the credibility of the witnesses and testimony. Although agreeing that the supervisor's statement was highly inappropriate, the Supreme Court nevertheless held that based on the evidence, the employment decision did not involve marital or sex-plus discrimination and that DNRC did not discriminate against Beaver based on marital status. Beaver v. Dept. of Natural Resources and Conservation, 2003 MT 287, 318 M 35, 78 P3d 857 (2003).

Single Incident of Sexual Assault — Work Environment That Is Not Subjectively Objectionable Not Considered Type of Hostile Environment to Be Actionable Under Title VII — Standard of Review: Following a single incident of sexual assault by a coworker, Beaver brought a claim against the Department of Natural Resources and Conservation (DNRC) under the Montana governmental code of fair practices; Title 49, ch. 2, commonly known as the Montana Human Rights Act; and Title VII of the Civil Rights Act of 1964, asserting that the incident was sufficiently severe or pervasive to alter employment conditions and to create a hostile and abusive working environment. Under Harris v. Forklift Sys., Inc., 510 US 17 (1993), to be sufficiently severe or pervasive to violate Title VII and establish a claim, the misconduct must create a working environment that is both objectively and subjectively offensive and that a reasonable person and the victim perceive as hostile and abusive. The correct legal standard for determining whether an environment is hostile or abusive under Title VII is to review the totality of the circumstances, including: (1) the frequency of the discriminatory conduct; (2) the severity of the conduct, whether it is physically threatening or humiliating or a mere offensive utterance; and (3) whether the conduct interferes with an employee's work performance. Psychological well-being is one factor among many in the determination. Here, the coworker was dismissed following the incident, and Beaver continued working for DNRC, testifying that conditions of employment did not change following the assault. Thus, the District Court correctly concluded that the work environment was not subjectively objectionable to Beaver and that the single incident of sexual assault did not create the type of hostile or abusive environment actionable under Title VII. Beaver v. Dept. of Natural Resources and Conservation, 2003 MT 287, 318 M 35, 78 P3d 857 (2003).

Stalking Activities Not Related to Constitutionally Protected Rights: As part of a parenting plan, Adgerson was allowed to contact his former wife regarding decisions regarding their children. However, Adgerson also contacted her repeatedly regarding issues not related to the children in ways that frightened her and made her fear for her safety. On appeal, Adgerson contended that the stalking statute was unconstitutional because it interfered with his right to happiness, individual dignity, and family privacy and the right to parent his children. The Supreme Court noted that it was not constitutionally protected activity for which Adgerson was prosecuted, but rather the activity outside the scope of the parenting plan that was intended to intimidate his former wife. Adgerson's motion to dismiss on constitutional grounds was properly denied. St. v. Adgerson, 2003 MT 284, 318 M 22, 78 P3d 850 (2003).

Three-Year Statute of Limitations Reasonable for Prosecution of Misdemeanor Fish and Game Violations — Equal Protection and Due Process Not Violated: Defendant was charged with five misdemeanor fish and game and outfitter violations that occurred nearly 2 years earlier. Although misdemeanor violations must generally be charged within 1 year, 45-1-205(5) and (6) allow charges for misdemeanor fish and game crimes to be brought within 3 years of violation. Defendant contended that the extended statute of limitations for charging fish and game crimes violated equal protection and due process guarantees. The District Court reviewed the legislative history of 45-1-205(5) and (6) and concluded that the extended statute of limitations served a reasonable relation to the proper legislative purpose of protecting wildlife and that in order to effectively enforce fish and games laws, additional time to discover and investigate fish and game violations was warranted. The Supreme Court agreed. A separate class of misdemeanors for fish and game violations did not violate equal protection because all persons who commit such crimes are in a similarly situated class and subject to the same treatment. Further, because fish and game and outfitter violations sometimes require investigation over several hunting seasons and involve perpetrators who reside out of state, an extended statute of limitations is

a reasonable exercise of the state's legitimate police power in preserving wildlife and does not violate substantive due process. St. v. Egdorf, 2003 MT 264, 317 M 436, 77 P3d 517 (2003).

Probationer Not Entitled to Good Time Credit for Time Served on Original Sentence: Williams' suspended sentence for felony assault was revoked after Williams violated the terms of the suspension. Williams requested that he be credited for good time that he served on the suspended sentence. The District Court concluded that Williams was a probationer, not a parolee, and declined to grant good time credit. Williams appealed, but the Supreme Court affirmed. Williams' original sentence did not provide that Williams be treated as a parolee, so as a probationer, Williams was not entitled to credit for good time under McDermott v. Dept. of Corrections, 2001 MT 134, 305 M 462, 29 P3d 992 (2001). St. v. Williams, 2003 MT 136, 316 M 140, 69 P3d 222 (2003).

Prison Behavior Modification Plans Violative of Excessive Sanction Protection and Equal Protection — State Directed to Revise Incarceration Procedures: Walker, an inmate with diagnosed mental illness, alleged that conditions at the state prison violated constitutional sanctions against excessive punishment and equal protection guarantees because of his mental condition. Although Walker had been released from the state prison when his petition for postconviction relief was considered by the Supreme Court, the case was not moot, as the state contended, because the prison programs remained in place. The court went on to consider whether behavior modification programs used at the prison unconstitutionally exacerbated inmates' mental health conditions and concluded that they do. The plain meaning of the dignity clause in this section commands that the intrinsic worth and basic humanity of persons may not be violated, and if the particular conditions of confinement cause serious mental illness to be greatly exacerbated or deprive inmates of their sanity, those conditions then cross into the realm of psychological torture. Thus, prison behavior modification programs and living conditions in maximum security constitute an affront to the inviolable right to human dignity and constitute cruel and unusual punishment when they exacerbate an inmate's mental health condition. The prison was directed to conform the operations of its administrative segregation units to the requirements of this opinion. Walker v. St., 2003 MT 134, 316 M 103, 68 P3d 872 (2003). See also Campbell v. Mahoney, 2001 MT 146, 306 M 45, 29 P3d 1034 (2001), and Wilson v. St., 2010 MT 278, 358 Mont. 438, 249 P.3d 28.

Disparate Partial Disability Benefits Under Workers' Compensation Act and Occupational Disease Act (Now Repealed) Violative of Equal Protection: Plaintiff contracted an occupational disease. Because of the extent of the impairment, plaintiff would have been entitled to a partial disability benefit of $27,027 if the entitlement was calculated under 39-71-703 of the Worker' Compensation Act, but the maximum that could be recovered under 39-72-405 (now repealed) was $10,000. Plaintiff argued that 39-72-405 (now repealed) violated the right to equal protection by limiting compensation to less than would have been available for the same disability under 39-71-703. The Supreme Court agreed. Providing partial disability benefits to a person in plaintiff's situation in the amount of $27,027 under the Workers' Compensation Act but limiting plaintiff's wage supplement to $10,000 under the Occupational Disease Act of Montana (now repealed and merged with Workers' Compensation Act) violated the constitutional guarantee of equal protection under the law. Stavenjord v. Mont. St. Fund, 2003 MT 67, 314 M 466, 67 P3d 229 (2003), following Henry v. St. Comp. Ins. Fund, 1999 MT 126, 294 M 449, 982 P2d 456 (1999).

Operating Unlawful Clandestine Laboratory and Manufacturing Dangerous Drugs Considered Separate Offenses — No Equal Protection Violation: Davison was charged with two counts of operating an unlawful clandestine laboratory and one count of possession of dangerous drugs. Davison moved to dismiss the laboratory charges, claiming an equal protection violation because of the disparity in punishment between the laboratory charges and the charge of manufacturing dangerous drugs. The motion was denied, and Davison appealed, contending that disparate punishment for essentially the same crime lacked a rational basis in violation of equal protection guarantees. When reviewing equal protection challenges, the Supreme Court applies one of three levels of scrutiny, including strict scrutiny (if a law affects a suspect class or threatens a fundamental right), intermediate scrutiny (if a law affects a constitutional right that is not found in this article, and the rational basis test (which requires that a law must be rationally related to a legitimate governmental interest and applies if neither of the first two tests applies). Davison's argument failed because he did not identify a classification that would warrant an equal protection analysis under any of the three recognized levels of scrutiny. The offense of operating an unlawful clandestine laboratory is a separate and distinct crime from the offense of manufacturing dangerous drugs, so an individual convicted under one statute is not similarly situated to an individual convicted under the other statute for equal protection purposes. Further, the state is not required to charge a particular offense when an offender's

conduct satisfies the elements of more than one crime. Davison could not show that the crimes affect similarly situated classes in an unequal manner, so the Supreme Court affirmed. St. v. Davison, 2003 MT 64, 314 M 427, 67 P3d 203 (2003).

Process for Establishing County Building Code Jurisdictional Area Based on Franchise Limitation Unconstitutional: The 2001 Legislature enacted Senate Bill No. 242 (SB 242), which established a process for designating a county building code jurisdictional area and eliminating municipal jurisdictional areas by an election procedure limited to record owners of real property instead of the general constituency. When questioned regarding the constitutionality of the process, the Supreme Court noted that because voting rights cases involve a fundamental political right, strict scrutiny required the state to demonstrate a compelling governmental interest in restricting the voting franchise. The court concluded that: (1) the application and enforcement of building codes is an issue of public safety that affects all persons living in the area, not just record owners of real property; (2) governmental entities that oversee building codes are not special-purpose units whose functions and actions exclusively or disproportionately affect record owners of real property over other constituents in the area that do not own real property; and (3) elections to determine who may impose and enforce building codes in a given area are general interest elections rather than special interest elections. The state failed to show a compelling interest in limiting the voting franchise to only record owners of real property, and because the valid provisions of SB 242 were not severable from the invalid provisions, the court held that SB 242 was invalid in its entirety. (However, see Ch. 443, L. 2003, wherein the Legislature amended the voting procedure to address the franchise limitation.) Finke v. State ex rel. McGrath, 2003 MT 48, 314 M 314, 65 P3d 576 (2003). See also Kramer v. Union School District, 395 US 621 (1969).

Disparate Government Treatment of Outdoor Signs Not Violative of Equal Protection: Plaintiff contended that the disparate treatment of outdoor signs under city and county zoning ordinances was violative of equal protection because the city of Whitefish did not regulate its own "Welcome to Whitefish" sign in the same manner as other off-premises signs. The Supreme Court found no constitutional violation. In contrast to plaintiff's sign, the welcome sign did not advertise an establishment, merchandise, service, or entertainment located elsewhere. Further, the welcome sign fit within the official government sign exemption in the city ordinance. The city's disparate treatment of the signs did not violate equal protection guarantees because the signs in question were not of the same class. Mont. Media, Inc. v. Flathead County, 2003 MT 23, 314 M 121, 63 P3d 1129 (2003).

Sentence Based on Refusal to Admit Guilt Violative of Right Against Self-Incrimination: Shreves was convicted of deliberate homicide and sentenced to 100 years in prison, with no parole for 60 years. At trial, Shreves chose to testify on his own behalf and assert his innocence, and at sentencing, Shreves chose not to testify, but his counsel indicated that Shreves maintained his innocence. The District Court imposed the sentence based in significant part on Shreves' failure to show remorse or responsibility. Shreves appealed on grounds that it was improper to hold his refusal to admit to the crime against him in determining the sentence. The state contended that the sentencing court properly considered the lack of remorse as a factor relevant to Shreves' rehabilitation and the danger presented to the community, and argued that the lack of remorse was based on trial testimony and evidence. The Supreme Court considered whether Shreves adequately invoked the right to maintain silence, the scope of the oral sentence that controlled over the subsequent written sentence as it related to the entire sentence, and the District Court's decision to base its sentence in large part on Shreves' refusal to admit to the crime. Although lack of remorse can be considered as a sentencing factor, a sentence that is based on a refusal to admit guilt cannot be upheld. Here, the Supreme Court was unable to find a sentencing distinction between punishing Shreves for remaining silent and the proper consideration of Shreves' failure to show remorse. A sentencing court may not draw a negative inference of lack of remorse from a defendant's silence at sentencing when the defendant has maintained innocence throughout the proceedings. Shreves was improperly penalized for maintaining his innocence pursuant to the constitutional right to remain silent. The sentence was therefore illegal. Shreves' conviction was reversed, and the case was remanded for resentencing. St. v. Shreves, 2002 MT 333, 313 M 252, 60 P3d 991 (2002), distinguished in St. v. J.C., 2004 MT 75, 320 M 411, 87 P3d 501 (2004), and St. v. Burkhart, 2004 MT 372, 325 M 27, 103 P3d 1037 (2004). See also St. v. Imlay, 249 M 82, 813 P2d 979 (1991), St. v. Kelly, 265 M 298, 876 P2d 641 (1994), and St. v. Fuller, 276 M 155, 915 P2d 809 (1996).

Use of Force in Self-Defense Distinguished From Use of Force in Resisting Arrest — Jury Instruction Proper: Courville was stopped by an officer who had reports of underage drinking

in the area. When the officer tried to arrest Courville, Courville assaulted the officer. Courville claimed that his conduct was self-defense. The jury was instructed regarding the justifiable use of force and the unlawful use of force in resisting arrest. Courville contended that the instructions confused the jury by creating two classes of persons against whom the use of force is justified, in violation of equal protection. The Supreme Court disagreed. The use of self-defense applies equally to both classes of persons and depends on a reasonable belief of imminent harm based on the facts of the situation. The fact that the actor against whom the defensive conduct is directed happens to be a police officer is inapplicable to the self-defense defense. A person cannot use force to resist arrest, but can use defensive force if it is reasonably believed that force is necessary as against the imminent use of unlawful force. The claim of self-defense in justification of one's conduct is always considered within context and circumstances of the specific event at issue so that the factfinder can determine whether the accused's belief is reasonable. The jury was properly instructed, but found no merit in Courville's defense that the use of force against the officer was reasonable in this case. No substantial right of Courville was prejudiced, so the conviction was affirmed. St. v. Courville, 2002 MT 330, 313 M 218, 61 P3d 749 (2002).

Failure of Defense Counsel to Question Defendant's Mental Condition During Sentencing — Alleged Errors in Attorney Performance Properly Resolved in Postconviction Relief Proceeding: Watson petitioned for postconviction relief and claimed that defense counsel provided inadequate assistance at sentencing by not questioning whether Watson suffered from a mental disease or defect. The District Court denied the petition, determining that the ineffective assistance claim was record-based and should have been raised on direct appeal. In St. v. Harris, 2001 MT 231, 306 M 525, 36 P3d 372 (2001), the Supreme Court outlined a two-step process for determining whether ineffective assistance claims should have been raised on appeal or in a postconviction hearing. First, the trial record must adequately document a challenged act or omission of defense counsel for a defendant to raise an ineffective assistance claim on direct appeal. Second, the record on appeal must afford sufficient understanding of the reasons for counsel's act or omission to answer the threshold question of whether the alleged error expressed a trial strategy or tactical decision, and if the record does not supply the reason for counsel's act or omission, the claim must be raised by petition for postconviction relief. Here, the record was devoid of any evidence as to why counsel did not question Watson's mental condition, so Watson could not have properly raised an ineffective assistance claim on direct appeal. Therefore, the Supreme Court reversed and remanded for an evidentiary postconviction hearing to determine whether counsel's act or omission was a trial strategy or tactical decision. Watson v. St., 2002 MT 329, 313 M 209, 61 P3d 759 (2002), following Strickland v. Wash., 466 US 668 (1984). See also Soraich v. St., 2002 MT 187, 311 M 90, 53 P3d 878 (2002).

Legislation Crafted to Apply Only to Missoula Irrigation District Upheld as Constitutional: The Legislature enacted legislation primarily directed at the Missoula Irrigation District (MID) allowing certain landowners to opt out of MID because they had no access to MID's water. MID challenged Geil's petition for removal from MID on grounds that the legislation was unconstitutional as a violation of equal protection because the legislation was narrowly crafted to apply only to MID. The Supreme Court noted that even a cursory glance at the legislation's history indicated that the Legislature intended for the relaxed land exclusion process to apply only to Missoula. However, the Supreme Court noted that whether the legislation applied to the whole state or only to Missoula, the objective was to offer persons not served by MID relief from assessments, and the Supreme Court held that that was a legitimate governmental objective. Geil v. Missoula Irrigation District, 2002 MT 269, 312 M 320, 59 P3d 398 (2002).

Constitutionality of Custodial Interference Statute: Price argued that 45-5-304, prohibiting custodial interference, was constitutionally invalid on equal protection and vagueness grounds. The Supreme Court disagreed. A party challenging the constitutionality of a statute bears the burden of proving unconstitutionality beyond a reasonable doubt, and by failing to present any analysis regarding levels of scrutiny or potential governmental interests, Price did not meet that burden. The court applied the rational basis test in concluding that the statute's objective is a legitimate attempt to facilitate the return of children who are taken during parental custody disagreements, rather than to prosecute the person who took the child, and thus the statute does not violate equal protection. Further, the plain language of 45-5-304, taken as a whole, is not misleading as to the conduct prohibited or confusing as to the mitigation available to a defendant who violates the statute for the first time, nor is the statutory language confusing to a person of average intelligence. The District Court properly denied Price's motion to dismiss on equal protection and vagueness grounds. St. v. Price, 2002 MT 229, 311 M 439, 57 P3d 42 (2002).

Child's Best Interest Outweighs Parent's Fundamental Right to Travel: A final parenting plan provided that the mother be allowed to remain in the family home and that the parties' three children reside primarily with the mother, with liberal visitation by the father. The mother later decided to move with the children to Idaho. The District Court issued an order preventing the mother from removing the children from Montana, and the mother sought to amend the parenting plan to allow her to move. A psychiatrist found that the children loved both parents and that both parents agreed that the children needed to have regular contact with and the support of the other parent. The psychiatrist recommended that the children remain together and not be separated. The mother testified that she was moving to Idaho because her fiance lived there, the schools were superior, and she had an employment opportunity there. The District Court concluded that the children's best interests would be served if the children remained in Montana and that the children's primary residence would remain with the mother if she stayed in Montana, but that if she moved to Idaho, the children should remain in Montana with their father. The mother appealed. The mother claimed that she had a constitutional right to relocate her children to Idaho that could not be restricted merely because it might be best for the children if both parents lived in the same town, citing In re Marriage of Cole, 224 M 207, 729 P2d 1276 (1986), and In re Custody of D.M.G. & T.J.G., 1998 MT 1, 287 M 120, 951 P2d 1377 (1998). The Supreme Court distinguished both Cole and D.M.G., holding that although the fundamental nature of the constitutional right to travel and the need to demonstrate a compelling interest before violating that right are still viable, a presumption in favor of the parent who provides most of the child's primary care no longer exists. Contrary to the mother's assertion that the parent resisting the move must show that the move would be disadvantageous to the child or that the child would be harmed by the move, the burden of proof is the best interests of the child standard. The District Court properly considered the standard in 40-4-212 and the psychiatrist's recommendations, noting that the children had an established support system in Montana that did not exist in Idaho, and the court did not abuse its discretion in amending the parenting plan to reflect the reality of the parties' actual parenting arrangement. The best interests of a child outweigh a parent's fundamental right to travel. In re Marriage of Robison, 2002 MT 207, 311 M 246, 53 P3d 1279 (2002). See also In re Parenting of N.P. v. Perkins, 2006 MT 10, 330 M 293, 127 P3d 1035 (2006), in which the Supreme Court noted that application of the Robison criteria must be made cautiously and only in furtherance of the best interests of the child and held that because a father was unable to prove that restricting the mother's travel was in their child's best interests, the mother was allowed to continue to reside with the child in another state where the child had become accustomed to home, school, and community and where the mother had extended family and better job opportunities.

Right to Effective Assistance of Counsel for Person Subject to Involuntary Commitment Because of Mental Disorder — Strickland Test for Ineffective Assistance Inappropriate in Involuntary Commitment Proceedings: The right to counsel afforded by state law regarding the treatment of the seriously mentally ill provides a person who is subject to an involuntary commitment proceeding the right to effective assistance of counsel, which in turn provides that person the right to raise the allegation of ineffective assistance of counsel when challenging a commitment order. The test for ineffective assistance of counsel set out in Strickland v. Wash., 466 US 668 (1984), is inappropriate in involuntary commitment proceedings. However, the Strickland test simply does not go far enough to protect the liberty interests of persons involved in involuntary commitment proceedings who may or may not have broken any law but who, upon the expiration of a 90-day commitment, must indefinitely bear the badge of inferiority of a once involuntarily committed person with a proved mental disorder. Instead, upon a substantial showing of evidence to the issuing District Court or to the Supreme Court pursuant to 53-21-131 that counsel did not effectively represent the person's interests, an order of involuntary commitment should be vacated. The due process afforded individuals must serve to protect the fundamental liberty interests of dignity and integrity, and it is not only counsel, "but also courts, that are charged with the duty of safeguarding the due process rights of individuals involved at every stage of the proceedings". The Supreme Court identified five critical areas of representation that generally define the scope of effective counsel in involuntary commitment proceedings: (1) appointment of competent counsel; (2) the initial investigation; (3) the client interview; (4) the right to remain silent; and (5) counsel as an advocate and adversary. The statutory and constitutional standards must be rigorously adhered to in order to ensure the fundamental fairness of civil commitment proceedings, and it is imperative that the constitutional and legislated rights be formally and fairly balanced with the state's ultimate power to protect both the individual and the public from actual or perceived harm. In re K.G.F., 2001 MT 140, 306 M 1, 29 P3d 485 (2001), following

Conservatorship of Roulet, 590 P2d 1 (Calif. 1979), and distinguishing In re Carmody, 653 NE 2d 977 (Ill. App. Ct. 1995).

No Liberty Interest in Good Time Credits for Probationers — Credit for Time Served on Probation Properly Denied: McDermott pleaded guilty in early 1995 to issuing a bad check, felony common scheme, and received a 6-year deferred sentence and was placed on probation. After nearly 4 years on probation, McDermott had failed to comply with the conditions of probation, so the District Court revoked the deferred sentence and sentenced McDermott to 5 years at the state prison, specifying that no credit was allowed for time served while on probation or for good time. McDermott contended that he was improperly denied good time credit while on probation and that 53-30-105 (repealed 1995) violated equal protection guarantees because it granted good time credit for parolees but not probationers. The Supreme Court disagreed. Although it was held in Orozco v. Day, 281 M 341, 934 P2d 1009 (1997), that 53-30-105 created a liberty interest in good time credit for inmates, the court concluded that a similar liberty interest is not created for probationers. Because probationers are not statutorily entitled to good time credits and because the terms of probation are part of the sentence, the state's decision not to award good time credits during probation did not create an atypical and significant hardship or inevitably affect the duration of McDermott's sentence. McDermott had no protected liberty interest and was denied no process to which he was constitutionally entitled. Further, McDermott's argument that 53-30-105 violated equal protection by treating probationers differently than parolees also failed. Applying the rational basis test, the court concluded that the state has a legitimate interest in the disparate treatment of parolees and probationers regarding eligibility for sentence-reducing credits, including jurisdictional differences as well as penological interests. McDermott was properly credited with good time for the time that he was incarcerated and was properly denied credit for time spent on probation against his subsequent sentence. Thus, McDermott showed no constitutional basis for the claim that he was being illegally restrained, so his petitions for writs of habeas corpus and mandate were denied. McDermott v. Dept. of Corrections, 2001 MT 134, 305 M 462, 29 P3d 992 (2001). See also St. v. Bruns, 213 M 372, 691 P2d 817 (1984), and St. v. Nelson, 275 M 86, 910 P2d 247 (1996).

Changing Procedural Rule to Create Different Time Period to Have Summons Issued Does Not Create Two Classes of Plaintiffs: The plaintiff's attorney argued that the lower court erred in dismissing the plaintiff's lawsuit for failure to have the summonses issued within the 12-month time period required by former Rule 41(e), M.R.Civ.P. (now superseded), because those plaintiffs filing after the adoption of the new rule had 3 years in which to have the summonses issued and those filing before the adoption of the new rule had only 1 year. The Supreme Court ruled that the plaintiff's suit was properly dismissed and that under the plaintiff's theory, any procedural rule would implicitly create two classifications of litigants—those who complied with the rule and those who did not. Otto v. Dept. of Fish, Wildlife, and Parks, 2000 MT 333, 303 M 86, 15 P3d 402, 57 St. Rep. 1406 (2000).

Statutory Limitation on Workers' Compensation Family Member Domiciliary Care Benefits Justified — Not Violative of Equal Protection or Substantive Due Process: Plaintiff, injured in a vehicle accident in the scope of his employment, received disability benefits and payments for domiciliary care provided at home by his wife at the maximum rate permitted by 39-71-1107. Plaintiff challenged the constitutionality of the limits on benefits for 24-hour care provided by a family caregiver, arguing that the cap violated his right to equal protection because it forced him to choose between being placed in a nursing home or having his wife assist him. His wife received less compensation as a result of his choice to live at home rather than at a skilled nursing facility. Additionally, plaintiff alleged that establishment of different benefit limits for family and nonfamily caregivers violates his right to substantive due process because it arbitrarily and unfairly balances cost containment with plaintiff's personal choice of who acts as his care provider. In affirming the District Court decision, the Supreme Court ruled that the differences in care provided by family member caregivers and nonfamily member caregivers offer significant justification for limiting compensation to family care member caregivers. As a result, family member caregivers and nonfamily caregivers are not similarly situated for purposes of equal protection, and the difference in family caregiver compensation is not arbitrary and capricious in violation of substantive due process, but is reasonably related to a permissible legislative objective. Powell v. St. Comp. Ins. Fund, 2000 MT 321, 302 M 518, 15 P3d 877, 57 St. Rep. 1353 (2000).

Mixed Motive Analysis Applicable When Parties Disagree on Reason for Refusing to Hire: Laudert suffered liver failure while employed by the Richland County Sheriff's Department (RCSD) and had to resign. Following Laudert's full recovery, his former position came open

again and he applied but was not rehired. He filed a discrimination charge on grounds of age and disability. The hearings examiner found that questions asked by the RCSD interview panel constituted direct evidence that RCSD had unlawfully considered Laudert's disability, but did not award damages because Laudert would not have been hired even in the absence of any unlawful consideration of his disability. RCSD maintained that Laudert was not hired because of his employment history. The hearings examiner determined that this was a "mixed motive" case. On review, the District Court concluded that European Health Spa v. Human Rights Comm'n, 212 M 319, 687 P2d 1029 (1984), precluded it from applying the mixed motive approach, so the court instead applied the burden-shifting approach in McDonnell Douglas Corp. v. Green, 411 US 792 (1973). However, the McDonnell Douglas test applies to claims involving circumstantial evidence of unlawful discrimination or pretext, while in this case, Laudert presented direct evidence of discrimination, rendering the McDonnell Douglas test inapplicable under Trans World Airlines, Inc. v. Thurston, 469 US 111 (1985). On appeal, Laudert maintained that Reeves v. Dairy Queen, 1998 MT 13, 287 M 196, 953 P2d 703 (1998), should apply because that decision stated that when discrimination is proved by direct evidence, the employer must prove by a preponderance of the evidence that an unlawful motive played no role in the challenged action or that the direct evidence was not credible. However, the Reeves approach was not directly on point either, because Reeves pertains only to instances in which the parties do not dispute the employer's reasons for the challenged action. The Supreme Court held that the District Court should have applied the mixed motive analysis contained in Price Waterhouse v. Hopkins, 490 US 228 (1989), as suggested by the hearings examiner. Laudert v. Richland County Sheriff's Dept., 2000 MT 218, 301 M 114, 7 P3d 386, 57 St. Rep. 872 (2000).

No Claim to Unconstitutional Effect of Mandatory Minimum Sentence When Defendant Not Subject to Mandatory Minimum: Duffy was sentenced to 20 years for each offense of sexual abuse of his daughters, who were less than 16 years old at the time of the offense. On appeal, Duffy claimed that because of their ages, 45-5-503 and 45-5-507 required a minimum 4-year prison term, which deprived him of equal protection and due process because he did not qualify for the exception to the minimum term in 46-18-222(5) regarding instances involving a lack of serious bodily injury, asserting that he was similarly situated to persons convicted of sexual assault but treated differently because those offenders could qualify for the exception. However, before Duffy could claim standing to complain that he was unconstitutionally affected by the mandatory minimum sentences, he must have been subjected to those sentences, which was not the case here. Thus, Duffy was not affected by the disparate treatment of sex offenders based on the nature of the offenses and lacked standing to challenge the sentencing scheme on equal protection or due process grounds. St. v. Duffy, 2000 MT 186, 300 M 381, 6 P3d 453, 57 St. Rep. 734 (2000).

Constitutional Due Process and Equal Protection Rights Not Violated by Procedure in Rule 9 Regulating Practice of Attorneys: Formal complaints against two attorneys were filed with the State Bar Commission on Practice, which recommended disciplinary actions against the attorneys. In their appeal, the attorneys contended that Rule 9 of the Rules on Lawyer Disciplinary Enforcement, which sets forth the procedure relied on by the Commission, unconstitutionally violated their rights to due process, to an impartial tribunal, and to equal protection, because the procedure improperly vested both investigatory and adjudicatory functions in one body—the Commission. The Supreme Court disagreed. Applying Withrow v. Larkin, 421 US 35, 43 L Ed 2d 712, 95 S Ct 1456 (1975), the court noted that bias in a decisionmaker is not presumed and must be proved and that state and federal case law generally rejects the idea that the combination of judging and investigation functions is a denial of due process. Although attorneys who are confronted with proceedings that may result in the loss of their licenses to practice law are entitled to the same due process considerations as any other professionals faced with such proceedings, the attorneys in this case cited no authority stating that either equal protection or due process requires that identical procedures must be followed in all types of disciplinary proceedings, nor did they establish that the procedure for handling disciplinary complaints under Rule 9 denied them their constitutional rights. In re Goldstein & Albers v. Comm'n on Practice, 2000 MT 8, 297 M 493, 995 P2d 923, 57 St. Rep. 31 (2000), following In re Wyse, 212 M 339, 688 P2d 758, 41 St. Rep. 1780 (1984).

Constitutional Right to Equal Protection Not Violated by Confidentiality Provisions in Rule 13 Regulating Complaints Against Attorneys: Formal complaints against two attorneys were filed with the State Bar Commission on Practice, which recommended disciplinary actions against the attorneys. In their appeal, the attorneys contended that Rule 13 of the Rules on Lawyer Disciplinary Enforcement violated their rights to equal protection under the law, making a

comparison with the constitutional provision in Art. VII, sec. 11, Mont. Const., and statutes concerning the Judicial Standards Commission under which a judge responding to a disciplinary complaint may waive confidentiality. The Supreme Court found the argument inscrutable and unworthy of consideration. The attorneys failed to establish that they were treated differently under the Rules on Lawyer Disciplinary Enforcement from than any other attorney facing disciplinary charges. In re Goldstein & Albers v. Comm'n on Practice, 2000 MT 8, 297 M 493, 995 P2d 923, 57 St. Rep. 31 (2000), following In re Wyse, 212 M 339, 688 P2d 758, 41 St. Rep. 1780 (1984).

Statute Prohibiting Operation of Vehicle by Person Under Twenty-One Years of Age With Alcohol Concentration of 0.02 or More Not Violative of Right to Equal Protection — Sandstrom Not Contravened: Twenty-year-old Luchau was convicted in Justice's Court of a violation of 61-8-410. On appeal to the District Court, Luchau contended that 61-8-410 was an unconstitutional violation of his right to equal protection, creating a conclusive presumption of guilt. Unlike 61-8-401, which requires the state to prove diminished ability as an element of the crime, 61-8-410 imposes a strict liability for operation of a vehicle by a person under 21 years of age with an alcohol concentration of 0.02 or more, regardless of whether the accused's ability to drive safely is diminished. Although an alcohol concentration of 0.02 is an element of the crime, nothing in 61-8-410 creates a factual presumption with respect to when such a concentration is present. Rather, the defendant's alcohol concentration is an element that the state must prove beyond a reasonable doubt, so 61-8-410 contains no presumption relating to an element of the offense. The Supreme Court found that 61-8-410 does not run afoul of Sandstrom v. Mont., 442 US 510, 61 L Ed 2d 39, 99 S Ct 2450 (1979), because the burden-shifting that gives rise to the concern in Sandstrom becomes relevant only when the state requires the accused to prove that which, by virtue of the statutory definition of the crime, the prosecution is required to prove beyond a reasonable doubt. Further, there is no equal protection violation because persons targeted by the statute are legally forbidden to consume alcohol, which, coupled with the fact that there is a high correlation of injury and death between underage drinking and driving, forms more than an adequate rational basis for treating underage drivers differently from adult drivers. St. v. Luchau, 1999 MT 336, 297 M 415, 992 P2d 840, 56 St. Rep. 1340 (1999), followed, with respect to the shifting of the state's burden to prove elements of felony nonsupport, in St. v. Price, 2002 MT 284, 312 M 458, 59 P3d 1122 (2002).

Statute Establishing Time Bar to Medical Malpractice Actions Not Violative of Constitutional Right to Equal Protection or Access to Court: In 1974, shortly after the premature birth of Richard Best, a doctor placed an umbilical vein catheter in the baby, who subsequently developed liver problems. In 1995, Best filed a complaint against the doctor's estate, claiming that the doctor's actions were negligent, constituting medical malpractice resulting in injuries for which Best sought a variety of damages. The estate moved for summary judgment on grounds that the complaint was time-barred by the statute of limitations in 27-2-205(2). The District Court denied the motion, agreeing with Best that the statute of limitations violated Best's constitutional rights to equal protection of the law and access to courts. Following acceptance of the estate's writ for supervisory control, the Supreme Court reversed. The rational basis test applicable to review of the statute of limitations required only that the classification created by 27-2-205(2) bear a rational relationship to a legitimate legislative purpose. In this case, the statute passed the test because ensuring the availability and affordability of health care services and reducing the costs of medical malpractice insurance are legitimate legislative objectives, and the classification, narrowly defined to minors injured between birth and 4 years of age, was rationally related to the legitimate legislative objectives. Further, Best presented no persuasive argument or authority supporting the contention that the statute was not rationally related to legitimate legislative objectives and therefore failed to meet the burden of establishing that the statute was unconstitutional beyond a reasonable doubt. Best was required to bring the action before October 1, 1989, and failing to do so, the estate was entitled to summary judgment because the statute of limitations applied. Estate of Dennis McCarthy, M.D. v. District Court, 1999 MT 309, 297 M 212, 994 P2d 1090, 56 St. Rep. 1241 (1999), distinguishing Carson v. Maurer, 424 A2d 825 (N.H. 1980), Schwan v. Riverside Methodist Hosp., 425 NE 2d 1337 (Ohio 1983), Sax v. Votteler, 648 SW 2d 661 (Tex. 1983), Barrio v. San Manuel Div. Hosp., Magma Copper, 692 P2d 280 (Ariz. 1984), Strahler v. St. Luke's Hosp., 706 SW 2d 7 (Mo. 1986), Lyons v. Lederle Laboratories, 440 NW 2d 769 (S.Dak. 1989), and Torres v. County of Los Angeles, 257 Cal. Rep. 211 (Cal. App. 1989).

Failure to Provide Vocational Rehabilitation Benefits — Occupational Disease Act (Now Repealed) Violative of Equal Protection: Henry's on-the-job injury claim was accepted under the

Occupational Disease Act of Montana (now repealed and merged with Workers' Compensation Act), but his request for rehabilitation benefits after reaching maximum healing was denied. On appeal, the Supreme Court found that providing rehabilitation benefits to workers covered by the Workers' Compensation Act, but not to workers covered by the Occupational Disease Act of Montana (now repealed and merged with Workers' Compensation Act), was not rationally related to the legitimate government interest of returning workers to work as soon as possible after suffering a work-related injury. The historical justification for treating workers differently under the Workers' Compensation Act and the Occupational Disease Act of Montana (now repealed and merged with Workers' Compensation Act) no longer exists. Therefore, to the extent that it fails to provide vocational rehabilitation benefits as are provided under the Workers' Compensation Act, the Occupational Disease Act of Montana (now repealed and merged with Workers' Compensation Act) violates the equal protection clause of this section. Henry v. St. Comp. Ins. Fund, 1999 MT 126, 294 M 449, 982 P2d 456, 56 St. Rep. 506 (1999), distinguishing Eastman v. Atlantic Richfield Co., 237 M 332, 777 P2d 862, 46 St. Rep. 845 (1989).

Failure to Prosecute Both Parties in Incest Case Not Violative of Equal Protection — Prosecutorial Discretion: Harris was convicted of incest with his adopted daughter. On appeal, he argued that if he were guilty of incest, his adopted daughter was also guilty of incest and that the state's failure to also prosecute her for the crime amounted to a violation of Harris's constitutional right to equal protection against selective prosecution. The Supreme Court disagreed. The state's decision not to prosecute Harris's daughter was a matter of prosecutorial discretion. Because Harris did not show that the state's decision was based on any arbitrary, unjustifiable standard, such as race, religion, or other arbitrary classification, he did not establish that his equal protection right was violated by selective prosecution. St. v. Harris, 1999 MT 115, 294 M 397, 983 P2d 881, 56 St. Rep. 481 (1999), following St. v. Lemmon, 214 M 121, 692 P2d 455 (1984), and St. v. Stanko, 1998 MT 323, 292 M 214, 974 P2d 1139, 55 St. Rep. 1313 (1998), and distinguishing St. v. Fuhrmann, 278 M 396, 925 P2d 1162, 53 St. Rep. 966 (1996), and St. v. Ingraham, 284 M 77, 945 P2d 16, 54 St. Rep. 614 (1997).

Transfer of Youth Court Case to District Court Not Violative of Equal Protection Rights: Spina argued that the statute allowing transfer of her Youth Court case to the District Court resulted in an equal protection violation because of discriminatory treatment on the basis of her gender, asserting that the transfer was primarily motivated by the lack of affordable placement options for girls in the juvenile system. However, the primary concern in Spina's case was not that placements were not available, but that the duration of placement in the juvenile system would not be long enough to rehabilitate her. Further, the quality of supervision required for a juvenile like Spina, who was charged with killing her father, was not available for male or female offenders, so the concern was not triggered by gender. State placement policy with regard to juvenile offenders convicted and sentenced as adults has no bearing on the constitutionality of the transfer statute. Hence, it is not the transfer statute that generates any alleged disparities in treatment but rather the state placement policies, and the policies were not at issue in this case. Spina's challenge of the transfer statute on equal protection grounds failed. St. v. Spina, 1999 MT 113, 294 M 367, 982 P2d 421, 56 St. Rep. 467 (1999).

Right of Interstate Travel as Basic Constitutional Freedom — Custodial Designation Improperly Revised: The District Court ordered that a mother who had relocated out of state must forfeit her status as primary custodian unless she moved back to Montana with the children. However, the right of interstate travel, which includes the right to migrate, resettle, find a new job, and start a new life, is a basic constitutional freedom recognized in Memorial Hosp. v. Maricopa County, 415 US 250, 39 L Ed 2d 306, 94 S Ct 1076 (1974), and described in Shapiro v. Thompson, 394 US 618, 22 L Ed 2d 600, 89 S Ct 1322 (1969), and Dunn v. Blumstein, 405 US 330, 31 L Ed 2d 274, 92 S Ct 995 (1972). A classification that operates to penalize persons who exercise this right must be justified by a compelling state interest, and the government's burden to justify this compelling interest is heavy. Absent legitimate, case-specific reasons and evidence pertaining to the particular child, there is no compelling state interest that justifies a court ordering a custodial parent to live in a state other than the state in which the parent freely chooses to reside. In the present case, the father failed in his burden to provide sufficient proof that the children's best interests would be most appropriately served by requiring the mother to move back to Montana or lose her status as primary physical custodian. The trial court erred in failing to apply the former rebuttable statutory presumption in 40-4-212(3)(a) (deleted 1997) regarding a grant of custody to the parent who has provided most of the primary care during the child's life and in ordering that custody be alternated between the parents every 2 years. In re Custody of D.M.G. & T.J.G., 1998 MT 1, 287 M 120, 951 P2d 1377, 55 St. Rep. 1 (1998),

following In re Marriage of Cole, 224 M 207, 729 P2d 1276 (1986), distinguishing In re Marriage of Abrahamson, 278 M 336, 924 P2d 1334 (1996), and In re Marriage of Tade, 282 M 449, 938 P2d 673 (1997), and followed in In re Marriage of Guffin & Plaisted-Hartman, 2009 MT 169, 350 M 489, 209 P3d 225 (2009).

Deletion of Hanging as Form of Capital Punishment Not Denial of Ability to Present Argument Regarding Cruel and Unusual Punishment: Pursuant to the version of 46-19-103 that was in effect at the time that Langford was sentenced for execution, he affirmatively elected that death be imposed by hanging rather than lethal injection. Langford appealed to the District Court for a declaration that execution by hanging was cruel and unusual punishment that violated the eighth amendment to the U.S. Constitution. The District Court denied the motion, holding that Langford's choice of hanging rendered the cruel and unusual punishment argument moot. Langford appealed to the appropriate federal courts for a writ of habeas corpus, applying the same argument. During the pendency of Langford's federal habeas corpus proceedings, the Montana Legislature met and amended 46-19-103 by removing the hanging option, rendering the federal proceedings moot and nonjusticiable. Langford asserted that the amendment to 46-19-103 violated numerous constitutional provisions by denying him the ability to present the cruel and unusual punishment argument to the federal courts. The Supreme Court found no merit in Langford's argument that the state Attorney General advised the Legislature to amend 46-19-103 in order to deny Langford the grounds for appeal, because the Attorney General supported but did not initiate the legislation. Further, the court did not agree with Langford's assertion that the amendment rendered the time that Langford spent in pursuing the cruel and unusual punishment argument retroactively useless and chargeable to the state as a form of cruel and unusual punishment in itself, because the eighth amendment argument was not the only claim that Langford pursued. Therefore, the entire time could not be charged to the state as being related to the amendment to 46-19-103. Having concluded that Langford failed to establish any constitutional violations, his petition for writ of injunction staying his execution was denied. Langford v. St., 287 M 107, 951 P2d 1357, 54 St. Rep. 1522 (1997).

Grant of Petition to Dispose of Evidence Held No Denial of Constitutional Rights — Inclusion of Additional Property for Restitution — Order to Dispose of Property Held Not to Impose Restitution Obligation: Woods was convicted of writing a bad check for $3,830. However, Woods continued to write other bad checks totaling over $30,000, even as of the time that his probation officer was preparing his presentence investigation. The investigation showed that the bad checks had been used to purchase merchandise and to obtain cash. After sentencing, which included a requirement for restitution, the state filed a petition for destruction of evidence, requesting that it be allowed to return the merchandise to the rightful owners, to apply the value of that property to satisfy Woods's obligation to make restitution, and to destroy other property that had been seized as evidence. The District Court granted the petition but stayed enforcement pending appeal. Woods contended that the District Court order granting the petition violated his rights under Art. II, sec. 3, 15, 17, and 22, Mont. Const., and this section and under the 5th, 8th, and 14th amendments to the United States Constitution. The Supreme Court held that Woods had waived his right to object to restitution, even restitution in an amount greater than $3,830, because Woods promised to make restitution in response to the recommendation of his probation officer that Woods make restitution in an amount in the "tens of thousands of dollars". The Supreme Court held, contrary to Woods's claim that the state misinterpreted the District Court order as to the amount of restitution, that the District Court had ordered Woods to make "full restitution" and that the order included the amounts over and above the $3,830 involved in the underlying conviction for writing a bad check. Woods also objected to the timing of the state's petition, arguing that he was not required to make restitution until he was released from jail. In response, the Supreme Court pointed out that Woods misconstrued the purpose of the state's petition; all the state wanted to do was receive permission from the District Court to return the merchandise to its rightful owners and apply the value to Woods's obligation for restitution. For this reason, the Supreme Court held that the District Court did not err when it granted the state's petition. St. v. Woods, 286 M 355, 951 P2d 981, 54 St. Rep. 1445 (1997).

Mother Estopped From Denying Father's Paternity Also Precluded From Establishing Paternity in Another — No Equal Protection Violation Found — Standing to Establish Paternity: The Supreme Court held in In re Marriage of K.E.V. & M.L.V., 267 M 323, 883 P2d 1246 (1994), that after a common-law marriage to Kevin was dissolved, Margery, Kevin's former common-law wife, was estopped from denying Kevin's paternity of her daughter, Kathryn. After that decision, Margery brought a petition to have another man, Phillip, declared the father of Kathryn. The District Court dismissed the petition with prejudice and held that Margery was estopped from

bringing the action, based upon the Supreme Court's decision in Marriage of K.E.V. and that Kathryn's siblings did not have standing to bring the action. The Supreme Court affirmed, holding that under Borchers v. McCarter, 181 M 169, 592 P2d 941 (1979), a person seeking to have Phillip named as the father of Kathryn must first rebut the presumption under 40-6-105 that Kevin is the father. The Supreme Court held that under Marriage of K.E.V., Margery is equitably estopped from contesting the presumption of Kevin's paternity and therefore, under Borchers, Margery cannot establish Phillip's paternity. The Supreme Court noted that all of the cases raised by Margery in support of her argument that dismissal of her petition violates her right to equal protection were cases in which a parent asserted the the parent's own right to prove the parent's own paternity and not the paternity of someone else. Because Margery had shown no authority holding that one person had a fundamental right to establish the paternity of another, the Supreme Court held that Margery's right to equal protection had not been violated. Relying upon In re Estate of Goick, 275 M 13, 909 P2d 1165 (1996), the Supreme Court also held that because there was no evidence in the record showing how Kathryn's siblings would benefit from proving that Phillip is Kathryn's biological father, the siblings had no personal stake in the outcome of such a proceeding and therefore affirmed the District Court's holding that Kathryn's siblings did not have standing to petition the District Court. In re Paternity of Vainio, 284 M 229, 943 P2d 1282, 54 St. Rep. 858 (1997).

Limitation on Entitlement to Uninsured Employers' Fund Benefits Not Equal Protection Violation or Restriction on Access to Courts: Zempel was injured while working for an enrolled tribal member on a reservation. Although the tribe carried insurance covering tribal members, Zempel's employer was not covered by workers' compensation insurance, nor was Zempel an enrolled tribal member. Zempel sought benefits from the tribe's insurer through tribal court, but it was determined that the employer was not required to carry insurance. Zempel then sought benefits under the uninsured employers' fund, but the claim was denied because the employer was not an uninsured employer as defined in 39-71-501. Zempel appealed on the grounds that 39-71-501 deprived him of equal protection and violated his constitutional right of access to courts. However, equal protection does not require that all persons be treated alike regardless of whether their circumstances are the same but only that all persons be treated alike under like circumstances. Only injured employees of employers meeting the definition of uninsured employer contained in 39-71-501 are entitled to the substitute workers' compensation benefits that the uninsured employers' fund was created to provide to injured employees of employers who have failed to properly comply with the law. The limitation on entitlement to uninsured employers' fund benefits bears a reasonable relationship to the purpose of that law because it is only those employers subject to the law in the first place upon whom the state can impose the reimbursement and penalty obligations that provide the source of the uninsured employers' fund benefits. Applying the rational basis test, the Supreme Court found no constitutional violation under 39-71-501 on either issue because Zempel failed to meet the burden of establishing the invalidity of the statute. Zempel was not precluded from pursuing other remedies outside the Workers' Compensation Act. The Supreme Court offered a further observation that when Montana citizens avail themselves of jobs on Indian reservations, they agree to abide by tribal rules. Zempel v. Uninsured Employers' Fund, 282 M 424, 938 P2d 658, 54 St. Rep. 415 (1997).

Conflict Between Workers' Compensation Statute and Administrative Rule — Fiscal Health Not Justification for Discrimination: Under 33-22-111, a workers' compensation claimant is entitled to freedom of choice in selecting a treating physician, but under ARM 24.29.1511, an injured worker cannot change physicians without the approval of the State Fund. The Workers' Compensation Court correctly found that pursuant to 33-1-102, the freedom of choice under 33-22-111 is not extended to workers' compensation cases. However, in reality, the exemption extends to cases involving coverage by the State Fund under Plan No. 1 or 3 but not to workers covered under Plan No. 2. The State Fund argued that the differentiation did not present an equal protection problem because the disparate treatment was rationally related to the legitimate governmental goal of controlling workers' compensation costs. The Supreme Court found that the policy of discriminating among injured workers based solely on which insurance plan supplied coverage was an equal protection violation because it was not rationally related to a legitimate government objective. Offering services to some while excluding others always results in lower costs, but cost control alone does not justify disparate treatment that violates an individual's right to equal protection of the law. Discrimination is not allowed merely for the sake of fiscal health. Heisler v. Hines Motor Co., 282 M 270, 937 P2d 45, 54 St. Rep. 345 (1997), distinguishing Stratemeyer v. Lincoln County, 259 M 147, 855 P2d 506 (1993), and Chiropractors for Justice v. Alaska, 895 P2d 962 (Alaska 1995).

Provision Treating Victims of Nonresident Corporate Tortfeasors Differently From Victims of Other Nonresident Tortfeasors — Unconstitutional Violation of Equal Protection: The provisions of 25-2-122(2) provide different venues for tort suits brought against nonresident corporate defendants and other nonresident defendants. Applying the rational basis test, the Supreme Court found no question that tort victims are not treated equally under the statutory venue limitations and that the subsection discriminates against a tort victim injured by a corporate nonresident, whose choice of venue is limited to only four options according to the corporate status of the defendant, as opposed to a tort victim injured by a noncorporate nonresident whose choice of venue may be any Montana county. By limiting the choice of venue, plaintiffs are unconstitutionally deprived of the equal protection guaranteed by this section. Davis v. Union Pac. RR Co., 282 M 233, 937 P2d 27, 54 St. Rep. 328 (1997), distinguishing Ford v. Burlington N. RR, 250 M 188, 819 P2d 169 (1991). See also State ex rel. Burlington N. RR Co. v. District Court, 270 M 146, 891 P2d 493 (1995), followed in Isakson v. Burlington N. RR Co., 282 M 296, 937 P2d 472, 54 St. Rep. 389 (1997).

Private School Student Not Entitled to Participate in Public School Extracurricular Events: The Kapteins sought an order requiring the Conrad School District to allow their daughter, a private school student, to play on the public school basketball team. The Supreme Court stated that participation in extracurricular activities is not a fundamental right but is subject to constitutional protection and would be subject to a middle-tier analysis of the rights infringed versus the governmental interest served by the infringement. The Supreme Court held that in the present case, it was unable to conclude that a private student's interest in participating in extracurricular activities was more important than the school district's policy decision that, in order to effectively integrate academics and extracurricular activities, the district needed to restrict participation to those students enrolled in the public school system. Kaptein v. Conrad School District, 281 M 152, 931 P2d 1311, 54 St. Rep. 106 (1997).

Irrigation Districts Special, Limited-Purpose Units of Government — Freeholder Requirement for Qualifications of Commissioners Constitutional — Reasonable Relationship Standard Applied: The freeholder requirement under 85-7-1501 does not violate the right to equal protection under the federal constitution. Montana irrigation districts are special, limited-purpose units of government whose activities have a disproportionate effect on landowners in the districts as a group. It is appropriate to depart from the usual strict scrutiny standard applied to statutes impacting on a citizen's right to vote and to analyze the freeholder requirement of 85-7-1501 under the reasonable relationship standard. Johnson v. Killingsworth, 271 M 1, 894 P2d 272, 52 St. Rep. 274 (1995).

No Constitutional Right to Punitive Damages as Remedy for Discrimination: Fugate brought an action for sexual discrimination in employment before the Human Rights Commission. The Commission denied punitive damages. Citing Romero v. J.&J. Tire, 238 M 146, 777 P2d 292 (1989), the Supreme Court held that there is no constitutional right to an award of punitive damages. Moran v. Shotgun Willies, Inc., 270 M 47, 889 P2d 1185, 52 St. Rep. 71 (1995).

Levels of Equal Protection Scrutiny: Courts examine the right to equal protection under three levels of scrutiny: (1) strict scrutiny for classifications that infringe fundamental rights or involve suspect classifications, such as race or national origin; (2) middle tier analysis in specific limited situations requiring a somewhat heightened scrutiny; and (3) rational basis analysis for all other classifications. McKamey v. St., 268 M 137, 885 P2d 515, 51 St. Rep. 1218 (1994).

Principal Purpose of Equal Protection Clause: The principal purpose of the equal protection clause is to ensure that persons who are citizens of this country are not subjected to arbitrary and discriminatory state action. McKamey v. St., 268 M 137, 885 P2d 515, 51 St. Rep. 1218 (1994).

Requiring National Guard Membership of State Firefighters Protecting National Guard Aircraft: The state's requirement that its firefighters protecting civilian and National Guard aircraft belong to the National Guard did not meet the rational basis test and was an unconstitutional violation of equal protection. Other states do not have the requirement, the federal National Guard Bureau does not recommend it, the state fire chief said that there is no rational basis for it, and the state offered no persuasive argument for it. The state's argument that firefighters need security clearances and thus have to be in the National Guard was without merit because a security clearance can be given to nonmilitary personnel. McKamey v. St., 268 M 137, 885 P2d 515, 51 St. Rep. 1218 (1994). See also Peters v. St., 285 M 345, 948 P2d 250, 54 St. Rep. 1185 (1997).

Municipal Ordinance Limiting University Students' Parking Rights Not Violation of Equal Protection: A university student association challenged the legality of a city ordinance limiting parking in residential areas near the university to residents of those areas. The Supreme Court

held that resident and nonresident classifications do not result in invidious discrimination and that the ordinance had valid objectives, such as limiting congestion and meeting safety concerns, and therefore was legal. Assoc. Students v. Missoula, 261 M 231, 862 P2d 380, 50 St. Rep. 1301 (1993).

Constitutionality of Workers' Compensation Provision Disallowing Coverage for Mental Stress Injury: After holding that Stratemeyer did not qualify for workers' compensation coverage under 39-71-119 because his injury was mental stress-related rather than having a physical component, the Workers' Compensation Court went on to declare the portion of the statute precluding stress-related coverage to be a violation of the constitutional guarantee of equal protection. However, the court did not first presume the statute to be constitutional and did not look to any possible legitimate purpose for the law, which is the proper analysis under an equal protection challenge. Applying the rational basis test, the Supreme Court found that the exclusion of mental claims was rationally related to the possible goal of reducing costs and providing a viable program for the state, employers, and employees in the workers' compensation field, which is a legitimate government objective warranting various classifications of work-related injuries and not an equal protection violation. The order of the lower court was reversed. Stratemeyer v. Lincoln County, 259 M 147, 855 P2d 506, 50 St. Rep. 731 (1993).

Denial of Accrued Benefits Not Unconstitutional: State employees, dismissed because of criminal and sexual misconduct investigations, appealed a summary judgment, alleging that the refusal by the Department of Social and Rehabilitation Services (now Department of Public Health and Human Services) to pay accrued vacation benefits violated the double jeopardy and equal protection clauses of the federal constitution. The Supreme Court held that the employees' failure to meet the statutory prerequisite to receive the accrued vacation benefits does not equate to violating a law and facing double jeopardy. Similarly, the terminated employees failed to establish any grounds to support an equal protection discrimination violation. Stuart v. Dept. of Social and Rehabilitation Services, 256 M 231, 846 P2d 965, 50 St. Rep. 48 (1993).

Forfeiture of Water Rights Not Violative of Equal Protection: Former water rights holders who forfeited their rights through failure to meet the filing deadline contended that 85-2-226 violated constitutional equal protection guarantees by imposing an arbitrary deadline that unreasonably divided water claimants into two classes: one class of persons who retained their rights and another, late claimants, who lost their rights without opportunity to show good cause for the late filing. This classification was alleged to have resulted in discrimination against late filers who in good faith attempted to meet the statutory filing deadline. The Supreme Court found that 85-2-226 does not create different classes and that all claimants were treated equally, provided equal notice, and given equal time to file by the given deadline. Any alleged classification was created by the late filers' own negligence, and the equal protection challenge failed. In re Adjudication of Existing Yellowstone River Water Rights, 253 M 167, 832 P2d 1210, 49 St. Rep. 413 (1992).

Constitutionality of Statute Regulating Fees of Workers' Compensation Attorneys — No Equal Protection Violation: An attorney whose fee arrangements were disallowed by the Employment Relations Division claimed that 39-71-613, which allows regulation of fees of workers' compensation attorneys, violated his equal protection rights because the Department regulates the fees of only claimants' attorneys and not defense attorneys. However, there is neither a suspect class nor a fundamental right involved. The Department's application of the statute to a claimant's attorney fee is rationally related to the government's legitimate interest in protecting the claimant's net benefits in workers' compensation cases, and protection from impaired fee agreements is rationally related to that interest and is therefore not a constitutional violation. Burris v. Employment Relations Div., 252 M 376, 829 P2d 639, 49 St. Rep. 326 (1992).

Lack of Standing to Raise Constitutional Issues Absent Wrongful Discharge: A jury found that plaintiffs were not discharged wrongfully. On appeal, plaintiffs raised numerous issues regarding the constitutionality of the Wrongful Discharge From Employment Act, contending that the Act violated the right of trial by jury and the Montana Constitution's privileges and immunities clause, equal protection clause, impairment of contracts clause, and due process clause. The Supreme Court, citing Jones & Harriot v. Judge, 176 M 251, 577 P2d 846 (1978), and Stelling v. Rivercrest Ranches, Inc., 224 M 313, 730 P2d 388 (1986), found that plaintiffs lacked standing to challenge the constitutionality of the Act because consideration of the issues was rendered moot by the jury verdict, resulting in no adverse effect on plaintiffs by the challenged statutes. Allmaras v. Yellowstone Basin Properties, 248 M 477, 812 P2d 770, 48 St. Rep. 519 (1991), followed in Lutey Constr. v. St., 257 M 387, 851 P2d 1037, 50 St. Rep. 321 (1993).

Stratified Sales Assessment Ratio — Unconstitutional: On October 12, 1990, the court issued its written order explaining that the use of 1990 tax values derived from the stratified sales

assessment ratio study and the subsequent application of a percentage factor to certain residential properties, which in 1989 were assessed or appraised at or above their true market values, resulted in unfair discrimination by requiring those property owners to bear a disproportionate share of the state tax burden in violation of the equal protection and due process requirements of both the U.S. and Montana Constitutions. The court further found that application of the ratio violated statutory appraisal provisions requiring general and uniform appraisal, assessment, and equalization of all taxable property in the state. Dept. of Revenue v. Barron, 245 M 100, 799 P2d 533, 47 St. Rep. 1869 (1990), followed, with regard to the unconstitutionality of a 2% phasein of changes in real property value (revised Ch. 584, L. 1999) on equal protection grounds, in Roosevelt v. Dept. of Revenue, 1999 MT 30, 293 M 240, 975 P2d 295, 56 St. Rep. 125 (1999).

Tax Exemption for Business Inventory While Taxing Livestock Not Violative of State or Federal Equal Protection Laws: The Supreme Court reversed a lower court decision that held that taxing livestock while exempting business inventories was unconstitutional in that the law denied certain individuals equal protection under the federal and state constitutions. The Supreme Court ruled that a middle tier scrutiny was not required; rather the proper test was a rational basis test to determine if there was a basis for treating inventory and livestock differently. Under the rational basis test, it was clear that the Legislature had acted rationally in applying different classifications, and historically the two properties had been treated differently. Mont. Stockgrowers Ass'n v. St., 238 M 113, 777 P2d 285, 46 St. Rep. 1132 (1989), followed in GBN, Inc. v. Dept. of Revenue, 249 M 261, 815 P2d 595, 48 St. Rep. 715 (1991).

Wrongful Discharge Law Limitations on Damages Not Violative of Equal Protection Guarantee — Relation to Legitimate State Interests: The Supreme Court applied the rational basis test in determining whether provisions of the Wrongful Discharge From Employment Act, Title 39, ch. 2, part 9, which prohibit recovery of noneconomic damages and punitive damages, violated the constitutional guarantee of equal protection. The court found that the Act survived scrutiny because it was rationally related to legitimate state interests, including: (1) promoting the financial interests of businesses in the state or potentially in the state to improve economic conditions; (2) limiting employers' liability for wrongful discharge through restrictions on recovery; (3) providing greater certainty in defining an employer's duties by recalling a contract law limitation on damages for pain and suffering; (4) providing a reasonably just substitute for the common-law causes it abrogates; (5) bettering prior common-law provisions for recovery by allowing claims for prejudgment interest; and (6) allowing some recovery for wrongful discharges that would otherwise deny retirement benefits. Meech v. Hillhaven W., Inc., 238 M 21, 776 P2d 488, 46 St. Rep. 1058 (1989), overruling Pfost v. St., 219 M 206, 713 P2d 495, 42 St. Rep. 1957 (1985), White v. St., 203 M 363, 661 P2d 1272, 40 St. Rep. 507 (1983), and Corrigan v. Janney, 192 M 99, 626 P2d 838, 38 St. Rep. 545 (1981).

Occupational Disease Act (Now Repealed) — Equal Protection: Claimant, who has a history of asthma, was exposed to an unusually large and concentrated dose of fumes while working as a welder. He was hospitalized briefly, and, following treatment, his health was returned to its preexacerbation state. Claimant is not entitled to compensation under the Workers' Compensation Act for the injury he suffered during the incident in which he inhaled fumes because his health was returned to its preexacerbation state. However, he is entitled to compensation under the Occupational Disease Act (now repealed and merged with Workers' Compensation Act). The Occupational Disease Act (now repealed and merged with Workers' Compensation Act) does not violate the equal protection clause of the state or federal constitution because there is a rational basis for the benefits awarded under the Act. Eastman v. Atlantic Richfield Co., 237 M 332, 777 P2d 862, 46 St. Rep. 845 (1989), distinguished in Henry v. St. Comp. Ins. Fund, 1999 MT 126, 294 M 449, 982 P2d 456, 56 St. Rep. 506 (1999).

Question of Equal Protection Not Reached: Claimant argued that the lower court's decision: (1) rested on the classification of individuals; and (2) held that persons with business acumen could receive lump-sum payments and those without business acumen could not. The Supreme Court found that the lower court had considered the interests of the claimant, the claimant's family, and the public, based its decision on the particular facts of the case, and concluded that the presumption favoring periodic payments applied. The court held that there existed no issue in the case before it of whether or not a classification based on possession of business acumen would survive equal protection analysis. Hernandez v. St. Comp. Ins. Fund, 236 M 210, 770 P2d 502, 46 St. Rep. 302 (1989).

Declaratory Judgment — Exhaustion of Administrative Remedies Not Required — Summary Judgment Improper: The District Court erred in granting the Town of West Yellowstone's motion for summary judgment in a declaratory judgment action brought to challenge the constitutionality

of an off-street parking ordinance. When a bona fide constitutional issue is raised, a plaintiff has a right to resort to the Uniform Declaratory Judgments Act for a determination of his rights and he may not be required to submit himself to the provisions of the ordinance that he claims are unconstitutional. This is so even though, as the District Court implied, the monetary result to the plaintiff under the zoning ordinance may be inconsequential. Mitchell v. W. Yellowstone, 235 M 104, 765 P2d 745, 45 St. Rep. 2226 (1988).

Skier Responsibility Statutes Unconstitutional: Although there is a legitimate state interest in defining ski area operator liability and protecting the economic vitality of the ski industry, as expressed in 23-2-731, 23-2-736, and 23-2-737 are needlessly overbroad in that they prohibit a skier from obtaining legal recourse against an operator even if the injury is proximately caused by the negligent or even intentional actions of the operator. The sections violate the equal protection guarantee of both the state and federal constitutions because they do not bear even a minimum rational relationship to the stated purpose. Brewer v. Ski-Lift, Inc., 234 M 109, 762 P2d 226, 45 St. Rep. 1769 (1988).

Equal Protection Not Violated by Statutory Immunity From Suit: Section 2-9-111, which grants immunity from suit for legislative acts and omissions, does not violate the equal protection guarantee of Art. II, sec. 4, Mont. Const. Bieber v. Broadwater County, 232 M 487, 759 P2d 145, 45 St. Rep. 1218 (1988).

Imposition of Trial Costs Not Unconstitutional: Defendant contended that 46-18-232 and 46-18-233 are unconstitutional because they leave it to the discretion of the judge whether to impose costs of prosecution, thus permitting discrimination in violation of equal protection of the law. In striking down defendant's argument, the Supreme Court held that it is within the trial court's discretion to impose prosecution, jury, and counsel costs on defendant. St. v. Pease, 227 M 424, 740 P2d 659, 44 St. Rep. 1203 (1987).

Constitutionality of 2.0 Grade Average Rule — Extracurricular Activities Not Fundamental Right: In determining whether the District Court erred in holding that participation in extracurricular activities is not a fundamental right, the Supreme Court applied the middle-tier level of constitutional analysis recognized in Butte Community Union v. Lewis, 219 M 426, 712 P2d 1309, 43 St. Rep. 65 (1986), and concluded that the 2.0 rule did not violate the Montana Constitution because: (1) the right to extracurricular participation is not enumerated in the constitutional Declaration of Rights; and (2) government interests in developing the full educational potential in each person and providing a basic system of quality public education by enactment of the 2.0 rule outweigh a student's interest in participating in existing extracurricular activities. State ex rel. Bartmess v. Bd. of Trustees, 223 M 269, 726 P2d 801, 43 St. Rep. 1713 (1986), followed in Kaptein v. Conrad School District, 281 M 152, 931 P2d 1311, 54 St. Rep. 106 (1997), holding that a private school student has no right to participate in public school extracurricular activities.

Personal Injury Not Shown — Equal Protection Not Considered: The Supreme Court refused consideration of a claim by residents of the Montana portion of Yellowstone Park that their "county-less" status denied them equal protection of the law. They asserted that because they did not reside in a county they could not run for county office, obtain hunting or fishing licenses, or have a county domicile for civil litigation venue purposes; however, the court found no evidence that the appellants ever sought to run for office or purchase hunting or fishing licenses. Absent allegations of personal injury suffered by operation of the statutes in question sufficient to meet the requirements of standing to sue, the alleged denial of equal protection was not an issue for consideration. Olson v. Dept. of Revenue, 223 M 464, 726 P2d 1162, 43 St. Rep. 1916 (1986), citing Chovanak v. Matthews, 120 M 520, 188 P2d 582 (1948), and followed in Bowen v. McDonald, 276 M 193, 915 P2d 201, 53 St. Rep. 343 (1996).

Inability to Pay Restitution — Not Violative of Equal Protection in Light of State Correctional Policy and Previous Offenses: A defendant convicted of felony theft was sentenced to 5 years in the state prison with 2 years suspended and, in addition, was ordered to pay restitution. The defendant asserted on appeal that he was sentenced to a prison term because of his indigency, in violation of his right to equal protection. However, the District Judge specifically noted the prison term was necessary to protect the property of others and that the defendant's criminal record contained three previous misdemeanor thefts. The Supreme Court found these to be sufficient reasons to support incarceration and upheld the state's correctional policy outlined in 46-18-101. The court noted that the sentence was well within the parameters of punishment for felony theft in 45-6-301. Finding no abuse of discretion or violation of the defendant's constitutional rights, the District Court was affirmed. St. v. Carroll, 220 M 466, 716 P2d 212, 43 St. Rep. 531 (1986).

Definition of "Negligently" as Applied to Negligent Homicide — Not Unconstitutionally Vague: Defendant contended that the definition of "negligently", as applied to negligent homicide, is unconstitutionally vague when compared and contrasted with other terms like "gross negligence", "lack of ordinary care", and "reckless disregard for consequences". Defendant asserted the statute is vague because it did not require a conscious deviation from a known risk. After considering 45-5-104 and the definition of "negligently" in 45-2-101, the court found no indefiniteness on the face of the statutes sufficient to require a holding of unconstitutionality and no unconstitutional application by the lower court. The court enumerated the facts indicating that defendant's conduct was properly classified as a gross deviation, meaning a deviation that was considerably greater than the lack of ordinary care. St. v. Gould, 216 M 455, 704 P2d 20, 42 St. Rep. 946 (1985).

Retroactive Application of Tax Delinquency Interest Increase: After the Legislature passed an amendment raising the rate of interest applied to tax payments in delinquency, the Attorney General issued two opinions as to whether the increase should be given retroactive application, the first opinion saying "no" and the second opinion, issued 2 months later, saying "yes". Appellant claimed that the effect of the Attorney General's opinions was to divide delinquent taxpayers into two groups, those to whom the increase was not retroactively applied, under the first opinion, and those to whom the increase was applied, under the second opinion, and that therefore, retroactive application of the increase violated the Due Process and Equal Protection Clauses of the Montana Constitution as well as the 14th amendment of the United States Constitution. The Supreme Court upheld the District Court's dismissal of appellant's claim, ruling that the constitutionality of a law is determined by looking at the enactment itself rather than at an administrative interpretation of it. Further, the law is not discriminatory and a delinquent taxpayer does not have a vested right to application of a particular rate of interest. O'Shaughnessey v. Wolfe, 212 M 12, 685 P2d 361, 41 St. Rep. 1557 (1984).

Enhanced Sentence — Ex-Policeman — Homicide by Shooting — No Equal Protection Violation: Defendant convicted of negligent homicide with a revolver was given an extra 10 years for committing the offense with a dangerous weapon. His claim that he was punished for being an ex-policeman and that thus his equal protection rights were violated was clearly without merit. He cited no authority for the claim. Given the evidence produced at trial, holding him to a greater knowledge of the risks inherent in his actions for the purpose of deciding whether to enhance his negligent homicide sentence was unquestionably reasonable and therefore constitutionally sustainable. St. v. Stroud, 210 M 58, 683 P2d 459, 41 St. Rep. 919 (1984).

Misapplication of or Failure to Apply State or Local Law — Rights Under Federal Constitution: Plaintiff landowners claimed that the county and its officials violated plaintiffs' federal constitutional due process and equal protection rights by misapplying, misinterpreting, and failing to apply local health regulations adopted under state law and by applying them discriminatively against plaintiffs. The District Court ruled that the right to have state laws strictly obeyed is not a federal right protected by the Civil Rights Act (42 U.S.C. § 1983) or the federal constitution, but rather is a state right. The mere violation of a state law does not violate the federal constitution. Federal equal protection is violated by proving intentional discrimination in applying state regulations. H O H Bar S Land & Cattle v. Ravalli County, 41 St. Rep. 271 (D.C. Mont. 1984) (apparently not reported in Federal Supplement).

Plaintiff's Burden of Proof — Purpose of Legislation: The mere allegation that a fundamental right is burdened is insufficient to trigger a strict scrutiny equal protection analysis; one must also lay the groundwork for a claim that a classification either burdens a fundamental right or involves a suspect criteria. The purpose of legislation is of vital concern when it is challenged as a denial of equal protection, and the policy of the legislation should be drawn out of its terms as nourished by their proper environment and not, like nitrogen, out of the air. Oberg v. Billings, 207 M 277, 674 P2d 494, 40 St. Rep. 2034 (1983).

Corporation Protected: A corporation is a person within the Equal Protection Clause. Mont. Power Co. v. P.S.C., 206 M 359, 671 P2d 604, 40 St. Rep. 1712 (1983).

Investigation of Human Rights Violations — Personnel Files: The Human Rights Commission (HRC) requested access to personnel files in connection with its investigation of a discrimination complaint. The court found that information sought by the HRC is protected by the right of privacy. The court also found that a sufficient showing of compelling state interest was made under Art. II, sec. 4, Mont. Const., and Title 49, ch. 2, allowing the HRC access to the information. To protect the privacy of the individuals whose files are disclosed, the court directed that the HRC may not disclose the information unless it is altered so as to provide for the anonymity of the persons involved. If the information must be released in such a way as to disclose the identity of the persons involved, HRC must, prior to the release, obtain an order from the District Court

authorizing the release. Mont. Human Rights Div. v. Billings, 199 M 434, 649 P2d 1283, 39 St. Rep. 1504 (1982), followed in Flesh v. Bd. of Trustees, 241 M 158, 786 P2d 4, 47 St. Rep. 161 (1990).

Jurisdiction of State Court Over Nonresident Federally Chartered Bank — Sufficiency of Evidence — Denial of Due Process and Equal Protection: Officers of the plaintiff corporation traveled to Reno, Nevada, to deposit money in the defendant branch bank in anticipation of business in Nevada and later brought an action in a Montana District Court against the defendant for unlawful dishonor of a check and associated charges. The District Court did not err in dismissing the action for lack of jurisdiction. Under the provisions of 12 U.S.C. § 94, a federally chartered bank may be sued, among other places, where it is "located". The U.S. Supreme Court in Citizens & S. Nat'l Bank v. Bougas, 434 US 35 (1977), construed the term "located" to mean wherever branch offices are found. Because there is no branch bank in Montana and there has been no business operation conducted by the defendant in Montana that would constitute a waiver of the protection of federal law, the District Court had no jurisdiction. There was, moreover, sufficient evidence before the District Court for it to make the determination that there was no voluntary waiver and the U.S. Supreme Court has held in Mercantile Nat'l Bank at Dallas v. Langdeau, 371 US 555 (1963), that Congress "unquestionably" has the authority to determine those situations in which national banks can be sued. Hamelly Int'l, Inc. v. First Nat'l Bank of Nev., 199 M 221, 648 P2d 282, 39 St. Rep. 1304 (1982).

Award of Part of Retirement Benefits — Equal Protection Claim: Husband's claim that award of one-third of his future retirement benefits (husband was 51) to wife denied him equal protection lacked merit as it was not raised below and there was no plain error in the award. Laster v. Laster, 197 M 470, 643 P2d 597, 39 St. Rep. 737 (1982).

Codefendants — Disparate Sentences — Suspension Versus Twenty Years: Defendant, a 28-year-old male with a history of involvement with weapons, and his codefendant, a 58-year-old alcoholic with a wooden leg and no record of violence, were each convicted of two counts of kidnapping and two counts of assault in regard to two girls 12 and 14 years old. Defendant was sentenced to two consecutive 10-year prison sentences on the kidnapping convictions and to 6 months on each assault charge, to run concurrently with each other and with the kidnapping sentences. Codefendant, defendant's natural father, received a 10-year sentence, all of which was suspended on the condition that he commit himself to alcohol treatment at a state institution and remain a law-abiding citizen. The Supreme Court ruled that there was no denial of equal protection as claimed by defendant. St. v. Herrera, 197 M 462, 643 P2d 588, 39 St. Rep. 731 (1982).

Job Promotions — Standards — Use of Single Factor as Basis for Equal Protection Violation: Differences in treatment of persons in regard to promotions do not all constitute deprivation of either due process or equal protection, particularly where the difference is one of evaluating facts rather than in resolving them. Where college evaluated tenure candidates in three basic areas and balanced all the factors and appellant teacher denied tenure claimed discrimination in that he had published an article and two candidates granted tenure had published no articles, publication being one of the factors, there was no equal protection violation. Akhtar v. Van De Wetering, 197 M 205, 642 P2d 149, 39 St. Rep. 470 (1982).

University Tenure System — Discrimination by Regents or College President Generally — State Action: The Montana University tenure system is maintained under authority of state statutes by the Board of Regents and the presidents of the Montana University System's institutions. Therefore, any action by the Board or a president in regard to tenure is state action, and a discriminatory application of the tenure process would be a denial of equal protection. Akhtar v. Van De Wetering, 197 M 205, 642 P2d 147, 39 St. Rep. 470 (1982).

Constitutionality of Mandatory Vehicle Insurance Law: Section 61-3-301 does not violate either due process or equal protection guarantees of the Constitution. St. v. Turk, 197 M 311, 643 P2d 224, 39 St. Rep. 584 (1982).

Death Penalty — Facially Neutral — Discrimination to Be Shown: Petitioner challenged Montana's death penalty statutes as arbitrary and discriminatory. Montana has instituted sentencing procedures that focus on the character of the defendant and the circumstances of the crime. In doing this, arbitrariness is conclusively removed from sentencing. As regards discrimination, the disproportionate impact of a facially neutral law will not make the law unconstitutional unless discriminatory intent or purpose is found. Montana's law is facially neutral, and no allegation of discriminatory intent was raised. Fitzpatrick v. St., 194 M 310, 638 P2d 1002, 38 St. Rep. 1448 (1981).

Trade Secrets — When to Be Disclosed and to Whom — Protectable Property: A telephone utility was required to disclose trade secrets to the Public Service Commission (PSC) to aid in a decision on its rate increase request. The utility was entitled to a protective order preventing access to the secrets by the general public, but the Montana Consumer Counsel and any citizen whose interest related to the ratemaking function of the PSC could have access to the information. Use or disclosure of the trade secrets except for purposes of the ratemaking proceeding was prohibited. Mtn. States Tel. & Tel. v. Dept. of Public Service Regulation, 194 M 277, 634 P2d 181, 38 St. Rep. 1479 (1981). Mtn. States and its progeny were overruled to the extent that those decisions relied on the constitutional balancing test of the right to individual privacy against the public's right to examine documents or observe governmental deliberations as a basis of protecting trade secrets and other confidential proprietary information of nonhuman entities in Great Falls Tribune v. Mont. Pub. Serv. Comm'n, 2003 MT 359, 319 M 38, 82 P3d 876 (2003).

Operating Business Across State Lines Not a Fundamental Right: The right to operate an outfitting business across state lines is not a fundamental right within the meaning of the Equal Protection Clause. Godfrey v. Fish & Game Comm'n, 193 M 304, 631 P2d 1265, 38 St. Rep. 661 (1981).

Right of State to Appeal Denial of Change of Venue Not Enjoyed by Defendant — No Violation of Equal Protection: Armstrong argued that it is a violation of the equal protection of the law to allow the State to appeal the denial for a change of venue but to refuse that same right to a defendant. The Supreme Court said that the State has no right to appeal following a conviction or acquittal. Therefore, the allowance to the State of an interlocutory appeal for review of orders respecting place of trial, prior to conviction or acquittal, serves a purpose, that the public interest be protected in the handling of criminal cases. There is a rational basis for these appeal provisions in the statute. St. v. Armstrong, 189 M 407, 616 P2d 341, 37 St. Rep. 1563 (1980).

Appeals of Administrative Decisions — Prompt Service Constitutional: The requirement in 2-4-702 of prompt service of a petition for judicial review on the agency that rendered the decision to be reviewed applies with equal force on private individuals and government agencies that seek review of adverse administrative decisions, thus there is no unconstitutional discrimination favoring the government violative of equal protection. Rierson v. St., 188 M 522, 614 P2d 1020 (1980).

Review of Death Sentence — Disproportionate Application: The Supreme Court, in reviewing a death sentence to determine whether it is disproportionate, reviews the circumstances of the crime of which the defendant is accused and, in light of those circumstances, the judgment and the sentence thereupon imposed. It examines cases involving similar crimes to make certain that, as far as the defendant in this particular case is concerned, there has been no discriminatory action on the part of the sentencing judge, no abuse of discretion by the sentencing judge, and that the sentencing judge has considered and applied fairly and without discrimination the applicable law. The Supreme Court looks for the even-handed application of death sentences without regard to sex, color, creed, or race or any other discriminating consideration. When this has occurred, as here, the death sentence must be upheld. St. v. Coleman, 185 M 299, 605 P2d 1000 (1979).

Effective Assistance of Counsel — Effect of Delay of Payment to Appointed Defense Counsel: Defendant's claims that the failure of the court to provide funds in advance for appointed defense counsel created a "chilling effect" and that by the time funds became available there was inadequate time in which to prepare a defense were rejected because defendant failed to show that the alleged lack of preparation prejudiced him in any way. St. v. Bretz, 185 M 253, 605 P2d 974 (1979).

Trial by Impartial Jury — Pretrial and Trial Publicity: In a case that was the subject of extensive pretrial and trial publicity, the defendant was not denied his right to a trial by a fair and impartial jury where the record indicated that the defendant had attempted to use the media for his own advantage and had failed to move for a change of venue on the basis of the publicity. The defendant's argument that the court should have examined the jury as to their contact with the publicity and its prejudicial effect on them was not a proper subject for examination on appeal since no such motion was made during trial. St. v. Bretz, 185 M 253, 605 P2d 974 (1979).

Equal Protection Test: Equal protection of the laws requires that all persons be treated alike under like circumstances. Classification of persons is allowed as long as it has a permissible purpose. Billings Assoc. Plumbing, Heating, & Cooling Contractors v. Bd. of Plumbers, 184 M 249, 602 P2d 597 (1979). Citing: Mont. Land Title Ass'n v. First Am. Title, 167 M 471 (1975), and U.S. v. Reiser, 394 F. Supp. 1060 (D.C. Mont. 1975).

Equal Protection — Nonresident Hunting — United States Constitution: Nonresidents brought suit for declaratory and injunctive relief from the Montana elk hunting license scheme

asserting that, as applied to nonresidents, the system violated both the Privileges and Immunities and Equal Protection Clauses of the United States Constitution (similar to Art. II, sec. 4, Mont. Const.). The U.S. Supreme Court held that: (1) access by nonresidents to recreational big game hunting in Montana did not fall within the category of rights protected by the Privileges and Immunities Clause; and (2) the efforts of Montana to allocate access to recreational hunting were rationally related to the preservation of a finite resource and to a substantial regulatory interest of the state and did not violate the Equal Protection Clause. Baldwin v. Fish & Game Comm'n, 436 US 371, 98 S Ct 1852 (1978).

Selective Prosecution Under Persistent Felony Offender Statutes: Sections 46-18-501 and 46-18-502, which provide for increased sentences for certain persistent offenders, do not violate the equal protection and due process guarantees for the reason that only a minority of repeat felony offenders are prosecuted under them. St. v. Maldonado, 176 M 322, 578 P2d 296 (1978), followed in St. v. Pease, 227 M 424, 740 P2d 659, 44 St. Rep. 1203 (1987). Maldonado and Pease were followed in St. v. Stanko, 1998 MT 323, 292 M 214, 974 P2d 1139, 55 St. Rep. 1313 (1998).

Adoption of City Ordinance: The Supreme Court rejected plaintiff's contention that a formula for assessment of offstreet parking improvements was adopted in violation of due process and equal protection. Schumacher v. Bozeman, 174 M 519, 571 P2d 1135 (1977).

Restriction on Continuing Study of Law: The practices, policies, rules, and procedures under which the fitness of a student to continue the study of law is appraised, as applied to plaintiff, do not violate constitutional requirements of due process and equal protection or 37-61-204 (now repealed). Johnson v. Sullivan, 174 M 491, 571 P2d 798 (1977).

Prospective Application: In action to modify a divorce decree entered before the effective date of the 1972 Montana Constitution, husband could not attack an award of alimony on the ground that it violated this section. By virtue of section 3 of the Transition Schedule, the rights created by this section apply prospectively only and do not serve to invalidate the award if it was proper when made. Rogers v. Rogers, 169 M 403, 548 P2d 141 (1976).

Tax Valuation — Violation of Uniformity Requirements: When the use of an appraisal increased the taxable valuation of a county to a level in excess of valuations of similar property in other counties, the result was to place a disproportionate share of the tax burden on the affected county in violation of Art. II, sec. 4, Mont. Const. Larson v. Dept. of Revenue, 166 M 449, 534 P2d 854 (1975).

CLASSIFICATIONS GENERALLY

Constitutionality of Notice Requirement of Dram Shop Law — Not Violative of Equal Protection — Not Considered Unlawful Special Legislation: A little over 1 year after being injured in an accident involving an intoxicated bar patron, plaintiffs brought an action against the bar to recover damages incurred as a result of the accident. The bar moved to dismiss the action under 27-1-710, which requires that a person who wishes to commence a dram shop action must notify the person who furnished alcohol by certified mail within 180 days from the date of sale or service. Plaintiffs admitted that they did not meet the notice requirement but argued that the notice provision was unenforceable because it was unconstitutional special legislation and violated plaintiffs' right to equal protection. The District Court dismissed the action as untimely and plaintiffs appealed the constitutional issues, but the Supreme Court affirmed. The notice requirement is rationally related to a legitimate government purpose, and while those who make a claim under the dram shop law must take an additional step before bringing suit, they are still in a situation similar to that of others who allege injury by the wrongful act or omission of another, so the notice requirement does not create an unreasonable classification in violation of equal protection. Additionally, the notice requirement does not constitute special legislation because it operates in the same manner upon all persons in like circumstances without conferring particular privileges or disabilities upon a class of persons arbitrarily selected from a larger group of persons, all of whom stand in the same relation to the privileges or disabilities. Rohlfs v. Klemenhagen, LLC, 2009 MT 440, 354 M 133, 227 P3d 42 (2009). See also State ex rel. Fisher v. School District, 97 M 358, 34 P2d 522 (1934), Lowery v. Garfield County, 122 M 571, 208 P2d 478 (1949), and Linder v. Smith, 193 M 20, 629 P2d 1187, 38 St. Rep. 912 (1981).

Firefighter Retirement System Phase-In Not Violative of Equal Protection: The 2001 Legislature passed Senate Bill No. 289, providing that National Guard firefighters who were hired on or after October 1, 2001, would participate in the Firefighters' Unified Retirement System, while those hired prior to October 1, 2001, would continue to participate in the Public Employees' Retirement System, which provided less benefits. The bill had no provision allowing transfer between systems, resulting in denial of better benefits for about 22 firefighters who were hired prior to

October 1, 2001. Bean was one of the 22 and challenged the new retirement process, codified in 19-13-210, on grounds that the law created two similarly situated classifications of firefighters who were treated differently, in violation of equal protection. The District Court agreed and held that the new process was unconstitutional. The state appealed, and the Supreme Court reversed, noting that an equal protection challenge fails if the groups at issue do not constitute similarly situated classes. The cutoff date in 19-13-210 created two dissimilar classes of firefighters. The Legislature recognized that the new process created an inequitable situation, but rather than approaching the inequity with an immediate and comprehensive solution, the Legislature chose to correct the imbalance by phasing National Guard firefighters into the Firefighters' Unified Retirement System, providing a prospective retirement solution for newly hired firefighters without affecting the retirement expectation of existing firefighters, and instituting a process that would end the alleged distinction once all National Guard firefighters hired before October 1, 2001, retired. Thus, the statute operated equally upon members of each class of firefighters and did not violate Bean's right to equal protection. Bean v. St., 2008 MT 67, 342 M 85, 179 P3d 524 (2008), following Gulbrandson v. Carey, 272 M 494, 901 P2d 573 (1995).

Sole Use of Actual Wage Loss in Determining Permanent Partial Disability Benefits Not Violative of Equal Protection: Wilkes asserted that 39-71-703 violated equal protection guarantees by basing permanent partial disability benefits solely on actual wage loss, resulting in treatment of similarly situated classes of workers unequally by creating two classes of workers—one class with actual wage loss who suffer reduced earning capacity, and one class without actual wage loss who suffered reduced earning capacity. Wilkes contended that denying permanent partial disability benefits to workers who suffer reduced earning capacity without suffering actual wage loss impermissibly compensated similarly situated workers differently, in violation of equal protection. The Supreme Court disagreed. The Legislature's express public policy, as stated in 39-71-105, is that the wage-loss benefit should bear a reasonable relationship to actual wages lost as a result of a work-related injury or disease, so the distinguishing factor of actual wage loss between the two classes plainly relates to the underlying justification of 39-71-703 and sufficiently distinguishes the two putative classes. Because the classes are not similarly situated, the equal protection claim failed. Wilkes v. Mont. St. Fund, 2008 MT 29, 341 M 292, 177 P3d 483 (2008), following Powell v. St. Comp. Ins. Fund, 2000 MT 321, 302 M 518, 15 P3d 877 (2000), and distinguishing Reesor v. Mont. St. Fund, 2004 MT 370, 325 M 1, 103 P3d 1019 (2004), and Snetsinger v. Mont. Univ. Sys., 2004 MT 390, 325 M 148, 104 P3d 445 (2004).

Constitutionality of Montana Recoupment Statutes: Ellis contended that 46-8-113 and 46-8-115 violated the right to equal protection because they strip indigent defendants of protections against imprisonment for debt that are afforded to similarly situated nonindigent criminal defendants and civil judgment debtors. The Supreme Court disagreed. Under Montana's recoupment statutes, a court may not sentence a defendant to pay the costs of court-appointed counsel unless the court determines that the defendant is or will be able to pay the costs, nor do counsel costs become a judgment in the same manner as civil judgments. Further, a defendant may at any time petition the court for remission of payment on grounds that payment will impose manifest hardship on the defendant or the defendant's family. Ellis's equal protection claim was also rejected for failure to identify similarly situated classes that are treated differently, inasmuch as individuals who are ordered to pay recoupment costs as a condition of a felony criminal sentence are not similarly situated to civil judgment debtors. Thus, Ellis failed to establish that the recoupment statutes violated the constitutional right to equal protection. St. v. Ellis, 2007 MT 210, 339 M 14, 167 P3d 896 (2007), following St. v. Farrell, 207 M 483, 676 P2d 168 (1984). See also Fuller v. Oregon, 417 US 40 (1974).

Disparate Awards for Permanent Partial Disability and Permanent Total Disability Not Violative of Equal Protection: The statutory framework of the Workers' Compensation Act reveals distinctly different purposes served by permanent partial disability and permanent total disability benefits. Permanent partial disability benefits compensate a worker for sustaining a partial disability by a smaller impairment award and by supplementing wages earned when the claimant returns to work. Permanent total disability benefits do not contemplate a return to work and so provide a higher continuous benefit that is paid over the work life of the claimant. Because claimants in these classes are not similarly situated, denial of an impairment award to permanent partial disability claimants does not violate equal protection guarantees. Rausch v. St. Comp. Ins. Fund, 2005 MT 140, 327 M 272, 114 P3d 192 (2005).

Improper Apportionment of Total Disability Benefits for Total Wage Loss as Result of Occupational Disease — Schmill Applied: In its order of determination, the Department determined that Hand was entitled to 25% of total disability payments if Hand suffered a total

wage loss as the result of an occupational disease. However, Hand's case was still pending when the Supreme Court decided Schmill v. Liberty NW. Ins. Corp., 2003 MT 80, 315 M 51, 67 P3d 290 (2003), which held that the apportionment of benefits for a work-related injury was statutorily prohibited and violated the equal protection clause of the Montana Constitution. Thus, the Supreme Court remanded Hand's case and ordered that Hand be awarded 100% of his total disability payments if he suffered a total wage loss as the result of an occupational disease. Hand v. Uninsured Employers' Fund, 2004 MT 336, 324 M 196, 103 P3d 994 (2004).

Similarly Situated Classes of Workers Treated Differently Under Workers' Compensation Act and Occupational Disease Act (Now Repealed) — Occupational Disease Permanent Impairment Award Violative of Equal Protection: Schmill suffered an occupational disease arising from employment, resulting in a 3% physical impairment rating. In spite of the limitations, Schmill did not suffer an actual wage loss as a result of the occupational disease, so Schmill requested an impairment award pursuant to the Workers' Compensation Act because the Occupational Disease Act of Montana (now repealed and merged with Workers' Compensation Act) does not provide partial disability or impairment benefits. Schmill's petition alleged that plaintiff was entitled to the same impairment award available under the Workers' Compensation Act. Subsequently, the Workers' Compensation Court issued a decision (affirmed in Stavenjord v. Mont. St. Fund, 2003 MT 67, 314 M 466, 67 P3d 229 (2003)) requiring that permanent partial disability benefits be paid to occupational disease claimants pursuant to the Workers' Compensation Act. Based on that decision, the insurer agreed to pay Schmill's impairment award, but deducted 20% from the award for nonoccupational factors that contributed to the disability, pursuant to 39-72-706 (now repealed). Schmill claimed entitlement to full payment pursuant to the Workers' Compensation Act, and the Workers' Compensation Court agreed, concluding that full payment was warranted because 39-72-706 (now repealed) violated equal protection guarantees by providing disparate treatment to workers injured and workers with occupational diseases. The insurer appealed, but the Supreme Court affirmed. Apportioning a permanent impairment award under the Occupational Disease Act of Montana (now repealed and merged with Workers' Compensation Act) while providing a full award for a permanent impairment under the Workers' Compensation Act is not rationally related to a legitimate government interest, and by treating similarly situated classes of workers differently, 39-72-706 (now repealed) is violative of the constitutional guarantee of equal protection. Schmill v. Liberty NW. Ins. Corp., 2003 MT 80, 315 M 51, 67 P3d 290 (2003). On remand, the Workers' Compensation Court held that the 2003 Schmill rule applied retroactively, and on appeal, the Supreme Court affirmed. A retroactive application of the rule that the former Occupational Disease Act of Montana (now repealed and merged with Workers' Compensation Act) cannot allow for apportionment deductions for nonoccupational factors if the Workers' Compensation Act does not allow apportionment deductions places workers whose occupational disease arose before the decision on equal footing with those whose occupational disease arose subsequently. A retroactive application of the Schmill rule does not retard the rule's operation, and future claimants will not find it more difficult to receive nonapportioned awards, so the 2003 Schmill decision applies retroactively to all cases not final or settled at the time of its issuance. Schmill v. Liberty NW. Ins. Corp., 2005 MT 144, 327 M 293, 114 P3d 204 (2005), following Dempsey v. Allstate Ins. Co., 2004 MT 391, 325 M 207, 104 P3d 483 (2004).

Following the 2005 Schmill decision, the Workers' Compensation Court issued summonses to over 500 insurers regarding their obligation to identify and pay past Schmill-type claims. Numerous insurers appealed on grounds that enforcement of the Schmill decisions violated the insurers' due process rights inasmuch as the summonses failed to satisfy notice requirements because the insurers were not parties to the Schmill cases. Nevertheless, the Supreme Court affirmed. Once all potential beneficiaries were granted a vested right pursuant to the Schmill decisions, a corresponding duty to pay on the part of all insurers arose as a matter of law. Schmill v. Liberty NW. Ins. Corp., 2009 MT 430, 354 M 88, 223 P3d 842 (2009), following Murer v. St. Comp. Mut. Ins. Fund, 283 M 210, 942 P2d 69 (1997), and Ruhd v. Liberty NW. Ins. Corp., 2004 MT 236, 322 M 478, 97 P3d 561 (2004).

Closure to Nontribal Member of Big Game Hunting on Indian Reservation Not Violative of Equal Protection Guarantee: Fish, Wildlife, and Parks Commission regulations limited hunting on Indian reservations to tribal members only. Shook, who was not a tribal member, killed a whitetail buck on private property on the Flathead Indian Reservation. Shook did not own the property, nor was the property owned by a tribal member. Shook was convicted of hunting in a closed area and appealed on grounds that the closure was an unconstitutional violation of equal protection because it distinguished between tribal and nontribal members on the basis of race. The state and tribes countered that laws that distinguish between persons based on tribal

membership have long been held constitutional because the distinction is political rather than racial. The District Court agreed with the state and the tribes, and the Supreme Court affirmed. As set out in Morton v. Mancari, 417 US 535 (1974), laws that afford special treatment for Indians are constitutional as long as those laws can be rationally tied to the fulfillment of the unique federal obligation toward Indians. Federal Indian law is binding on the state; therefore, the state constitutional equal protection guarantee must allow for state classifications based on tribal membership if those classifications can be rationally tied to the governmental obligation toward Indians. The state has a duty to regulate hunting by nontribal members in a way that recognizes Indian hunting privileges protected by federal law; thus, the regulation was an entirely rational way for the state to fulfill that duty by preserving wildlife populations for hunting by Indians and was not violative of equal protection guarantees. St. v. Shook, 2002 MT 347, 313 M 347, 61 P3d 863 (2002).

Equal Protection Analysis of Vocational-Technical School Levy — Rational Basis Test Applied: Plaintiffs challenged the constitutionality of 20-25-439, asserting that the tax levy for vocational-technical schools resulted in an unequal tax burden on five counties where the schools are located, even though the schools are part of the statewide University System. The state contended that the levy is not unconstitutional because it is rationally related to a legitimate government purpose. The District Court found that the levy is constitutional because it is rationally related to the legitimate government interest of supporting the schools, in that the schools provide specific benefits to their individual counties. The Supreme Court agreed that the rational basis analysis applied. The constitutional tax provisions in Art. VIII, sec. 1 and 3, Mont. Const., are broad directives whose specifics are left to the Legislature, so no constitutionally significant interests are implicated that require greater than a rational basis analysis. A tax classification under the rational basis test will be upheld if it is reasonable and not arbitrary and if it applies equally to all who fall within the same classification. A classification is not reasonable if it confers particular privileges or imposes particular disabilities on a class of persons arbitrarily selected from a larger number of persons, all of whom stand in the same relation to privileges conferred or disabilities imposed. Neither the uniformity doctrine nor equal protection prevent the state from making classifications that result in different state taxes among the various counties as long as the classifications are rationally related to a legitimate government purpose. Simply because other state taxes for education funding are assessed in every county does not mean that the Legislature is prohibited from creating subclasses for tax purposes. Attendance at vocational-technical schools by local residents and course offerings related to local interests serve as a rational basis for putting the five counties in a separate class for purposes of the levy. Counties with vocational-technical schools are not arbitrarily selected from the rest of the state because those counties do not stand in the same relation to the greater privileges conferred on those counties by the schools than the rest of the state, so the disability of the levy is rationally imposed. The constitutionality of 20-25-439 was affirmed. Kottel v. St., 2002 MT 278, 312 M 387, 60 P3d 403 (2002), following Leuthold v. Brandjord, 100 M 96, 47 P2d 41 (1935), and distinguishing State ex rel. Woodahl v. Straub, 164 M 141, 520 P2d 776 (1974), Allegheny Pittsburgh Coal Co. v. County Comm'rs of Webster County, W. Va., 488 US 336 (1989), and Roosevelt v. Dept. of Revenue, 1999 MT 30, 293 M 240, 975 P2d 295 (1999).

Uniformity Doctrine of 1889 Constitution Embodied in Equal Protection Clause of 1972 Constitution: Plaintiffs challenged the constitutionality of 20-25-439, asserting that the tax levy for vocational-technical schools resulted in an unequal tax burden on five counties where the schools are located, even though the schools are part of the statewide University System. The state contended that the levy is not unconstitutional because it is rationally related to a legitimate government purpose. The 1889 Montana Constitution contained a uniformity doctrine that required a tax to be levied by a general law that is uniform within the same class of subjects within the territorial limits of the authority levying the tax; however, that uniformity doctrine does not appear in the plain language of the 1972 Montana Constitution. Nevertheless, plaintiffs asserted that the uniformity doctrine is still a constitutional requirement apart from equal protection guarantees. The state argued that because the uniformity doctrine is not part of the 1972 Montana Constitution, the levy could not be violative of the doctrine. The District Court agreed with the state and plaintiffs appealed. The Supreme Court agreed that the statement defining the uniformity doctrine in Hilger v. Moore, 56 M 146, 182 P 477 (1919), was subsequently applied in post-1972 cases, but disagreed that the definition supports any stricter limitation on taxation than that imposed by equal protection. The framers of the 1972 Montana Constitution intended to preserve the uniformity doctrine only as it is equivalent to equal protection requirements. Thus, the uniformity doctrine as interpreted under the 1889 Montana Constitution, which provided for

equal protection in the area of taxation, is still embodied in the 1972 Montana Constitution in the equal protection clause. Analysis of the constitutionality of the levy in question was therefore conducted under the equal protection clause. Kottel v. St., 2002 MT 278, 312 M 387, 60 P3d 403 (2002).

Different Tax Rates on Coal, Oil, and Natural Gas Versus Classified Property Not Violation of Equal Protection and Due Process: Certain counties and individual taxpayers argued that a statewide 50-mill increase on classified property to aid in equalization of school funding that was not imposed on coal, oil, and natural gas that was taxed at a fixed rate was effectively tax-shifting and increased the burden on all other taxable property in the state and therefore was a violation of equal protection and due process. The Supreme Court stated that the presumption was that the law was valid and that the appellants did not provide convincing arguments that the rational basis tier of equal protection analysis did not apply in this case. The Supreme Court held that there had been a showing that the legislation was not arbitrary and bore a substantial relation to the object of the legislation—equality of tax burden and economic competitiveness. Powder River County v. St., 2002 MT 259, 312 M 198, 60 P3d 357 (2002).

Elements of Prima Facie Case of Alleged Employment Discrimination Based on Marital Status: Under the first part of the test for employment discrimination set out in McDonnell Douglas Corp. v. Green, 411 US 792 (1973), plaintiff must first establish a prima facie case of discrimination. In cases of alleged employment discrimination resulting in termination and based on marital status, plaintiff must prove the following prima facie elements: (1) the claimant belonged to a protected class; (2) the claimant was otherwise qualified for continued employment; and (3) the claimant was denied employment under circumstances that raise a reasonable inference that the claimant was treated differently because of membership in the protected class. Here, Foss notified his employer, Vortex Fishing Systems, Inc. (Vortex), of his intention to marry another Vortex employee and was told that under Vortex's unwritten antinepotism policy, a change in his marital status was grounds for termination. Foss quit his employment because of the policy and married within the week. Even though Foss was not married at the time that he quit, he was nevertheless a member of a protected class because it was the change in his marital status that jeopardized his employment. The second element was undisputed because Foss was otherwise qualified for the job and had been a satisfactory employee. Foss also proved the third element because there was no other apparent reason why Foss would have left his job but for his belief that he would soon be fired. The Vortex policy in effect gave Foss a choice between his job and his marriage, and as a member of a protected class, Foss was treated differently and denied further employment with Vortex. Foss established a prima facie case of employment discrimination, and the Commission for Human Rights' holding to that effect was affirmed. Vortex Fishing Sys., Inc. v. Foss, 2001 MT 312, 308 M 8, 38 P3d 836 (2001).

Exhaustion of Remedies Under Individuals With Disabilities Act Not Required Upon Claim of Discrimination in Public Education Under Human Rights Act: Amanda Johnson suffered from Campomelic Syndrome and as a result was confined to a wheelchair. Prior to Amanda's enrollment at Great Falls High School, her family brought Amanda's access issues to the attention of the Great Falls School District. There was no elevator in the school, which precluded Amanda's access to second-floor classrooms and science labs. There were numerous other physical barriers as well, such as parking problems, snow-covered sidewalks, cafeteria restrictions, heavy doors, office countertops that were too high, and inaccessibility to restrooms, water fountains, vending machines, and public telephones. The district determined that it could not build an elevator and continue to provide educational services to the rest of the student body; however, the district did prepare individualized education programs for Amanda each year that attempted to accommodate her by scheduling her classes on the first floor, transporting her to another high school for science labs, fitting desks for her and providing special seating, making minor physical adjustments to the building, providing a parking space for her in the faculty lot, attempting to coordinate snow removal with her arrival, and assigning a staff member to help her use the cafeteria. Nevertheless, her family was dissatisfied with the district's efforts and brought an education discrimination claim, alleging that the district illegally discriminated against Amanda by failing to provide an accessible building in violation of Title 49, ch. 2, commonly known as the Montana Human Rights Act (MHRA), and specifically 49-2-307 and 49-2-308. A hearings examiner found that Amanda did have far less access to the school than her classmates, but concluded that the district had provided reasonable access in light of the resources available to meet Amanda's needs. The hearings examiner ordered the district to proactively monitor accommodations provided to students with physical disabilities and to take a number of steps to minimize the likelihood of future violations of the MHRA. The Commission for Human Rights

adopted the hearings examiner's findings and conclusions, and the district filed for judicial review, arguing to the District Court that: (1) the Commission lacked jurisdiction to consider the complaint until Amanda exhausted the administrative remedies under the Individuals With Disabilities Education Act (IDEA) through the Office of Public Instruction; and (2) the relief granted exceeded the Commission's statutory authority. The District Court agreed and overruled the Commission's order, and the issues were appealed to the Supreme Court. On the first issue, the Supreme Court found that the gravamen of Amanda's claim was grounded in discrimination under the MHRA, not the right to a free appropriate public education under the IDEA. Disabled students can receive an appropriate education, as attested by Amanda's 3.7 grade point average, and still suffer discrimination when the physical premises of a school deprive them of basic human dignities. When claims involve the simple application of the IDEA exhaustion doctrine in the absence of a parallel state statutory remedy, the logic of the IDEA exhaustion may apply, but when, as here, state human rights laws provide an administrative remedy through the Commission for Human Rights, there is no compelling reason to preclude the MHRA claim by first requiring the IDEA exhaustion. The court found no legal basis for determining that the IDEA was intended to limit applicable state human rights discrimination claims. Thus, Amanda's claim could proceed prior to exhaustion of or without ever invoking the IDEA administrative remedies, and the District Court erred in holding otherwise. On the second issue, the Supreme Court found that the remedy ordered by the Commission—requiring the district to formalize its policy and procedure for addressing the special needs of disabled students—fell within the authority of 49-2-506 and was reasonable in light of the relief requested. The District Court was reversed, and the Commission's order was reinstated. Great Falls Pub. Schools v. Johnson, 2001 MT 95, 305 M 200, 26 P3d 734 (2001), following Harrison v. Chance, 244 M 215, 797 P2d 200 (1990), and Shields v. Helena School District No. 1, 284 M 138, 943 P2d 999 (1997), and distinguishing Koopman v. Freemont County School District No. 1, 911 P2d 1049 (Wyo. 1996).

Changing Procedural Rule to Create Different Time Period to Have Summons Issued Does Not Create Two Classes of Plaintiffs: The plaintiff's attorney argued that the lower court erred in dismissing the plaintiff's lawsuit for failure to have the summonses issued within the 12-month time period required by former Rule 41(e), M.R.Civ.P. (now superseded), because those plaintiffs filing after the adoption of the new rule had 3 years in which to have the summonses issued and those filing before the adoption of the new rule had only 1 year. The Supreme Court ruled that the plaintiff's suit was properly dismissed and that under the plaintiff's theory, any procedural rule would implicitly create two classifications of litigants—those who complied with the rule and those who did not. Otto v. Dept. of Fish, Wildlife, and Parks, 2000 MT 333, 303 M 86, 15 P3d 402, 57 St. Rep. 1406 (2000).

Statutory Limitation on Workers' Compensation Family Member Domiciliary Care Benefits Justified — Not Violative of Equal Protection or Substantive Due Process: Plaintiff, injured in a vehicle accident in the scope of his employment, received disability benefits and payments for domiciliary care provided at home by this wife at the maximum rate permitted by 39-71-1107. Plaintiff challenged the constitutionality of the limits on benefits for 24-hour care provided by a family caregiver, arguing that the cap violated his right to equal protection because it forced him to choose between being placed in a nursing home or having his wife assist him. His wife received less compensation as a result of his choice to live at home rather than at a skilled nursing facility. Additionally, plaintiff alleged that establishment of different benefit limits for family and nonfamily caregivers violates his right to substantive due process because it arbitrarily and unfairly balances cost containment with plaintiff's personal choice of who acts as his care provider. In affirming the District Court decision, the Supreme Court ruled that the differences in care provided by family member caregivers and nonfamily member caregivers offer significant justification for limiting compensation to family care member caregivers. As a result, family member caregivers and nonfamily caregivers are not similarly situated for purposes of equal protection, and the difference in family caregiver compensation is not arbitrary and capricious in violation of substantive due process, but is reasonably related to a permissible legislative objective. Powell v. St. Comp. Ins. Fund, 2000 MT 321, 302 M 518, 15 P3d 877, 57 St. Rep. 1353 (2000).

Lack of Sentence Review Process for Misdemeanants Not Violative of Equal Protection: The plain language of 46-18-903 applies the sentence review process only to felons facing incarceration in the state prison, not to misdemeanants. Because felons and misdemeanants are not similarly situated classes, the lack of a sentence review process for misdemeanants does not violate equal protection guarantees. St. v. Renee, 1999 MT 135, 294 M 527, 983 P2d 893, 56 St. Rep. 545 (1999).

Nonviolent Felony Offenders Not Similarly Situated With Misdemeanor Offenders — No Equal Protection Violation in Different Felony and Misdemeanor Sentencing Schemes: Renee contended that Montana's nonviolent felony offender sentencing statutes violated his equal protection rights to physical liberty as a misdemeanor offender because both kinds of offenders may be subject to imprisonment, thus both felony and misdemeanor offenders are similarly situated classes dealt with unequally under the law. The Supreme Court disagreed. Relying on Tigner v. Tex., 310 US 141, 84 L Ed 1124, 60 S Ct 879 (1940), the court found that the constitution does not require that things that are different in fact or opinion be treated in law as though they were the same. Misdemeanor and felony offenders are not similarly situated because of differences in the quality and duration of punishment, as well as the long-term effects on an individual's liberty interest brought about by a felony conviction as compared to that for a misdemeanor conviction. Renee failed to make the necessary threshold showing that misdemeanor and nonviolent felony offenders are similarly situated, so the equal protection challenge failed. St. v. Renee, 1999 MT 135, 294 M 527, 983 P2d 893, 56 St. Rep. 545 (1999), distinguishing In re S.L.M., 287 M 23, 951 P2d 1365, 54 St. Rep. 1480 (1997). See also Kiser v. Dept. of Revenue, 1999 MT 228, 296 M 93, 987 P2d 363, 56 St. Rep. 897 (1999).

Phasein of Real Property Value Modifications Violative of Equal Protection Rights: Roosevelt and the Department of Revenue filed a joint interlocutory petition to adjudicate issues raised before the State Tax Appeal Board, asking the District Court to determine whether the 2% phasein of changes in real property value in 15-7-111 violated the state constitution or statutes. Although the appraised value of Roosevelt's property declined by $161,757 in 1997, under 15-7-111, he was given credit for only a $3,235 difference and was assessed taxes based on a value of $817,362 rather than the actual 1997 appraised value of $658,840. In District Court, Roosevelt raised numerous alleged statutory and constitutional violations, including equal protection and due process concerns. The District Court held 15-7-111 unconstitutional on its face, in conflict with Art. VIII, sec. 3 and 7, Mont. Const., with the equal protection and due process clauses of both the state and federal constitutions, and with statutes pertaining to the valuation and assessment of real property. On appeal, the Supreme Court cited U.S. v. Raines, 362 US 17, 4 L Ed 2d 524, 80 S Ct 519 (1960), in reversing the holding that the statute was unconstitutional on its face because even though it imposed different tax burdens on various classes of taxpayers, the statute was neutral on its face. However, the court did not find it necessary to address all other issues raised or decided by the District Court beyond the equal protection question. The court first noted that the level of scrutiny applicable to this case did not rise to the level of strict scrutiny, which requires a compelling state interest for statutory classifications that treat otherwise similarly situated persons differently and is reserved for situations when a statutory classification impermissibly interferes with the exercise of a fundamental right or operates to a peculiar disadvantage of a suspect class. Although a legitimate state interest exists in reducing reliance on property taxes and avoiding property tax increases, the method in 15-7-111, which taxed property owners, such as Roosevelt, based on 124% of market value while other taxpayers paid less than full market value, was not rationally related to a legitimate state interest, so the court declined to decide whether a higher level of scrutiny applied to classifications created for property tax assessment. Rather, the court held that creating a class of property owners whose taxes are assessed on a basis greater than the market values of their property, while other property owners are assessed on the actual or less than the actual market values of their property, causes the property owners in the first class to pay a disproportionate share of state taxes, in violation of the equal protection guarantee in this section. General adjustments over a short time to equalize the treatment of similarly situated property holders is permissible, but seasonable attainment of the equality is required. The 2% phasein accomplished neither. In this case, Roosevelt and similarly situated taxpayers were entitled to be assessed at the actual 1997 market value of their property for purposes of calculating 1997 property taxes. (See changes to phase-in system in Ch. 584, L. 1999.) Roosevelt v. Dept. of Revenue, 1999 MT 30, 293 M 240, 975 P2d 295, 56 St. Rep. 125 (1999), following Allegheny Pittsburgh Coal Co. v. County Comm'rs of Webster County, W. Va., 488 US 336, 102 L Ed 2d 688, 109 S Ct 633 (1989), and distinguishing Nordlinger v. Hahn, 505 US 1, 120 L Ed 2d 1, 112 S Ct 2326 (1992).

No Discriminatory Application of DUI Laws: Koehn asserted that the Yellowstone County Attorney's office discriminated against him by prosecuting him for felony DUI when other similarly situated offenders were charged with lesser offenses, contending that this discriminatory treatment was based on his out-of-state residency status. However, the evidence convinced the Supreme Court that the reduction in charges applied to certain Montana residents during the same period was due to factors unrelated to residency and for reasons that did not apply in

Koehn's case. The District Court properly concluded that the actions of the County Attorney's office did not result in discriminatory treatment of an identifiably burdened class. St. v. Koehn, 1998 MT 234, 291 M 87, 966 P2d 143, 55 St. Rep. 985 (1998).

No Equal Protection Violation Under Workers' Compensation Act and Occupational Disease Act (Now Repealed) Requirements for Medical Examination: Grooms filed a workers' compensation claim with her insurer, the State Fund, alleging that she suffered from a skin allergy condition. The State Fund denied liability and requested that the Department of Labor and Industry process her claim under the Occupational Disease Act of Montana (now repealed and merged with Workers' Compensation Act) by scheduling a medical examination for her by a member of a panel of physicians. Grooms argued before the Supreme Court that her rights to equal protection were infringed by the requirement that if she requested a second medical examination, she would have to pay for it, whereas if her claim had been processed under the Workers' Compensation Act, then 39-71-605 requires the insurer or the Department to pay for the cost of the examination. The Supreme Court held that Grooms misinterpreted the statutes because 39-71-605 does not allow a workers' compensation claimant to request and obtain an examination at the insurer's expense but, rather, provides that an insurer or the Department may require the claimant to submit to physical examinations from time to time and provides that the entity requesting the examination must pay for it. As a result, the Supreme Court held that there was no disparate treatment between the two Acts. In response to Grooms' argument that the Occupational Disease Act (now repealed and merged with Workers' Compensation Act) violates the state constitutional equal protection clause by requiring a mandatory physical examination without providing for a waiver of the costs of the examination for an indigent claimant, the Supreme Court again held that Grooms misapprehended the statutes because 39-72-602 and 39-72-608 (both now repealed) do not mandate an examination at the claimant's expense but provide that it is mandatory for a claimant to submit to a medical examination and require the claimant to pay for an examination only if the claimant is dissatisfied with the results of the first examination and requests a second examination. Because a second examination is not mandatory but optional at the choice of the claimant, the Supreme Court held that Grooms' right of equal protection was not violated. Grooms v. Ponderosa Inn, 283 M 459, 942 P2d 699, 54 St. Rep. 725 (1997).

1989 Retirement Benefit Increase Not Applicable to Judge Who Retired After Date of Enactment but Before Effective Date of Legislation: Gulbrandson was an active member of the judges' retirement system at the time of enactment of Ch. 664, L. 1989, which provided an increase in state funding to the system and an increase in retirement benefits for those years served by a judge after the 15th year. Implementation of the increase under 19-5-502 was delayed until July 1, 1991. Gulbrandson voluntarily retired prior to the delayed effective date. The Supreme Court held that based on the plain meaning of the statute, Gulbrandson was not entitled to the increased retirement benefit upon his retirement prior to July 1, 1991. Denial of the benefit did not impair Gulbrandson's contract with the system in violation of Art. II, sec. 31, Mont. Const., because the statute affecting his contract at the time of retirement did not include the benefit increase. Moreover, denial of the benefit does not violate equal protection provisions of this section because although Ch. 664 effectively created two classes of retired judges, it operates equally upon those within each class. Nearly all such legislation creates classifications regarding applicability, benefits, and recipients of retirement benefits. The fact that some of the classifications are imperfect does not necessarily mandate a conclusion that they violate equal protection. Under the rational basis test, which is the proper test in this case, the legitimate government interest of encouraging judges with significant years of service to remain in service longer was met. Thus, the 1989 amendment to 19-5-502 was not unreasonable or arbitrary or devoid of rational basis. Gulbrandson v. Carey, 272 M 494, 901 P2d 573, 52 St. Rep. 843 (1995), following Hughes v. Judges Retirement Bd., 282 NW 2d 160 (Mich. 1979), and distinguishing Leonard v. Seattle, 503 P2d 741 (Wash. 1972).

Right to Sue Nonresident FELA Defendant in Any County — No Equal Protection Violation: This section's provision that if none of the defendants reside in the state, venue is proper in any county designated by the complaint has been interpreted by this court to allow a plaintiff in a Federal Employers' Liability Act suit to sue a nonresident, such as Burlington Northern, in any county in the state. The provision, as interpreted, does not violate equal protection by treating, without any rational basis, nonresidents differently than residents for venue purposes. Since 1910, it has been national policy to allow a railroad worker to sue his employer at any location where the employer does business, and this policy constitutes a justification for disparate treatment. In this case, Sheridan, Wyoming, residents injured in Sheridan sued in Yellowstone County in which the railroad does business, not Hill County in which the railroad's Montana

headquarters are located. The court distinguished this case from Power Mfg. Co. v. Saunders, 274 US 490, 47 S Ct 678 (1927), cited by the railroad, in which the defendant did no business in the county in which it was sued. The court also cited several U.S. Supreme Court cases, finding that it should not make much difference what county a nonresident defendant defends in and finding that it is not necessarily important that all persons in the same classification be made equal as to the place in which they may sue, but it is important that the law applied to the facts and issues of the case be the same and be equally applied in whatever county the suit is brought. Ford v. Burlington N. RR Co., 250 M 188, 819 P2d 169, 48 St. Rep. 740 (1991). This decision was affirmed by the U.S. Supreme Court in Burlington N. RR Co. v. Ford, 504 US 648, 119 L Ed 2d 432, 112 S Ct 2184 (1992).

Different Treatment of Transportation Companies Reasonable: The plaintiff was awarded a state contract to haul goods for the school lunch program. The contract was contingent upon the plaintiff's obtaining a Class C certificate from the Public Service Commission by August 1, 1989. The Commission informed the plaintiff that a public hearing had to be held on issuing the certificate and that the earliest the hearing could be held was August 23, 1989. The plaintiff argued that the hearing requirement denied him equal treatment because Class C solid waste carriers were exempt from the hearing process. The Supreme Court held that there was a reasonable basis for excluding solid waste carriers because they were regulated by other state laws and agencies. State ex rel. Roberts v. Pub. Serv. Comm'n, 242 M 242, 790 P2d 489, 47 St. Rep. 774 (1990).

State Constitution — No Guarantee of Fundamental Right to Particular Cause of Action: In response to a motion by the plaintiff in a wrongful discharge case, the lower court ruled that the Wrongful Discharge From Employment Act was unconstitutional because it limited the plaintiff's right to full legal redress. The Supreme Court overruled the lower court stating that in Meech v. Hillhaven W., Inc., 238 M 21, 776 P2d 488, 46 St. Rep. 1058 (1989), it had ruled that there is no constitutional guarantee to a particular cause of action, and therefore the Legislature may alter common-law causes of action, remedies, and redress. Johnson v. St., 238 M 215, 776 P2d 1221, 46 St. Rep. 1214 (1989).

Unconstitutionality of Workers' Compensation Exclusion of Coverage for Members of Employer's Family: Subsection (2)(c) of 39-71-401, excluding workers' compensation coverage of employment of members of an employer's family dwelling in the employer's household, is an unconstitutional statutory classification that violates the equal protection provisions of Art. II, sec. 4, Mont. Const., by creating a distinction with no reasonable or readily identifiable state interest. Cottrill v. Cottrill Sodding Serv., 229 M 40, 744 P2d 895, 44 St. Rep. 1762 (1987).

Classification Rationally Related to Governmental Interest: The city of Billings alleged that 7-2-4736 violated Art. II, sec. 4, Mont. Const., by placing a greater tax on annexed taxpayers than on unannexed taxpayers, thereby denying equal protection to both classes of taxpayers. The Supreme Court, citing Tipco Corp., Inc. v. Billings, 197 M 339, 642 P2d 1074 (1982), found that 7-2-4736 was not subject to strict scrutiny under an equal protection analysis because it did not burden a fundamental right or constitute invidious discrimination against a suspect classification. The test was whether the classification was rationally related to a legitimate governmental interest. The court found that the classification of people in annexed areas using private garbage services prior to annexation bears a rational relation to the governmental purpose of encouraging private garbage service in unannexed areas. Therefore, 7-2-4736 was held to be constitutional under Art. II, sec. 4, Mont. Const. D & F Sanitation Serv. v. Billings, 219 M 437, 713 P2d 977, 43 St. Rep. 74 (1986).

Invalid Classification: The classification created by 87-3-122's (now repealed) exemption from its coverage of landowners, lessees, or their agents is not rationally related to the state interest involved, that is, protection of its wildlife. The section allows exceptions that would permit arbitrary and irrational enforcement by law enforcement officers and is a nullity. It is inadequate to serve the legislative purpose of prohibiting the use of artificial light with the intent to hunt for animals. St. v. Austin, 217 M 265, 704 P2d 55, 42 St. Rep. 1186 (1985).

State Liability Limitation Violates Fundamental Right — Strict Scrutiny Applies: The limitation on governmental tort liability in 2-9-107 was declared unconstitutional as violative of the fundamental right to full legal redress guaranteed in Art. II, sec. 16, Mont. Const. The legislative findings failed to state a compelling state interest as required under the strict scrutiny test. Pfost v. St., 219 M 206, 713 P2d 495, 42 St. Rep. 1957 (1985), following White v. St., 203 M 363, 661 P2d 1272, 40 St. Rep. 507 (1983).

Retroactivity of Employment Preference — No Equal Protection Violation: A provision (Ch. 1, sec. 14, Sp. L. 1983) in the 1983 employment preference law (Title 39, ch. 30), making the repeal

of the former law retroactive, is not a violation of Art. II, sec. 4, of the Montana Constitution or the Equal Protection Clause of the 14th amendment to the United State Constitution. The proper standard of review in this case is the rational basis test since the employment preference law neither burdens a fundamental right nor involves a suspect class. The law is valid under the rational basis test since it was a rational response to the Legislature's legitimate concerns of fiscal integrity, employee competence, and academic freedom created by the implications of the decision in Crabtree v. Mont. St. Library, 204 M 398, 665 P2d 231, 40 St. Rep. 963 (1983). Nick v. Dept. of Highways, 219 M 168, 711 P2d 795, 42 St. Rep. 1926 (1985).

Denial of Good Time and Parole Eligibility for Jail Inmates Not Denial of Equal Protection: The defendant was convicted of three counts of driving under the influence of alcohol (DUI) and sentenced to serve 10 months in the county jail. The sentence may be greater than would be served in the state prison for a more serious offense because county jail inmates are not entitled to a statutory good time allowance or parole eligibility as are prison inmates. The defendant contends that the denial of good time and parole eligibility to county jail inmates is a denial of equal protection. However, the Legislature may discriminate on a rational basis in the treatment of different classes of criminal offenders, as long as the different treatment is not based on any impermissible classification such as race, sex, or religion. The good time and parole eligibility rules have been devised to rationally address the special problems of rehabilitation and management of a large prison population. These benefits are not selectively endowed on the basis of any impermissible classification. Their denial to all DUI offenders, who statutorily are required to serve their time in the county jail, does not violate the Equal Protection Clause. St. v. Bruns, 213 M 372, 691 P2d 817, 41 St. Rep. 2178 (1984).

Employee Lie Detector Test Ban — Excepting Law Enforcement Agencies — Equal Protection Violated: Provision that public law enforcement agencies are not covered by law forbidding private and public employers from requiring a lie detector test as a condition of employment or continued employment violates the right of employees of law enforcement agencies to equal protection under the state constitution. Strict scrutiny test was not applied because the proper foundation for it was not laid. However, even under the rational basis test, the provision must fail because there is no expressed purpose for the classification on the face of the statute or in the statute's legislative history; thus, the provision is overbroad and vague on its face. The court would have no trouble finding a rational relationship to a legitimate governmental interest had the Legislature provided any evidence that the provision was applied only to police officers in view of their positions of high public trust and integrity; however, a statute specifically excluding police from a general statutory protection for all other employees would probably not survive a sustained strict scrutiny test attack. Oberg v. Billings, 207 M 277, 674 P2d 494, 40 St. Rep. 2034 (1983).

Denial of Equal Protection — City Ordinance Exempting Local Merchants From Its Operation: The city of Billings enacted an ordinance declaring uninvited door-to-door solicitations a nuisance punishable as a misdemeanor and exempting local merchants from its operation. Using the "rational relationship" test to determine whether the ordinance satisfies equal protection requirements, the Supreme Court held that the classification used by the city bears no rational relationship to a legitimate governmental interest and offends equal protection of the laws. Tipco Corp. v. Billings, 197 M 339, 642 P2d 1074, 39 St. Rep. 600 (1982).

Mobile Homes — Restrictive Zoning Based on Health and Safety Reasons: Summary judgment striking down a zoning ordinance restricting mobile homes to certain areas that comprised a very small percentage of the municipal area was improperly granted because factual controversies existed. The first issue to be resolved was whether the ordinance required such restrictive placement of all mobile homes, thus unconstitutionally excluding them, or whether for health or safety reasons only those mobile homes not in compliance with Uniform Building Code (UBC) standards, which had been adopted by the local government, were restricted to zoned areas, thus allowing all UBC complying mobile homes to be located with other complying residences. If the ordinance were to be construed as affecting only non-UBC compliance, it should then be determined whether mobile homes complied or could reasonably be altered to comply with UBC standards. Martz v. Butte-Silver Bow, 196 M 348, 641 P2d 426, 39 St. Rep. 149 (1982).

Outfitter's Residency Requirements Violative of Equal Protection: Sections 87-4-122 (renumbered 37-47-302) and 87-4-126 (repealed Ch. 239, L. 1983), imposing in-state residency requirements for holders of an outfitter's license, violate the Equal Protection Clause of the Montana Constitution. None of the reasons advanced by the State in defense of the statutes justify the inequities engendered by the statutes. (Following St. v. Jack, 167 M 456, 539 P2d 726 (1975).) Further, the two exceptions contained in the statutes bear little relationship to what the

statute seeks to accomplish. Godfrey v. Fish & Game Comm'n, 193 M 304, 631 P2d 1265, 38 St. Rep. 661 (1981).

Panel Act Not Special Legislation: The panel act does not constitute special legislation violative of equal protection guarantees because the medical profession as a group of potential tort defendants is getting special treatment not accorded to other tort defendants and medically injured plaintiffs are being subjected to barriers to the judicial system not put in the way of other tort plaintiffs. A law which operates in the same manner upon all persons in like circumstances is not "special" in the constitutional sense. The classifications rest on distinctions between the groups of tort plaintiffs and tort defendants involved that have a fair and rational relationship to the object of the legislation. Linder v. Smith, 193 M 20, 629 P2d 1187, 38 St. Rep. 912 (1981).

Card Games — Statute Constitutional: A declaratory judgment action yielded a District Court order declaring 23-5-311 constitutional. That order was appealed. The Supreme Court on review held the statute did not deny equal protection, was not special legislation, and was not void for vagueness. A criminal statute need not apply to all areas that may be injurious to public health to comply with equal protection requirements. Mere classification of the subjects of legislation does not deny equal protection. If all persons in the same class are treated alike, there is no violation of equal protection requirements. The statute was general and operated uniformly and equally on all persons in Montana and thus was a general law, not local or special legislation in the constitutional sense. The claim the term "poker" was vague was rejected because the appellant lacked standing to challenge the constitutionality of the statute because he was not injured or jeopardized by the alleged vagueness of the word "poker". Palmer v. St., 191 M 534, 625 P2d 550, 38 St. Rep. 447 (1981).

Incompetent Spouse — Elective Share Requirement — Reasonable Classification: A requirement under 72-2-703 (renumbered 72-2-223) that an incompetent spouse obtain a court-ordered finding of financial need before she can exercise her right to an elective share of her husband's estate while a competent spouse is not restricted in any way in exercising the right to an elective share does not create an arbitrary or unreasonable classification. Section 72-2-703 (renumbered 72-2-223) insures that the spouse will be adequately cared for, thus fulfilling the ultimate purpose of the statute while denying the incompetent spouse only the discretionary income. In re Estate of Merkel, 190 M 78, 618 P2d 872, 37 St. Rep. 1782 (1980).

Mortmain Statute Unconstitutional: Montana's mortmain statute, section 91-142, R.C.M. 1947 (72-11-334, MCA, now repealed), as it applies to deaths occurring before enactment of the Code, is unconstitutional. The statute arbitrarily creates a classification of testators according to the length of time left between execution of the testator's will and his death rather than according to factors such as the degree of undue influence that the testator suffered or whether the testator possessed an unsound mind. The latter factors are reasonably related to the statutory objective of preventing a testator from bequeathing his property to charitable organizations unwillingly, whereas the former classification is in large part unrelated to that statutory objective. In re Estate of Kinyon, 189 M 76, 615 P2d 174, 37 St. Rep. 1234 (1980).

Trust for Unlocatable Mineral Interest Owners Constitutional: Section 82-1-305 does not violate the Equal Protection Clause of the federal and state Constitutions. The state through its Legislature has a legitimate interest in establishing a classification for the protection of unlocated owners of interests in minerals or in mineral production and in providing a method for the protection of mineral producers, including oil and gas operators, as a defense against liability from future claims of such unlocated owners. In re Mont. Pac. Oil & Gas Co., 189 M 11, 614 P2d 1045, 37 St. Rep. 1238 (1980).

Concurrent Regulation by State and Municipality: Regulation of plumbers by the state and certain municipalities was not a denial of equal protection. All plumbers subject to the municipal and state regulations were treated alike, and to the extent the dual regulatory system established a classification between plumbers in certain municipalities and those in the rest of the state, the classification was reasonable and bore a rational relationship to the purpose of protecting public health. Any system of dual regulation by different governmental agencies subjects some persons to different treatment than others, but this is not the test of equal protection. Billings Assoc. Plumbing, Heating, & Cooling Contractors v. Bd. of Plumbers, 184 M 249, 602 P2d 597 (1979).

Prohibition Against Cultivation of Marijuana and Not Tobacco — State Need Not Prohibit All Dangers to Public Health: The Supreme Court rejected defendant's contention that the statute prohibiting the cultivation of marijuana plants denies him equal protection of the laws under Art. II, sec. 4, Mont. Const., because no criminal sanctions are imposed on tobacco growers. The court held criminal statutes need not apply to all areas that may be injurious to public health, and

failure of the Legislature to enact such statutes does not constitute denial of equal protection. State ex rel. Zander v. District Court, 180 M 548, 591 P2d 656 (1979).

Classifications of Felony Theft: Statute was not unconstitutional for providing separate classifications of felony theft by monetary value and domesticated hoofed animals because there was a specific problem in the state with livestock theft which made the separate category of theft a rational classification. St. v. Feeley, 170 M 227, 522 P2d 66 (1976).

Jury Selection Based on Assessment Roll Not Violative of Equal Protection: Using the definition that an impartial jury is one where potential membership is drawn from a "cross section of the community", court held that the class of people who pay no property taxes is not such a definable class as to provide a basis for objection on an equal protection ground, as all persons who do not pay taxes are not necessarily poor. St. v. Taylor, 168 M 142, 542 P2d 100 (1975).

Licensed Guide for Nonresident Hunters — Former Statutory Requirement Unconstitutional: Statute (now repealed) allegedly designed to promote safety for hunters by requiring nonresident hunters to be accompanied by a licensed outfitter or a professional guide, when no such requirements apply to resident hunters, is constitutionally defective as applied because the relationship between the statutory classification and its legitimate objectives is tenuous and remote and therefore insufficient to justify the inequities it has engendered. St. v. Jack, 167 M 456, 539 P2d 726 (1975).

Discrimination in Imposition of Statutory Attorney's Fees: Where a workers' compensation statute provided that insurers would be liable for the payment of costs and attorney's fees to the successful claimant and did not provide for payment of costs and fees to prevailing insurers, the statute did not violate principles of equal protection because it is reasonable to impose the burden on a party whose refusal to pay a just claim renders litigation necessary. McMillen v. McKee, 166 M 400, 533 P2d 1095 (1975).

RACE

Failure to Establish Race-Based Sentencing — Illegal Incarceration Argument Dismissed: Baker contended that the District Court illegally based her sentence for vehicular homicide on race, in violation of constitutional guarantees of equal protection, no cruel or unusual punishment, and no discrimination. However, Baker presented no case law or legal analysis in support of the constitutional arguments, and thus failed to establish trial court error. The Supreme Court declined to consider Baker's unconstitutional incarceration argument. St. v. Baker, 2008 MT 396, 347 M 159, 197 P3d 1001 (2008).

No Evidence That Parent's Race or National Origin Considered in Adoption of Parenting Plan No Equal Protection Violation: In proposing a parenting plan, a guardian ad litem referenced the mother's nationality when suggesting that the child would be better integrated into the community by living with her American father than with her Mexican mother. The mother asserted that the standing master and the District Court impermissibly considered the mother's race when adopting the parenting plan. The Supreme Court affirmed that consideration of a parent's race is prohibited by equal protection guarantees in making decisions regarding child custody. However, in this case the standing master made detailed findings on a number of factors that led to the recommendation that the father should be the primary custodial parent, and none of those factors involved the mother's race or national origin. Absent evidence that the standing master's statement regarding community integration was part of the District Court's rationale in adopting the parenting plan, the mother's assertion failed. In re Marriage of Olson, 2008 MT 232, 344 M 385, 194 P3d 619 (2008).

Defendant's Batson Challenge of Prosecution's Race-Based Use of Peremptory Challenges During Voir Dire Properly Dismissed: During voir dire in Barnaby's trial on drug charges, the state used two peremptory challenges to dismiss jurors who were tribal members. Defense counsel used one peremptory challenge to remove a tribal member. Barnaby objected to the state's use of challenges to remove members from the venire based solely on their race, citing Batson v. Ky., 476 US 79 (1986), but the objection was overruled. On appeal, the Supreme Court applied the three-part Batson test to determine whether the state exercised its peremptory challenges in a discriminatory manner. First, defendant must establish a prima facie case for discrimination based on the fact that defendant belongs to a cognizable racial group and then must raise an inference that the state used peremptory challenges to exclude members of the venire on account of their race. If defendant makes that case, the state must provide a race-neutral explanation for its use of peremptory strikes, and the trial court then determines whether the defendant has established purposeful discrimination. Here, the trial court did not rule whether Barnaby presented a prima facie case for discrimination. Nevertheless, the state provided its explanation

for striking the jurors. One of the jurors was related to Barnaby, and the other was a close friend of Barnaby's attorney. The trial court also noted that the third strike was made by Barnaby, not the state. Although the trial court did not develop a complete record by providing a full explanation of the rationale for denying Barnaby's Batson challenge (subsequently required under St. v. Parrish, 2005 MT 112, 327 M 88, 111 P3d 671 (2005)), the Supreme Court affirmed because the state provided highly credible race-neutral explanations for its peremptory strikes. St. v. Barnaby, 2006 MT 203, 333 M 220, 142 P3d 809 (2006).

Complaint of School Use of Indian Mascots — Montana Commission for Human Rights Proper Forum for Claim of Unlawful Discrimination: Dupuis brought a discrimination claim against a reservation school district for using mascots allegedly degrading to Indian students. Without ruling on whether the use of the mascots was degrading, the Supreme Court held that Dupuis's remedy for a human dignity and racial discrimination case was to bring a claim before the Montana Commission for Human Rights before bringing an action in District Court. Failure to exhaust administrative remedies precluded the Supreme Court's consideration of the discrimination claims. Dupuis v. Ronan School District No. 30, 2006 MT 3, 330 M 232, 128 P3d 1010 (2006).

Sufficient Race-Neutral Explanation Regarding Exercise of Peremptory Challenge to Remove Only Potential Juror of Different Ethnic Background — Batson Argument Properly Denied: During defendant's trial for deliberate homicide, aggravated kidnapping, and sexual intercourse without consent, the state exercised a peremptory challenge to remove the only potential juror of a different ethnic background. Defendant contended that the challenge was discriminatory, based on Batson v. Ky., 476 US 79 (1986). Despite the fact that the District Court did not make findings regarding its reason for denying defendant's objection, the record was sufficient for the Supreme Court to determine that the state provided a sufficient race-neutral explanation for its exercise of the peremptory challenge, namely that concern for the juror arose not from ethnic background, but rather from the juror's experience with assault cases. The explanation was sufficient to withstand defendant's Batson challenge, and the District Court was affirmed. St. v. Falls Down, 2003 MT 300, 318 M 219, 79 P3d 797 (2003). See also St. v. James, 2010 MT 175, 357 Mont. 193, 237 P.3d 672.

Delaying Access to Courts by Using Agency to Handle Racial Discrimination Complaints Not Unconstitutional: The defendant's suit in District Court alleging that his employment was terminated due to race was dismissed because by statute he was required to file his complaint with the Commission for Human Rights. The defendant filed an appeal, alleging that the requirement denied him due process and access to the courts. The Supreme Court held that the state's purpose of combating illegal discrimination was a rational basis for delaying access to the courts and therefore did not violate the federal or state constitution. Romero v. J&J Tire, 238 M 146, 777 P2d 292, 46 St. Rep. 1159 (1989), followed in Harrison v. Chance, 244 M 215, 797 P2d 200, 47 St. Rep. 1539 (1990).

Voting Rights Violation: The evidence established that the at-large system of voting for county commissioners discriminated against Indians and hampered Indians' ability to participate in the political process by diluting Indian votes. The system violated the Voting Rights Act of 1965 by denying an equal opportunity to participate in the political process. Windy Boy v. Big Horn County, 647 F. Supp. 1002 (1986).

Wrongful Placement of Special Education Child — Constitutional Claims Properly Dismissed: The plaintiff, a minor child, was diagnosed as needing special education, and as a result of alleged misplacement in a special education program, regressed in her training and filed an action for damages. The Supreme Court held that the District Court did not err in dismissing the plaintiff's claims based on a denial of due process and equal protection of the law. As to due process, the complaint alleged no constitutional claim that goes beyond the protection provided by statute and administrative rules. As to the equal protection claim, it was based on the fact that persons evaluating the child's learning difficulties took the child's Indian background into account, which was necessary in order to properly evaluate the child. This action cannot be classified as invidious racial discrimination, for a psychological evaluation that considers the cultural factors cannot be avoided if it is to have any validity. B.M. v. St., 200 M 58, 649 P2d 425, 39 St. Rep. 1285 (1982).

Employee Sensitivity Not Sufficient to Support Discrimination Claim: Petitioner filed an employment discrimination claim with the Human Rights Commission alleging that he was forced to resign from his position as a welder with respondent because of racial harassment. The hearing examiner found that although rough language and ethnic joking were common in the workplace, they were not directed toward petitioner. The hearing examiner also found that petitioner had failed to bring his allegations to respondent's attention. On appeal, the court

affirmed the hearing examiner finding that the sensitivity of an employee to casual remarks, isolated incidents of harassment, or an occasional racial slur is not sufficient to support a discrimination claim. Snell v. Montana-Dakota Util. Co., 198 M 56, 643 P2d 841, 39 St. Rep. 763 (1982).

Access to State Courts — Indian Jurisdiction: When action arises on a reservation and all parties are Indians so that exclusive jurisdiction is vested in the tribal court, denying the parties access to state courts does not constitute impermissible racial discrimination because the tribal court jurisdiction derives from the quasi-sovereign status of the tribe under federal law. Fisher v. District Court, 424 US 382, 47 L Ed 2d 106, 96 S Ct 943 (1976), reversing State ex rel. Firecrow v. District Court, 167 M 139, 536 P2d 190 (1975).

SEX

Plaintiff's Failure to File Accurate Complaint Not Detrimental — Defendant Had Notice of Nature of Claim: A tenant filed a complaint with the Human Rights Commission alleging that her landlord committed sexual harassment under the public accommodations provision in 49-2-304. The Commission determined that 49-2-304 was inapplicable, as the rental property was private property, but it allowed the tenant to pursue a claim based on the real estate transaction provision in 49-2-305. The landlord then petitioned the District Court for judicial review, reasoning that his due process rights would be violated if the tenant was allowed to pursue a claim under 49-2-305. The District Court agreed with the landlord and reversed the Commission, but the Supreme Court, in turn, reversed the District Court and determined that while the tenant could have been clearer in asserting a claim under 49-2-305, the landlord had sufficient notice of the nature of the claim and no evidence was presented showing that the landlord would have presented any additional evidence in a 49-2-305 defense. Bates v. Neva, 2013 MT 246, 371 Mont. 466, 308 P.3d 114.

Sexual Discrimination in the Workplace — Claim Affirmed: Defendant employer's son managed the employer's business. Plaintiff complained to the employer regarding the employer's son's sexual conduct on the job, but rather than considering any complaints against her son, the employer rescheduled plaintiff to work a shift that conflicted with plaintiff's child care arrangements, forcing plaintiff to quit. In considering plaintiff's sexual discrimination claim, the hearings examiner found that plaintiff had been discriminated against and that the employer's response to plaintiff's complaint created a hostile work environment. The Commission for Human Rights reversed the hearings examiner's decision, and the District Court affirmed, but on appeal, the Supreme Court reversed the District Court. By failing to do anything to change her son's behavior, the employer created a workplace permeated with discriminatory intimidation that was sufficiently severe or pervasive to alter the conditions of plaintiff's employment and create an abusive working environment. The District Court's affirmation of the Commission's decision was reversible error. Stringer-Altmaier v. Haffner, 2006 MT 129, 332 M 293, 138 P3d 419 (2006).

Full-Time Employment Wage Disparity Not Pleaded in Sex Discrimination Case — Improper Amendment of Pleadings by Hearings Examiner to Include Full-Time Employment Claim — Reversal of Commission Order Affirmed: Sprow brought an employment discrimination case, claiming that because of her sex, she was paid less than other employees at plaintiff's corporation. Sprow had started the job as a full-time employee, but received a pay decrease upon moving to part-time work, at which time she discovered the pay disparity between part-time employees and filed the claim. The hearings examiner reported that plaintiff had provided a legitimate nondiscriminatory reason for paying Sprow less as a part-time employee, but that Sprow had established that for full-time work, Sprow was as qualified as other workers. The hearings examiner concluded that plaintiff had discriminated against Sprow based on pay discrepancies in her full-time employment. In order to reach that conclusion, the hearings examiner amended the original pleadings, which only alleged discrimination regarding part-time employment. Plaintiff appealed to District Court, and the court reversed on grounds that the court had no jurisdiction to determine discrimination in full-time employment because Sprow's complaint concerned only part-time wage disparity. On appeal, the Supreme Court affirmed. Sprow never pleaded wage disparity in full-time employment, the hearings examiner erred by inserting the issue into the pleadings, and the Commission for Human Rights erred by concluding that Sprow had alleged full-time wage disparity based on the improperly amended pleadings. The District Court properly reversed in favor of plaintiff. Centech Corp. v. Sprow, 2006 MT 27, 331 M 98, 128 P3d 1036 (2006).

Substantial Evidence Supporting Hearings Examiner's Finding of Sexual Discrimination — Commission for Human Rights Reversal of Hearings Examiner's Findings Reversed: Schmidt was hired as a live-in maid at a motel but was told by the manager that as part of the job,

she would be required to have sex with him and with motel customers. Schmidt filed a human rights complaint against the motel manager and the owner, alleging that the manager and the motel discriminated against her on the basis of sex in employment by subjecting her to sexual harassment. A hearings examiner determined that the manager illegally discriminated against Schmidt by subjecting her to quid pro quo sexual harassment as a condition of employment as a maid and that the owner was jointly and severally liable for failing to provide a sexual harassment policy. The owner appealed the final agency decision to the Commission for Human Rights, which reversed the agency decision and dismissed Schmidt's complaint. The District Court affirmed the Commission decision, and Schmidt appealed. The Supreme Court found that although there may have been evidence in the record that supported contrary findings, substantial credible evidence supported the hearings examiner's findings. Thus, the Commission for Human Rights erred in reversing the hearings examiner, and the District Court erred in affirming the Commission. The case was reversed and remanded for further proceedings. Schmidt v. Cook, 2005 MT 53, 326 M 202, 108 P3d 511 (2005).

Elements of Workplace Sexual Harassment — Claim Dismissed Upon Failure to Prove Discriminatory Motive: Campbell worked as the newest member of a plumbing crew and was barraged with offensive sex-themed comments from the all-male crew. The comments nearly always referred to ways that the other crewmembers wanted to use Campbell to sexually gratify themselves. Campbell ultimately brought a sexual harassment claim against the employer, but the claim was dismissed, and Campbell appealed. The Supreme Court noted that there are four requirements that must be met for a plaintiff to establish a prima facie case of hostile environment sexual harassment. A plaintiff must: (1) be a member of a protected class; (2) show that the offensive conduct amounted to actual discrimination because of sex; (3) show that the harassment was unwelcome; and (4) show that the claimed sexual harassment was so severe and pervasive that it altered the conditions of employment and created an abusive work environment. To be sufficiently severe, the work environment must be one that a reasonable person would find hostile and abusive and that plaintiff in fact perceived as hostile and abusive. To determine whether the environment was hostile and abusive, a court must look at all circumstances, including the frequency of the discriminatory conduct, the severity of the conduct and whether it was physically threatening or humiliating or a mere offensive utterance, and whether the conduct unreasonably interfered with the employee's work performance. Here, Campbell met requirements one and three, but failed to meet requirement two by proving a discriminatory motive and that the disturbing treatment was perpetrated because Campbell was male. Because Campbell's claim failed to satisfy requirement two, the court declined to analyze requirement four, and dismissal of the claim was affirmed. Campbell v. Garden City Plumbing & Heating, Inc., 2004 MT 231, 322 M 434, 97 P3d 546 (2004), following Oncale v. Sundowner Offshore Serv., Inc., 523 US 75 (1998).

Peremptory Challenges to Prospective Jurors — Factors Necessary to Show Purposeful Discrimination in Jury Selection — Waiver of Batson Challenge When Not Timely Raised: Ford contended that the state violated his due process rights by improperly exercising all of its peremptory challenges at trial to exclude women from the jury panel, citing J.E.B. v. Ala. ex rel. T.B., 511 US 127 (1994), as a prohibition against gender discrimination during jury selection. In a case of first impression, the Supreme Court applied a de novo review to the trial court's application of the law, deferring to the trial court's findings of fact unless clearly erroneous. The Supreme Court then reviewed the history of the discriminatory use of peremptory challenges as addressed in Batson v. Ky., 476 US 79 (1986), and its progeny, noting that the rules regarding challenges to jury selection no longer apply exclusively to prosecutors striking members of the venire who are the same race as the defendant, but that any racially motivated reason for striking a prospective juror is prohibited whether the juror shares the racial identity of the defendant or not (see Powers v. Ohio, 499 US 400 (1991)). Further, the challenge is no longer limited to the government in criminal actions but has been extended to prevent a defendant in a criminal action from using peremptory challenges to exclude jurors based on race (see Ga. v. McCollum, 505 US 42 (1992)), has been applied to private litigants in civil cases (see Edmonson v. Leesville Concrete Co., 500 US 614 (1991)), and has been used to prohibit gender discrimination in jury selection, as in J.E.B. In order to establish a prima facie case of purposeful discrimination, a defendant must show that: (1) the defendant is a member of a cognizable racial group; (2) the prosecutor exercised peremptory challenges to remove members of the defendant's race from the venire; and (3) these facts and other relevant circumstances raise an inference that the prosecutor used the peremptory jury selection practice to exclude members of the venire from the petit jury on account of their race. In addition, numerous courts have held that the right to be tried by a jury

whose members are selected pursuant to nondiscriminatory criteria must be exercised in a timely manner, and failure to raise a Batson challenge before the jury is sworn and before the venire is dismissed results in waiver of the challenge. In Ford's case, his counsel waited until after the jury was sworn and the venire dismissed before raising the Batson challenge. Because the motion was untimely, and therefore waived, the Supreme Court declined to address the merits of Ford's claim of discriminatory use of peremptory challenges. St. v. Ford, 2001 MT 230, 306 M 517, 39 P3d 108 (2001), followed in Casiano v. Greenway Enterprises, Inc., 2002 MT 93, 309 M 358, 47 P3d 432 (2002), St. v. Parrish, 2005 MT 112, 327 M 88, 111 P3d 671 (2005), and Ford v. St., 2005 MT 151, 327 M 378, 114 P3d 244 (2005).

Employment Contingent on Adherence to Teachings of Roman Catholic Church — Discrimination Statutes Inapplicable: Until her termination in 1993, Parker-Bigback was employed by St. Labre School, which is operated by the St. Labre Indian School Education Association, an institution based on the teachings and beliefs of the Roman Catholic Church. Parker-Bigback filed a complaint with the Montana Commission for Human Rights, alleging that she was discriminated against because her termination was based on marital status or sex discrimination. The school maintained that Parker-Bigback's position was eliminated to establish a personnel department, which Parker-Bigback contended was simply a pretext for terminating her employment based on her lifestyle of cohabiting with a man who was not her husband. However, one condition of Parker-Bigback's employment was an agreement to adhere to the moral and religious teachings and beliefs of the Roman Catholic Church and to not engage in any personal conduct or lifestyle contrary to church policies. Thus, it made no difference whether Parker-Bigback was married or single—if she cohabited with someone of the opposite sex to whom she was not married, she would be at variance with church teachings in violation of her contract. Therefore, this was not a case about marital status or gender, but rather about conduct Parker-Bigback agreed to avoid as a condition of employment. Nothing in 49-2-303 or this section prohibits discrimination based on conduct, nor was any authority offered to persuade the Supreme Court that Parker-Bigback's conduct involved a right of such high order that it would overcome the school's right to freely exercise its religion through its employment practices. Even if she was terminated for cohabitation, her rights to be free from discrimination were not involved, so her employment discrimination case was properly dismissed by summary judgment for the school. Parker-Bigback v. St. Labre School, 2000 MT 210, 301 M 16, 7 P3d 361, 57 St. Rep. 823 (2000). See also Miller v. Catholic Diocese of Great Falls, 224 M 113, 728 P2d 794 (1986).

Transfer of Youth Court Case to District Court Not Violative of Equal Protection Rights: Spina argued that the statute allowing transfer of her Youth Court case to the District Court resulted in an equal protection violation because of discriminatory treatment on the basis of her gender, asserting that the transfer was primarily motivated by the lack of affordable placement options for girls in the juvenile system. However, the primary concern in Spina's case was not that placements were not available, but that the duration of placement in the juvenile system would not be long enough to rehabilitate her. Further, the quality of supervision required for a juvenile like Spina, who was charged with killing her father, was not available for male or female offenders, so the concern was not triggered by gender. State placement policy with regard to juvenile offenders convicted and sentenced as adults has no bearing on the constitutionality of the transfer statute. Hence, it is not the transfer statute that generates any alleged disparities in treatment but rather the state placement policies, and the policies were not at issue in this case. Spina's challenge of the transfer statute on equal protection grounds failed. St. v. Spina, 1999 MT 113, 294 M 367, 982 P2d 421, 56 St. Rep. 467 (1999).

Sexual Harassment Claim as Basis for Retaliatory Discharge Claim — Jury Instruction in Context of Only Constitutional Question Inadequate: An employee did not bring a sexual harassment claim as a separate cause of action; rather, specific allegations of harassment formed the basis of the retaliatory discharge claim. The employee's proposed jury instruction would have attempted to tie harassment testimony directly to the wrongful discharge count, but the trial court denied the instruction and instead submitted a special jury form that asked the jury to determine whether the employer engaged in sexual discrimination in violation of this section. The jury found no sexual discrimination, and the court directed verdict for the employer on the wrongful discharge claim. On appeal, the Supreme Court held that the directed verdict was error absent an assurance that the jury was given an appropriate framework in which to tie the employee's testimony to the constitutional language. The jury instruction effectively denied the employee of the opportunity to fully present the wrongful discharge claim. Foster v. Albertsons, Inc., 254 M 117, 835 P2d 720, 49 St. Rep. 638 (1992).

Child's Death Occurring Prior to Amendment of 27-1-512 Providing That Wrongful Death Action May Be Brought by Either Parent — Second Action by Father Permissible — Lack of Standing by Defendant to Challenge Constitutionality of Statute: Prior to its amendment in 1975, section 93-2809, R.C.M. 1947 (now recodified as 27-1-512), provided that an action for wrongful death of a child was to be brought by the child's father, unless the father was dead or had deserted the family. In those instances, the mother could bring the lawsuit. The statute was amended to provide that either parent may bring such an action. Barrett's daughter was killed in an automobile accident 2 weeks before the statute was amended. Barrett and his wife were divorced in 1969, prior to the child's death. The mother was the child's legal custodian. Ten weeks after the amendment went into effect, the mother filed a wrongful death action. The mother settled the case and as personal representative of the child's estate executed a release of all claims arising from the accident. Barrett had not been made a party to the lawsuit or notified of the proceedings, nor did he share in the proceeds of the settlement; however, he was aware of the lawsuit prior to its settlement. In 1978, Barrett filed a wrongful death action on his own behalf. The District Court, over appellant's objection, conducted a jury trial at which Barrett prevailed. The Supreme Court affirmed. The court agreed with appellant's contention that normally there can be only one wrongful death action arising from a death. But the court ruled that, in this case, the father's suit was permissible because an action for wrongful death accrues in the statutory designee at the time of death and the amendment had not been made retroactive. The court further held that appellant lacked standing to challenge the constitutionality of the original statute because appellant was not injured by the alleged under-inclusiveness of the statute. Barrett v. Soyland, 221 M 160, 717 P2d 1090, 43 St. Rep. 712 (1986).

Changing Child's Name to Father's After Divorce — Custody in Mother Who Gave Child Her Name: After divorcing child's father, the mother gave birth to the child and gave it her last name. It was not a violation of Art. II, sec. 4, Mont. Const., for the court to order the child's last name to be changed to that of the father. The findings and conclusions did not state that the husband had any preference or natural right to have the child bear his name. The court stressed the best interests of the child, and the child's best interests did not involve the equality of the sexes in this instance. Overton v. Overton, 207 M 292, 674 P2d 1089, 40 St. Rep. 2047 (1983).

Maternity Leave Law Not Unconstitutional: The Montana maternity leave law does not violate the Equal Protection and Due Process Clauses, and it does not conflict with and is not preempted by the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k). By amending its policy to grant reasonable sickness and disability leave to all first-year employees in its Montana stores, plaintiff could insure compliance with both the Montana maternity leave law and the Pregnancy Discrimination Act of Title VII. Miller-Wohl Co., Inc. v. Comm'r of Labor & Indus., 515 F. Supp. 1264, 38 St. Rep. 967 (D.C. Mont. 1981); on appeal to the U.S. Supreme Court, judgment vacated and case remanded, 479 US 1050, 93 L Ed 2d 972, 107 S Ct 919 (1987); judgment reinstated and remanded to the District Court for determination of appropriate attorney fees and costs, 228 M 505, 744 P2d 871, 44 St. Rep. 1718 (1987).

Equal Protection — Discrimination in Private Trust Not Illegal Absent State Action: A trust that was created to provide stipends to male members of Future Farmers of America and 4-H clubs, although clearly discriminatory, did not violate the Equal Protection Clause of the United States Constitution. A private person may dispose of his money or property as he wishes and in so doing may lawfully discriminate without offending the Due Process Clause as long as the state and its instrumentalities are not involved. In re the Trust Created Under the Will of Cram, 186 M 37, 606 P2d 145 (1980).

Membership in FFA or 4-H Club Not State Action: Under the provisions of a trust that provides for stipends for male members of the Future Farmers of America and 4-H clubs, the fact that leaders of the organizations are state employees and are acting as part of their official duties with the Montana University System and the office of the Superintendent of Public Instruction and that the organizations enjoy a wide variety of federal, state, and local financing, assistance, and participation does not rise to the level of "state action". Membership and participation in the organization by eligible boys do not constitute the requisite entwinement between the state and private conduct from which state action results. In re the Trust Created Under the Will of Cram, 186 M 37, 606 P2d 145 (1980).

Classification by Sex — Sexual Intercourse Without Consent: Pre-1975 statute defining offense of sexual intercourse without consent, whereby only a male could commit the offense, was not a violation of the equal protection of the law or an arbitrary distinction based solely upon sex since historically such attacks have been by men upon women. St. v. Craig, 169 M 150, 545 P2d 649 (1976).

Constitutionality of Statute Restricting Terms of Married Women's Wills: In determining the constitutionality of a statute, all statutes should be read together to fully understand the meaning of any individual statute. Section 91-102, R.C.M. 1947 (now repealed), which operated to limit to two-thirds the amount a wife could deprive her husband of by will, did not impose a discriminatory restriction on a wife solely because of her sex as section 22-107, R.C.M. 1947 (now repealed), regarding statutory dower allowing the wife two-thirds of her husband's estate, provided the wife with a greater potential if she chooses to elect to take against her husband's will. St. v. Craig, 169 M 150, 545 P2d 649 (1976); In re the Estate of Kujath, 169 M 128, 545 P2d 662 (1976).

SOCIAL OR ECONOMIC CONDITION

Constitutionality of Montana Recoupment Statutes: Ellis contended that 46-8-113 and 46-8-115 violated the right to equal protection because they strip indigent defendants of protections against imprisonment for debt that are afforded to similarly situated nonindigent criminal defendants and civil judgment debtors. The Supreme Court disagreed. Under Montana's recoupment statutes, a court may not sentence a defendant to pay the costs of court-appointed counsel unless the court determines that the defendant is or will be able to pay the costs, nor do counsel costs become a judgment in the same manner as civil judgments. Further, a defendant may at any time petition the court for remission of payment on grounds that payment will impose manifest hardship on the defendant or the defendant's family. Ellis's equal protection claim was also rejected for failure to identify similarly situated classes that are treated differently, inasmuch as individuals who are ordered to pay recoupment costs as a condition of a felony criminal sentence are not similarly situated to civil judgment debtors. Thus, Ellis failed to establish that the recoupment statutes violated the constitutional right to equal protection. St. v. Ellis, 2007 MT 210, 339 M 14, 167 P3d 896 (2007), following St. v. Farrell, 207 M 483, 676 P2d 168 (1984). See also Fuller v. Oregon, 417 US 40 (1974).

Retroactive Application of Stavenjord-Type Claims: On remand to the Workers' Compensation Court of Stavenjord v. Mont. St. Fund, 2003 MT 67, 314 M 466, 67 P3d 229 (2003) (Stavenjord I), the State Fund paid Stavenjord's additional benefits, and Stavenjord then sought to retroactively apply Stavenjord I. The Workers' Compensation Court cited Chevron Oil Co. v. Huson, 404 US 97 (1971), and applied partial retroactive application of Stavenjord I and ordered common fund attorney fees for claims arising within the period of retroactivity. Stavenjord appealed. The Supreme Court noted the strong presumption in favor of retroactive application of new rules of law, but also noted that an exception to retroactivity would be recognized only when a party arguing for the purely retroactive application of new rules of law meets all three Chevron factors: (1) the decision must establish a new principle of law; (2) the history of the rule must be weighed; and (3) the inequity imposed by retroactive application must be weighed. In this case, the second factor was not met, and the Workers' Compensation Court erred in ordering only partial retroactivity, which Chevron does not allow. Therefore, Stavenjord I applied retroactively to all claims that remained open. Stavenjord's occupational disease-related claims for permanent partial disability benefits previously finalized and closed by court order or settlement and release were not subject to being reopened. Stavenjord v. Mont. St. Fund, 2006 MT 257, 334 M 117, 146 P3d 724 (2006).

Showing of Constitutionally Protected Property Interest Required — Federal and State Claims: Plaintiff brought property interest claims against a city and city council members on several state and federal grounds after a state liquor license was denied. The city had enacted ordinances disallowing the sale of alcohol in the city without a conditional use permit and then denied plaintiff's application for a permit. The District Court held that plaintiff's property interest claims were invalid, and plaintiff appealed. The Supreme Court noted that to establish a viable claim under 42 U.S.C. 1983, a plaintiff must first establish that it possesses a protected liberty or property interest and has a legitimate claim of entitlement to that interest. Under state due process and takings law, a plaintiff must also establish a property interest, and a property interest exists only when the Legislature has so narrowly circumscribed the issuing agency's discretion that approval of the interest is virtually assured. Receipt of a liquor license is a privilege and not a right. Plaintiff had yet to obtain a state liquor license at the time that the ordinances were passed and thus had no property interest in operating a bar, nor could plaintiff assert ultimate entitlement to a liquor license. Therefore, plaintiff's inability to demonstrate a protected property interest in operating property as a bar precluded the establishment of federal or state property claims against the city and City Council members, nor did the city deprive plaintiff of a protected property interest by enacting the ordinances or denying a conditional use

permit. The District Court was affirmed. Germann v. Stephens, 2006 MT 130, 332 M 303, 137 P3d 545 (2006), following ISC Distrib., Inc. v. Trevor, 273 M 185, 903 P2d 170 (1995), and Kiely Constr. v. Red Lodge, 2002 MT 241, 312 M 52, 57 P3d 836 (2002).

Failure to Pay Debts Noted in Sentencing — Poverty and Social Status Not Improperly Considered: The District Court listed numerous reasons for sentencing Nolan for criminal endangerment and resisting arrest, including the violence of the offenses at issue, Nolan's 25 traffic-related convictions, his two prior felony convictions involving violence, and the numerous opportunities previously given to Nolan to be a responsible. law-abiding citizen. One of the court's additional considerations was that Nolan did not pay his debts, including child support, while employed. Nolan contended that the court's consideration of his poverty as a sentencing criteria was an unconstitutional infringement on his due process rights. However, failure to pay debts does not generally equate with poverty, and because indigency or poverty was not the touchstone for imposing the maximum allowable punishment, the District Court did not improperly rely on Nolan's poverty in sentencing Nolan to less than the maximum penalty allowed. Nolan's contention that the sentencing court relied on his social status was also unfounded, even though testimony was given regarding the number of Nolan's children who were born out of wedlock. Nolan did not object to the inquiries when they were made, and Nolan opened the door to the inquiries by presenting both witness testimony and his own statement regarding being a good father and loving his children. Nolan's due process rights were not violated through mention of his failure to pay bills and father children out of wedlock, and the sentences were affirmed. St. v. Nolan, 2003 MT 13, 314 M 47, 62 P3d 1118 (2003), distinguishing St. v. Farrell, 207 M 483, 676 P2d 168 (1984), and St. v. Pritchett, 2000 MT 261, 302 M 1, 11 P3d 539 (2000).

Sentence of Restitution Based on Defendant's Indigency Constituting Due Process Violation: Pritchett entered the garage of a former employer in an effort to return two hunting rifles that he had stolen and pawned to support his gambling habit. Pritchett dropped his flashlight and, unable to find it in the dark, lit a cigarette lighter, which ignited a leaking propane bottle and caused an explosion that destroyed the garage and its contents. Pritchett was convicted of burglary and ordered to pay restitution of $63,569.25. Noting that the amount of restitution was "enormous", the probation officer who prepared the presentence investigation report stated that Pritchett should receive a 20-year suspended sentence to allow adequate time to pay off the restitution. The District Court adopted the sentencing recommendation exactly as proposed. Although the court did not expressly state that it was sentencing Pritchett to the maximum term to provide sufficient time to pay the ordered restitution, there was sufficient evidence in the record to show that the length of the sentence was based on Pritchett's indigency because, given Pritchett's limited financial resources, no shorter time would allow payment of restitution. Under St. v. Farrell, 207 M 483, 676 P2d 168 (1984), basing a prison term on a defendant's indigency is a violation of the right to due process. Thus, the Supreme Court vacated the sentence and remanded for further proceedings. St. v. Pritchett, 2000 MT 261, 302 M 1, 11 P3d 539, 57 St. Rep. 1093 (2000).

Good Time Credit for Indigent Defendant Confined to County Detention Facility: The decision in Bearden v. Ga., 461 US 660, 76 L Ed 2d 221, 103 S Ct 2064 (1983), clearly and unambiguously stands for the principle that to deprive a criminal defendant of freedom simply because, through no want of bona fide effort, willful refusal, or fault of the defendant, the defendant lacks the financial resources to buy liberty is contrary to the fundamental fairness required by the 14th amendment to the U.S. Constitution. This is not to say that poverty insulates a defendant from having to post a reasonable bond should the facts and circumstances of the case so require. However, if a criminal defendant is unable to secure presentence freedom by posting bail for no other reason than indigency, that defendant is entitled to good time credit for the presentence time spent in a county detention facility to the same extent that the law allows good time credit to the criminal defendant who is able to post bail and thus serve the entirety of a sentence in the state correctional facility. In the present case, it was not clear from the record whether defendant was offered or denied bail and whether, if offered, the sole reason for defendant's inability to post bail was indigency; nevertheless, the Supreme Court granted defendant's petition for writ of habeas corpus and remanded to the District Court for a determination of whether defendant was entitled to good time credit for time served in the county detention facility. MacPheat v. Mahoney, 2000 MT 62, 299 M 46, 997 P2d 753, 57 St. Rep. 291 (2000), following MacFarlane v. Walter, 179 F3d 1131 (9th Cir. 1999), followed in Eisenman v. St., 2000 MT 170, 300 M 322, 5 P3d 542, 57 St. Rep. 704 (2000), in which the case of an indigent defendant was remanded for a determination of whether defendant was detained presentence in a county detention facility because he was too poor to post bail and thus entitled to credit for good time under the MacPheat

test, and distinguished in Sebastian v. Mahoney, 2001 MT 88, 305 M 158, 25 P3d 163 (2001). However, see also McGinnis v. Royster, 410 US 263, 35 L Ed 2d 282, 93 S Ct 1055 (1973).

Different Statute of Limitations Period for Illegitimate Child to Bring Paternity Action Unconstitutional: The lower court found that state law granting illegitimate children a shorter time to bring a paternity suit than legitimate children was unconstitutional. The Supreme Court affirmed the decision on the basis that the state had no compelling reason to treat the two classes unequally. Ariz. v. Sasse, 245 M 340, 801 P2d 598, 47 St. Rep. 2171 (1990).

Employment Rights Inapplicable to State Prison Inmates: Plaintiffs maintained that while they were male inmates at the state prison, they were employed in various capacities and paid wages substantially less than were paid female inmates for essentially the same jobs. They requested damages, claiming that as male prisoners they were economically discriminated against in favor of female prisoners. They also asked the District Court to describe conditions of work that would alleviate this sexual discrimination in the state prison system. However, the legislature specifically prohibited plaintiffs from receiving the relief they sought by providing that one of the penalties for being a prison inmate is that a prisoner does not have employment rights while serving a sentence in the state prison. The Supreme Court affirmed, holding the plaintiffs were precluded from recovering under both the sex discrimination statutes and the Fair Labor Standards Act. Quigg v. South, 243 M 218, 793 P2d 831, 47 St. Rep. 1176 (1990). See also Worsley v. Lash, 421 F.Supp. 556 (N.D. Ind. 1976).

Indigent Intentionally Prolonged Incident — No Constitutional Violation: The defendant, an indigent, failed three times to appear to answer charges on two traffic violations. The lower court ordered him held in jail until his trial, which was set for 65 days later, with bail set at $300. The Supreme Court stated that the record indicated that the City Court Judge had engaged in a wholly inappropriate exercise of judicial power to punish the defendant by setting the bail in an amount the defendant could not pay and then setting an excessively late trial date. While incarceration of indigents is not prevented in every case, a court must search for the least oppressive alternative. However, the Supreme Court refused to find a constitutional violation because the defendant had $47 and could have obtained a surety bond for $50 and made no attempt to obtain the additional $3 he needed. Billings v. Layzell, 242 M 145, 789 P2d 221, 47 St. Rep. 558 (1990).

Increased Penalty for Second Conviction Held Constitutional: The defendant was convicted of carrying a concealed weapon, was sentenced under the provisions allowing an increased penalty for persons with prior felony convictions, and appealed his sentence, claiming the statute violated Art. II, sec. 28, Mont. Const., providing for restoration of rights upon completion of state supervision. On appeal, the Supreme Court held that Art. II, sec. 28, only applied to insure restoration of such prior civil rights as the right to serve on a jury and the right to vote and to hold public office, and did not prevent the Legislature or the courts from taking the defendant's background and history into account when he was sentenced for a violation. The court also held that the statute's implicit classification of felons and nonfelons for the purposes of sentencing was not invidiously discriminatory in violation of the constitutional guarantee to equal protection of the law because it was based upon a reasonable legislative purpose and an assumption that previous felons present a greater danger to society than the ordinary person. St. v. Sanders, 208 M 283, 676 P2d 1312, 41 St. Rep. 338 (1984).

Consideration of Indigency in Sentencing — Violation of Due Process: Defendant was convicted of theft of public assistance funds in violation of 45-6-301 and sentenced to the maximum term of imprisonment, 10 years. The sentence was then suspended on the conditions that defendant seek alcohol treatment, make restitution of the funds, and pay the fees of his court-appointed attorney. The Supreme Court ruled that if the reason for defendant's receiving the maximum sentence was that he is indigent and will therefore make restitution slowly, the sentence is a violation of his right to due process. The court remanded the case for reconsideration of the sentence in view of the opinion. St. v. Farrell, 207 M 483, 676 P2d 168, 41 St. Rep. 91 (1984), followed in St. v. Pritchett, 2000 MT 261, 302 M 1, 11 P3d 539, 57 St. Rep. 1093 (2000).

Statute of Limitations — State — Child: A male child was born out of wedlock. The State obtained an assignment of the mother's claim for support from the putative father. The State brought an action against the father more than 3 years after the birth of the child. As to children born out of wedlock, the Statute of Limitations in 40-6-108 creates an unfair burden and unfairly discriminates against them and is therefore unconstitutional. Their guardian, guardian ad litem, or next friend cannot be barred access to the courts for them. However, in that the State's interest is economic, the paternal parent protection offered by the statute as against the State has a substantial relation to the intended purpose and therefore, as against the State, is constitutional. St. v. Wilson, 193 M 318, 631 P2d 1273, 38 St. Rep. 1299 (1981).

Milk Pricing Control — Violation of Equal Protection: A third-party plaintiff brought an action for declaratory and injunctive relief against the operation and enforcement of certain milk pricing statutes, claiming the statutes violated the Equal Protection Clause of the 14th amendment of the United States Constitution, and the defendant moved to dismiss the claim. The court found that the base plan established by the Board of Milk Control created a classification of milk producers based upon the past history of their deliveries to distributors and that while the states have wide discretion to make classifications in the area of economic regulation, it could not be said from the third-party complaint alone that there was no merit in the claimed denial of equal protection. Hinshaw v. Beatrice Foods, Inc., 37 St. Rep. 1677 (D.C. Mont. 1980) (apparently not reported in Federal Supplement).

Sentencing — Restrictions on Parole and Furlough Permissible: Section 46-18-202 provides that whenever a sentence of imprisonment in the state prison for a term exceeding 1 year is given, the court may impose the restriction that the defendant be ineligible for parole and participation in the prisoner furlough program while serving his term. If the court finds the restriction necessary, it shall impose the restriction as part of the sentence and set forth its reasons for imposing the statute. It does not permit District Judges to add any time beyond the statutory maximum underlying the offense. Petitioners, who both pleaded guilty, were represented by counsel and were given presentence hearings. Parole and participation in the furlough program are privileges, not rights. Petitioners were not denied due process or equal protection in being sentenced under 46-18-202. Cavanaugh v. Crist, 189 M 274, 615 P2d 890, 37 St. Rep. 1461 (1980).

Reduction of Workers' Compensation Benefits Not Discrimination Based on Social Condition: Appellant attacked 39-71-705 (now repealed), which provided for reduction of workers' compensation benefits for amounts received by the claimant under the Social Security Act, on the grounds that it discriminated against him on the basis of social condition, namely, as a parent and totally disabled person. The words "social condition" were intended to include and refer to "discriminations based on status of income and standard of living". "Social condition" relates to one's economic status or rank in society, and the type of discrimination which is sought to be prohibited is, for example, that type of discrimination which results solely because one is poor. As such, appellant's status here did not fall within the protections of the provision. McClanathan v. St. Compensation Ins. Fund, 186 M 56, 606 P2d 507 (1980).

Statute Offsetting Workers' Compensation Benefits Constitutional — Application of Equal Protection Clause to Social Legislation: Appellant attacked 39-71-705 (now repealed), which provided for reduction of workers' compensation benefits for amounts received by the claimant under the Social Security Act, as being unconstitutional under the Equal Protection Clause of the United States Constitution in that it provided for different reductions in benefits for claimants with dependents. In applying the Equal Protection Clause to social and economic legislation, great latitude is given to state legislatures in making classifications. Perfection in making classifications is neither possible nor necessary; neither is mathematical nicety nor perfect equality. Rather, where the goals of a classification are legitimate and the classification is rationally related to the achievement of those goals, the statute should be constitutionally upheld. Here, the avoidance of duplication or overlapping benefits is a reasonable and permissive legislative objective. Though there are results in inequality to some, the statute was rationally related to the accomplishment of that objective. The statute was applied to individuals uniformly and equally, the difference in treatment relating only to differences in factual situations between individuals. McClanathan v. St. Compensation Ins. Fund, 186 M 56, 606 P2d 507 (1980).

Double Undertaking Required for Appeal to District Court Unconstitutional: Section 25-33-201, which requires the filing of a sum equal to twice the amount of any money judgment before an appeal from Justice or City Court may be taken, as applied to the indigent appellant, violates her 14th amendment equal protection rights based on the traditional equal protection test. The classification established by the double undertaking requirement is arbitrary and rests on grounds wholly irrelevant to the achievement of the state's objectives in enactment of this provision. Merchants Ass'n v. Conger, 185 M 552, 606 P2d 125 (1979).

Custodial Arrest Because of Inability to Post Bond — Burden of Proof: Placing a speeding violator under custodial arrest in the county jail for inability to post an appearance bond does not violate his right to equal protection of the law because such an arrest is not predicated on indigency. The violator did not sustain his burden of demonstrating unequal treatment when he failed to prove that persons not booked and jailed for failure to post a bond were in essentially the same situation. State ex rel. Kotwicki v. District Court, 166 M 335, 532 P2d 694 (1975).

RELIGION

Workers' Compensation Act Inclusion of Religious Organization Employer Receiving Remuneration for Certain Services — No Violation of Equal Protection: In 2009, the Legislature broadened the definition of "employer" in the Workers' Compensation Act to include religious organizations that receive remuneration for commercial activities from nonmembers, and it revised the definition of "employee" to include religious organization members performing commercial activities. Among other claims, a Hutterite colony alleged that these definitions violated the equal protection clause. Because employers and employees of religious and nonreligious entities are treated similarly regardless of their religious affiliation, the Act did not violate the equal protection clause. Big Sky Colony, Inc. v. Dept. of Labor and Industry, 2012 MT 320, 368 Mont. 66, 291 P.3d 1231 (certiorari denied, 571 US __, 134 S Ct 59, 2013 US LEXIS 5381 (2013)), following Wilkes v. Mont. St. Fund, 2008 MT 29, 341 Mont. 292, 177 P.3d 483.

Employment Contingent on Adherence to Teachings of Roman Catholic Church — Discrimination Statutes Inapplicable: Until her termination in 1993, Parker-Bigback was employed by St. Labre School, which is operated by the St. Labre Indian School Education Association, an institution based on the teachings and beliefs of the Roman Catholic Church. Parker-Bigback filed a complaint with the Montana Commission for Human Rights, alleging that she was discriminated against because her termination was based on marital status or sex discrimination. The school maintained that Parker-Bigback's position was eliminated to establish a personnel department, which Parker-Bigback contended was simply a pretext for terminating her employment based on her lifestyle of cohabiting with a man who was not her husband. However, one condition of Parker-Bigback's employment was an agreement to adhere to the moral and religious teachings and beliefs of the Roman Catholic Church and to not engage in any personal conduct or lifestyle contrary to church policies. Thus, it made no difference whether Parker-Bigback was married or single—if she cohabited with someone of the opposite sex to whom she was not married, she would be at variance with church teachings in violation of her contract. Therefore, this was not a case about marital status or gender, but rather about conduct Parker-Bigback agreed to avoid as a condition of employment. Nothing in 49-2-303 or this section prohibits discrimination based on conduct, nor was any authority offered to persuade the Supreme Court that Parker-Bigback's conduct involved a right of such high order that it would overcome the school's right to freely exercise its religion through its employment practices. Even if she was terminated for cohabitation, her rights to be free from discrimination were not involved, so her employment discrimination case was properly dismissed by summary judgment for the school. Parker-Bigback v. St. Labre School, 2000 MT 210, 301 M 16, 7 P3d 361, 57 St. Rep. 823 (2000). See also Miller v. Catholic Diocese of Great Falls, 224 M 113, 728 P2d 794 (1986).

Protective Removal of Children From Home Not Violative of Parent's Right of Religious Freedom — Best Interests of Children Prevail: The District Court hearing a child abuse and neglect case ordered the children removed from the home in their best interests. The mother contended that the order violated her constitutional right to religious freedom by removing her ability to participate in and control the children's religious upbringing because she couldn't see them pending her psychiatric evaluation. The Supreme Court found nothing in the record suggesting that the District Court was hostile to the mother's religious views or had based its order on those views. Rather, the order was based on evidence that the children were emotionally disturbed and threatened with harm, and the temporary restriction on the mother's access to the children was warranted. The mother remained free to pursue her religious beliefs, and the order did not infringe on that freedom. In re B.P. & A.P., 2000 MT 39, 298 M 287, 995 P2d 982, 57 St. Rep. 179 (2000), affirmed in In re B.P. & A.P., 2001 MT 219, 306 M 430, 35 P3d 291 (2001).

Refusal of Hospital to Provide Voluntary Sterilization — No State Action: Action of defendant Catholic hospital in forbidding the use of its facilities for voluntary sterilization was merely private conduct and not state action, even though the general public had contributed to the hospital funds, the hospital was regulated by state, hospital was allowed tax-exempt status, and it occupied a monopoly position in the area where it was located. Ham v. Holy Rosary Hosp., 165 M 369, 529 P2d 361 (1974).

POLITICS

Failure to Establish Federal or State Claim of Political Discrimination — Petition for Injunction Properly Dismissed: Plaintiffs who were two minor party candidates sued the University System for political discrimination in violation of federal and state law because they were not included in gubernatorial debates on university campuses. The District Court dismissed the petition for failure to state a claim for which relief could be granted, and on appeal, the Supreme Court

affirmed. A political discrimination claim based on 42 U.S.C. 1983 generally takes the form of deprivation of a property interest in government employment. Plaintiffs made no employment-based discrimination allegations, so that claim failed. Plaintiffs' political discrimination claim based on 42 U.S.C. 1985 was in the form of a common-law conspiracy, and to prove conspiracy under that section, a plaintiff must show that some racial or perhaps otherwise class-based, invidiously discriminatory animus lay behind the conspirator's action and that the conspiracy was aimed at interfering with the plaintiff's private and publicly protected rights. Plaintiffs could not show that they were members of a suspect class. A common-law conspiracy occurs in Montana when two or more persons, by some concerted action, intend to accomplish some unlawful objective for the purpose of harming another that results in damage, and it is not the conspiracy itself but torts committed or wrongs done in furtherance of the conspiracy that give rise to a claim. Even when viewed in a light most favorable to plaintiffs, in this case, the asserted facts would at most only breed a suspicion that plaintiffs might have had a right to relief, so that federal claim failed as well. Plaintiffs' state law claim under 49-3-205 was denied because plaintiffs failed to exhaust administrative remedies prior to filing suit in District Court. Absent viable federal or state discrimination claims, the District Court properly dismissed plaintiffs' petition for injunctive relief. Jones v. Mont. Univ. Sys., 2007 MT 82, 337 M 1, 155 P3d 1247 (2007).

No Standing to Bring Political Discrimination Claim on Behalf of Others: Plaintiffs who were two minor party candidates sued the University System for political discrimination because they were not included in gubernatorial debates on university campuses. The claim was brought on behalf of "91,989 Montana hungry unregistered minors". The Supreme Court addressed the standing claim sua sponte. The general rule is that a litigant may assert only the litigant's own constitutional rights or immunities and must demonstrate a personal stake in the controversy and some injury that would be alleviated successfully by maintaining the action. Here, the alleged hungry minors possessed neither a stake in the outcome of plaintiffs' asserted civil rights violations nor suffered any injury that plaintiffs' complaint would alleviate, and plaintiffs were prohibited by the general rule from asserting constitutional rights on behalf of others. Jones v. Mont. Univ. Sys., 2007 MT 82, 337 M 1, 155 P3d 1247 (2007).

Suspension of Income Tax Law Pending Vote of the People Not Violation of Equal Protection: An increase in the state income tax passed by the Legislature was referred to the people, and its effect was suspended by petition pending that vote. Nicholson filed suit, arguing that the suspension of the law caused by the petition of a minority of voters vetoed the will of the majority, acting through their Legislature, in passing the income tax increase. The Supreme Court held that in adopting the constitutional provision providing for petition, referendum, and suspension, the majority had granted the minority the powers complained of and that in any event, the majority would have its opportunity to vote upon the tax increase at the referendum election. There was therefore no violation of the equal protection provisions of the constitution. Nicholson v. Cooney, 265 M 406, 877 P2d 486, 51 St. Rep. 579 (1994).

Election Loss in Primary — Lack of Standing to Challenge Constitutionality of Filing Deadline for Independent Candidates: A former County Attorney who lost a primary election as a party candidate and who attempted to file a late petition for nomination as an independent candidate and his supporter are not the right parties to raise the issue of constitutionality of filing deadlines for independent candidates. The candidate has not been denied access to the general election ballot by law but by the will of the electors in the party he sought to represent. Plaintiffs have each exercised full candidacy and electoral rights as partisans. One cannot attack the constitutionality of laws that now work in one's disfavor, having taken advantage of the same laws when they worked in one's favor. State ex rel. Racicot v. District Court, 244 M 521, 798 P2d 1004, 47 St. Rep. 1785 (1990).

Initiative Solicitation in School Polling Place Constitutional: Plaintiff was not allowed to gather signatures for an initiative petition on a general election day in a school building used as a polling place. The school district had a general policy prohibiting solicitation of any kind in school buildings. The District Court granted summary judgment to the school district. On appeal, the Supreme Court said that although 13-35-218 permits some manner of solicitation at polling places on election day, it does not guarantee the right. The court found the initiative process to be within the protection of Montana's counterpart of the first amendment. This does not assure that the process may not be regulated, however. The court, relying on the time, place, and manner regulations on the right to use public places for expressive activity found in Grayned v. City of Rockford, 408 US 104 (1972), and Tinker v. Des Moines School District, 393 US 503 (1969), found that the school district's policy was not narrowly tailored to further its interests

in undisrupted school functioning. The policy applied regardless of whether classes were being held and applied to all solicitors regardless of whether they acted peaceably. Fear of disruption was not sufficient to overcome the right to freedom of expression. The school district's policy was found unconstitutional. Dorn v. Bd. of Trustees, 203 M 136, 661 P2d 426, 40 St. Rep. 348 (1983).

Employee Transferred for Publicly Expressed Views — Employer's Right to Choose Spokesman: Plaintiff contended he was transferred from his job as secretary to the manager to the job of senior accountant because of his publicly expressed political views. The jury by special verdict found that not to be the case. The jury found that the motive for the transfer was the defendant's belief that the public might perceive plaintiff's political expressions as company policy. In cases where an employer may terminate an employment at will, it follows he may transfer an employee, because a transfer is basically the termination of one job and appointment to another. The transfer was not aimed at curbing plaintiff's political views. An employer has a right to choose his spokesman and eliminate public confusion as to whether a person is authorized to speak for the employer. No discriminatory motive was involved in the transfer. Bowden v. The Anaconda Co., 38 St. Rep. 1974 (D.C. Mont. 1981) (apparently not reported in Federal Supplement).

AGE

Youth Court Authority to Extend Probation Period at Probation Revocation Proceeding — No Violation of Equal Protection: At age 14, the appellant admitted to the charge of assault with a weapon and was placed on probation until his 18th birthday by the Youth Court. Two years later, the appellant admitted to possession of a handgun, in violation of his probation agreement. At the disposition hearing, the Youth Court revoked the appellant's probation, committed him to the Pine Hills Youth Correctional Facility until his 18th birthday, and extended his probation term until his 21st birthday to ensure he would be fully rehabilitated. The appellant appealed the Youth Court order on the grounds that the Youth Court had no authority to impose an additional probationary period beyond the period in the initial order. The appellant also asserted that he was denied equal protection of the law because he was similarly situated to an adult who committed assault with a weapon but was treated differently because the adult could not be subject to an additional probation period upon revocation. The Supreme Court upheld the order of the Youth Court because, under 41-5-1431, the court could have issued an order of commitment to the correctional facility and required the appellant to remain on probation until his 21st birthday at the original hearing. In addition, the Supreme Court determined that the appellant was not similarly situated to an adult who committed assault with a weapon because specific statutory provisions within the Youth Court Act ensure minors are treated differently from adults, including emphasizing rehabilitation, which was the Youth Court's justification for extending the appellant's probation. In re S.M.K.-S.H., 2012 MT 281, 367 Mont. 176, 290 P.3d 718.

Absence of Youth Court Procedure to Determine Competency of Youths Not Violative of Equal Protection: Attorneys for a 9-year-old youth charged with arson contended that the youth lacked the capacity to form the requisite mental intent to commit the crime and that the youth was too young to understand the process against him and to effectively assist in his defense. A motion was made to dismiss. The Youth Court determined that the youth understood the charges and his rights and sentenced the youth to 2 years' probation. On appeal, the youth asserted that the Youth Court Act violated the constitutional guarantee of equal protection by not providing a procedure to evaluate the competency of youths similar to the procedure for determining the competency of adults to stand trial. The Supreme Court disagreed. A youth alleging incompetency based on immaturity is not similarly situated to an adult criminal defendant alleging mental disease or defect. All youths experience a period of immaturity, which most youths outgrow, but the same cannot be said for a mental disease or defect. The court noted that the logical extension of the youth's argument would require that immature youths be placed in mental health facilities until they are mature enough to stand trial. Because immature youths are not similarly situated to adult criminal defendants alleging mental disease or defect, equal protection was not implicated. In this case, substantial evidence indicated that the youth could consult with his attorneys and understand the proceedings against him and that the youth could form the requisite criminal intent of purposely and knowingly starting a fire. The youth was fit to proceed and did not suffer from a mental disorder, and the youth's due process rights were protected by hearings at which the youth's competency to proceed was determined. The Youth Court was affirmed. In re G.T.M., 2009 MT 443, 354 M 197, 222 P3d 626 (2009). See also State ex rel. Elliot v. District Court, 211 M 1, 684 P2d 481 (1984), and In re S.M.K.-S.H., 2012 MT 281, 367 Mont. 176, 290 P.3d 718, in which the court determined the youth was not similarly situated to an adult because he faced a

different disposition for assault with a weapon as a delinquent youth than an adult would face in District Court.

Constitutionality of Statute Providing That Permanent Workers' Compensation Benefits Not Permanent — No Equal Protection or Due Process Violation in Termination of Permanent Benefits Based on Social Security Retirement Eligibility: Plaintiffs were granted permanent total disability benefits for work-related injuries, but the benefits were terminated pursuant to 39-71-710 when plaintiffs became eligible for Social Security retirement. Plaintiffs challenged the constitutionality of 39-71-710 on equal protection and due process grounds. The Workers' Compensation Court granted summary judgment for State Fund and plaintiffs appealed, but the Supreme Court affirmed. First, the statute does not discriminate based on age. Although the two classes of claimants — those who receive or are eligible to receive Social Security benefits, and those who do not or are not eligible to receive Social Security benefits — are similarly situated with regard to their eligibility and reliance on workers' compensation benefits, under rational basis analysis the objective of 39-71-710 is legitimate and bears a rational relationship to a legitimate governmental interest. Section 39-71-710 provides a sufficiently rational means of ensuring that workers' compensation benefits do not become a lifetime benefit and rationally advances the governmental purpose of providing wage loss benefits that bear a reasonable relationship to actual wages lost. The Workers' Compensation Court also properly considered cost containment, inasmuch as cost containment is a legitimate governmental interest that may be constitutionally pursued by the Legislature, and as long as cost containment is not the sole reason for disparate treatment and is achieved by rational means, the Legislature may attempt to improve the viability of the workers' compensation system without offending equal protection. Second, the statute does not violate substantive due process, as plaintiff argued, based on the lack of a quid pro quo for benefits lost after age 65. This argument ignores the fundamental compromise in the Workers' Compensation Act, that in exchange for no-fault recovery, employers gained the predictability of consistent workers' compensation payments that would be capped in a way that personal tort injury claims were not, thus making sufficiently rational the enactment of 39-71-710. Without a limitation on the duration of permanent total disability benefits, the cap and predictability of payments that employers bargained for in the Act would be lost, thus denying employers the benefit of the quid pro quo. The Workers' Compensation Court's grant of summary judgment to State Fund was affirmed. Satterlee v. Lumberman's Mut. Cas. Co., 2009 MT 368, 353 M 265, 222 P3d 566 (2009), following Ingraham v. Champion Int'l, 243 M 42, 793 P2d 769 (1990), distinguishing Reesor v. Mont. St. Fund, 2004 MT 370, 325 M 1, 103 P3d 1019 (2004).

Firefighter Age Restriction Unconstitutional: Jaksha filed a complaint against the county alleging that he had been unlawfully denied employment as a probationary entry-level firefighter because of his age. Jaksha challenged the constitutionality of 7-33-4107, which disqualified an individual from receiving an original appointment as a firefighter if the individual was more than 34 years of age. The District Court denied the constitutional challenge and found in favor of the county, and Jaksha appealed. The Supreme Court reversed. Section 7-33-4107 violates the equal protection clause of the Montana Constitution by discriminating against an individual on the basis of age and is therefore unconstitutional. The jury's verdict, which was premised on the constitutionality of 7-33-4107, was therefore vacated. Nevertheless, Jaksha's claims for damages and back pay were barred under 2-9-103, because the county relied on 7-33-4107 in good faith and Jaksha failed to allege or prove that the county acted with malice or corruption. Jaksha v. Butte-Silver Bow County, 2009 MT 263, 352 M 46, 214 P3d 1248 (2009).

Reduction of Disability Benefits Based on Social Security Entitlement Unconstitutional — Equal Protection: Reesor was injured on the job when he was 65 years old and had been receiving Social Security retirement benefits for 9 months. Because of his age and pursuant to 39-71-710, he received no permanent partial disability benefits other than an impairment award. The Workers' Compensation Court upheld the award and found 39-71-710 constitutional. On appeal, the Supreme Court held that the disparate treatment of partially disabled claimants based upon their age, because they are receiving or are eligible to receive Social Security retirement benefits, is not rationally related to a legitimate governmental interest, that there is no rational basis to deny a class of injured workers a category of benefits based on their age, and that 39-71-710 is unconstitutional. Reesor v. Mont. St. Fund, 2004 MT 370, 325 M 1, 103 P3d 1019 (2004). See also Caldwell v. MACo Workers' Compensation Trust, 2011 MT 162, 361 Mont. 140, 256 P.3d 923 (ruling 39-71-710 unconstitutional with regard to denial of rehabilitation benefits based solely on the claimant's eligibility to receive Social Security retirement benefits).

Imposition of Both Juvenile and Adult Sentences — Level of Constitutional Scrutiny: Imposition of both juvenile and adult sentences under the Extended Jurisdiction Prosecution Act infringed upon the juvenile's physical liberty. Physical liberty is a fundamental right under the Montana Constitution. Therefore, the court must apply strict scrutiny analysis to the claim that the Act violates the Montana Constitution's equal protection and rights of minors clauses by subjecting the juvenile to a longer period of incarceration than an adult committing the same offense, and there must be a compelling state interest sufficient to justify the Act. In re S.L.M., 287 M 23, 951 P2d 1365, 54 St. Rep. 1480 (1997).

Scope of Minors' Rights — Test for Constitutional Scrutiny: Section 15 of this article, relating to minors' rights, clearly affords minors full recognition under the equal protection clause in this section and all the fundamental rights of an adult under this article. If the Legislature wishes to create an exception to this guarantee, it must show a compelling state interest and that the exception is designed to enhance the rights of minors. In re S.L.M., 287 M 23, 951 P2d 1365, 54 St. Rep. 1480 (1997).

Unconstitutional to Impose Both a Juvenile and an Adult Sentence Upon Youth: The 1995 amendments to the purpose section of the Montana Youth Court Act made the Act espouse much more preventative, if not punitive, goals because the Act was amended to seek to prevent delinquency through imposition of enforceable and immediate consequences upon juveniles and to establish programs of detention and community protection. Obviously, it is no longer accurate to reason, as the Supreme Court did in In re C.H., 210 M 184, 683 P2d 931 (1984), that the Act's infringements upon juveniles' physical liberty are legitimate means of enhancing their protections within the meaning of section 15 of this article, providing that minors have all the fundamental rights of this article unless specifically precluded by laws that enhance the protection of minors. Moreover, it is no longer accurate to state, as the court did in In re C.S., 210 M 144, 687 P2d 57 (1984), that a Youth Court disposition is strictly for rehabilitation, not retribution. Indeed, the Extended Jurisdiction Prosecution Act (EJPA), by requiring the Youth Court to impose an adult sentence in addition to a juvenile sentence, with the adult portion stayed pending successful completion of the juvenile portion, goes beyond mere rehabilitation of a juvenile and injects the specter of retribution. Thus, the EJPA, on its face, violates the equal protection clause of this section by treating juveniles more harshly than adults. The EJPA also violates section 15 of this article by reducing, rather than enhancing, juveniles' rights as compared to adults' rights. The state has no compelling state interest in treating a juvenile as an adult and restricting the juvenile's physical liberty beyond the restrictions that are imposed upon an adult who commits the same offense as the juvenile. Furthermore, the paternalistic rationale of *parens patriae* does not apply to distinguish between the treatment of a juvenile and an adult when a juvenile is no longer sentenced solely as a juvenile, but as an adult as well. Although the EJPA is subject to a severability clause, the sentencing portion of the EJPA is necessary to its integrity; thus, the remaining provisions of the EJPA cannot be saved by the severability clause. In re S.L.M., 287 M 23, 951 P2d 1365, 54 St. Rep. 1480 (1997), distinguished in In re S.M.K.-S.H., 2012 MT 281, 367 Mont. 176, 290 P.3d 718.

Youth's Standing to Challenge Imposition of Both Juvenile and Adult Sentence: Youth given both juvenile and adult sentences under the Extended Jurisdiction Prosecution Act, with the adult portion stayed pending successful completion of the juvenile portion, who were not the subject of a proceeding to revoke the stay, had standing to challenge the Act on the ground that the Act subjected them to a longer period of incarceration than that permitted for an adult who committed the same offense. There was a threatened injury to the youth's civil rights, and they suffered a legitimate and realistic fear that the adult sentence would be carried out if they violated the juvenile sentence. In re S.L.M., 287 M 23, 951 P2d 1365, 54 St. Rep. 1480 (1997).

Teachers' Pension Postretirement Adjustment Age Classification Violative of Equal Protection Guaranty: The 1989 Legislature enacted 19-4-711 (renumbered 19-20-711 and now repealed), which allowed a postretirement adjustment increase in the pensions of the beneficiaries of the Teachers' Retirement System. The law provided that to be eligible, retirees or their beneficiaries must be 55 years of age or older or, irrespective of age, must be receiving disability or survivorship benefits. Applying the rational basis test, the District Court declared the law unconstitutional, finding no reason rationally related to a legitimate state purpose to justify granting a postretirement adjustment to the class of beneficiaries under age 55 receiving disability or survivorship benefits, while denying it to another class of beneficiaries under age 55 receiving benefits from retirees. The Supreme Court noted that while nearly all legislation classifies or sets forth classifications of applicability, benefits, and recipients, the fact that some of these classifications are imperfect does not necessarily violate the equal protection clause. However, the court was unable to find

any rational relationship to the purpose of the establishment of the classification in 19-20-711 (now repealed), holding that it was wholly arbitrary and an example of the Legislature picking and choosing who will receive benefits without making any distinction between the affected classes. The District Court ruling of unconstitutionality was affirmed. Arneson v. St., 262 M 269, 864 P2d 1245, 50 St. Rep. 1546 (1993).

Inference of Age Discrimination — Failure to Present Facts Indicating Dismissal a Pretext — Summary Judgment Proper: In the context of a summary judgment motion in an age discrimination action under 29 U.S.C. 621, et seq., the plaintiff need only adduce facts that, if believed, support a reasonable inference of the denial of an employment opportunity because of discriminatory age criteria. If that burden is met, the employer must rebut the inference of discrimination with evidence of legitimate, nondiscriminatory reasons that the plaintiff was not hired or was terminated. Upon such a showing, the burden shifts back to the employee to demonstrate with specific facts that the employer's explanation is a pretext. In this case, Kenyon was in the protected age class, met the minimum job qualifications, and was discharged and replaced by a younger woman, which was sufficient to support a reasonable inference of age discrimination. The employer then established that there were problems with Kenyon's work performance, number of absences, and time spent on nonprofessional duties over a long period of time and that there was a documented probation for poor work performance. Kenyon admitted by deposition that her employer's dissatisfaction with her work performance was apparent by his yelling at her on an almost daily basis. This evidence was sufficient to rebut the inference of discrimination. Kenyon subsequently failed to present specific facts that indicated that the employer's explanation for her dismissal was a pretext, relying only on conclusory assertions of discrimination raised in her affidavit. Kenyon therefore failed to raise a genuine issue of material fact as to her age discrimination claim, and summary dismissal in favor of the employer was proper. Kenyon v. Stillwater County, 254 M 142, 835 P2d 742, 49 St. Rep. 673 (1992), following Foster v. Arcata Assoc., Inc., 772 F2d 1453 (9th Cir. 1985), and overruled, with regard to plaintiff's burden to adduce facts that, if believed, support a reasonable inference that plaintiff was denied an employment opportunity and, if the employer rebuts the inference of discrimination with evidence of legitimate, nondiscriminatory reasons, to demonstrate with specific facts that the employer's explanation is a pretext, in Heiat v. E. Mont. College, 275 M 322, 912 P2d 787, 53 St. Rep. 162 (1996).

Mandatory Transfer of Prosecution of Older Youth to District Court — No Denial of Equal Protection Under U.S. or Montana Constitution: Plaintiff alleged that the automatic transfer provisions of 41-5-206(3) infringed upon a youth's rights to equal protection under the equal protection provisions of the U.S. Constitution and the Montana Constitution. The Supreme Court held that a classification based on age and gravity of the offense for automatic transfer of prosecution to District Court from Youth Court requires only a rational relationship to a legitimate state interest. The court found that interest in curbing homicides committed by teenagers and in protecting society from these violent offenders. Strict scrutiny analysis under federal equal protection is not required because procedural due process is not a fundamental right, nor is age a suspect class. Under this section, the Supreme Court determined that no provision exists in the Montana Constitution that provides a youth with a fundamental right to special treatment, and thus the state's middle tier analysis is inapplicable and only a rational relationship to a legitimate state interest is required. In re Wood, 236 M 118, 768 P2d 1370, 46 St. Rep. 228 (1989).

Restriction of Welfare Benefits Based on Age — Constitutionality — Middle-Tier Test — Equal Protection Analysis: Although a right to welfare is not contained in the Declaration of Rights of the Montana Constitution, Art. XII, sec. 3(3), directs the Legislature to provide necessary assistance to the misfortunate. The Supreme Court held that a benefit lodged in the Montana Constitution is an interest whose abridgment requires something more than a rational relationship to a governmental objective and that a classification which abridges welfare benefits is subject to a heightened scrutiny under an equal protection analysis. The court developed its own middle-tier test for determining the constitutionality of HB 843 (Ch. 670, L. 1985), a bill which restricted or denied general assistance benefits to able-bodied persons under the age of 50 who do not have minor dependent children. The court held that a finding that HB 843 is constitutional required the state to demonstrate two factors: (1) that its classification of welfare recipients on the basis of age was reasonable; and (2) that state interest in such classification was more important than the people's interest in obtaining welfare benefits. The state failed to show that misfortunate people under age 50 are more capable of surviving without assistance than people over age 50 or that broad generalizations based on age are reasonable rather than arbitrary. Also, the trial record did not show the state to be in such a financially unsound position that the welfare benefit, granted

constitutionally, could be abrogated. Therefore, the Supreme Court found unconstitutional the provisions of HB 843 which denied or restricted welfare benefits based on age. Butte Community Union v. Lewis, 219 M 426, 712 P2d 1309, 43 St. Rep. 65 (1986).

Constitutionality of Certain Provisions of Montana Youth Court Act: The Montana Youth Court Act, which allows a youth in need of supervision (now youth in need of intervention) who has violated probation to be adjudged a delinquent youth, is not unconstitutional as violative of the due process, equal protection, or cruel and unusual punishment provisions of the United States and Montana Constitutions. The Supreme Court rejected appellant's assertion that a juvenile status offender who violated the terms of her probation by truancy should not be considered a delinquent youth and subjected to greater punishment for the same conduct which originally gave the Youth Court authority to designate her a youth in need of supervision (now youth in need of intervention). In re C.H., 210 M 184, 683 P2d 931, 41 St. Rep. 997 (1984), followed in In re T.A.S., 244 M 259, 797 P2d 217, 47 St. Rep. 1590 (1990).

Youth Not Denied Equal Protection by Sentencing System More Severe Than System Imposed on Adults: A youth has not been denied her right to equal protection of the law by imposition of a term of commitment upon her that is longer than the criminal sentence an adult would receive for the same act. Adults and minors are not similarly situated with respect to state sentencing laws because: (1) the purpose of their detention is not the same, that of the adult offender being both retributional and rehabilitational; and (2) the physical liberty interests of minors and adults are qualitatively different. In re C.S., 210 M 144, 687 P2d 57, 41 St. Rep. 970 (1984), followed in In re S.M.K.-S.H., 2012 MT 281, 367 Mont. 176, 290 P.3d 718.

Presumption of Deferred Imposition for Person Under Twenty-One: When confronted with an equal protection challenge to 45-9-102(5), which provides that a person 21 years of age or under convicted on a first violation for possession of dangerous drugs is presumed to be entitled to a deferred sentence, the Supreme Court determined the issue with nonconstitutional grounds. The court relied on factual findings of the lower court as brought out in a postconviction hearing. St. v. Henry, 177 M 426, 582 P2d 321 (1978).

INDIVIDUAL DIGNITY GENERALLY

Prosecutor's Arguments During Sentencing Likening Defendant to an Animal — Alleged Violation of Defendant's Right to Dignity — No Right to Resentencing: The defendant was charged with attempted deliberate homicide for a bar fight. At trial, it was alleged the defendant had continued to punch the victim in the face 15 to 20 times after the victim had fallen to the ground and was motionless. The defendant was acquitted of attempted deliberate homicide and convicted of aggravated assault. During the sentencing hearing, the prosecutor referred to the "savage nature" of the beating, stating that "Some animals need to be caged" and describing the defendant's actions as "inhuman." The District Court sentenced the defendant to the maximum sentence of 20 years. In his appeal to the Supreme Court, the defendant argued that the prosecutor's comments violated his constitutional right to dignity and he should be resentenced. The Supreme Court disagreed because the defendant did not demonstrate that the prosecutor's comments, as offensive as they may have been, played any part in the District Court's sentence, which was within sentencing guidelines. St. v. Kingman, 2011 MT 269, 362 Mont. 330, 264 P.3d 1104.

Physician Aid in Dying Not Against Public Policy — Protection of Participating Physician From Prosecution: The District Court held that a competent terminally ill patient has a right to die with dignity pursuant to the rights to individual dignity and privacy in the Montana Constitution, which includes protection of the patient's physician from prosecution for homicide. The Supreme Court held that the issue could be resolved at the statutory level and therefore declined to rule on the constitutional issue. Because suicide is not a crime under Montana law, the only person who might be subject to criminal prosecution is a physician who prescribes a lethal dose of medication to a terminally ill patient. Thus, the court addressed the possible culpability of a physician who extends aid in dying, whether the patient's consent could constitute a statutory defense against a homicide charge against the assisting physician, and whether patient consent is rendered ineffective by 45-2-211(2)(d) because permitting the conduct or resulting harm is against public policy. The court noted that the consent defense is effective only if none of the exceptions in 45-2-211(2) apply. By law, consent is ineffective if it is (1) given by a person who is legally incompetent to authorize the conduct charged to constitute the offense; (2) given by a person who by reason of youth, mental disease or defect, or intoxication is unable to make a reasonable judgment as to the nature or harmfulness of the conduct charged to constitute the offense; (3) induced by force, duress, or deception; or (4) against public policy to permit the conduct

or the resulting harm, even though consented to. The first three exceptions require case-by-case factual determinations, so the court confined its analysis to whether consent to physician aid in dying is against public policy and concluded that physician aid in dying provided to terminally ill, mentally competent adult patients is not against public policy. The exception to consent applies only to conduct that disrupts public peace and physically endangers others, to which the act of a physician handing medicine to a terminally ill patient and the patient's subsequent peaceful and private act of taking the medicine is not comparable. The physician is not directly involved in the final decision or the final act, and the patient's private decision whether to take the medicine does not breach public peace or endanger others, so the patient's consent to physician aid in dying constitutes a statutory defense to a homicide charge against the physician when no other exceptions apply. Baxter v. St., 2009 MT 449, 354 M 234, 224 P3d 1211 (2009).

Rights of the Terminally Ill Act Not Against Public Policy: The Montana Rights of the Terminally Ill Act clearly provides that terminally ill patients are entitled to autonomous end-of-life decisions even if enforcement of those decisions involves direct participation by a physician through withdrawing or withholding treatment. It is not against public policy to honor the patient's wishes when the patient is conscious and able to vocalize and carry out the decision with self-administered medication and no immediate or direct physician assistance. The Act's encompassing immunity for medical professionals reinforces the patient's right to enforce the decisions without fear that those who give effect to the patient's wishes will be prosecuted. There is nothing in the plain language of the law that indicates that the Act is against public policy. Baxter v. St., 2009 MT 449, 354 M 234, 224 P3d 1211 (2009).

Capacity of Defendant to Withdraw Appeals — Rees Standard: Dawson was convicted of a capital crime and sentenced to death, and after years of appeals, Dawson decided to fire his attorneys, discontinue all appeals, and proceed with imposition of the death penalty. Dawson filed a pro se motion in state and federal courts to dismiss all pending appeals, and the Supreme Court considered whether to grant the motion. To decide whether a person under a death sentence has the mental competence to waive the right to further judicial review, the court applied the federal standard in Rees v. Payton, 384 US 312 (1966). The standard is whether the defendant has the capacity to appreciate the defendant's position and make a rational choice with respect to continuing or abandoning further litigation or whether the defendant is suffering from a mental disease, disorder, or defect that may substantially affect the defendant's capacity in the premises. After examining the record, the Supreme Court determined that Dawson did not suffer from a mental disease, disorder, or defect, that he had the capacity to appreciate his position, that he had made a rational choice to abandon further litigation, and that his motion to dismiss the appeal was voluntarily made. Once Dawson's competency was determined and the voluntariness of his action was established, Dawson was protected by his right to privacy from further medical examination and evaluation and from testimony from his doctor, and was entitled to the individual autonomy to make his private decision. Absent any showing that Dawson was denied any right while incarcerated or evidence of prison conditions that would cause him to abandon his desire to live, the Supreme Court dismissed Dawson's appeal and remanded to the District Court for execution of the original death sentence. St. v. Dawson, 2006 MT 69, 331 M 444, 133 P3d 236 (2006). See also Rumbaugh v. Procunier, 753 F2d 395 (5th Cir. 1985), and Dennis v. Budge, 378 F3d 880 (9th Cir. 2004).

Attorney General's Opinions

District Residency Requirements of School Employees: A school board may, as a condition of employment, require that school district employees be residents of the school district. Nothing in the U.S. or Montana Constitution prohibits the establishment of a continuous residency requirement as long as the policy has a rational basis. 43 A.G. Op. 54 (1990).

Applicability of Montana Human Rights Act to Employment in School Districts Located on Indian Reservations: Although applicability of the Montana Human Rights Act to reservation-related activities must be decided on a case-by-case basis, the Act does apply to public school districts lying wholly or partially within Indian reservations on district-owned lands and prohibits the school district from granting employment preferences to Indians unless specifically required by federal statute. Indian tribes do not have a federally protected interest in requiring that employment preferences be granted to their members or to other Indians. 43 A.G. Op. 42 (1989).

Imprisonment in County Jail Upon Failure to Pay Traffic Fines — Indigent Defendant: Both 61-8-711 and 46-19-102 concern imprisonment upon failure to pay fines for traffic offenses. Because a particular statute governs when a general statute and a particular statute on the same subject are inconsistent, 61-8-711 governs. However, if the failure to pay is based on indigency, constitutional issues arise. The courts have recognized the infirmity of imposing a fine as a

sentence and then converting it into a jail term simply because the defendant is indigent and cannot forthwith pay the fine in full. 38 A.G. Op. 61 (1980).

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Equality for Men and Women, Three Approaches: Frontiero, The Equal Rights Amendment, and the Montana Equal Dignities Provision, Uda, 35 Mont. L. Rev. 325 (1974).

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Constitutional Law—Equal Protection—Integration in Public Schools, Angel, 20 Mont. L. Rev. 126 (1958).

Collateral References

Equality of the Sexes, Interim Report, Montana Legislative Council (1974).

Section 5. Freedom of religion.

Convention Notes

Revises 1889 constitution by using wording of the U.S. constitution to guarantee free exercise of religion and prohibit the state from establishing a religion.

Compiler's Comments

Former Constitutional Provision: Article III, sec. 4, 1889 Mont. Const., guaranteed religious freedom.

Case Notes

DECISIONS UNDER 1972 CONSTITUTION

Inclusion of Religious Organization Employers Receiving Remuneration for Certain Services Not Violative of Free Exercise Clause or Establishment Clause: In 2009, the Legislature broadened the definition of "employer" in 39-71-117 to include religious organizations that receive remuneration for commercial activities from nonmembers, and it revised the definition of "employee" to include religious organization members performing commercial activities. Among other claims, a Hutterite colony alleged that these definitions violated the free exercise clause and the establishment clause of the U.S. and Montana Constitutions. Because the Workers' Compensation Act regulates the colony's voluntary commercial activities and was not intended to regulate religious practices, the expanded definition of "employer" did not violate the free

exercise clause. The Act's revised definitions of "employer" and "employee" also did not violate the establishment clause because the promotion of the health, safety, and welfare of workers is a secular purpose, the Legislature's inclusion of religious organizations in the workers' compensation system could not be reasonably interpreted as disapproval of religion, and the Act's requirements affected only the commercial activities of the colony undertaken for a business purpose. Big Sky Colony, Inc. v. Dept. of Labor and Industry, 2012 MT 320, 368 Mont. 66, 291 P.3d 1231 (certiorari denied, 571 US __, 134 S Ct 59, 2013 US LEXIS 5381 (2013)), following Dept. of Human Resources of Oregon v. Smith, 494 US 872 (1990) and Lemon v. Kurtzman, 403 US 602 (1971).

Limitation on Personal Beliefs on Religion — Not Burden on Religious Beliefs: A high school did not unduly burden a student's free exercise of religion when it conditioned the delivery of her valedictory speech on omitting "God" and "Christ" from the text because one part of the freedom of religion analysis was whether the conduct was proscribed by religious faith or mandated by religious belief. The student's belief that she could not speak without the religious expression was a personal, not a religious, belief. Griffith v. Butte School Dist. No. 1, 2010 MT 246, 358 Mont. 193, 244 P.3d 321.

Determination of Church Corporation Property Dispute Not Considered Interference With Establishment of Religion: Plaintiff, the Council, was organized in 1991 and incorporated in 1993 as a nonprofit corporation. The Council is the ultimate authority for the hierarchical denomination of the Baha'i faith known as the Baha'is Under the Provision of the Covenant. A controversy arose in the church over who was the leader of the faith and corporate president of the Council. Defendant Chase claimed the title. The Council brought a claim against Chase for wrongful interference with the conduct of the corporation and conversion of church property. Chase moved to dismiss on grounds that a judicial resolution of the church property dispute would require inquiry into and interpretation and application of religious doctrine, which is forbidden to civil courts by the first amendment to the U.S. Constitution, and the District Court agreed and dismissed the case. On appeal, the Supreme Court noted that states have a legitimate interest in the peaceful resolution of property disputes and that the civil courts are generally proper forums for those disputes, but also recognized that courts must exercise great care to avoid resolving disputes on the basis of religious doctrine and practice. The court cited Maktab Tarighe Oveyssi Shah Maghsoudi, Inc. v. Kianfar, 179 F3d 1244 (9th Cir. 1999), holding that a court may resolve church property disputes by applying neutral secular principles of property, trust, and corporate law when the instruments upon which those principles operate are at hand and that no first amendment issue arises when a court resolves a church property dispute by relying on state statutes concerning the holding of religious property, the language in the relevant deeds, and the terms of the religious organization's corporate charter. Although no civil court may presume to ascertain the proper successor to a religious office, the first amendment does not preclude a District Court from consulting corporate bylaws, state statutes, and general corporate property law to determine the powers of the Council presidency regarding the corporate property at issue. The case was reversed and remanded with instructions to the District Court to determine the composition of the Council and the powers of the presidency in relation to the church property and then, if those issues could be resolved on purely secular grounds, to apply corporate, property, and tort law in determining the merits of the Council's claims. Second Int'l Baha'i Council v. Chase, 2005 MT 30, 326 M 41, 106 P3d 1168 (2005), followed in New Hope Lutheran Ministry v. Faith Lutheran Church of Great Falls, Inc., 2014 MT 69, 374 Mont. 229, 328 P.3d 586.

Prison Diet Plan Not Violative of Freedom of Religion — Summary Dismissal Proper: While incarcerated at a correctional facility, Cape, a Catholic, sued the facility and the food service providers for violating Cape's freedom of religion by failing to provide religious meals of fish and unleavened bread during Lent. The District Court summarily dismissed the claim on grounds that Cape failed to state a claim upon which relief could be granted. On appeal, Cape asserted that because the court was not the arbitrator of religious orthodoxy, it could not pass judgment on the correctness of Cape's religious beliefs. However, the warden at the facility testified that meatless meals were provided to all Catholic inmates during Lent, and a Catholic priest testified that the Catholic religion does not require that fish be consumed on days of abstinence from red meat, that a vegetarian diet is acceptable, and that Catholics are not required to consume unleavened bread during Lent. To be protected as a constitutional right, a dietary request must be essential to the practice of a particular religion. Cape failed to allege that the dietary requests were an essential part of a religious diet. Having failed to state a claim upon which relief could be granted, the Supreme Court affirmed. Cape v. Crossroads Correctional Center, 2004 MT 265, 323 M 140, 99 P3d 171 (2004).

Summary Dismissal Proper Absent Evidence Supporting Inmate's Freedom of Religion and Equal Protection Claims: While a prisoner at the Crossroads Correctional Facility, Cape sued the facility and the food service providers for violating Cape's freedom of religion for failing to provide religious meals, for failing to provide access to a priest and religious materials, and for violating his right to equal protection by denying Cape's request for group prayer and Bible study while providing those services to other inmates. Cape was subsequently transferred to a regional jail facility. The District Court granted summary judgment for defendants on grounds that the matter was moot because Cape was no longer in the custody of the facility. On appeal, the Supreme Court acknowledged that Cape could be transferred back to the facility and thus suffer the same alleged deprivation of rights. Nevertheless, the Supreme Court affirmed absent evidence to support Cape's freedom of religion and equal protection claims. Cape v. Crossroads Correctional Center, 2004 MT 265, 323 M 140, 99 P3d 171 (2004).

High School Association Requirement That Member Schools Hire Certified Teachers Not Violative of Freedom of Religion: As a condition of membership and participation in interscholastic competitions with other member schools, defendant, a private and voluntary association of public and private schools, required that schools in the association be accredited by the state. When plaintiff, a private religious school, hired an uncertified teacher who nevertheless met its philosophical criteria, the school lost its state accreditation, its membership in the association, and the ability to compete in certain interscholastic competitions. The school moved for a preliminary injunction preventing the association from enforcing its rules on grounds that the association bylaws constituted an impermissible burden on the school's free exercise of religion. The motion was denied, and the school appealed, but the Supreme Court affirmed. The court applied the test in Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 US 707 (1981), to determine whether a burden on religion existed. The first part of the test involves whether an important benefit is at issue, and the court concluded that association membership and participation were important benefits. The next part of the test focuses on conduct proscribed by religious faith and conduct mandated by religious belief. Here, rather than attempting to preserve a unique religious culture and a right to live apart from the predations and vices of modern society, the school sought to fully integrate itself and allow its students to exemplify their Christian ideals in competition with students from other schools. Thus, the school failed to show that its religious belief was incompatible with teacher certification, and the court found no constitutional basis for the school's claim that the association should have to yield to the school's wish to employ a teacher who was devoted to the school's principles but not certified by the state. Valley Christian School v. Mont. High School Ass'n, 2004 MT 41, 320 M 81, 86 P3d 554 (2004), distinguishing Wis. v. Yoder, 406 US 205 (1972).

Employment Contingent on Adherence to Teachings of Roman Catholic Church — Discrimination Statutes Inapplicable: Until her termination in 1993, Parker-Bigback was employed by St. Labre School, which is operated by the St. Labre Indian School Education Association, an institution based on the teachings and beliefs of the Roman Catholic Church. Parker-Bigback filed a complaint with the Montana Commission for Human Rights, alleging that she was discriminated against because her termination was based on marital status or sex discrimination. The school maintained that Parker-Bigback's position was eliminated to establish a personnel department, which Parker-Bigback contended was simply a pretext for terminating her employment based on her lifestyle of cohabiting with a man who was not her husband. However, one condition of Parker-Bigback's employment was an agreement to adhere to the moral and religious teachings and beliefs of the Roman Catholic Church and to not engage in any personal conduct or lifestyle contrary to church policies. Thus, it made no difference whether Parker-Bigback was married or single—if she cohabited with someone of the opposite sex to whom she was not married, she would be at variance with church teachings in violation of her contract. Therefore, this was not a case about marital status or gender, but rather about conduct Parker-Bigback agreed to avoid as a condition of employment. Nothing in Art. II, sec. 4, Mont. Const., or 49-2-303 prohibits discrimination based on conduct, nor was any authority offered to persuade the Supreme Court that Parker-Bigback's conduct involved a right of such high order that it would overcome the school's right to freely exercise its religion through its employment practices. Even if she was terminated for cohabitation, her rights to be free from discrimination were not involved, so her employment discrimination case was properly dismissed by summary judgment for the school. Parker-Bigback v. St. Labre School, 2000 MT 210, 301 M 16, 7 P3d 361, 57 St. Rep. 823 (2000). See also Miller v. Catholic Diocese of Great Falls, 224 M 113, 728 P2d 794 (1986).

Theology as Impermissible Basis on Which to Make Law or Interpret Constitution: In deciding that statutory provisions prohibiting a physician assistant-certified from performing abortions were an unconstitutional invasion of the right of privacy and personal procreative autonomy, the Supreme Court clarified that its opinion was not a comment on the merits of sectarian doctrine or on the deep and sincerely held beliefs, values, and convictions of those who either favor abortion or oppose it on moral or religious grounds. The right of expression aimed at changing individual values and convictions and at fostering respect for the intrinsic value of all life is protected by the first amendment to the U.S. Constitution and by section 7 of this article and this section. However, the doctrine of separation of church and state that is also embodied in the first amendment and in this section makes theology an impermissible basis on which to make law or interpret the constitution. Religious arguments do not count as legal arguments. The cost of a person's enjoyment of fundamental constitutional rights does not permit the government's infringement of personal and procreative autonomy in the name of political ideology. Armstrong v. St., 1999 MT 261, 296 M 361, 989 P2d 364, 56 St. Rep. 1045 (1999).

Testimonial Privilege Not Extended to Nonclerical Church Member — No Prejudice in Admission of Member's Testimony: Testimonial privileges must be strictly construed because they contravene the fundamental principle that the public has the right to everyone's evidence; however, the clergy-penitent privilege in 26-1-804 will not be so strictly construed as to violate the right to freedom of religion in this section. Here, Gooding claimed that testimony regarding his confessions of sexual molestation of his stepdaughter in the presence of the wife of a nonordained junior minister was privileged. However, nothing in the record indicated that the wife was a clergy member acting in a professional character, a counselor, or anything more than an ordinary confidant. The Supreme Court declined to extend the clergy-penitent privilege to nonclerical church members and, in light of overwhelming uncontradicted evidence of Gooding's guilt, affirmed his conviction regardless of the wife's testimony. St. v. Gooding, 1999 MT 249, 296 M 234, 989 P2d 304, 56 St. Rep. 977 (1999). See also St. v. MacKinnon, 1998 MT 78, 288 M 329, 957 P2d 23, 55 St. Rep. 331 (1998).

Court's Reference to Aryan Nations at Sentencing Held Not Denial of Freedom of Religion or Speech: Finney pleaded guilty to charges of burglary and theft and was sentenced to a total term of 50 years. In a written statement prepared for the presentence investigation, Finney made references to the Aryan Nations organization and also appeared at the sentencing hearing with the words "white power" tattooed across his forehead. Finney petitioned for postconviction relief, alleging that the District Court had violated his rights of freedom of religion and speech by considering his membership in the Aryan Nations for purposes of sentencing. The Supreme Court reviewed the federal court cases cited by Finney, noting that those cases also indicated that if there was an otherwise legitimate reason for references to constitutionally protected membership in similar organizations, it was not error for those references to be made during the course of the trial. The Supreme Court pointed out that Finney's sentence was within the range of sentences allowed for the crimes Finney had committed and that the references made in Finney's case were limited references to those organizations made because Finney brought up the subject himself by his words or actions, were made by the prosecutor in order to clarify Finney's past criminal behavior, or were limited to comments by the court on those words or actions. The Supreme Court held that for these reasons, the District Court did not deny Finney his constitutional rights and there was no plain error. St. v. Finney, 281 M 58, 931 P2d 1300, 54 St. Rep. 58 (1997), distinguished in Hans v. St., 283 M 379, 942 P2d 674, 54 St. Rep. 654 (1997).

Sale of Eagle Parts — Federal Violation Notwithstanding Claims of Religious Use: Frank and William Hugs admitted active involvement in purchasing and selling eagles and eagle parts but claimed that they did so for religious purposes. Following an undercover investigation, they were convicted of a violation of the federal Bald and Golden Eagle Protection Act (BGEPA), 16 U.S.C. 668(a), which prohibits the taking of eagle parts for religious purposes unless the person has obtained the proper federal permit. The Hugses claimed that the BGEPA infringed on their constitutional guarantee of free exercise of religion and that actions of the undercover agent were so outrageous as to warrant dismissal of the prosecution. The Hugses could challenge only the facial validity of the BGEPA, not the operation of the underlying administrative scheme, because they did not possess a permit and never applied for one. On appeal, it was held that the statute and permit system, while imposing a substantial burden on the practice of religion by restricting the ability of adherents to obtain and possess eagles and eagle parts, nevertheless provided the least restrictive means of conserving eagles while permitting access to eagles and eagle parts for religious purposes. Further, the undercover agent's conduct fell short of the level

of outrageousness required to invalidate a prosecution under the due process clause. Judgment was affirmed. U.S. v. Hugs, 109 F3d 1375 (9th Cir. 1997).

Church Statements Requiring Evidence and Analysis of Religious Practices and Beliefs: Although freedom of religious belief is absolute, freedom of religious conduct may be subject to regulation for the protection of society, and occasionally a constitutionally compelling governmental interest may outweigh a free exercise of religion defense and subject the religious conduct to judicial scrutiny. In an action by a church member injured in a fall on church property, in which plaintiff claimed that because of her attempts to collect damages, the church denied her an award status indicating membership in good standing, denied a church calling, and threatened excommunication, the church's claim that the matters were protected by constitutional freedom of religion was upheld and evidence on the matters was not allowed. For the court to consider the claims would be a prohibited intrusion because it would require evaluation of evidence about the internal functioning of the church and its doctrines to determine if the church's actions were proper under the practices and beliefs of the church. Davis v. Church of Jesus Christ of Latter Day Saints, 258 M 286, 852 P2d 640, 50 St. Rep. 535 (1993).

Classification of Church Pastor as Employee Rather Than as Independent Contractor for Workers' Compensation Purposes Not Violative of Constitutional Free Exercise Clause: The furnishing of equipment and of the vast majority of the tools of his trade was sufficient to establish a church pastor's status as an employee rather than as an independent contractor for workers' compensation purposes. The employee status was allegedly contrary to the pastor's sincerely held religious beliefs. The Supreme Court determined that the status affected the pastor's status only for workers' compensation purposes and did not violate the pastor's constitutional right of free exercise of religion because the governmental action did not prohibit the exercise of his beliefs. St. John's Lutheran Church v. St. Comp. Ins. Fund, 252 M 516, 830 P2d 1271, 49 St. Rep. 119 (1992), following Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 US 707, 67 L Ed 2d 624, 101 S Ct 1425 (1981), and distinguishing McClure v. Salvation Army, 460 F2d 553 (5th Cir. 1972).

Placement of Children With Christian Foster Parents Not Violative of First Amendment Establishment Clause: Appellant claimed that by placing children with Christian foster parents who maintained their own ministry, the state violated the establishment clause of the first amendment to the U.S. Constitution (similar to this section) prohibiting government support of religion. According to Lemon v. Kurtzman, 403 US 602, 29 L Ed 2d 745, 91 S Ct 2105 (1971), state aid is constitutional if: (1) it has a secular purpose; (2) its primary effect neither advances nor inhibits religion; and (3) it does not foster government entanglement in religion. In this case, aid provided for foster parental care was clearly secular; the primary effect of the placement and attendant payments was that the children were provided with a safe, loving, and secure home and parents, which did not advance or inhibit religion; and placement and payments did not excessively entangle the state in religion because foster parents, whether ministers or not, may do as they please with foster care reimbursements and do not have to account for the money. Thus, no constitutional violation occurred. In re S.P., 241 M 190, 786 P2d 642, 47 St. Rep. 190 (1990).

Qualified Privilege of Statements of Church Leaders Incident to Disfellowship — Free Exercise of Religion: Disfellowshipped former church members brought an action against church leaders alleging defamation under state law and contending that the Supreme Court need not delve into the religious affairs of the church. The court disagreed, noting that the statements in question were made within the congregation and were based on ecclesiastical doctrine. The statements were found to be privileged under 27-1-804, and incidental communication to nonchurch members attending the service did not eliminate the privilege. Having established a qualified privilege on the part of the church leaders, the burden was on the former members to show the privilege was abused by excessive publication, by use of the occasion for an improper purpose, or by lack of belief or grounds for belief in the truth of what was said. Finding no evidence of malice, the court would be violating the church leaders' right to free exercise of religion if it were to find the leaders' statements actionable under state defamation law. Rasmussen v. Bennett, 228 M 106, 741 P2d 755, 44 St. Rep. 1378 (1987).

Balancing Test for Establishment Clause Claims: A parochial school teacher was terminated without notice or hearing and brought suit alleging breach of the implied covenant of good faith and fair dealing. The school sought summary judgment, alleging that applying the tort to it would impermissibly interfere with freedom of religion. In upholding summary judgment for the school, the court applied the three-factor balancing test from Lemon v. Kurtzman, 403 US 602, 29 L Ed 2d 745, 91 S Ct 2105 (1971). The factors are: (1) the character and purpose of the

institution involved; (2) the nature of the law's intrusion into church affairs; and (3) the resulting relationship between the government and the religious authority. The court found no intrusion by denying the application of the tort and found the resulting relationship to be negligible. Miller v. Catholic Diocese of Great Falls, 224 M 113, 728 P2d 794, 43 St. Rep. 2059 (1986).

Covenant of Good Faith and Fair Dealing as Interfering With Freedom of Religion: The Supreme Court upheld a summary judgment dismissing a wrongful discharge complaint against a religious school that dismissed a teacher without notice or hearing. In holding that denying application of the tort of bad faith in this case did not result in an intrusion into church affairs, the court relied on the standard set out in Wis. v. Yoder, 406 US 205, 32 L Ed 2d 15, 92 S Ct 1526 (1972), that ". . . only those interest of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion". The majority of the court felt that the bad faith tort claim did not meet the Yoder standard and that to allow the lawsuit to go forward would impermissibly interfere with the free exercise of religion. Miller v. Catholic Diocese of Great Falls, 224 M 113, 728 P2d 794, 43 St. Rep. 2059 (1986).

DECISIONS UNDER 1889 CONSTITUTION

Corporate License Tax on Organization of Church Society: The corporate license tax imposed on the agricultural activities of a religious society formed for the purposes of farming, stock growing, and other branches of agriculture did not conflict with Art. III, sec. 4, 1889 Mont. Const. St. v. King Colony Ranch, 137 M 145, 350 P2d 841 (1960).

Operation and Effect: Article III, sec. 4, 1889 Mont. Const., was not in conflict with any provision of the federal Constitution and could not be invoked as a protection against law prohibiting the unlawful possession of peyote under the claim that the drug was possessed for use for sacramental purposes by members of a church to which defendant belonged. St. v. Big Sheep, 75 M 219, 243 P 1067 (1926).

Attorney General's Opinions

Religious Exemption to Mandatory Immunization Not Limited to Established or Recognized Religion: The religious exemption to mandatory immunization of students in 20-5-405 is not limited to beliefs or tenets of an established or recognized traditional religion but also encompasses sincerely held personal religious beliefs. 44 A.G. Op. 7 (1991).

Attendance Unit on Hutterite Colony Premises — Establishment — Closure — Finance: A school district board of trustees may establish a separate attendance unit on the premises of a Hutterite colony located in the district. Closure of an attendance unit on the premises of a Hutterite colony is a matter within the discretion of the board of trustees of the school district involved, and the trustees have no authority to make an agreement to the contrary. The colony may effectively close an attendance unit by failing to renew the lease agreement if no similar space is available for its continued operation. Operational costs of an attendance unit must be budgeted and financed in the manner provided by law. Any agreement between the school district and the colony for private financing would be unenforceable. 38 A.G. Op. 26 (1979).

Alternative Renewable Energy Source Grants to Religious Organizations: Alternative renewable energy source grants may not be awarded to any church or to any school, academy, seminary, college, university, or other literary or scientific institution controlled in whole or in part by any church, sect, or denomination. Other religious organizations may be awarded grants if a substantial portion of their functions are secular and grants will only be used for such functions. 37 A.G. Op. 165 (1978).

Law Review Articles

How Did the Ten Commandments End Up on Both Sides of the Wall of Separation Between Church and State? The Contradicting Opinions of Van Orden v. Perry and McCreary v. ACLU, O'Connell, 69 Mont. L. Rev. 263 (2008).

Freedom of Religion in Indian Country, O'Brien, 56 Mont. L. Rev. 451 (1995).

Dam the RFRA at the Prison Gate: The Religious Freedom Restoration Act's Impact on Correctional Litigation, Cooper, 56 Mont. L. Rev. 325 (1995).

Sovereignty and the Sacred: The Establishment Clause in Indian Country, Smith, 56 Mont. L. Rev. 295 (1995).

A RFRA Runs Through It: Religious Freedom and the U.S. Code, Paulsen, 56 Mont. L. Rev. 249 (1995).

The Religious Freedom Restoration Act: Establishment, Equal Protection and Free Speech Concerns, Marshall, 56 Mont. L. Rev. 227 (1995).

Of Time and the RFRA: A Lawyer's Guide to the Religious Freedom Restoration Act, Lupu, 56 Mont. L. Rev. 171 (1995).

RFRA, Congress, and the Ratchet, Laycock, 56 Mont. L. Rev. 145 (1995).

Religious Harassment in the Workplace: An Analysis of the EEOC's Proposed Guidelines, Gregory, 56 Mont. L. Rev. 119 (1995).

RFRA and the Possibility of Justice, Gedicks, 56 Mont. L. Rev. 95 (1995).

The Religious Freedom Restoration Act: The Constitutional Significance of an Unconstitutional Statute, Conkle, 56 Mont. L. Rev. 39 (1995).

Accommodating Indian Religions: The Proposed 1993 Amendment to the American Indian Religious Freedom Act, Simpson, 54 Mont. L. Rev. 19 (1993).

An American Tradition: The Religious Persecution of Native Americans, Rhodes, 52 Mont. L. Rev. 13 (1991).

Section 6. Freedom of assembly.

Convention Notes

No change except in grammar. Retains basic rights to assemble and to petition or protest for redress of grievances.

Compiler's Comments

Former Constitutional Provision: This section is similar to Art. III, sec. 26, 1889 Mont. Const.

Case Notes

DECISIONS UNDER 1972 CONSTITUTION

Order to Pay Public Defender Costs — Meticulous and Scrupulous Findings of Ability to Pay — No Chilling of Constitutional Rights to Jury Trial: The defendant was convicted of murdering her husband and was ordered to pay the costs of her court-appointed public defender. On appeal, the defendant claimed that the District Court had failed to ascertain her ability to pay and to consider her forfeiture of her husband's estate. She also claimed that the award of costs had a chilling effect on her right to a jury trial. The Supreme Court disagreed and affirmed, noting that the District Court had met its burden by "scrupulously and meticulously" considering the defendant's current assets and her future ability to pay. Although she was not entitled to the victim's estate, the District Court correctly presumed that the defendant still owned an undivided interest in the marital property. St. v. Gable, 2015 MT 200, 380 Mont. 101, 354 P.3d 566.

Right to Petition for Redress No Guaranty of Response: Gehring argued that his right to petition for redress had been violated because the state governmental entities that he sent notices and petitions to failed to respond. The Supreme Court held that the right to petition for redress contains no corresponding right that the petition must be acted upon. Gehring v. Members of 1993 Legislature, 269 M 373, 889 P2d 1164, 52 St. Rep. 34 (1995).

Initiative Solicitation in School Polling Place Constitutional: Plaintiff was not allowed to gather signatures for an initiative petition on a general election day in a school building used as a polling place. The school district had a general policy prohibiting solicitation of any kind in school buildings. The District Court granted summary judgment to the school district. On appeal, the Supreme Court said that although 13-35-218 permits some manner of solicitation at polling places on election day, it does not guarantee the right. The court found the initiative process to be within the protection of Montana's counterpart of the first amendment. This does not assure that the process may not be regulated, however. The court, relying on the time, place, and manner regulations on the right to use public places for expressive activity found in Grayned v. City of Rockford, 408 US 104 (1972), and Tinker v. Des Moines School District, 393 US 503 (1969), found that the school district's policy was not narrowly tailored to further its interests in undisrupted school functioning. The policy applied regardless of whether classes were being held and applied to all solicitors regardless of whether they acted peaceably. Fear of disruption was not sufficient to overcome the right to freedom of expression. The school district's policy was found unconstitutional. Dorn v. Bd. of Trustees, 203 M 136, 661 P2d 426, 40 St. Rep. 348 (1983).

Language Requiring Nonlobbying Expenses to Be Disclosed — Unconstitutional: The words "regardless of whether it was paid solely" as used in subsection (5)(c) of 5-7-208, enacted by Initiative 85, are void as a violation of the first amendment right of association which exists as a necessary corollary to the freedoms of speech and assembly. The forced disclosure of contributions and membership fees "regardless of whether . . . paid solely for the purpose of lobbying" compels revelation of information that has no relationship to the ends that the lobbyist disclosure laws and Initiative 85 seek to achieve. That some money is in fact spent for lobbying does not lessen the repugnance of subsection (5)(c) of 5-7-208. Further, the forced disclosure of the name of an individual who contributed $250 reaches too broadly and too blindly into an area that is essential

to the exercise of our most basic freedoms. Mont. Auto. Ass'n v. Greely, 193 M 378, 632 P2d 300, 38 St. Rep. 1174 (1981).

Prohibited Compensation Provision Held Unconstitutional: Section 5-7-302 as amended by Initiative 85 is void because it violates the right to petition the government included in the first amendment to the United States Constitution and Art. II, sec. 6, Mont. Const. Section 5-7-302 unduly infringes the rights of those who, while contemplating neither illegal nor unethical conduct, need or desire to employ a lobbyist on a contingent fee basis in order to advance their interests before a public official. Mont. Auto. Ass'n v. Greely, 193 M 378, 632 P2d 300, 38 St. Rep. 1174 (1981).

Prohibition Against Soliciting Lobbying Efforts as Unconstitutional: Subsection (8)(b) of 5-7-102, enacted by Initiative 85, is unconstitutional and void for vagueness. Facially, subsection (8)(b) constitutes a more drastic infringement of freedom of the press and freedom of speech than was present in Mills v. Alabama, 384 US 214 (1966). Further, the court is unable to find any compelling state interest which requires the enactment of subsection (8)(b). Mont. Auto. Ass'n v. Greely, 193 M 378, 632 P2d 300, 38 St. Rep. 1174 (1981).

DECISIONS UNDER 1889 CONSTITUTION

Judicial Nomination: Under the rule that a statute which denies an elector the right to nominate candidates for public office was void as violative of Art. III, sec. 5 and 26, 1889 Mont. Const., Ch. 113, L. 1909, which provided for nonpartisan nominations to judicial office by petition, was invalid because it was incapable of being made to operate uniformly throughout the state, in that it failed to provide any means by which a candidate for judicial office may be nominated in a newly created municipality or for a newly created judicial office or for judicial office in a district the boundaries of which have been changed since the last election or may be changed hereafter. State ex rel. Holliday v. O'Leary, 43 M 157, 115 P 204 (1911).

Attorney General's Opinions

Gathering Initiative Petition Signatures at Primary Election Polling Places: The orderly gathering of initiative petition signatures at primary election polling places that does not interfere with the election process or obstruct voter access to the polling place may not be prohibited. Any interference with the initiative process must be narrowly construed in light of the state constitution's provisions guaranteeing an open initiative process. 39 A.G. Op. 62 (1982).

Section 7. Freedom of speech, expression, and press.

Convention Notes

Revises 1889 constitution by enlarging a citizen's freedom to express himself and allowing the truth to be given in evidence in slander as well as libel cases.

Compiler's Comments

Former Constitutional Provision: This section is similar to Art. III, sec. 10, 1889 Mont. Const.

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DECISIONS UNDER 1972 CONSTITUTION

FREEDOM OF SPEECH

Racial Epithet Spoken in Vehicle — Fighting Words: The driver of a car slowed her vehicle next to a 13-year old boy. The driver raised her middle finger, speaking an expletive toward the teenager. The passenger in the vehicle added, "spic bastard", and the women then drove away. The passenger argued that "spic bastard" did not constitute fighting words, since the listener could not have undertaken an immediate violent response because the speaker was inside the vehicle. The Supreme Court found that the very utterance of a racial slur tends to incite a breach of the peace and that the speech could have incited an immediate violent response. Billings v. Nelson, 2014 MT 98, 374 Mont. 444, 322 P.3d 1039.

Sexual Abuse of Children Statute Constitutional: Defendant appealed his conviction of sexual abuse of children for counseling a child over the Internet to engage in masturbatory conduct,

arguing that 45-5-625 violates the First Amendment and Commerce Clause of the United States Constitution by criminalizing any means of communication that serves to induce a child to engage in sexual conduct. The Supreme Court affirmed, concluding that the knowing communication requirement of 45-5-625 narrowly tailors the statute's reach to apply only to conduct that would contravene the state's interest in protecting children from online sexual predators and that the state's regulatory effort to prevent sexual abuse of children constitutes a permissible regulation of commerce that fails to unlawfully infringe on commerce among the several states. St. v. Hantz, 2013 MT 311, 372 Mont. 281, 311 P.3d 800.

Expletives Stated Over Phone — No Categorical Exception to Free Speech Protection: Dugan called a victim services office for assistance with obtaining an order of protection. When informed by the officer that she could not assist him, he argued with the officer and called her a "fucking cunt" as he hung up the phone. Dugan argued that the privacy in communications statute under which he was charged, 45-8-213, violated his free speech rights. The District Court found that Dugan's words constituted unprotected "fighting words" that were inherently inflammatory and held little social value. On appeal, the Supreme Court reversed and remanded, finding that Dugan's words did not fall under any categorical exceptions to free speech protection. His words were not "fighting words" or a "true threat" because Dugan was not in close physical proximity to the victim services officer and therefore could not have threatened imminent harm. The circumstances also indicated that Dugan's utterance was not an unprotected obscenity because he said it in frustration, rather than as an erotic utterance. Further, Dugan's words could not be punished under the captive audience doctrine because the officer took the call at work and could have ended the conversation at any time. Because Dugan's words could not be punished under a categorical exception to the First Amendment, the court struck the statute's presumption of intent that impermissibly shifted evidentiary burden requirements to the defendant. St. v. Dugan, 2013 MT 38, 369 Mont. 39, 303 P.3d 755.

Conduct of City Council Meeting Hearing Criticism of City Employee — Not Restricted by Free Speech and Privileged Communication Cases and Statute — Not Legislative Act Shielded by Legislative Immunity: Denke filed complaints with the Human Rights Commission alleging that Thompson Falls and Shoemaker, a City Council member, retaliated against her for previously filing sexual harassment charges with the Commission by holding a City Council meeting at which Shoemaker was allowed, with virtually no limitation, to severely criticize her conduct as city clerk and finance officer. The Commission hearing examiner, the Commission, and the District Court held that Shoemaker's criticism of Denke's actions as city bookkeeper aired during the City Council meeting was a "legislative act" within the meaning of 2-9-111 and the city was therefore immune from a charge of retaliation. The Supreme Court held that 27-1-804(2) and free speech cases such as New York Times Co. v. Sullivan, 376 US 254 (1964), and Skinner v. Pistoria, 194 M 257, 633 P2d 672 (1981), did not limit the City Council's ability to regulate the time, place, and manner of Shoemaker's criticism. The Supreme Court also held that Denke's claim did not involve the calling of the City Council meeting (for which the city would be immune under 2-9-114) so much as the manner in which the meeting was conducted and that the conduct of the meeting did not fall within the definition of a "legislative act", and remanded the case for further proceedings. Denke v. Shoemaker, 2008 MT 418, 347 M 322, 198 P3d 284 (2008).

Injunction Prohibiting Contact and Threats by Radiologist Partly Violative of Prior Restraints Against Free Speech — Remand: Following numerous complaints of harassing and intimidating comments by a radiologist, plaintiff hospital sought and was granted an injunction prohibiting the radiologist from: (1) contacting and threatening another doctor; (2) indicating to patients, potential patients, or physicians that the hospital's services were inadequate or unprofessional; (3) contacting any potential candidate for the radiology department in a manner that would discourage or intimidate the candidate from negotiating or contracting with the hospital; and (4) threatening any employee or agent of the hospital. The radiologist appealed on grounds that the injunction violated the right to free speech. The Supreme Court noted that of all forms of infringement on the right to free speech, prior restraints are the most serious and least tolerable and cited the definition of prior restraint in Alexander v. U.S., 509 US 544 (1993), that a prior restraint is a judicial or administrative order, such as a temporary restraining order or permanent injunction, that forbids certain communications when issued in advance of the time that the communications are to occur. Declining to apply the test in Kuiper v. District Court, 193 M 452, 632 P2d 694 (1981), which the court limited to injunctions issued in the context of the discovery process, the court instead applied the rationale in Tory v. Cochran, 544 US 734 (2005), which focuses on whether an injunction sweeps more broadly than necessary and is precisely and narrowly tailored to achieve the pinpoint objective needs of the case. Here, the prohibition against

the radiologist indicating to patients, potential patients, or physicians that the hospital's services were inadequate or unprofessional was overly broad because it potentially interfered with the radiologist's practice. The court directed that that condition be stricken. Likewise, the prohibition against contacting any potential candidate for the radiology department in a manner that would discourage or intimidate the candidate from negotiating or contracting with the hospital was also overbroad, although the provision was found not to interfere with the radiologist's free speech if only the provision against intimidation was left intact. The court directed that the language prohibiting the radiologist from discouraging candidates be stricken. However, the remaining provisions of the injunction were precisely and narrowly tailored to achieve the pinpoint objective needs of the case, did not amount to prior restraint, and were thus constitutionally permissible. The court remanded with directions to strike the unconstitutional conditions of the injunction. St. James Healthcare v. Cole, 2008 MT 44, 341 M 368, 178 P3d 696 (2008).

Plaintiff's Internal E-mail on Internal Structural Arrangements of University Departments Not Protected Speech: Ray alleged that his position as department head at Montana Tech of the University of Montana was not renewed in violation of his right to free speech. One of six criteria that the university relied upon in not renewing Ray's position was that he had sent an internal e-mail comparing the school's proposals to relocate department members to harassment and in which Ray threatened to mobilize students and others in opposition to the relocation proposals. The Supreme Court stated that the threshold question in a free speech claim by a public employee is whether the employee is speaking out as an employee on a matter of personal interest or as a citizen on a matter of public interest. The Supreme Court held that Ray's e-mail concerned the internal structural arrangements at the school and therefore did not transcend the internal school workings and were not of public concern and not protected as free speech. Ray v. Mont. Tech of the Univ. of Mont., 2007 MT 21, 335 M 367, 152 P3d 122 (2007).

Constitutionality of Law Prohibiting and Punishing Unauthorized Practice of Law: O'Neil was a paralegal and state senator who was investigated by the Commission on the Unauthorized Practice of Law and permanently enjoined from engaging in conduct that constituted the practice of law. O'Neil challenged the constitutionality of 37-61-201 and 37-61-210, which prohibit and punish the unauthorized practice of law, on grounds that the law interfered with O'Neil's freedom of speech and the free speech of O'Neil's customers. O'Neil asserted that the statutes were too overbroad and vague to impose any restrictions on his liberty and insufficient to support the District Court's finding of contempt and entry of the injunction against him. The Supreme Court held that O'Neil incorrectly framed the freedom of speech challenge as an overbreadth challenge. The overbreadth doctrine allows plaintiffs to challenge a statute not because their own rights of free expression are violated but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression. However, O'Neil failed to show that the impact of the statutes on the conduct of other speakers would differ from its impact on O'Neil's conduct, so O'Neil's case was not susceptible to a facial overbreadth challenge based on hypothetical applications of the law not before the court. The central question of O'Neil's free speech challenge was whether the injunction unconstitutionally restricted O'Neil's right to free speech. The Supreme Court cited Ohralik v. Ohio St. Bar Ass'n, 436 US 447 (1978), for the holding that regulation of the bar is a subject only marginally affected with free speech concerns and noted that other courts have repeatedly rejected claims that an individual has a free speech right to practice law, free even of rationally based regulation, because such a broadly formulated argument, if successful, would greatly undermine the recognized power of states to regulate bar membership. Just as O'Neil had no free speech right to practice law without a license, O'Neil's customers had no free speech right to unlicensed legal representation because the constitutional right to receive legal advice is limited to clients of qualified attorneys, consistent with the state's interest in high standards of legal ethics. Sections 37-61-201 and 37-61-210 were not void for vagueness because they provided fair notice of the prohibited conduct. O'Neil's challenge to the constitutionality of the statutes failed. Mont. Supreme Court Comm'n on Unauthorized Practice of Law v. O'Neil, 2006 MT 284, 334 M 311, 147 P3d 200 (2006).

Criminal Trespass Statute Not Vague and Overbroad: Allum caused a disturbance in a grocery store and was asked by the manager to leave. When Allum refused, he was arrested for trespass. Allum contended that the manager did not have the authority to ask Allum to leave without written authority from the property owner. Allum asserted that the trespass statute violated free speech and due process and was vague and overbroad unless the phrase "authorized person" in 45-6-201(1) was narrowly construed to mean someone who has explicit written authority from the landowner. The Supreme Court noted that a statute is void for vagueness if it fails to give

a person of ordinary intelligence fair notice that the statute does not permit a contemplated conduct. Section 45-6-201 gives fair notice and is not vague. St. v. Allum, 2005 MT 150, 327 M 363, 114 P3d 233 (2005), following the overbreadth test in St. v. Lilburn, 265 M 258, 875 P2d 1036 (1994).

Unprovoked Obscenity Directed at Police Officer Not Considered Free Speech — Disorderly Conduct Conviction Affirmed: Robinson was charged with disorderly conduct after directing an unprovoked obscenity, referring to a fornicating porcine, at a police officer who was seated in a patrol car at an intersection. Robinson contended that the remark did not rise to the level of fighting words and was thus protected by freedom of speech. The Supreme Court disagreed. Under the fighting words interpretation of 45-8-101, the remark, outside the confines of a sty, qualified as sufficiently and inherently inflammatory, irrespective of the intended audience. St. v. Robinson, 2003 MT 364, 319 M 82, 82 P3d 27 (2003), following Chaplinsky v. N.H., 315 US 568 (1942), and Whitefish v. O'Shaughnessy, 216 M 433, 704 P2d 1021 (1985).

Commercial Versus Noncommercial Speech — Analysis to Determine Validity of Commercial Speech Restriction — Local Government Billboard Prohibitions Not Overreaching: Plaintiff petitioned for a declaratory judgment requesting that city and county zoning regulations for off-premises signs and billboards be declared unconstitutional and violative of the state Outdoor Advertising Act. The petition was denied and plaintiff appealed. The Supreme Court noted that under Metromedia, Inc. v. San Diego, 453 US 490 (1981), commercial and noncommercial speech enjoy different constitutional free speech protections, and that commercial speech is afforded less constitutional protection than noncommercial speech. Commercial speech may be regulated in situations in which noncommercial speech may not. In determining the validity of a commercial speech restriction, pursuant to Cent. Hudson Gas & Elec. v. Pub. Serv. Comm'n, 447 US 557 (1980): (1) commercial speech must concern a lawful activity and may not be misleading to be protected; (2) there must be a substantial government interest for adopting a commercial speech regulation; (3) if the speech is protected and a substantial government interest exists, the regulation must directly advance the asserted government objective; and (4) the regulation must reach no further than to achieve that objective. Despite subsequent holdings related to other forms of media, Metromedia remains the controlling law in billboard cases. Here, the first prong of the Metromedia test was not disputed. With regard to the second prong, the parties conceded that aesthetics and safety constituted substantial government interests. Further, the ordinances in question directly advanced the government's goal of reducing visual blight and traffic hazards, meeting the third prong of the test. Last, because the ordinances prohibited billboards only in residential areas and restricted billboard use in commercially zoned areas, speech was restricted no more than necessary to achieve the government objectives, so the fourth prong of the test was also met. Thus, the validity of the zoning ordinances was affirmed. Mont. Media, Inc. v. Flathead County, 2003 MT 23, 314 M 121, 63 P3d 1129 (2003).

Local Ordinance Restricting Billboards Not Considered Unconstitutional Prior Restraint on Commercial Speech: Under Desert Outdoor Advertising, Inc. v. Moreno Valley, 103 F3d 814 (9th Cir. 1996), an ordinance or regulation that subjects protected speech to prior restraint without narrow, objective, and definite standards to guide permitting officials violates the federal constitutional right to free speech. The law may not condition the exercise of free speech on the unbridled discretion of permitting officials. In the case at bar, city and county ordinances governing billboards provided objective guidelines for the issuance of billboard permits that allowed permitting officials little discretion in deciding whether to grant a permit and thus did not create an unconstitutional prior restraint on speech. Mont. Media, Inc. v. Flathead County, 2003 MT 23, 314 M 121, 63 P3d 1129 (2003).

Local Ordinances Restricting Billboards Not Unconstitutionally Vague: Plaintiff contended that city and county zoning ordinances regulating billboards were vague and subject to inconsistent and arbitrary application. The Supreme Court cited Broers v. Dept. of Revenue, 237 M 367, 773 P2d 320 (1989), for the holding that a noncriminal statute or regulation is vague if a person of common intelligence must guess at its meaning, but is not vague simply because it can be dissected or subjected to different interpretations. The court went on to analyze the various provisions of the ordinances regarding political signs, holiday signs, and the distinction between offsite signs and billboards, but found that plaintiff failed to demonstrate that any of the definitions were unconstitutionally vague. Mont. Media, Inc. v. Flathead County, 2003 MT 23, 314 M 121, 63 P3d 1129 (2003).

No Inmate First Amendment Right in Legal Correspondence to Other Inmates: Murphy served as a law clerk while incarcerated at the Montana State Prison. Upon learning that Tracy had been charged with assaulting officer Galle, Murphy decided to assist Tracy with his defense

and wrote Tracy a letter. In accordance with prison policy, prison officials intercepted the letter and reviewed it. Based on accusations against Galle contained in the letter, Murphy was cited for violations of prison rules. After a hearing, Murphy was found guilty and received sanctions of 10 days detention and demerits that could affect his custody level. Murphy sought declaratory and injunctive relief under 42 U.S.C. 1983, alleging a violation of his first amendment rights. The District Court granted the defendant's motion for summary judgment, finding that Murphy was not formally acting as an inmate law clerk at the time that the letter was written and that the letter was therefore not subject to any privilege that might apply. The District Court found the prison regulation of all inmate mail reasonably related to a legitimate penological interest. The Ninth Circuit Court of Appeals reversed, determining that inmates have a first amendment right to assist other inmates with their legal claims. The United States Supreme Court was asked to decide if Murphy had a first amendment right to provide legal advice that enhanced the protections otherwise available under Turner v. Safley, 482 US 78 (1987). The court found that there was no increased constitutional protection based upon the content of the communication. The appropriate question was whether the prison regulations, as applied to Murphy, are reasonably related to legitimate penological interests. The case was reversed and remanded for further proceedings. Shaw v. Murphy, 532 US 223, 149 L Ed 2d 420, 121 S Ct 1475 (2001).

Removal of Handbills — Violation of Free Speech: Giebel was a professor at Montana State University-Northern until 1995 when his contract was not renewed. About a year after the termination of employment, the university sponsored a conference on "intellectual freedom" and arranged for the participation of about 25 speakers, one of whom was Giebel. When the conference was publicized, Giebel posted his own handbills on campus bulletin boards announcing his upcoming speech. Sylvester, the chairman of the department that formerly employed Giebel, tore down Giebel's handbills. Giebel filed a 42 U.S.C. 1983 action in federal court, alleging a violation of the first amendment. The handbills constituted "speech" because they were words conveying information. Sylvester's actions were determined to be viewpoint discrimination. Sylvester violated Giebel's clearly established first amendment right to post handbills informing the public of his upcoming speech at the "intellectual freedom" conference. Giebel v. Sylvester, 244 F3d 1182 (9th Cir. 2001).

Limit on Corporate Contributions to Ballot Issues: Montana voters approved Initiative Measure No. 125 (I-125) in November 1996. I-125 prohibited direct corporate spending in connection with ballot issues, other than by nonprofit corporations formed solely for political purposes. The measure allowed a corporation to establish and administer a separate, segregated fund that could solicit contributions from shareholders, employees, or members of the corporation. In July 1998, Initiative Measure No. 137 (I-137), restricting certain types of mining, was certified for the November ballot. Appellee Montana Mining Association (MMA) and other organizations subject to I-125 sought to delay and then invalidate the election in which Montana's voters approved I-137 on the ground that I-125 unconstitutionally constrained their participation in the election process. Appellee Montana Chamber of Commerce (MCC) brought a federal declaratory action, alleging that I-125 was unconstitutional, and sought an injunction against its enforcement. MMA brought suit in September 1998, requesting a preliminary injunction that would either waive I-125, as applied to MMA, or delay a vote on I-137 until after the I-125 case was resolved. The District Court consolidated the actions. On summary judgment, the District Court ruled that I-125 restricted core political speech, but concluded that a trial was necessary to determine whether a compelling state interest justified the restriction. The District Court accepted the contentions of the I-125 opponents, ruling that at least as applied, the measure infringed the first amendment rights of speech and association of those subject to its prohibitions. The initiative was not narrowly tailored to address only the spending of large corporations. Requiring corporations to fund ballot-issue campaign speech through segregated funds impermissibly deprived them of their ability to communicate political ideas directly to the electorate. The initiative prevented the electorate from being exposed to diverse political viewpoints on matters of public policy. The proponents' evidence did not establish domination of the initiative process through corporate expenditures. Accordingly, the District Court concluded that the corporations were entitled to defend their economic interests by using their treasuries to fund their participation in ballot initiative campaigns. Ed Argenbright, the Montana Commissioner of Political Practices, appealed from the District Court's judgment for MCC, MMA, and the other opponents of I-125. The Ninth Circuit Court of Appeals affirmed the District Court, finding that I-125 unconstitutionally restricted public discussion in the initiative process. A restriction destructive of the right of public discussion, without greater or more imminent danger to the public interest than existed in this case, was held to be incompatible with the freedoms secured by the first amendment. The issue of

whether the District Court should have delayed or invalidated the I-137 election, together with the question whether MMA's preelection request for injunctive relief should have been granted, was moot. The District Court did not abuse its discretion in failing to void the results of the I-137 election. Mont. Chamber of Commerce v. Argenbright, 226 F3d 1049 (2000).

Constitutional Right to Free Speech Not Violated by Confidentiality Provisions in Rule 13 Regulating Complaints Against Attorneys: Formal complaints against two attorneys were filed with the State Bar Commission on Practice, which recommended disciplinary actions against the attorneys. In their appeal, the attorneys contended that Rule 13 of the Rules on Lawyer Disciplinary Enforcement violated their rights to free speech by placing a blanket gag order on all freedom of expression relating to ethical charges against an attorney, citing Doe v. Supreme Court of Fla., 734 F. Supp. 981 (S.D. Fla. 1990). The Supreme Court distinguished Doe based on totally different facts and circumstances. The attorneys failed to establish that their free speech rights were violated. In re Goldstein & Albers v. Comm'n on Practice, 2000 MT 8, 297 M 493, 995 P2d 923, 57 St. Rep. 31 (2000), following In re Wyse, 212 M 339, 688 P2d 758, 41 St. Rep. 1780 (1984).

Theology as Impermissible Basis on Which to Make Law or Interpret Constitution: In deciding that statutory provisions prohibiting a physician assistant-certified from performing abortions were an unconstitutional invasion of the right of privacy and personal procreative autonomy, the Supreme Court clarified that its opinion was not a comment on the merits of sectarian doctrine or on the deep and sincerely held beliefs, values, and convictions of those who either favor abortion or oppose it on moral or religious grounds. The right of expression aimed at changing individual values and convictions and at fostering respect for the intrinsic value of all life is protected by the first amendment to the U.S. Constitution and by section 5 of this article and this section. However, the doctrine of separation of church and state that is also embodied in the first amendment and section 5 of this article makes theology an impermissible basis on which to make law or interpret the constitution. Religious arguments do not count as legal arguments. The cost of a person's enjoyment of fundamental constitutional rights does not permit the government's infringement of personal and procreative autonomy in the name of political ideology. Armstrong v. St., 1999 MT 261, 296 M 361, 989 P2d 364, 56 St. Rep. 1045 (1999).

Hate Crime Statute Not Violative of Right to Free Speech: Nye and four other individuals affixed bumper stickers that read "NO I do not belong to CUT" on state and county road signs near Gardiner, Montana; placed stickers on several mailboxes in the area; and affixed stickers to property belonging to the Church Universal and Triumphant (CUT). Pursuant to a plea agreement, Nye pleaded guilty to a charge of malicious intimidation or harassment relating to civil or human rights under 45-5-221, reserving the right to appeal his prior motion to dismiss. On appeal, Nye claimed that 45-5-221 violated his constitutional right to freedom of speech because his acts of distributing the bumper stickers were meant to convey his beliefs and ideas and were thus constitutionally protected. Nye pointed out that numerous other residents in the Gardiner area also have the stickers attached to their vehicles or in their windows as a protest against perceived objectionable CUT practices. Noting the distinction between content-neutral regulation and impermissible content-based regulation set out in St. v. Lilburn, 265 M 258, 875 P2d 1036 (1994), the Supreme Court held that the governmental purpose in 45-5-221 is not to suppress the content of the communication but rather to prohibit conduct that violates other criminal laws. If Nye had limited his attack on CUT to the display of a bumper sticker on his car or the window of his home, that expression of speech would have been constitutionally protected. However, Nye lost his constitutional free speech protection when he coupled the message on the sticker with defacement of the property of others. Free speech does not include the right to cause substantial emotional distress by harassment or intimidation. St. v. Nye, 283 M 505, 943 P2d 96, 54 St. Rep. 766 (1997).

Court's Reference to Aryan Nations at Sentencing Held Not Denial of Freedom of Religion or Speech: Finney pleaded guilty to charges of burglary and theft and was sentenced to a total term of 50 years. In a written statement prepared for the presentence investigation, Finney made references to the Aryan Nations organization and also appeared at the sentencing hearing with the words "white power" tattooed across his forehead. Finney petitioned for postconviction relief, alleging that the District Court had violated his rights of freedom of religion and speech by considering his membership in the Aryan Nations for purposes of sentencing. The Supreme Court reviewed the federal court cases cited by Finney, noting that those cases also indicated that if there was an otherwise legitimate reason for references to constitutionally protected membership in similar organizations, it was not error for those references to be made during the course of the trial. The Supreme Court pointed out that Finney's sentence was within the

range of sentences allowed for the crimes Finney had committed and that the references made in Finney's case were limited references to those organizations made because Finney brought up the subject himself by his words or actions, were made by the prosecutor in order to clarify Finney's past criminal behavior, or were limited to comments by the court on those words or actions. The Supreme Court held that for these reasons, the District Court did not deny Finney his constitutional rights and there was no plain error. St. v. Finney, 281 M 58, 931 P2d 1300, 54 St. Rep. 58 (1997), distinguished in Hans v. St., 283 M 379, 942 P2d 674, 54 St. Rep. 654 (1997).

Stalking Statute Not Violative of Free Speech: Cooney asserted that 45-5-220, prohibiting stalking, deprived him of his freedom of speech because he did not threaten the victim but rather only expressed his love for her. The Supreme Court disagreed, finding that Cooney's conduct inflicted injury on the victim by causing substantial emotional distress and that the conduct lacked any social value. The trial court did not unconstitutionally apply 45-5-220 in holding that Cooney's conduct was not a violation of the constitutional right to free speech. St. v. Cooney, 271 M 42, 894 P2d 303, 52 St. Rep. 320 (1995).

Hunter Harassment Law Not Violation of Free Speech Rights or Overbroad: Lilburn challenged the hunter harassment law on the basis that its prohibition of "dissuading" a hunter from taking a wild animal is content-based and designed to prevent the message contained in the dissuading language. The Supreme Court held that the Legislature did not use the term "dissuade" in isolation and that, reading the statute as a whole, it is clear that the conduct proscribed is the "disturbance" of a hunter engaged in a lawful activity. The Supreme Court also held that the law is not overbroad and that, to the extent that the statute might reach constitutionally protected expression, whatever overbreadth might exist should be cured on a case-by-case analysis of the fact situations. St. v. Lilburn, 265 M 258, 875 P2d 1036, 51 St. Rep. 507 (1994).

Free Speech — Private Property: This section does not provide a right to the use of private property by strangers that entitled defendant to access to clinic property for purposes of conveying a message to the clinic's invitees. Helena v. Krautter, 258 M 361, 852 P2d 636, 50 St. Rep. 566 (1993).

Regulation of Nude Dancing by Municipality: This section's free expression protections do not accord a greater state protection of nude and seminude dancing in establishments licensed by the state to sell alcoholic beverages than is afforded by the United States Constitution. Under the broad regulatory powers of the twenty-first amendment, a municipality with self-government powers may enact an ordinance that regulates nude and seminude dancing. Billings v. Laedeke, 247 M 151, 805 P2d 1348, 48 St. Rep. 133 (1991). See also Helena v. Krautter, 258 M 361, 852 P2d 636, 50 St. Rep. 566 (1993), applying Laedeke to uphold a trespass conviction of an abortion protester at a clinic.

Fair Trial to Outweigh Free Speech: Noris contended that the presence of women spectators wearing buttons bearing the words "Women Against Rape" at his trial for kidnapping and rape denied him a fair trail. The court determined that the buttons conveyed the message that spectators believed defendant was guilty before it was proved, eroding the presumption of innocence. When balancing the competing rights of the spectators' right to free speech against defendant's right to a fair trail, the right to a fair trail controls. Norris v. Risley, 918 F2d 828 (9th Cir. 1990).

Circumstances Producing Fear That Threat of Criminal Mischief Would Be Carried Out — Conviction Not Violative of Free Speech: Cleland stole a saxophone and threatened the owner with felony criminal mischief by intimating he would damage or destroy the horn unless he received money. The circumstances under which Cleland voiced his threats reasonably tended to produce a fear that the threats would be carried out, including his: (1) demand for more money; (2) possession of the saxophone, which made the threats more plausible; and (3) forceful manner. Given these circumstances, Cleland's conviction for intimidation was justified and did not violate constitutional principles of free speech. St. v. Cleland, 246 M 165, 803 P2d 1093, 47 St. Rep. 2311 (1990), following St. v. Lance, 222 M 92, 721 P2d 1258 (1986).

Open Hearing on Disciplinary Actions Against School Administrator Not Required by Prohibition on Prior Restraint: Plaintiff argued that closure of a grievance hearing on his allegations of malicious and dishonest actions by a school administrator and request for a reprimand and a public apology constituted a prior restraint on his constitutional right of free speech. However, the prohibition on prior restraint does not require a school board to conduct an open hearing on allegations seeking disciplinary actions against a school administrator. Flesh v. Bd. of Trustees, 241 M 158, 786 P2d 4, 47 St. Rep. 161 (1990).

Employment Discrimination Based on Political Beliefs: The Department of Social and Rehabilitation Services (now Department of Public Health and Human Services) did not hire

plaintiff because of her support for certain legislation pending before the Legislature. The Supreme Court cited Pickering v. Bd. of Educ., 391 US 563, 20 L Ed 2d 811, 88 S Ct 1731 (1968), in holding that a public employee does not relinquish his first amendment right to comment on matters of public interest by virtue of government employment. Plaintiff's support of proposed legislation was a matter of public concern as to how government should be conducted and thus was an expression of her political ideas or beliefs. Failure to hire her because of those ideas or beliefs constituted illegal discrimination. Taliaferro v. Dept. of Social and Rehabilitation Services, 235 M 23, 764 P2d 860, 45 St. Rep. 2131 (1988).

Resisting Removal From Public Meeting — Disturbance of Eight People Constituting Disorderly Conduct: Defendant argued that his forcible removal from a town council meeting constituted a physical censorship. However, the decision of a presiding officer to have a citizen physically removed from a public meeting for disrupting the meeting cannot lawfully be challenged by forcible resistance. Defendant's actions in physically resisting removal did not fit within the concept of constitutionally protected speech. Further, the disturbance of eight people was sufficient to justify prosecution for disorderly conduct. St. v. Lowery, 233 M 96, 759 P2d 158, 45 St. Rep. 1322 (1988).

Licensing Fee for Adult Movie Video Booths as Regulatory Measure — Free Speech Not Violated: The Supreme Court affirmed a city ordinance imposing a $300 annual fee for adult movie video booths, finding the city met its burden of proving the fee was both reasonable and designed as a regulatory measure to provide funds for administrative costs, policing of the booths, and health enforcement costs and expenses. The court held that estimates of future expenses may be included for purposes of setting a fee and that, being regulatory in nature, the fee did not violate the right to free speech guaranteed by the first amendment to the U.S. Constitution and Art. II, sec. 7, Mont. Const. Great Falls v. M.K. Enterprises, Inc., 225 M 292, 732 P2d 413, 44 St. Rep. 242 (1987).

Preliminary Pleadings — Public's Right to Know: In a defamation case, an affirmative defense based on the privilege under 27-1-804(4) extends to newspaper accounts of preliminary pleadings. The Supreme Court acknowledged that the public has a right to know what happens in the judicial system, including the filing of civil suits. Cox v. Lee Enterprises, Inc., 222 M 527, 723 P2d 238, 43 St. Rep. 1476 (1986), followed, with respect to Commission on Practice investigation, in Lence v. Hagadone Inv., 258 M 433, 853 P2d 1230, 50 St. Rep. 601 (1993).

Threats in Letters Punishable as Intimidation: In divorce proceedings, appellant lost custody of his children and valuable property. After filing numerous unsuccessful lawsuits in state and federal courts, appellant wrote five separate letters to two judges and others threatening to take a hostage for the purpose of focusing nationwide media attention on his plight and for the purpose of negotiating for the return of his ranch and children and for damages. Appellant was convicted of intimidation under 45-5-203 and appealed, alleging that the statute, as it read before 1985 amendments, was unconstitutionally overbroad and unconstitutional as applied to him. On appeal, the Supreme Court held that the statute was not unconstitutionally overbroad or unconstitutional as applied to appellant. The statute punishes only threats of physical confinement and physical restraint. Such threats are not speech protected by the first amendment to the U.S. Constitution. Only serious threats are punishable, and the question of intent and what constitutes a true threat is to be determined by the trier of fact. Appellant's statements constituted threats punishable under the statute. St. v. Lance, 222 M 92, 721 P2d 1258, 43 St. Rep. 1086 (1986).

Statute Prohibiting Solicitation of False Testimony Not Violative of Right to Freedom of Speech: Defendant Woods, while under arrest for suspected burglary, wrote two notes to his codefendants that were interpreted by the jury as attempts to elicit false testimony which would exculpate him. On appeal, Woods argued that 45-7-206 was so vague that it violated his right to free speech under the first amendment to the U.S. Constitution and Art. II, sec. 7, Mont. Const. The Supreme Court noted that the right to freedom of speech is not absolute and may be regulated if the regulating statutes are narrowly and precisely drawn. Section 45-7-206 has been precisely drawn to prohibit only speech designed to induce false testimony, and the state's interest in prohibiting such testimony must be balanced with the defendant's right to speak his mind. The court held that because witness tampering presents an imminent threat to the trial process, an aspect central to a democratic society, and because 45-7-206 was narrowly drawn to address that threat, 45-7-206 does not violate either the U.S. or Montana constitutional guarantees of the right to free speech. St. v. Woods, 221 M 17, 716 P2d 624, 43 St. Rep. 601 (1986).

Disciplinary Rules for Attorneys in Remarks on Criminal Cases — Violation of Attorney's Freedom of Speech: Disciplinary Rules 7-107(B) and (H) of the Canons of Professional Ethics,

adopted in Montana to govern the conduct of attorneys, restrict the use of extrajudicial statements in criminal actions on various subjects to protect the accused's right to a fair trial. The Supreme Court voided the Rules because, read literally, the Rules invaded an attorney's right of free speech; thus, a standard for interpretation of the Rules would be necessary to balance an attorney's right to free speech and the accused's right to a fair trial. The court declined to adopt such a standard and instead provided that new disciplinary rules be drafted incorporating such a standard. In re Keller, 213 M 196, 693 P2d 1211, 41 St. Rep. 2045 (1984).

Obscene "Fighting Words" Spoken to Police Officer — Disturbing the Peace Conviction Upheld: While on a city street at about 2 a.m. after closing his restaurant and bar, appellant and his friends were engaged in a louder-than-normal conversation. A police officer approached and told appellant to "hold it down". Appellant said, "Well, [m.f.], I will holler and yell when and wherever I want if I want to". The language constituted "fighting words", and by definition a threat of violence or violent response occurred. Appellant was properly convicted of disturbing the peace. Whitefish v. O'Shaughnessy, 216 M 433, 704 P2d 1021, 42 St. Rep. 928 (1985).

Narrow Construction of Disturbing the Peace Ordinance — No Vagueness or Overbreadth: Appellant was convicted of breach of the peace under Whitefish Municipal Ordinance, 9.64.010, which read: "No person within the municipality, or within three miles of the municipal limits, shall willfully and maliciously disturb the peace and quiet of any street, neighborhood, family, or person by loud, tumultuous noise, or by tumultuous or offensive conduct, or by using offensive, loud radio or television sets, or by threatening, quarreling, scolding, hallooing, hollering, challenging to fight, or fighting, or by cursing, swearing, uttering obscene, profane, vulgar, or indecent language in the presence of any person or persons, or by committing any obscene, vulgar, indecent, or lewd act in any public place, or in view of any person or persons". Appellant had been talking louder than normal on a city street at about 2 a.m., and when a police officer told appellant to "hold it down", appellant said "Well, [m.f.], I will holler and yell when and wherever I want if I want to". The Supreme Court construed the ordinance narrowly as applying only to words spoken willfully and maliciously, and that constitute "fighting words" with a direct tendency to violence, and stated that as so construed the ordinance is not unconstitutional for vagueness or overbreadth. Whitefish v. O'Shaughnessy, 216 M 433, 704 P2d 1021, 42 St. Rep. 928 (1985).

"Fighting Words" Unprotected by Right of Free Speech: Upon his appeal from conviction of disorderly conduct, defendant's speech and conduct were held to constitute "fighting words" and therefore were unprotected by his constitutional right of free speech. Billings v. Batten, 218 M 64, 705 P2d 1120, 42 St. Rep. 1398 (1985). See also Billings v. Nelson, 2014 MT 98, 374 Mont. 444, 322 P.3d 1039.

Drug Paraphernalia Act — Constitutionality: The Montana Model Drug Paraphernalia Act, Title 45, ch. 10, part 1, was not overbroad on its face, since the only right arguably implicated by the Act was commercial speech, and that right was not constitutionally protected in this instance because the statute is expressly directed at commercial activity promoting or encouraging illegal drug use. Neither was the Act overbroad or void for vagueness since the inclusion of the "layered" state of mind requirements imposed by 45-10-101 and 45-10-104 require the merchant to have already intended an item to be sold for drug use before his or her knowledge of its use by a buyer comes into play. Stoianoff v. Mont., 695 F2d 1214 (9th Cir. 1983).

Initiative Solicitation in School Polling Place Constitutional: Plaintiff was not allowed to gather signatures for an initiative petition on a general election day in a school building used as a polling place. The school district had a general policy prohibiting solicitation of any kind in school buildings. The District Court granted summary judgment to the school district. On appeal, the Supreme Court said that although 13-35-218 permits some manner of solicitation at polling places on election day, it does not guarantee the right. The court found the initiative process to be within the protection of Montana's counterpart of the first amendment. This does not assure that the process may not be regulated, however. The court, relying on the time, place, and manner regulations on the right to use public places for expressive activity found in Grayned v. City of Rockford, 408 US 104 (1972), and Tinker v. Des Moines School District, 393 US 503 (1969), found that the school district's policy was not narrowly tailored to further its interests in undisrupted school functioning. The policy applied regardless of whether classes were being held and applied to all solicitors regardless of whether they acted peaceably. Fear of disruption was not sufficient to overcome the right to freedom of expression. The school district's policy was found unconstitutional. Dorn v. Bd. of Trustees, 203 M 136, 661 P2d 426, 40 St. Rep. 348 (1983).

Denial of Valuable Governmental Benefit — Prohibited When Basis of Denial Infringes One's Constitutional Right: A valuable governmental benefit, such as a job, may not be denied on a basis that infringes one's constitutionally protected interest, especially one's interest in freedom

of speech. The court did not reach the question of whether a chairmanship title at Eastern Montana College (now Montana State University-Billings) is a valuable governmental benefit because the complaint did not state sufficient facts. Small v. McRae, 200 M 497, 651 P2d 982, 39 St. Rep. 1896 (1982).

City Ordinance Prohibiting Door-to-Door Solicitation — No Denial of Free Speech: The city of Billings enacted an ordinance declaring uninvited door-to-door solicitation a nuisance punishable as a misdemeanor. Following Breard v. City of Alexandria, 341 US 622 (1951), the Montana Supreme Court found that the ordinance did not violate Montana's freedom of speech guarantee. Tipco Corp. v. Billings, 197 M 339, 642 P2d 1074, 39 St. Rep. 600 (1982).

Intimidation Statute — Constitutionality: Defendant was convicted of intimidation under 45-5-203(1)(c), concerning the threat to commit any criminal offense. He had followed a woman around Kalispell in his car making obscene comments and threats. Defendant alleged that the intimidation statute was overly broad and an infringement on his rights guaranteed by the first amendment to the United States Constitution (similar to Art. II, sec. 7, Mont. Const.). The Supreme Court, relying on Boyle v. Landry, 401 US 77, 97 S Ct 758, 27 L Ed 2d 696 (1971), and Broadrick v. Oklahoma, 413 US 601, 93 S Ct 2908, 37 L Ed 2d 830 (1973), declined to make a "judicial prediction or assumption" that 45-5-203(1)(c) might cause others to refrain from constitutionally protected speech or expression. The activities encompassed by subsection (1)(c) of 45-5-203 (the commission of any criminal offense) are almost exclusively conduct. In that context the overbreadth must be substantial in relation to the statute's plainly legitimate sweep. The fact that the statute might be misapplied in the future to violate the constitutional rights of a party does not render it invalid. The possibility of misapplication does not render the statute overbroad. St. v. Wurtz, 195 M 226, 636 P2d 246, 38 St. Rep. 1808 (1981), overruled in Wurtz v. Risley, 719 F2d 1438 (9th Cir. 1983), holding that the statute violates the first amendment because the mere fact that communication induces or coerces an action in others does not remove it from first amendment protection. The statute was overbroad in that it regulated "pure speech" rather than conduct.

Protective Orders as to Use of Documents — First Amendment Rights: Order precluding plaintiff from using documents, already in his possession and relating to the safety of certain truck rims of defendant, has a chilling effect upon first amendment rights and is subject to close scrutiny. Before a trial court can enter a protective order restraining free expression, the court must find that three criteria exist: (1) the harm posed by dissemination must be substantial and serious; (2) the restraining order must be narrowly drawn and be precise; (3) there must be no alternative means of protecting the public interest that would intrude less directly on expression. In each case the trial court must consider and make necessary findings on each element. No findings were made that justified the court's order, and it was reversed. Kuiper v. District Court, 193 M 452, 632 P2d 694, 38 St. Rep. 1288 (1981).

Prohibition Against Voters' Promise of Support as Unconstitutional: Section 5-7-102(7)(c)(i) from Initiative 85 is an unconstitutional infringement of the right of free speech and is therefore void. The prohibited conduct is nothing more than a standard and accepted means of involvement in the political process. It is a free expression of the only real power an elector possesses. Criticism of government is at the very center of the constitutional protection of free speech. No law could stand that would prevent an elector from voting for or against an incumbent. Likewise, no law can stand that would prevent a voter from expressing to an elected official an intention to vote for or against that official if certain action is or is not taken. Further, the first amendment applies to associations as well as individuals and protects the right of associations to engage in advocacy on behalf of their members. Mont. Auto. Ass'n v. Greely, 193 M 378, 632 P2d 300, 38 St. Rep. 1174 (1981).

Language Requiring Nonlobbying Expenses to Be Disclosed — Unconstitutional: The words "regardless of whether it was paid solely" as used in subsection (5)(c) of 5-7-208, enacted by Initiative 85, are void as a violation of the first amendment right of association which exists as a necessary corollary to the freedoms of speech and assembly. The forced disclosure of contributions and membership fees "regardless of whether . . . paid solely for the purpose of lobbying" compels revelation of information that has no relationship to the ends that the lobbyist disclosure laws and Initiative 85 seek to achieve. That some money is in fact spent for lobbying does not lessen the repugnance of subsection (5)(c) of 5-7-208. Further, the forced disclosure of the name of an individual who contributed $250 reaches too broadly and too blindly into an area that is essential to the exercise of our most basic freedoms. Mont. Auto. Ass'n v. Greely, 193 M 378, 632 P2d 300, 38 St. Rep. 1174 (1981).

Prohibition Against Soliciting Lobbying Efforts as Unconstitutional: Subsection (8)(b) of 5-7-102, enacted by Initiative 85, is unconstitutional and void for vagueness. Facially, subsection (8)(b) constitutes a more drastic infringement of freedom of the press and freedom of speech than was present in Mills v. Alabama, 384 US 214 (1966). Further, the court is unable to find any compelling state interest which requires the enactment of subsection (8)(b). Mont. Auto. Ass'n v. Greely, 193 M 378, 632 P2d 300, 38 St. Rep. 1174 (1981).

Statewide Vote Through Initiative as Demonstrating Compelling State Interest: The absence of factfinding capabilities in the initiative process is not proof of the absence of a compelling state interest in the enactment of Initiative 85. To so hold would result in the emasculation of the initiative process in Montana with a result that no initiative could withstand a first amendment challenge. The statewide vote on Initiative 85 is a demonstration of a compelling state interest in enactment of Initiative 85. The compelling need or state interest in enactment of Initiative 85 is demonstrated by both common understanding and judicial precedent, and no additional evidence need be presented to show compelling state interest. Mont. Auto. Ass'n v. Greely, 193 M 378, 632 P2d 300, 38 St. Rep. 1174 (1981).

Letters Written by Defendant While Incarcerated Inadmissible: Absent a showing of some compelling justifiable purpose in the nature of prison security and discipline, the interception and photocopying of a letter written by the defendant, while in jail, to a friend is violative of the first and fourth amendments to the United States Constitution (similar to Art. II, sec. 7 and 11, Mont. Const.), and such a letter is inadmissible. St. v. Sheriff, 190 M 131, 619 P2d 181, 37 St. Rep. 1793 (1981).

Corporate Free Speech — United States Constitution: Corporations that sought to participate in a campaign involving an initiative proposal were prohibited from doing so by a Montana statute. The court held that the portion of 13-35-227 which totally prohibited payments or contributions by corporations in support of or opposition to ballot issues was an unconstitutional restriction of corporate first amendment to the United States Constitution rights to free speech (similar to Art. II, sec. 7, Mont. Const.). C & C Plywood Corp. v. Hanson, 583 F2d 421 (9th Cir. 1978).

Commercial Speech: Plaintiffs were guaranteed the right to advertise the availability, nature, and prices of their products and services as constitutionally protected commercial speech when the record indicated they made no agreement prohibiting advertising. Bauer v. Chaussee, 173 M 270, 567 P2d 448 (1977).

Breach of Order Barring Public Commentary on Prosecutions: This section did not protect public comments upon pending criminal prosecutions by the Attorney General when acting as a prosecutor and when he participated in proceedings which produced the order. State ex rel. Angel v. Woodahl, 171 M 13, 555 P2d 501 (1976).

LIBEL AND SLANDER

Dismissal Proper: Famed motorcycle stuntman Evel Knievel and his wife Krystal were photographed when they attended ESPN's Action Sports and Music Awards in 2001. The photograph depicted Evel, who was wearing a motorcycle jacket and rose-tinted sunglasses, with his right arm around Krystal and his left arm around another young woman. ESPN published the photograph on its "extreme sports" website with a caption that read "Evel Knievel proves that you're never too old to be a pimp." The Knievels brought suit against ESPN in state court, contending that the photograph and caption were defamatory because they accused Evel of soliciting prostitution and implied that Krystal was a prostitute. The Montana Constitution provision on jury decision on the law and facts of a case in a libel action did not prevent the District Court from granting the television network's motion to dismiss the defamation action. Knievel v. ESPN, 393 F3d 1068 (2005).

Determination of Whether Publication of "Most-Wanted" List Considered Privileged — Abuse of Conditional Privilege as Jury Question: Hale brought defamation and negligence claims against the Billings Police Department for publishing Hale's photograph and personal information and broadcasting the information on a cable television most-wanted fugitive program. The District Court summarily dismissed Hale's claims on grounds that the communication between the police and the media was privileged, either as a proper discharge of an official duty or as part of a judicial proceeding pursuant to 27-1-804. However, the court neglected to determine as a matter of law whether the privilege was an absolute or conditional privilege. Absent a mandate by law that the police provide information regarding arrest warrants to crime prevention programs, the privilege was, at best, conditional. Thus, it was a matter for the jury to determine whether the discharge of the official duty exercised by the police in providing criminal information was proper to the extent that the police did not abuse the privilege. Further, under Sacco v. High Country

Independent Press, Inc., 271 M 209, 896 P2d 411, 52 St. Rep. 407 (1995), statements made by the police as to the facts of the case or the evidence expected to be given are not yet part of the judicial proceeding and are not privileged. Summary judgment was improper. Hale v. Billings Police Dept., 1999 MT 213, 295 M 495, 986 P2d 413, 56 St. Rep. 830 (1999), distinguishing Cox v. Lee Enterprises, Inc., 222 M 527, 723 P2d 238, 43 St. Rep. 1476 (1986).

Public Airing of County's Most-Wanted Fugitive List — Material Facts as to Falsity of Statements Precluding Summary Judgment: Hale brought defamation and negligence claims against the Billings Police Department for publishing Hale's photograph and personal information and broadcasting the information on a cable television most-wanted fugitive program and for failing to pull the information from the program after Hale's arrest. The District Court summarily dismissed Hale's claims on grounds that the information was truthful or, if not truthful, then constitutionally protected and therefore not defamatory. Hale was depicted on the program as a potentially armed and dangerous fugitive. However, Hale's warrant for domestic abuse was chosen randomly from 3,000 to 5,000 outstanding warrants on file, and his whereabouts was known at all times by the police, suggesting that under the plain meaning of the terms, Hale was not accused of using a weapon and thus could not be considered "armed and dangerous", and was not a "most-wanted" suspect or a "fugitive" from justice. Clarifying Roots v. Mont. Human Rights Network, 275 M 408, 913 P2d 638, 53 St. Rep. 205 (1996), the Supreme Court held that it was improper for the District Court to create an artificial dichotomy by distinguishing statements of opinion from statements of fact, thereby granting unqualified immunity to the former. Citing Restatement (Second) of Torts 617 (1965), the court held that if an opinion is not based on disclosed facts and, as a result, creates the reasonable inference that the opinion is based on undisclosed defamatory facts, that opinion is not afforded constitutional protection. Without that protection, genuine issues of fact regarding the falsity of the statements made during the broadcast remained, making summary judgment improper. Further, the issue remained as to what constituted timely notification of Hale's arrest to the media by the police to avoid breach of their duty not to infringe on Hale's rights. Summary judgment was reversed, and the case was remanded. Hale v. Billings Police Dept., 1999 MT 213, 295 M 495, 986 P2d 413, 56 St. Rep. 830 (1999), following Milkovich v. Lorain Journal Co., 497 US 1, 111 L Ed 2d 1, 100 S Ct 2695 (1990).

Criminal Defamation Statute Unconstitutionally Overbroad: In a civil action for defamation, truth is an absolute defense barring any recovery by plaintiff. However, under the criminal defamation statute, 45-8-212, truth is not allowed as an absolute defense, impermissibly requiring the defendant to prove that the material, even if true, was communicated in good faith and for justifiable ends. Citing numerous cases, the Supreme Court held that in prohibiting truthful criticism, 45-18-212 is overbroad and a violation of the 1st and 14th amendments to the United States Constitution and this section. A showing of good motives and justifiable ends is not required to avoid liability for criminal defamation. Truth alone is sufficient as an absolute defense. St. v. Helfrich, 277 M 452, 922 P2d 1159, 53 St. Rep. 741 (1996).

Plaintiff as Limited Public Figure — Summary Judgment Held Improper: The Montana Human Rights Network (MHRN) published a booklet in which it identified Roots as a "Ku Klux Klan organizer". When Roots sued for libel, the MHRN moved for summary judgment on the basis of Roots' status as a public figure. The District Court granted the motion. The Supreme Court held that the motion for summary judgment was incorrectly granted because the MHRN had the burden of proving that there was no question of material fact as to Roots' status as a Ku Klux Klan organizer. The evidence introduced by the MHRN and affidavits introduced by Roots showed only that Roots may have had some sympathy for the Klan, but left genuine issues of fact as to whether he'd been a Klan organizer and as to whether Roots was a public figure for limited purposes. Roots v. Mont. Human Rights Network, 275 M 408, 913 P2d 638, 53 St. Rep. 205 (1996).

Attorney Not Public Figure as Matter of Law — Summary Judgment Improperly Granted: Defendant attorney filed a defamation action against the Great Falls Tribune for damages arising from a published article, later retracted, that incorrectly reported that he was sought for criminal charges. In reversing the judgment and remanding the case, the Supreme Court held that the District Court erred in granting summary judgment because its factors did not specify with sufficient particularity the rationale underlying its ruling that the defendant was a public figure as a matter of law. This section provides that in libel suits, the facts and the law are determined by the jury under the direction of the court. Review of the record revealed the existence of genuine issues of material fact that must be determined by a jury. Kurth v. Great Falls Tribune Co., 246 M 407, 804 P2d 393, 48 St. Rep. 13 (1991), followed in Lence v. Hagadone Inv., 258 M 433, 853 P2d 1230, 50 St. Rep. 601 (1993).

Investigative Responsibility of Newspaper Before Publishing: A newspaper has a duty to investigate before publishing when it has facts that indicate material is highly suspect. The Supreme Court remanded this case upon finding that a jury instruction defining "reckless disregard of the truth" as being equivalent to having serious doubts about the truth tended to shield a newspaper from its investigative responsibility. Sible v. Lee Enterprises, Inc., 224 M 163, 729 P2d 1271, 43 St. Rep. 2101 (1986).

Truth Defense — Law Clear That Statement Must Be True at Time Made — Frivolous Appeal: The plaintiff brought a malpractice action against certain attorneys, alleging a failure to introduce evidence supporting the defense of truth of a defamatory statement made by the plaintiff. On appeal from a summary judgment against the plaintiff, the Supreme Court found that the appeal was so frivolous as to warrant summary dismissal. The court pointed out that the law is clear that for the defense of truth to apply, an allegedly defamatory statement must be true when it is made, which was not the case with the plaintiff's statement, so that even if the attorneys had attempted to introduce the evidence it would have been ruled inadmissible. Lussy v. Davidson, 210 M 353, 683 P2d 915, 41 St. Rep. 360 (1984).

What Constitutes "Public Figure" for Purpose of Libel Defense — Summary Judgment Properly Granted: The plaintiff, a commodities broker who had some public notoriety within the state as a result of his membership in and speeches to political organizations and as a result of articles about him appearing in national publications, brought a libel action against the defendant. The Supreme Court held that the District Court did not err in granting summary judgment for the defendant, holding the plaintiff to be a public figure as a matter of law (and therefore requiring actual malice to be proven by the plaintiff), as there was no absolute prohibition in the Montana Constitution against granting summary judgment in a libel case and because the plaintiff had a general fame or notoriety in the state and exhibited pervasive involvement in the affairs of society. Williams v. Pasma, 202 M 66, 656 P2d 212, 39 St. Rep. 2332 (1982), followed in Lence v. Hagadone Inv., 258 M 433, 853 P2d 1230, 50 St. Rep. 601 (1993).

Abuse of Liberty: Since the statutory definition of libel was on the books at the time of the adoption of the Montana Constitution and since libel is referred to in other constitutional provisions, "abuse of that liberty" within the meaning of Art. II, sec. 7, Mont. Const., includes a publication that fits the statutory definition of libel. Madison v. Yunker, 180 M 54, 589 P2d 126 (1978).

Constitutionality of Retraction Provision: Sections 27-1-814 through 27-1-817 (now repealed), barring a libel action unless the defendant was given an opportunity to correct the libelous matter, were unconstitutional as being in contravention of Art. II, sec. 16, Mont. Const., which mandates state courts to be open to every person and to afford a remedy for every injury to character, and Art. II, sec. 7, Mont. Const., which provides that a person is responsible for abusing the freedom of the press. Madison v. Yunker, 180 M 54, 589 P2d 126 (1978), followed in Lence v. Hagadone Inv., 258 M 433, 853 P2d 1230, 50 St. Rep. 601 (1993).

Public Officials and Public Figures: For purposes of determining the appropriate standard of care and damages in a defamation suit, whether the plaintiff is a public official, public figure, or private person is a question for the jury to determine. Madison v. Yunker, 180 M 54, 589 P2d 126 (1978).

FREEDOM OF THE PRESS

Release of Redacted Student Disciplinary Records Not Violative of Family Educational Rights and Privacy Act: A Cut Bank newspaper sought redacted student disciplinary records related to school board actions following a BB gun incident at a local school. The District Court held that the federal Family Educational Rights and Privacy Act of 1974 (FERPA), 20 U.S.C. 1232(g), prohibited the school board from releasing the names of the students, any violations committed, and any action imposed without the consent of the students and their parents. The Supreme Court disagreed. The newspaper specifically requested that students' names be redacted from the disciplinary records and thus sought no information that would personally identify any students involved. Because FERPA does not prohibit disclosure of records that do not reveal personally identifying information, there was no basis under FERPA for the board's refusal to release the redacted public documents to the newspaper, nor was the newspaper's request clearly outweighed by any privacy interest at issue. The newspaper was therefore entitled to a redacted copy of the board's disciplinary records regarding disciplinary measures imposed on the students, and the District Court was reversed. Bd. of Trustees, Cut Bank Pub. Schools v. Cut Bank Pioneer Press, 2007 MT 115, 337 M 229, 160 P3d 482 (2007).

DECISIONS UNDER 1889 CONSTITUTION

FREEDOM OF SPEECH

Comment on Courts — After Disposition of Case: Bank president's statement that he was displeased with verdict against bank and that jurors could not expect to do business with bank was valid exercise of free speech under Art. III, sec. 10, 1889 Mont. Const., since statement was made 22 days after final disposition of case and since court of which jury is a part is not above individual criticism after case is disposed of. State ex rel. Polish v. District Court, 156 M 220, 478 P2d 270 (1970).

Contempt Proceeding Not Violative of Provision: Motion to quash citation of attorney in proceeding for contempt of the Supreme Court, asserting that the proceeding was violative of respondent's rights under Art. III, sec. 10, 1889 Mont. Const., and of the first amendment to the United States Constitution, was denied. State ex rel. Hall v. Niewoehner, 116 M 437, 155 P2d 205 (1944).

Intent: Article III, sec. 10, 1889 Mont. Const., was not intended to extend immunity for every use or abuse of language, the fundamental idea conveyed by it being penalty for a violation of the privilege, not prevention of its abuse. Tipton v. Sands, 103 M 1, 60 P2d 662 (1936).

Immunity Not Extended to Seditious Utterances During War: The immunity granted by Art. III, sec. 10, 1889 Mont. Const., did not extend to seditious utterances during time of war, and the Sedition Act of the Extraordinary Session of 1918 was not invalid. St. v. Kahn, 56 M 108, 182 P 107 (1919).

Abuse of Privilege: The right of free speech is guaranteed by the Montana Constitution. It is declared that no law shall be enacted impairing it and that every person shall be free to speak, write, or publish whatever he will on any subject. At the same time, it leaves a way open by which everyone who abuses his privilege may be brought to account. Kelly v. Independent Publishing Co., 45 M 127, 122 P 735 (1912).

Comment on Courts: The constitutional freedom of speech mentioned in Art. III, sec. 10, 1889 Mont. Const., includes the right to discuss court matters that have no tendency to affect the merits or results of particular cases pending. In re Shannon, 11 M 62, 27 P 352 (1891).

FREEDOM OF THE PRESS

Destruction of Public Confidence in the Court: While one might publish decisions of the court, comment upon them freely, and discuss their correctness, it is abuse of liberty of the press to destroy public confidence in the court and encourage disregard of its orders by false and defamatory publications. In re Nelson, 103 M 43, 60 P2d 365 (1936).

Injunction Not Applicable: The second clause of Art. III, sec. 10, 1889 Mont. Const., was not solely addressed to the Legislature, but under it the courts as well were without authority to restrain one by injunction from publishing what he pleased, though it imposed responsibility for all abuse of that liberty. Empire Theatre Co. v. Cloke, 53 M 183, 163 P 107 (1917).

Labor Publication: Under Art. III, sec. 10, 1889 Mont. Const., a court could not enjoin a labor organization from publishing a circular calling upon all laboring men and those in sympathy with organized labor not to patronize a certain business house characterized therein as "unfair", although the persons comprising the organization were insolvent and an abuse of the liberty guaranteed by the Constitution may result in loss for which there cannot be any adequate compensation. Lindsay & Co. v. Fed'n of Labor, 37 M 264, 96 P 127 (1908). See also Empire Theatre Co. v. Cloke, 53 M 183, 163 P 107 (1917).

Inaccurate Report of Court Proceedings: Article III, sec. 10, 1889 Mont. Const., was not violated by a statute making the publication of a false and grossly inaccurate report of the proceedings of any court punishable both as a contempt and as a misdemeanor. State ex rel. Haskell v. Faulds, 17 M 140, 42 P 285 (1895).

Rights and Responsibilities of the Press: While Art. III, sec. 10, 1889 Mont. Const., secured the largest liberty to the press, it also imposed responsibilities. It was a statute of liberty, not of "licentious scandal". The liberty of the press is one thing; the "abuse of that liberty" is quite another. State ex rel. Haskell v. Faulds, 17 M 140, 42 P 285 (1895).

LIBEL AND SLANDER

Rules of Practice: While under Art. III, sec. 10, 1889 Mont. Const., the jury in libel suits determines the law and the facts, the function of the court and jury is not greatly different from what it is in other cases. Thus, it is for the court and not the jury to pass upon the admissibility of evidence, upon motions for nonsuit or for a directed verdict, and upon motions for new trial and motions to set aside verdicts or vacate judgments, and so libel suits, though sui generis, are

subject to those rules of practice found wise and useful in administering justice generally in the courts. Griffin v. Opinion Publishing Co., 114 M 502, 138 P2d 580 (1943).

Question of Privilege: Notwithstanding the provision of Art. III, sec. 10, 1889 Mont. Const., which provided that in an action for libel the jury shall determine the law as well as the facts, the question whether an alleged libelous communication is privileged or not is one for determination by the court as one of law, and where it was privileged and there was no evidence of malice presented, the court properly withdrew the case from the jury by granting defendant's motion for nonsuit. Manley v. Harer, 82 M 30, 264 P 937 (1928).

Refusal to Follow Court's Advice: In libel cases, since the Montana Constitution provides that in such cases "the jury, under the direction of the court, shall determine the law and the facts", the refusal of the jury to follow the advice of the court on the question of the libelous nature of the publication is no ground for granting a new trial. Harrington v. Butte Miner Co., 48 M 550, 139 P 451 (1914).

Jury — Under Direction of Court: Except in prosecutions for libel, wherein the jury, "under the direction of the court, shall determine the law and the facts", the court shall declare the law and the jury shall determine the facts. Allen v. Bear Creek Coal Co., 43 M 269, 115 P 673 (1911).

Criminal or Civil Remedy: The language of Art. III, sec. 10, 1889 Mont. Const., was not susceptible of any other meaning than this: that the individual citizen cannot be prevented from speaking, writing, or publishing whatever he will on any subject. If, however, what he writes or publishes constitutes a criminal libel, he may be held responsible for the abuse of the liberty in a criminal prosecution, or if what he speaks, writes, or publishes wrongfully infringes the rights of others, he may be held responsible for the abuse in a civil action for damages. Lindsay & Co. v. Fed'n of Labor, 37 M 264, 96 P 127 (1908).

Role of Court: While the jury has the power to determine the law and facts in an action for libel, it is the duty of the court to give the jury a correct declaration of the legal principles involved, and an erroneous instruction to the prejudice of a party is cause for reversal. Paxton v. Woodward, 31 M 195, 78 P 215 (1904). See also St. v. Koch, 33 M 490, 85 P 272 (1905).

Express Provision: The doctrine that the jury are the judges of the law as well as the facts is not recognized in this jurisdiction, except, possibly, in prosecutions for libel, which are regulated by express constitutional provision. King v. Lincoln, 26 M 157, 66 P 836 (1901).

Right of Jury to Determine Law: The system of practice of this state is based upon the theory that it is the province of the jury to determine the facts and that of the court to determine and declare the law in all cases except in prosecutions for libel. The clause conferring upon the jury, under the direction of the court, the power to determine the law and the facts appears to make it plain that the jury has no right to determine the law in any other case. Murray v. Heinze, 17 M 353, 42 P 1057 (1895).

Attorney General's Opinions

Right of Public Officer or Employee to Support or Oppose Political Candidate or Ballot Issue: Although 2-2-121 sets forth rules of conduct for public officers and employees, it is not personal political speech that is prohibited, but rather the use of public time or resources in the presentation or furtherance of political speech. Thus, a public officer or employee may engage in political speech, including the support or opposition of a candidate or ballot issue, as long as the political speech does not involve the use of public time, facilities, equipment, supplies, personnel, or funds. 51 A.G. Op. 1 (2005).

Regulation of Live Dance Performance in Licensed Liquor Establishment — Abridgment of Free Expression: The validity of a city ordinance regulating live dance performances in establishments licensed to serve liquor must be measured against free expression standards imposed by Art. II, sec. 7, Mont. Const., and the first amendment to the U.S. Constitution. Therefore, a proposed city ordinance prohibiting any live performance involving dance or the removal of clothing in licensed liquor establishments is an unconstitutional abridgment of the constitutional standards because: (1) it fails to distinguish carefully between protected and unprotected conduct; and (2) the requisite governmental interest in regulating such conduct has not been sufficiently established. 41 A.G. Op. 75 (1986).

Gathering Initiative Petition Signatures at Primary Election Polling Places: The orderly gathering of initiative petition signatures at primary election polling places that does not interfere with the election process or obstruct voter access to the polling place may not be prohibited. Any interference with the initiative process must be narrowly construed in light of the state constitution's provisions guaranteeing an open initiative process. 39 A.G. Op. 62 (1982).

Law Review Articles

Trailing in the Wake: The Freedom of Speech in Montana, Wolff, 77 Mont. L. Rev. 61 (2016).

State Constitutional Design and State Constitutional Interpretation, Tarr, 72 Mont. L. Rev. 7 (2011).

Morse v. Frederick: Locking the "Schoolhouse Gate" on the First Amendment, Giuttari, 69 Mont. L. Rev. 447 (2008).

State v. Robinson: Free Speech, or Itchin' for a Fight?, Korver, 65 Mont. L. Rev. 385 (2004).

Montana's Role in the Free Speech vs. Equal Speech Debate, Lopach, 60 Mont. L. Rev. 475 (1999).

Montana's Criminal Syndicalism Statute: An Affront to the First Amendment, Reger, 58 Mont. L. Rev. 287 (1997).

Fair Trial and Free Press: The Courtroom Door Swings Open, Carey, 45 Mont. L. Rev. 323 (1984).

Political Patronage and the First Amendment: To the Victor Go Fewer Spoils, Rotering, 38 Mont. L. Rev. 365 (1977).

First Amendment Rights of Non-Tenured Teachers, Parish, 37 Mont. L. Rev. 215 (1976).

The Right to Dissent in a Free Society, Cromley, 32 Mont. L. Rev. 215 (1971).

Unauthorized Practice of Law—First and Fourteenth Amendments Give Union the Right to Hire Attorney on Salary to Represent Workmen's Compensation Claims of Members, Murphy, 29 Mont. L. Rev. 220 (1968).

The Contempt Power in Montana: A Cloud on Freedom of the Press, Hansen, 18 Mont. L. Rev. 68 (1956).

Peaceful Picketing as an Exercise of Free Speech, Williams, 11 Mont. L. Rev. 68 (1950).

Section 8. Right of participation.

Convention Notes

New provision creating a right of the people to participate in the decision making process of state and local government.

Case Notes

Individual Privacy Outweighed by Public's Right to Know — Position of Public Trust: The respondents sought information under the public's constitutional right to know from the petitioner school district concerning an individual who held a position of public trust. The petitioner sought judicial review of the documents to be released. The District Court conducted an in camera review, ruling that the public's right to know outweighed the individual's privacy interests for several documents in the individual's personnel file. On appeal, the Supreme Court affirmed, holding that for a person occupying a position of public trust, there is no blanket exemption from the public's right to know simply because the documents are contained in a personnel file. In re Petition of Missoula County v. Bitterroot Star, 2015 MT 95, 378 Mont. 451, 345 P.3d 1035.

Unlawful Closure of Executive Session Remedied by Subsequent Public Meetings: A citizens' group challenged the city's closure of an executive session in which the city commission discussed finalists for a city manager position. The District Court ruled in favor of the city. On appeal, the Supreme Court affirmed, holding that although the commission should have determined whether the demands of individual privacy exceeded the merits of public disclosure before closing the executive session, the commission allowed subsequent opportunities for public comment on the decision prior to making a final decision. Citizens for Open Gov't, Inc. v. Polson, 2015 MT 55, 378 Mont. 293, 343 P.3d 584, following Allen v. Lakeside Neighborhood Planning Comm., 2013 MT 237, 371 Mont. 310, 308 P.3d 956, and Common Cause of Mont. v. Statutory Comm'n to Nominate Candidates for Comm'r of Political Practices, 263 Mont. 324, 868 P.2d 604 (1994).

Related Constitutional Provisions — Inextricable Link: The plaintiffs sued the Fish, Wildlife, and Parks Commission for not providing adequate notice of a meeting at which the Commission voted to expedite the closing of the wolf hunting season. The District Court granted a temporary restraining order and ultimately awarded attorney fees under Art. II, sec. 8 and 9, Mont. Const. On appeal, the Commission argued that 2-3-221 allows for recovery only under Art. II, sec. 9, claims. The Supreme Court disagreed, holding that the two sections share a fundamental link and are inextricably associated with each other. Citizens for Balanced Use v. Fish, Wildlife & Parks Comm'n, 2014 MT 214, 376 Mont. 202, 331 P.3d 844.

Violation of Open Meeting Laws — Attorney Fees Awarded — Prevailing Party Despite No Final Judgment: The plaintiffs sued the Fish, Wildlife, and Parks Commission for not providing adequate notice of a meeting at which the Commission voted to expedite the closing of the wolf hunting season. The District Court granted a temporary restraining order and ultimately awarded attorney fees. During litigation, the Legislature enacted a law prohibiting the Commission from implementing certain hunting closures, rendering the litigation moot. On appeal, the Commission

argued that attorney fees were not appropriate because a final judgment was never issued. The Supreme Court disagreed, holding that the plaintiffs were a prevailing party because the preliminary injunction produced the same result as a final judgment and there was no remaining underlying controversy to litigate. Citizens for Balanced Use v. Fish, Wildlife & Parks Comm'n, 2014 MT 214, 376 Mont. 202, 331 P.3d 844.

Commissioners' One-on-One Discussions Before Meeting Not Subject to Right to Know: Because a majority of District and Apportionment Commission members never convened or deliberated as a public body, Art. II, sec. 9, Mont. Const., and the right to know provisions in Title 2, ch. 3, part 2, were not implicated. Willems v. St., 2014 MT 82, 374 Mont. 343, 325 P.3d 1204.

Districting and Apportionment Commission Part of Legislative Branch: The Districting and Apportionment Commission is exempt from the public participation requirements of Art. II, sec. 8, Mont. Const., and statutes regarding participation in government because the Commission is attached to the Legislative Branch and is not an agency and thus not a part of the Executive Branch. Willems v. St., 2014 MT 82, 374 Mont. 343, 325 P.3d 1204.

Failure to File Right to Know and Participate Claim Within Statute of Limitations — Application of Common-Law Equitable Tolling: The plaintiff's right to know and right to participate claims against a decision of the Custer County Commissioners that was made in an unnoticed meeting were dismissed by the District Court as being time-barred, even though the existence of the meeting was not revealed until 4 years later. Although 2-3-114 and 2-3-213 were later amended with a discovery tolling provision, the amended versions were not in effect when the meeting was held. The Supreme Court reversed the District Court, holding that common-law equitable tolling principles applied since the plaintiff, despite his diligent scrutiny of the Commissioners' actions, would not have learned about the decision until 4 years later when it was inadvertently revealed in another meeting. Schoof v. Nesbit, 2014 MT 6, 373 Mont. 226, 316 P.3d 831.

Standing to Pursue Right to Know and Participate Claims When Citizen Subject to Governmental Agency's Jurisdiction: A local citizen who followed county budget decisions brought an action challenging a decision that was made by the Custer County Commissioners during an unnoticed meeting 4 years earlier to allow elected county officials to receive cash payments in lieu of county contributions to a group health insurance program. The District Court concluded that the citizen lacked standing to pursue the claims. The Supreme Court reversed and held that the citizen, as a resident of Custer County subject to the county's jurisdiction, had a sufficiently concrete injury to establish standing. Schoof v. Nesbit, 2014 MT 6, 373 Mont. 226, 316 P.3d 831, overruling Fleenor v. Darby Sch. Dist., 2006 MT 31, 331 Mont. 124, 128 P.3d 1048, to the extent Fleenor requires a plaintiff in a right to know or right to participate case to allege an injury beyond failure to receive notice or to allege a personal stake in a particular governmental decision.

August Meeting's Compliance With Open Meeting Laws and Rights to Know and Participate — Earlier Violations Remedied: A proper meeting held after an improper meeting abrogated the earlier noncompliance and satisfied the requested remedy of reconsideration of the earlier decision. Zunski v. Frenchtown Rural Fire Dept. Bd. of Trustees, 2013 MT 258, 371 Mont. 552, 309 P.3d 21.

City Council Denial of Subdivision Exemption Not Violative of Constitutional Protections: The Missoula City Council denied plaintiffs' applications for exemptions from subdivision requirements, and plaintiffs appealed on grounds that denial of the applications constituted violations of constitutional rights of equal protection and public participation, was a taking, and was a tortious violation of the city council's statutory duties. The District Court granted summary judgment for the city on all the claims and plaintiffs appealed, but the Supreme Court affirmed. The equal protection argument was merely a bald assertion that was largely unclear and poorly supported, failing to demonstrate a discriminatory purpose, and was properly dismissed on summary judgment. The takings claim failed because plaintiffs never possessed a right to obtain an exemption, but instead only lost the opportunity to obtain an exemption, and the discretion to grant or deny the exemption was properly exercised by the city council. Plaintiffs raised the public participation claim in District Court but failed to discuss the issue in briefs on appeal, so the Supreme Court declined to consider the issue. The claim of a tortious violation of the city council's statutory duties also failed as a cognizable negligence claim because plaintiffs failed to prove that the council's actions damaged plaintiffs. Roe v. Missoula, 2009 MT 417, 354 M 1, 221 P3d 1200 (2009). See also Gudmundsen v. State ex rel. Mont. St. Hosp. Warm Springs, 2009 MT 56, 349 M 297, 203 P3d 813 (2009).

Sufficient Notice of Interim Zoning Hearing: Plaintiff contended that because the public notice requirements applicable to standard zoning were not applied to a hearing on interim zoning, the interim zoning measures were void. The Supreme Court noted that the hearing was widely publicized and that plaintiff in fact attended the meeting and offered comments. Because plaintiff received actual notice and had the opportunity to be heard, constitutional public notice requirements were essentially satisfied. The court also noted that the law has long recognized that actual attendance and participation may constitute a waiver of alleged deficiencies of notice. Therefore, any error in the public notice of the interim zoning hearing was harmless. Liberty Cove, Inc. v. Missoula County, 2009 MT 377, 353 M 286, 220 P3d 617 (2009). See also Knode v. Williamson, 84 US 586 (1873).

Conservation District Afforded Public Fundamentally Fair Participation in Process: Though exempt from the dictates of the Montana Administrative Procedure Act as a political subdivision of the state, the conservation district followed its own rules, provided notice, and allowed an extended opportunity for the submission of oral and written information in deciding Mitchell Slough's status under The Natural Streambed and Land Preservation Act of 1975, also known as the "310 Law", Title 75, chapter 7, part 1. Bitterroot River Protective Assoc., Inc. v. Bitterroot Conserv. Dist., 2008 MT 377, 346 M 507, 198 P3d 219 (2008).

Lack of Standing of Person Who Fails to Allege Personal Interest or Injury: Fleenor brought an action for violation of her right to know and right to participate in a school district's decision to hire a new superintendent on grounds that she was not properly notified of votes. The suit was brought by Fleenor as a citizen of Montana and resident of the county and the school district. The District Court dismissed the suit for lack of standing, and Fleenor appealed, asserting that standing existed by virtue of her status as an interested party and that a liberal interpretation of the constitution regarding a citizen's right to know and participate included anyone with an interest in enforcing the broad constitutional policies and protections. The Supreme Court disagreed. To establish standing, a complaining party must clearly allege a past, present, or threatened injury to a property right or a civil right and allege that the injury is personal to the claimant and distinguishable from injury to the public generally. Additionally, the challenged action must result in a concrete adverseness personal to the party staking a claim in the outcome. However, simply being an informed and interested citizen is insufficient to confer standing. Fleenor made no assertion of injury and did not establish a personal, concrete adverseness that would result from the school district's action and thus failed to meet the threshold for establishing standing. The District Court was affirmed. Fleenor v. Darby School District, 2006 MT 31, 331 M 124, 128 P3d 1048 (2006), following Flesh v. Bd. of Trustees, 241 M 158, 786 P2d 4 (1990), Carter v. Dept. of Transportation, 274 M 39, 905 P2d 1102 (1995), and Bryan v. Yellowstone County Elementary School District No. 2, 2002 MT 264, 312 M 257, 60 P3d 381 (2002), followed in Lohmeier v. Gallatin County, 2006 MT 88, 332 M 39, 135 P3d 775 (2006), and followed, with regard to criteria to establish standing, in Bd. of Trustees, Cut Bank Pub. Schools v. Cut Bank Pioneer Press, 2007 MT 115, 337 M 229, 160 P3d 482 (2007). Fleenor was overruled in Schoof v. Nesbit, 2014 MT 6, 373 Mont. 226, 316 P.3d 831, to the extent Fleenor requires a plaintiff in a right to know or right to participate case to allege an injury beyond failure to receive notice or to allege a personal stake in a particular governmental decision for purposes of establishing standing to pursue a claim.

Standard for Publication of Public Notice of County Commission Meetings — Adoption of Formal Guidelines for Public Participation Not Required: Missoula County had policies and procedures for the posting of public meetings to encourage public participation in county business, but the procedures were not formally adopted or published for public distribution under 2-3-103. At a meeting in April 2003, the agenda listed a discussion of adding domestic partner benefits as an amendment to the county employee benefits plan. In May 2003, plaintiffs filed a complaint alleging that the county had failed to give proper notice of the April meeting in violation of the public right to participate in government and sought to void the action of the Board of County Commissioners making the benefits available. The District Court granted summary judgment to the county. Under 2-3-103, notice and public participation are required on actions of significant public interest, and given recent national attention, the issue of adding domestic partner benefits was held to be of significant public interest. However, the statute does not set out a specific method of notification. The standard is simply that a Board of County Commissioners must provide notice that is adequate to ensure public opportunity to participate in the decisionmaking process. Here, the Board published notice of the meeting in the local newspaper, posted notice of the meeting 24 hours in advance, and e-mailed the meeting agenda to the newspaper the day before the meeting. This notice was sufficient to alert plaintiffs, who attended the meeting and

voiced their concerns, as well as the general public. Additionally, the fact that the county did not formally adopt or publish the procedures for public distribution under 2-3-103 was irrelevant because the formal adoption requirement applies only to state agencies. Summary judgment was affirmed. Jones v. Missoula County, 2006 MT 2, 330 M 205, 127 P3d 406 (2006). See also Sonstelie v. Bd. of Trustees, 202 M 414, 658 P2d 413 (1983).

Discretion of District Court Whether to Void School Board Decision: Motta filed a pro se lawsuit against a school district board, contending that the district did not have an appropriate procedure in place for public participation in the decisionmaking process and that because the school board did not adequately publicize a series of negotiation sessions and a special meeting to approve a negotiated agreement between the board and the teachers' union, results of the meeting should be void. The District Court found that the board violated state open meeting laws, granted partial summary judgment for Motta, and ordered that the district submit copies of its public participation procedures and maintain minutes consistent with applicable statutes, but the court did not void the agreement. On appeal, Motta argues that the District Court erred and moved the Supreme Court to void the agreement. The Supreme Court declined. Under 2-3-213, the decision whether to void any decisions reached at a meeting held in violation of state open meeting laws is clearly within the discretion of the District Court, and because that discretion was not abused, the partial summary judgment was affirmed. Motta v. Philipsburg School Bd. Trustees, District No. 1, 2004 MT 256, 323 M 72, 98 P3d 673 (2004).

Public Service Commission Rules Creating Impermissible Presumption of Confidentiality in Trade Secrets: Several media organizations sought access to power company documents filed with the Public Service Commission. Applying its administrative rules, the Commission evaluated the power company's claims of confidentiality against basic trade secret law, found that the company had met the initial burden of establishing trade secrets, and concluded that because the media had presented no evidence or argument to the contrary, the company information was entitled to constitutional protection as a matter of law. The Supreme Court disagreed. To the extent that the Commission's rules relied on mere company representations that the information contained trade secrets, the Commission unconstitutionally shifted the initial burden of proof to the public to challenge the confidentiality claims, creating a presumption of confidentiality that directly conflicted with the public's right to view public records and the Commission's duty to make its records available to the public. The court held that a nonhuman entity seeking protective measures for alleged confidential materials filed with a governmental regulating agency must support its claim with a supporting affidavit making a prima facie showing that the materials constitute property rights that are protected by due process. Further, the showing must be more than conclusory and specific enough for the Commission, any objecting parties, and reviewing authorities to clearly understand the nature and basis of the confidentiality claim. The agency then must review the materials at the time of filing, in accordance with 30-14-402(4)(b) and supporting case law, and make an independent determination whether the materials are in fact property rights entitled to due process protection. To the extent that Commission rules required less, the court directed revision of Commission rules to comport with this holding. Great Falls Tribune v. Mont. Pub. Serv. Comm'n, 2003 MT 359, 319 M 38, 82 P3d 876 (2003).

Dissemination of Incomplete Document Used to Make Decision — Right to Participate Entails Complying With Right to Know: A school district assembled a group of people to research and advise the district on the closure of schools, and a member of the group summarized the closure research information on a computer-generated spreadsheet and delivered various versions of the spreadsheet to various people and groups. The version given the school district contained a system rating the schools and explaining the rating system, but the group of parents that plaintiff belonged to was given a version not containing the rating system when a member of the group requested a copy. The school district told the group that a spreadsheet comparing the schools did not exist. The spreadsheet was a document of a public body subject to public inspection prior to the time that the school district's board met and used the spreadsheet to help determine which schools to close. The school district violated plaintiff's right to examine public documents. At a minimum, the "reasonable opportunity" standard articulated in 2-3-111 and this section for the right to participate demands compliance with the right to know contained in Art. II, sec. 9, Mont. Const. When the school district violated plaintiff's right to know, it reduced what should have been a genuine interchange into a mere formality. Bryan could and did voice her opinion to the school district, but did so without the ratings information contained on the version of the spreadsheet used by the school district. Therefore, the school district also violated her right of participation under this section. The Supreme Court stated that this violation tainted the entire process from start to finish and ruled that the school district's closure decision was

void. The court stated that on remand, the school district should allow plaintiff an opportunity to rebut the closure decision and should then reexamine the decision and affirm or modify it. Bryan v. Yellowstone County Elementary School District No. 2, 2002 MT 264, 312 M 257, 60 P3d 381 (2002).

Advisory Body Meeting Without Notice — Mootness of Issues When Ultimate Action Becomes Final: The committee that recommends a list of persons from whom the Governor may select the Commissioner of Political Practices met, without public notice, to discuss who would be recommended. The Governor appointed a recommended person. A suit was filed to void the appointment on the grounds that the submission of the list was void because there was no notice of the meeting. The committee was granted summary judgment in the District Court, and plaintiffs appealed. Before the appeal was heard, the Senate confirmed the appointment. That the confirmation vested the title to the office in the appointee did not make the appeal and issue moot because alleged violations of the state constitutional right to know and open meeting statutes could occur again, both in the context of this committee and similar advisory entities. To allow an alleged violation to escape judicial scrutiny simply because legal proceedings are not always swift would take away the people's constitutional right to know. Common Cause of Mont. v. Statutory Comm. to Nominate Candidates for Comm'r of Political Practices, 263 M 324, 868 P2d 604, 51 St. Rep. 77 (1994).

Appointment by Governor Not Voided by Failure of Recommending Committee to Give Notice of Meeting at Which Recommended Persons Chosen: The committee that recommends persons to the Governor, who appoints the Commissioner of Political Practices, violated the open meeting law when it met, without public notice, to discuss who would be recommended. The Governor appointed a recommended person, and the Senate confirmed the appointment. Since the Governor is free to disregard the recommended persons, the Governor did not violate the law in appointing one of the recommended persons, and the appointment would not be voided. Common Cause of Mont. v. Statutory Comm. to Nominate Candidates for Comm'r of Political Practices, 263 M 324, 868 P2d 604, 51 St. Rep. 77 (1994).

Decision of Issues on Other Than Constitutional Grounds When Possible: If the open meeting statutes require a meeting of an advisory committee to be open to the public, the court did not have to determine whether the state constitutional right to know provision requires the meeting to be open. It is elementary that courts should avoid constitutional questions if an issue can be otherwise resolved. Common Cause of Mont. v. Statutory Comm. to Nominate Candidates for Comm'r of Political Practices, 263 M 324, 868 P2d 604, 51 St. Rep. 77 (1994).

Failure to Give Notice of Meeting of Committee That Recommends Persons Governor May Appoint as Commissioner of Political Practices: When three members of the four-member committee that recommends a list of persons from whom the Governor may select the Commissioner of Political Practices met to discuss candidates and the transmission of their names to the Governor and gave no public notice of the meeting, the committee violated the open meeting law. Common Cause of Mont. v. Statutory Comm. to Nominate Candidates for Comm'r of Political Practices, 263 M 324, 868 P2d 604, 51 St. Rep. 77 (1994).

"Meeting" Held When Three of Four Members Met to Select Recommended Persons for Position Appointed by Governor: A meeting was held within the meaning of the open meeting law when three members of the four-member committee that recommends a list of persons from whom the Governor may select the Commissioner of Political Practices met to discuss candidates and the transmission of their names to the Governor. Common Cause of Mont. v. Statutory Comm. to Nominate Candidates for Comm'r of Political Practices, 263 M 324,868 P2d 604, 51 St. Rep. 77 (1994).

Meeting Open in Theory Only When No Public Notice Given: The open meeting law requires public notice of a meeting subject to that law. Without public notice, a meeting is open to the public in theory only, not in practice. Common Cause of Mont. v. Statutory Comm. to Nominate Candidates for Comm'r of Political Practices, 263 M 324, 868 P2d 604, 51 St. Rep. 77 (1994).

Public or Governmental Bodies — Committee to Recommend Commissioner of Political Practices Appointees to Governor: The committee that recommends a list of persons from whom the Governor may select the Commissioner of Political Practices is not a board, bureau, commission, or agency within the meaning of those terms as used in the open meeting law. However, the committee is a "public or governmental body" under the plain meaning of those terms as used in that law because it has a clear public and governmental purpose and was created for a specific governmental task and is thus subject to the open meeting law. Common Cause of Mont. v. Statutory Comm. to Nominate Candidates for Comm'r of Political Practices, 263 M 324, 868 P2d 604, 51 St. Rep. 77 (1994).

Government Entities Not Individuals: The Department of Revenue declined to release an audit report prepared by the Multistate Tax Commission, asserting the privacy rights of the organization. The Supreme Court held that the Commission was a government instrumentality. Government entities are not individuals entitled to assert the right of privacy. Pacificorp v. Dept. of Revenue, 254 M 387, 838 P2d 914, 49 St. Rep. 774 (1992).

No Hearing Required Before Issuance of Permit: The Hard Rock Mining Act (HRMA) does not provide for public participation in the decisionmaking process that precedes the issuance of a permit. Thus, the constitutional right to participation and the contested hearing provisions of the Montana Administrative Procedure Act are not invoked. Further, at the time pertinent events transpired, HRMA did not provide opportunity for hearing prior to issuance of a permit. Kadillak v. The Anaconda Co., 184 M 127, 602 P2d 147 (1979), cited in Mont. Health Care Ass'n v. St. Fund, 256 M 146, 845 P2d 113, 50 St. Rep. 1 (1993).

Suspension Period — Effect on Public Participation: The resultant effect of the 180-day period of suspension of proposed rate revisions in 69-12-505 is not to deprive the Consumer Counsel or any other interested member of the public a vehicle for challenging the reasonableness of a motor carrier's proposed intrastate rate increase. State ex rel. Chem. Transport v. Bollinger, 173 M 535, 568 P2d 172 (1977).

"Mini Hearing" by Public Service Commission Limited to "Pass Through Costs" of Purchased Gas and Royalty Expense Constitutional: Commission did not violate constitutional requirements of citizen participation, examination of documents, or due process when it limited the scope of subsequent hearing to cost of purchased gas and royalty expense adjustments and approved resulting rate schedule as just and reasonable when the company's application only sought authority to "pass through" increased gas purchase and royalty costs to consumers in order to maintain existing rate of return and annual net earnings previously approved by the Commission at prior full-scale hearing. Mont. Consumer Counsel, Brazier v. P.S.C. and Mont. Power Co., 168 M 177, 541 P2d 769 (1975).

Attorney General's Opinions

Municipal Entities Subject to Right of Public Participation — Limit on Public Comment: Any municipal entity, including an advisory board, commission, and committee of a City Council, is subject to the right of the public to participate in any action that is of significant interest to the public. However, those municipal entities need not permit public comment on matters that are not of significant interest to the public. 51 A.G. Op. 12 (2005).

Public Notice Required for City Council Meetings — Requirement for Agenda Item for Public Comment on Nonagenda Matters Directed Only to Matters of Significant Public Interest but Applicable to Formal and Informal Council Sessions: Public notice is required for any meeting of a City Council. The mandate imposed upon a City Council to include an agenda item for public comment on nonagenda matters applies only to the extent that the public comments are directed to matters of significant interest to the public, but the City Council is not required to take public comments on matters that are not of significant interest to the public. The mandate applies both to formal City Council meetings and to informal City Council work sessions when no action may be taken. 51 A.G. Op. 12 (2005).

Right of Public to Comment on Nonagenda City Council Items Extended to Matters Involving Individual Privacy — Right of Presiding Officer to Close City Council Meeting to Protect Individual Privacy: The right of the public to comment at a City Council meeting on nonagenda items extends to matters that may involve an interest in individual privacy. However, the presiding office of the City Council retains the power to close a City Council meeting to the public if the presiding officer determines that the interest of individual privacy clearly outweighs the public's right to know. 51 A.G. Op. 12 (2005).

Applicability of Open Meeting and Public Participation Laws to County Commission Meetings — Notice Required in Matters of Significant Public Interest: The gathering of a quorum of County Commissioners to discuss, either among themselves or with members of the public, issues over which the County Commission has authority is a meeting subject to open meeting laws. Meetings involving the consideration of matters of significant public interest, meaning decisions involving more than a ministerial act requiring no exercise of judgment, are subject to public participation mandates, including notice requirements and the opportunity for public participation in the decisionmaking process. Thus, a County Commission that established the hours of 9:30 a.m. to 5 p.m., Monday through Friday, as its regular meeting time for public notice purposes, did not comply with Montana's constitutional and statutory public participation provisions. 47 A.G. Op. 13 (1998). See also 42 A.G. Op. 51 (1988).

Implementation Through MAPA: The Montana Administrative Procedure Act, Title 2, ch. 4, part 3, fulfills the constitutional mandate that citizens of the state be afforded reasonable opportunity for participation in agency operation in the context of rulemaking by providing notice and hearing. 38 A.G. Op. 69 (1980).

Law Review Articles

Going With the Flow: The Montana Court's Conservative Approach to Constitutional Interpretation, Tuholske, 72 Mont. L. Rev. 237 (2011).

The Right to Participate, the Right to Know, and Electronic Voting in Montana, Miller, 69 Mont. L. Rev. 371 (2008).

The Right to Participate and the Right To Know in Montana, Snyder, 66 Mont. L. Rev. 297 (2005).

Section 9. Right to know.

Convention Notes

New provision that government documents and operations be open to public scrutiny except when the right to know is outweighed by the right to individual privacy.

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JUDICIAL DELIBERATIONS

Individual Privacy Outweighed by Public's Right to Know — Position of Public Trust: The respondents sought information under the public's constitutional right to know from the petitioner school district concerning an individual who held a position of public trust. The petitioner sought judicial review of the documents to be released. The District Court conducted an in camera review, ruling that the public's right to know outweighed the individual's privacy interests for several documents in the individual's personnel file. On appeal, the Supreme Court affirmed, holding that for a person occupying a position of public trust, there is no blanket exemption from the public's right to know simply because the documents are contained in a personnel file. In re Petition of Missoula County v. Bitterroot Star, 2015 MT 95, 378 Mont. 451, 345 P.3d 1035.

Statute Not Facially Unconstitutional: Plaintiff, an entity authorized to obtain child abuse information pursuant to 41-3-205, reported allegations of child abuse and neglect at the Swan Valley Youth Academy, which prompted an investigation. Plaintiff was provided a final report and wished to disseminate the report without seeking a court order. Plaintiff filed an action to allow public dissemination and to invalidate 41-3-205(7) as facially unconstitutional because of the alleged failure of the statute to balance the public's right to know against the right of individual privacy. The District Court determined that disclosure of child abuse and neglect records required a case-by-case analysis and review of redacted materials. The court refused to provide plaintiff with prospective relief and granted summary judgment to the state, so plaintiff appealed. The Supreme Court noted that any future report prepared by the state regarding alleged abuse or neglect will present a unique factual scenario that requires a careful balancing of the constitutional provisions at issue, to be conducted according to the mechanism for balancing of interests provided in 41-3-205(2), which then properly permits public disclosure following in camera inspection and further redaction of private information. Thus, in light of the myriad of future factual scenarios to which 41-3-205 must be applied, the statute could not be determined to be facially unconstitutional. Disability Rights Mont. v. St., 2009 MT 100, 350 M 101, 207 P3d 1092 (2009). See also Havre Daily News, LLC v. Havre, 2006 MT 215, 333 M 331, 142 P3d 864 (2006).

Release of Sealed Involuntary Commitment Records — Redacted Records Sufficiently Protective of Personal Privacy Rights: The Montana Advocacy Program (MAP) sought to disclose redacted District Court documents related to T.L.S.'s involuntary commitment for a serious developmental disability after T.L.S. died while residing at the Montana Developmental Center. The District Court held that MAP was required to establish a compelling state interest warranting public disclosure of the sealed court documents and denied the motion to release the court file. On appeal, the Supreme Court noted that the documents were sealed under 53-21-103 but that the commitment proceedings were conducted pursuant to Title 53, ch. 20, part 1, which does not contain any provisions relating to sealing and opening court records. Therefore, 53-21-103 did not apply, and MAP was not required to establish good cause before the court record could be opened. It was not disputed that the records were subject to public inspection under the constitutional

right to know, which is presumed absent a showing of individual privacy rights sufficient to override the right to know, so the District Court erred in requiring MAP to show a compelling state interest. Thus, the question was whether T.L.S.'s privacy interest clearly exceeded the merits of public disclosure. It is the party asserting individual privacy rights that carries the burden to establish that those privacy rights exceed the merits of public disclosure. MAP contended, and the Supreme Court agreed, that the merits of public disclosure were substantial in light of the need to inform the public regarding the actions of the officials and employees involved in the commitment proceedings and to effectively advocate for legislative, administrative, and judicial reforms for the protection of the developmentally disabled. The Supreme Court concluded that T.L.S.'s privacy interests were sufficiently protected by redacting personal information from the record and ordered that the redacted documents be immediately released. In re T.L.S. v. Mont. Advocacy Program, 2006 MT 262, 334 M 146, 144 P3d 818 (2006).

Possible Deferred Prosecution Agreement Not Considered Confidential Criminal Justice Information — Discussion by Prosecutor With Newspaper of Possible Deferred Prosecution Agreement Not Privacy Violation or Breach of Duty: Plaintiff alleged that the County Attorney negligently breached a legal duty and violated the Montana Criminal Justice Information Act of 1979 when the County Attorney told a local newspaper that plaintiff was considering a deferred criminal prosecution agreement. Plaintiff asserted that the information was confidential and that dissemination of the information was tortious. The District Court granted summary judgment to defendant. On appeal, the Supreme Court noted that criminal justice information is defined as information relating to criminal justice that is collected, processed, or preserved by a criminal justice agency and held that mere discussion of a possible deferred criminal prosecution agreement does not constitute a discussion of criminal justice information. Although there may be circumstances in which a person suspected of having committed a crime has a reasonable expectation that the person's privacy will not be violated by the release of details of an investigation, plaintiff here could not seriously claim a privacy violation when it was already public knowledge that the allegations were against her, what the allegations were, who was involved as complainants, that she was the subject of a school board investigation concerning the allegations, and that her intended retirement from teaching was connected to the allegations. There was no material issue of fact concerning whether the County Attorney negligently breached a duty owed to plaintiff by discussing a possible deferred criminal prosecution agreement with the newspaper or by releasing a copy of the initial offense report, and summary judgment was affirmed. Svaldi v. Anaconda-Deer Lodge County, 2005 MT 17, 325 M 365, 106 P3d 548 (2005), following Great Falls Tribune Co., Inc. v. Sheriff, 238 M 103, 775 P2d 1267(1989), and Citizens to Recall Mayor James Whitlock v. Whitlock, 255 M 517, 844 P2d 74 (1992).

Judicial Standards Commission Proceedings Not Violative of Constitutional Confidentiality Provisions: Records of the Judicial Standards Commission are confidential until the filing of a formal complaint. After a formal complaint is filed, certain papers, proceedings, and records of proceedings become accessible to the public. In order to protect the reputation of innocent judges wrongfully accused of misconduct, to maintain confidence in the judiciary by avoiding premature disclosure of alleged misconduct, and to encourage retirement as an alternative to costly lengthy formal proceedings and to protect Commission members from outside pressures, a complaint against a judicial officer is confidential until the Commission finds good cause to order a hearing, at which time the Legislature has determined that the public's right to know outweighs the individual judge's right to privacy. In this case, defendant argued that the Commission unlawfully provided copies of an investigation file to its members and the prosecutor, who in turn filed it as an exhibit during the formal hearing, making the matter a public record. The investigation file was never admitted into evidence during the hearing; however, it was included in the bound volume of prosecution exhibits. Defendant did not object at the hearing to inclusion of the file with other admitted exhibits, and thus waived any argument on appeal concerning a breach of privacy. Harris v. Smartt, 2002 MT 239, 311 M 507, 57 P3d 58 (2002).

In Camera Review of Criminal Justice Information Required to Balance Privacy Interests Against Right to Know: As part of its complaint, the Lincoln County Board of County Commissioners requested an evidentiary hearing, seeking the release of criminal justice system information related to an investigation of the Commission by the state. The state Criminal Investigation Bureau contended that the investigative file contained confidential information, the release of which would compromise both the investigation and the privacy interests of informants and witnesses. The District Court canceled the hearing, denied the request for dissemination of the investigative materials, and dismissed the complaint with prejudice. On appeal, the Supreme Court reversed, noting that an analysis of potentially competing privacy interests of the parties

was necessary in order to balance those interests against the Commission's right to know. On remand, the District Court was instructed to conduct an in camera inspection of the investigative file in order to determine what material could be released to the Commission while maintaining the privacy of witnesses and informants and was instructed to limit the release of any investigative information by protective order. Lincoln County Comm'n v. Nixon, 1998 MT 298, 292 M 42, 968 P2d 1141, 55 St. Rep. 1222 (1998).

Water Rights Decree "Updated" Without Notice or Hearing — No Violation of Right to Know Found — Possible Due Process Violation — Attorney Fees Denied: Jones discovered that her water right set forth in a 1902 court decree had been "updated" by the judges of the Fourth Judicial District and the terms of the 1902 decree had been changed in the process, all without notice and hearing for Jones. The Supreme Court, distinguishing Assoc. Press v. St., 250 M 299, 820 P2d 421 (1991), and noting that the methods used by the Fourth Judicial District Court may be a violation of due process rights, held that since there was no court order, statute, or other action preventing access to documents or observance of deliberations, there was no violation of the right to know and therefore no attorney fees were awardable pursuant to 2-3-221. State ex rel. Jones v. District Court, 283 M 1, 938 P2d 1312, 54 St. Rep. 460 (1997).

Lack of Evidentiary Hearing to Determine Whether Dissemination of Trial Information Would Jeopardize Trial Fairness — Media Involvement — "Pretrial Proceeding" Construed: The District Court did not conduct an evidentiary hearing or consider reasonable alternatives before issuing an order barring anyone involved in a criminal case from disseminating evidentiary information to the press or public and sealing evidentiary documents. The Missoulian newspaper sought to reverse the gag order. The Supreme Court, exercising supervisory control, applied the phrase "pretrial proceeding" in 46-11-701 to include all documents filed in conjunction with the pretrial process, regardless of whether the documents constitute records of a specific court hearing. Even though the gag order was entered with the consent of both counsel, that consent did not override the clear intent of 46-11-701 to balance the public's right to know with the defendant's right to a fair trial, a balancing that can only be accomplished by including the media in the decisionmaking process. Evidentiary materials filed with the court also fall within the public's constitutional right to know. Based on the District Court's failure to comply with 46-11-701, the Supreme Court reversed the order sealing court documents and remanded. State ex rel. The Missoulian v. District Court, 281 M 285, 933 P2d 829, 54 St. Rep. 175 (1997).

Participant Gag Order — Indirect Restraint of Media — Conditions for Issuance of Gag Order: A participant gag order is not as intrusive as a prior restraint upon publication or as intrusive as an order restricting news sources through closure of court proceedings or sealing of court documents, but instead constitutes an indirect restraint. A participant gag order does nevertheless impinge on the media's right to access news and the public's right to know. Prior restraints on publication consist of court-imposed restrictions that are directed at the media and interfere with the media's right to publish material already in its possession. Indirect restraints of the media include, without limitation, restraints that are aimed at the media's ability to gather information or to access official proceedings but that do not intrude on the media's prerogative to publish or edit information already in its possession and include restraints that are not directed at the media but at the sources of information. When the rights of the accused to a fair trial are asserted, a gag order may issue only when the following conditions have been met: (1) the press and general public are given an opportunity to be heard on the question before issuance of the order; (2) the court describes what alternatives have been considered and explains why those alternatives cannot adequately protect the defendant's fair trial rights; (3) the order is narrowly tailored to protect the defendant's fair trial rights; and (4) the court has made specific findings that there is a substantial probability that fair trial rights will be prejudiced by publicity that the gag order would otherwise prevent. A participant gag order is subject to a heightened scrutiny analysis. State ex rel. The Missoulian v. District Court, 281 M 285, 933 P2d 829, 54 St. Rep. 175 (1997), following N.Y. Times Co. v. Sullivan, 376 US 254, 11 L Ed 2d 686, 84 S Ct 710 (1964), and distinguishing Great Falls Tribune v. District Court, 186 M 433, 608 P2d 116 (1980), and State ex rel. Smith v. District Court, 201 M 376, 654 P2d 982 (1982).

In Camera Inspection of Private Employment Records — Court Discretion in Suppressing Discovery Proper: The state attempted to compel discovery of defendant's personnel files from the Helena Catholic Diocese. The state sought information regarding reports of similar misconduct, disciplinary actions, transfer records, and witness names to use in rebutting and cross-examining defendant's character witnesses. After initial refusal to surrender the records, the parties agreed to an in camera review of the records by the presiding judge. The judge ruled that the information was not discoverable because it contained personal and private information. The in camera

review and the subsequent prohibition on discovery of material that was not probative were held to be within the discretionary power of the judge in controlling discovery. Absent an abuse of that discretion, denial of access to the records was affirmed. St. v. Burns, 253 M 37, 830 P2d 1318, 49 St. Rep. 353 (1992).

Closure of Probation Revocation Hearing — Interruption a Contempt — Prior Notice of Closure Not Required: The public and the press have the right, with limited exception, to attend and observe probation revocation hearings. In a proper case, a District Court may close such a hearing. When a hearing is properly closed, no member of the public or representative of the press may interrupt the due course of the hearing in a manner that might defeat the reason for closure. Such an interruption constitutes a contempt of court. A District Court may proceed on an ad hoc basis, without giving prior notice, to make a closure decision in accordance with the facts and circumstances facing it at the time. State ex rel. Great Falls Tribune Co., Inc. v. District Court, 238 M 310, 777 P2d 345, 46 St. Rep. 1292 (1989).

Preliminary Pleadings — Public's Right to Know: In a defamation case, an affirmative defense based on the privilege under 27-1-804(4) extends to newspaper accounts of preliminary pleadings. The Supreme Court acknowledged that the public has a right to know what happens in the judicial system, including the filing of civil suits. Cox v. Lee Enterprises, Inc., 222 M 527, 723 P2d 238, 43 St. Rep. 1476 (1986), followed, with respect to Commission on Practice investigation, in Lence v. Hagadone Inv., 258 M 433, 853 P2d 1230, 50 St. Rep. 601 (1993).

Test to Be Employed — Fair Trial Versus Right to Know: The defendant charged with deliberate homicide sought to exclude the public from a pretrial suppression hearing. The trial court denied defendant's motion, and he appealed. The public's right to know and a criminal defendant's right to a fair trial may conflict. The right to a fair trial is paramount to the public's right to know. In weighing these two rights, the court adopts Standard 8-3.2 of the American Bar Association Standards for Criminal Justice (2nd Ed. 1978) as the appropriate test. State ex rel. Smith v. District Court, 201 M 376, 654 P2d 982, 39 St. Rep. 2176 (1982).

Closure of Voir Dire Examination to Public and Press Vacated: At the commencement of Gene Austad's trial, the District Court directed that the individual voir dire examination of prospective jurors be closed to the press and public. The Great Falls Tribune filed an original proceeding in the Supreme Court seeking a Writ of Supervisory Control. The Supreme Court directed the District Court to allow the press and public to attend the voir dire examination. The court found that there is nothing in subjecting the prospective jurors to an open and public voir dire examination that would deny or impair Austad's right to a speedy trial. The Montana Constitution imposes a stricter standard in order to authorize closure of a trial than does the United States Constitution. Great Falls Tribune v. District Court, 186 M 433, 608 P2d 116 (1980).

EDUCATIONAL BODY DELIBERATIONS

Individual Privacy Outweighed by Public's Right to Know — Position of Public Trust: The respondents sought information under the public's constitutional right to know from the petitioner school district concerning an individual who held a position of public trust. The petitioner sought judicial review of the documents to be released. The District Court conducted an in camera review, ruling that the public's right to know outweighed the individual's privacy interests for several documents in the individual's personnel file. On appeal, the Supreme Court affirmed, holding that for a person occupying a position of public trust, there is no blanket exemption from the public's right to know simply because the documents are contained in a personnel file. In re Petition of Missoula County v. Bitterroot Star, 2015 MT 95, 378 Mont. 451, 345 P.3d 1035.

Release of Redacted Student Disciplinary Records Not Violative of Family Educational Rights and Privacy Act: A Cut Bank newspaper sought redacted student disciplinary records related to school board actions following a BB gun incident at a local school. The District Court held that the federal Family Educational Rights and Privacy Act of 1974 (FERPA), 20 U.S.C. 1232(g), prohibited the school board from releasing the names of the students, any violations committed, and any action imposed without the consent of the students and their parents. The Supreme Court disagreed. The newspaper specifically requested that students' names be redacted from the disciplinary records and thus sought no information that would personally identify any students involved. Because FERPA does not prohibit disclosure of records that do not reveal personally identifying information, there was no basis under FERPA for the board's refusal to release the redacted public documents to the newspaper, nor was the newspaper's request clearly outweighed by any privacy interest at issue. The newspaper was therefore entitled to a redacted copy of the board's disciplinary records regarding disciplinary measures imposed on the students, and the

District Court was reversed. Bd. of Trustees, Cut Bank Pub. Schools v. Cut Bank Pioneer Press, 2007 MT 115, 337 M 229, 160 P3d 482 (2007).

Inability to Apply "Capable of Repetition Yet Evading Review" Exception to Mootness Doctrine Based on Failure to Preserve Appeal: The Billings Gazette requested documents related to the conduct of certain Billings school teachers. The teachers' union and the teachers declined to produce the documents based on the teachers' privacy. The District Court decided that as public employees, the teachers had no reasonable expectation of privacy in the information and ordered the school district to release the documents. The school district complied, but the teachers' union and the teachers appealed the order. The Supreme Court found that because the documents in question had already been released and the teachers could not be restored to their original position, the issue was moot. Nevertheless, the teachers' union and the teachers requested that the Supreme Court address the merits of the issue under the exception to the mootness doctrine for constitutional questions that are capable of recurring but which could evade effective review. Because the inquiry of whether the expectation of privacy clearly exceeds the merits of public disclosure must be undertaken in the context of the facts of each case, it could not be said that there was a reasonable expectation that the same action comprising the same factual scenario would arise again, so the Supreme Court declined to apply the exception. In addition, the teachers failed to use applicable civil procedures to preserve their ability to appeal, so the Supreme Court declined to address the merits of the privacy issue. In re Petition of Billings High School District No. 2 v. Billings Gazette, 2006 MT 329, 335 M 94, 149 P3d 565 (2006), following Turner v. Mtn. Eng'r & Constr., Inc., 276 M 55, 915 P2d 799 (1996).

Lack of Standing of Person Who Fails to Allege Personal Interest or Injury: Fleenor brought an action for violation of her right to know and right to participate in a school district's decision to hire a new superintendent on grounds that she was not properly notified of votes. The suit was brought by Fleenor as a citizen of Montana and resident of the county and the school district. The District Court dismissed the suit for lack of standing, and Fleenor appealed, asserting that standing existed by virtue of her status as an interested party and that a liberal interpretation of the constitution regarding a citizen's right to know and participate included anyone with an interest in enforcing the broad constitutional policies and protections. The Supreme Court disagreed. To establish standing, a complaining party must clearly allege a past, present, or threatened injury to a property right or a civil right and allege that the injury is personal to the claimant and distinguishable from injury to the public generally. Additionally, the challenged action must result in a concrete adverseness personal to the party staking a claim in the outcome. However, simply being an informed and interested citizen is insufficient to confer standing. Fleenor made no assertion of injury and did not establish a personal, concrete adverseness that would result from the school district's action and thus failed to meet the threshold for establishing standing. The District Court was affirmed. Fleenor v. Darby School District, 2006 MT 31, 331 M 124, 128 P3d 1048 (2006), following Flesh v. Bd. of Trustees, 241 M 158, 786 P2d 4 (1990), Carter v. Dept. of Transportation, 274 M 39, 905 P2d 1102 (1995), and Bryan v. Yellowstone County Elementary School District No. 2, 2002 MT 264, 312 M 257, 60 P3d 381 (2002), followed in Lohmeier v. Gallatin County, 2006 MT 88, 332 M 39, 135 P3d 775 (2006), and followed, with regard to criteria to establish standing, in Bd. of Trustees, Cut Bank Pub. Schools v. Cut Bank Pioneer Press, 2007 MT 115, 337 M 229, 160 P3d 482 (2007). Fleenor was overruled in Schoof v. Nesbit, 2014 MT 6, 373 Mont. 226, 316 P.3d 831, to the extent Fleenor requires a plaintiff in a right to know or right to participate case to allege an injury beyond failure to receive notice or to allege a personal stake in a particular governmental decision for purposes of establishing standing to pursue a claim.

Discretion of District Court Whether to Void School Board Decision: Motta filed a pro se lawsuit against a school district board, contending that the district did not have an appropriate procedure in place for public participation in the decisionmaking process and that because the school board did not adequately publicize a series of negotiation sessions and a special meeting to approve a negotiated agreement between the board and the teachers' union, results of the meeting should be void. The District Court found that the board violated state open meeting laws, granted partial summary judgment for Motta, and ordered that the district submit copies of its public participation procedures and maintain minutes consistent with applicable statutes, but the court did not void the agreement. On appeal, Motta argues that the District Court erred and moved the Supreme Court to void the agreement. The Supreme Court declined. Under 2-3-213, the decision whether to void any decisions reached at a meeting held in violation of state open meeting laws is clearly within the discretion of the District Court, and because that discretion

was not abused, the partial summary judgment was affirmed. Motta v. Philipsburg School Bd. Trustees, District No. 1, 2004 MT 256, 323 M 72, 98 P3d 673 (2004).

Open Public Meeting Laws Liberally Construed — University System Policy Committee Meetings Open to Public: Plaintiff media organizations sued the Commissioner of Higher Education, alleging that policy meetings between the Commissioner and other University System senior employees were subject to state open meeting laws. The District Court concluded that the meetings should be open to the public, and on appeal, the Supreme Court concurred. The Legislature created open meeting laws with the intent that deliberations of state agencies be conducted openly, and to that end, the open meeting laws are liberally construed. In the context of 2-3-203, public or governmental bodies means a group of individuals organized for a governmental or public purpose. Although the university policy committee was not formally created by a government entity to accomplish a specific function, the committee brought together public officials for an undeniably public purpose. The committee was not merely a staff meeting or factfinding body, nor was it an ad hoc group that came together to consider a specific matter or to gather facts on a particular issue. Rather, the group met to deliberate on matters of substance that were the public's business and thus was considered a public body within the meaning of this section, whose meetings were required to be open to the public. The Commissioner argued that: (1) even if the committee was considered a public body, it did not hold meetings as contemplated in the open meeting laws; (2) because the committee's membership was not fixed, no number of members were required to attend to constitute a quorum; and (3) neither direct action nor votes were taken at committee meetings. The Supreme Court disagreed. A quorum of any body of an indefinite number consists of the members who attend a meeting. All that is required under 2-3-202 is that a quorum of the membership convene to conduct public business, not that the meeting produces some particular result or action or that a vote be taken. The constitution protects the public's right to observe the deliberations of public bodies, and the policy committee meetings were required to be open to the public. Assoc. Press v. Crofts, 2004 MT 120, 321 M 193, 89 P3d 971 (2004).

When Particular Meetings Must Be Open to Public — Factors to Be Considered: Under this section and Montana's open meeting laws, which are liberally interpreted in favor of openness, factors to be considered when determining whether a particular committee's meetings must be open to the public include but are not limited to: (1) whether committee members are public employees acting in their official capacities; (2) whether the meetings are paid for with public funds; (3) the frequency of meetings; (4) whether the committee deliberates rather than simply gathers facts and reports; (5) whether the deliberations concern matters of policy rather than merely administrative or ministerial functions; (6) whether committee members have executive authority and experience; and (7) the results of the meetings. This list of factors is not exhaustive, and each factor may not be present in every instance of a meeting that must be open to the public. Assoc. Press v. Crofts, 2004 MT 120, 321 M 193, 89 P3d 971 (2004).

Dissemination of Incomplete Document Used to Make Decision — Right to Participate Entails Complying With Right to Know: A school district assembled a group of people to research and advise the district on the closure of schools, and a member of the group summarized the closure research information on a computer-generated spreadsheet and delivered various versions of the spreadsheet to various people and groups. The version given the school district contained a system rating the schools and explaining the rating system, but the group of parents that plaintiff belonged to was given a version not containing the rating system when a member of the group requested a copy. The school district told the group that a spreadsheet comparing the schools did not exist. The spreadsheet was a document of a public body subject to public inspection prior to the time that the school district's board met and used the spreadsheet to help determine which schools to close. The school district violated plaintiff's right to examine public documents. At a minimum, the "reasonable opportunity" standard articulated in Art. II, sec. 8, Mont. Const., and 2-3-111 for the right to participate demands compliance with the right to know contained in this section. When the school district violated plaintiff's right to know, it reduced what should have been a genuine interchange into a mere formality. Bryan could and did voice her opinion to the school district, but did so without the ratings information contained on the version of the spreadsheet used by the school district. Therefore, the school district also violated her Art. II, sec. 8, Mont. Const., right of participation. The Supreme Court stated that this violation tainted the entire process from start to finish and ruled that the school district's closure decision was void. The court stated that on remand, the school district should allow plaintiff an opportunity to rebut the closure decision and should then reexamine the decision and affirm or modify it. Bryan

v. Yellowstone County Elementary School District No. 2, 2002 MT 264, 312 M 257, 60 P3d 381 (2002).

School District Advisory Group as Public or Governmental Body: A school district assembled a group of people to research and advise the district on the closure of schools. The Legislature has given a school district the power to close schools. Therefore, the advisory group assumed the identity of the district with respect to the closure question and performed a legislatively designated governmental function that served a clear public and governmental purpose, and the advisory group was a public or governmental body subject to this section. Bryan v. Yellowstone County Elementary School District No. 2, 2002 MT 264, 312 M 257, 60 P3d 381 (2002).

Standing of Parent When Information on Proposed School Closure Requested by Another: School district parents, including Bryan, worked in concert to rebut a school closure recommendation, delegating duties among themselves. Schroeder, but not Bryan, requested information from the school authorities, which was not received. Bryan sued as a result of the school closure. That Bryan did not personally request the information did not prevent her from having standing to claim a violation of this section. Bryan v. Yellowstone County Elementary School District No. 2, 2002 MT 264, 312 M 257, 60 P3d 381 (2002).

National Honor Society Records Not "Documents of Public Body" — Writ of Mandate Properly Denied: The father of a high school student sought a writ of mandate to obtain names and rankings of teachers who evaluated the student and whose low rankings prevented the student from being admitted into the National Honor Society. The Supreme Court held that because the teachers acted voluntarily and the school did not keep records related to Honor Society membership, the documents sought were not "documents of a public body" as provided in the Montana Constitution. Therefore, the District Court's denial of the writ of mandate was correct. Becky v. Butte-Silver Bow School District No. 1, 274 M 131, 906 P2d 193, 52 St. Rep. 1154 (1995).

Collective Bargaining Strategy Exception Unconstitutional: The collective bargaining strategy exception to the open meeting law, as set out in 2-3-203(4), is an unconstitutional violation of the right to know provision of this section and an impermissible legislative attempt to extend grounds upon which meetings may be closed. Great Falls Tribune Co., Inc. v. Great Falls Public Schools, 255 M 125, 841 P2d 502, 49 St. Rep. 944 (1992).

Litigation Exception Unconstitutional — Board's Closure of Meeting Violation of Public's Right to Know: The Board of Public Education closed its meeting to the public to discuss litigation strategy concerning a possible challenge of an executive order requiring it to submit rules to the Governor for prior review and approval. The Associated Press and its member news organizations filed a complaint, arguing that the statutory litigation exception unconstitutionally conflicted with the public's right to know. Affirming the District Court order, the Supreme Court ruled that the litigation exception allowing public agencies to close meetings when discussing litigation strategy violated the public's constitutional right to attend and observe the deliberations of a public body. The dispute between the Board and the Governor was essentially a turf battle that should be given public scrutiny. The holding was limited to litigation between public entities. Assoc. Press v. Bd. of Pub. Educ., 246 M 386, 804 P2d 376, 48 St. Rep. 1 (1991).

University Presidents' Job Performance Evaluations — Right to Know Versus Right of Privacy: The Missoulian challenged the closure by the Board of Regents of a job performance evaluation of the university system's presidents. The challenge was based on the constitutional right to know. The right to know is not absolute but must be balanced against competing constitutional interests in the context of each case. In this case the demands of individual privacy of the university presidents and other university personnel in confidential job performance evaluations sessions by the Board of Regents clearly exceed the merits of public disclosure. Missoulian v. Bd. of Regents, 207 M 513, 675 P2d 962, 41 St. Rep. 110 (1984), followed in Flesh v. Bd. of Trustees, 241 M 158, 786 P2d 4, 47 St. Rep. 161 (1990) , Goyen v. Troy, 276 M 213, 915 P2d 824, 53 St. Rep. 353 (1996), and Billings Gazette v. Billings, 2013 MT 334, 372 Mont. 409, 313 P.3d 129.

Collective Bargaining Exception Construed: Plaintiff was negotiating his salary with the school board. The board closed its meeting to discuss plaintiff's salary request. Plaintiff contacted counsel and began proceedings against the board for violating the open meeting law. The board met at another closed meeting and withdrew its offer of employment. The board contended it closed the meetings to discuss collective bargaining strategy under 2-3-203(3). In construing the term "collective bargaining", the court relied on the identical technical and legal definitions of the phrase. Collective bargaining is an activity involving the settling of disputes by negotiation between the employer and the representative of the employees. The board improperly closed the meetings since plaintiff was not acting on behalf of anyone else and the board's decision would

not affect anyone else. Plaintiff had the right to be present at deliberations regarding his future. Jarussi v. Bd. of Trustees, 204 M 131, 664 P2d 316, 40 St. Rep. 720 (1983).

Violation of Right to Know — Exhaustion of Remedies Not Applicable Under Separation of Powers: Plaintiff was negotiating his salary with the school board. The board closed its meeting to discuss plaintiff's salary request. Plaintiff contacted counsel and began proceedings against the board for violating the open meeting law. The board met at another closed meeting and withdrew its offer of employment. The board contended plaintiff was required to exhaust his administrative remedies before filing suit in District Court. The Supreme Court held that the exhaustion doctrine does not apply to constitutional issues. Plaintiff claimed violation of his constitutional right to observe deliberations of a public body under the constitution's right to know provisions. Constitutional questions are properly decided by a judicial body, not an administrative official, under the separation of powers doctrine. Jarussi v. Bd. of Trustees, 204 M 131, 664 P2d 316, 40 St. Rep. 720 (1983).

Jurisdiction: Certain allegations of impermissible termination as violating Art. II, sec. 9, Mont. Const., do not involve rights guaranteed by federal law or the United States Constitution, and the remedy is found in state courts. Branch v. School District, 432 F. Supp. 608 (D.C. Mont. 1977).

GENERAL

Request by Citizen of One County for Public Documents From Another County — Standing: The plaintiff, a Montana citizen and resident of Ravalli County, requested documents from the Cascade County Attorney relating to the termination of a county detention officer. The plaintiff had standing to bring his claim regardless of any nexus between himself and the governing body in question and because the Constitution does not impose a requirement that Montana citizens be subject to the jurisdiction of a particular public body to exercise their right to know. Shockley v. Cascade County, 2014 MT 281, 376 Mont. 493, 336 P.3d 375.

Related Constitutional Provisions — Inextricable Link: The plaintiffs sued the Fish, Wildlife, and Parks Commission for not providing adequate notice of a meeting at which the Commission voted to expedite the closing of the wolf hunting season. The District Court granted a temporary restraining order and ultimately awarded attorney fees under Art. II, sec. 8 and 9, Mont. Const. On appeal, the Commission argued that 2-3-221 allows for recovery only under Art. II, sec. 9, claims. The Supreme Court disagreed, holding that the two sections share a fundamental link and are inextricably associated with each other. Citizens for Balanced Use v. Fish, Wildlife & Parks Comm'n, 2014 MT 214, 376 Mont. 202, 331 P.3d 844.

Violation of Open Meeting Laws — Attorney Fees Awarded — Prevailing Party Despite No Final Judgment: The plaintiffs sued the Fish, Wildlife, and Parks Commission for not providing adequate notice of a meeting at which the Commission voted to expedite the closing of the wolf hunting season. The District Court granted a temporary restraining order and ultimately awarded attorney fees. During litigation, the Legislature enacted a law prohibiting the Commission from implementing certain hunting closures, rendering the litigation moot. On appeal, the Commission argued that attorney fees were not appropriate because a final judgment was never issued. The Supreme Court disagreed, holding that the plaintiffs were a prevailing party because the preliminary injunction produced the same result as a final judgment and there was no remaining underlying controversy to litigate. Citizens for Balanced Use v. Fish, Wildlife & Parks Comm'n, 2014 MT 214, 376 Mont. 202, 331 P.3d 844.

Commissioners' One-on-One Discussions Before Meeting Not Subject to Right to Know: Because a majority of Districting and Apportionment Commission members never convened or deliberated as a public body, Art. II, sec. 9, Mont. Const., and the right to know provisions in Title 2, ch. 3, part 2, were not implicated. Willems v. St., 2014 MT 82, 374 Mont. 343, 325 P.3d 1204.

Districting and Apportionment Commission Part of Legislative Branch: The Districting and Apportionment Commission is exempt from the public participation requirements of Art. II, sec. 8, Mont. Const., and statutes regarding participation in government because the Commission is attached to the Legislative Branch and is not an agency and thus not a part of the Executive Branch. Willems v. St., 2014 MT 82, 374 Mont. 343, 325 P.3d 1204.

Failure to File Right to Know and Participate Claim Within Statute of Limitations — Application of Common-Law Equitable Tolling: The plaintiff's right to know and right to participate claims against a decision of the Custer County Commissioners that was made in an unnoticed meeting were dismissed by the District Court as being time-barred, even though the existence of the meeting was not revealed until 4 years later. Although 2-3-114 and 2-3-213 were later amended with a discovery tolling provision, the amended versions were not in effect when

the meeting was held. The Supreme Court reversed the District Court, holding that common-law equitable tolling principles applied since the plaintiff, despite his diligent scrutiny of the Commissioners' actions, would not have learned about the decision until 4 years later when it was inadvertently revealed in another meeting. Schoof v. Nesbit, 2014 MT 6, 373 Mont. 226, 316 P.3d 831.

Standing to Pursue Right to Know and Participate Claims When Citizen Subject to Governmental Agency's Jurisdiction: A local citizen who followed county budget decisions brought an action challenging a decision that was made by the Custer County Commissioners during an unnoticed meeting 4 years earlier to allow elected county officials to receive cash payments in lieu of county contributions to a group health insurance program. The District Court concluded that the citizen lacked standing to pursue the claims. The Supreme Court reversed and held that the citizen, as a resident of Custer County subject to the county's jurisdiction, had a sufficiently concrete injury to establish standing. Schoof v. Nesbit, 2014 MT 6, 373 Mont. 226, 316 P.3d 831, overruling Fleenor v. Darby Sch. Dist., 2006 MT 31, 331 Mont. 124, 128 P.3d 1048, to the extent Fleenor requires a plaintiff in a right to know or right to participate case to allege an injury beyond failure to receive notice or to allege a personal stake in a particular governmental decision.

Reasonable Expectation of Privacy in City Employee Identity in Disciplinary Matters: The defendant city of Billings appealed the District Court's order that the identity of five city employees who were disciplined for viewing pornography on their work computers be released to the plaintiff newspaper. The Supreme Court reversed. The employees had an actual or subjective expectation of privacy regarding their identities in internal disciplinary matters that society would be willing to accept as reasonable because the employees were not in positions of public trust and the misconduct involved did not violate a duty requiring a high level of public trust, and the employees' reasonable expectation of privacy in the disciplinary action outweighed the limited merits of public disclosure. Billings Gazette v. Billings, 2013 MT 334, 372 Mont. 409, 313 P.3d 129.

August Meeting's Compliance With Open Meeting Laws and Rights to Know and Participate — Earlier Violations Remedied: A proper meeting held after an improper meeting abrogated the earlier noncompliance and satisfied the requested remedy of reconsideration of the earlier decision. Zunski v. Frenchtown Rural Fire Dept. Bd. of Trustees, 2013 MT 258, 371 Mont. 552, 309 P.3d 21.

Dissemination of Confidential Criminal Justice Information — Videos of Workers' Compensation Claimant — Release to Montana State Fund Upheld: After the respondent was injured in the course and scope of his employment, Montana State Fund (MSF), which provided workers' compensation insurance to the respondent's employer, accepted the respondent's claim, settled with the respondent, and continued to pay the respondent's medical benefits. While performing a routine verification of the respondent's disabilities, MSF investigators recorded multiple videos of the respondent that indicated that the respondent may have faked or exaggerated his injuries and that were classified as confidential criminal justice information. MSF petitioned the District Court for the release of the videos pursuant to 44-5-303, and the District Court granted the petition. The respondent appealed, arguing that MSF lacked standing to bring the petition and that the District Court erred when balancing the demands of individual privacy against the merits of disclosure. The Supreme Court affirmed, concluding that MSF had standing to bring the petition under 44-5-303(6), which allows an organization to file any action for the release of information that the organization believes is appropriate and permissible. The Supreme Court examined the two-part balancing test to determine whether the respondent's right to privacy clearly exceeded the merits of disclosure and concluded that the District Court adequately engaged in the balancing of competing concerns. The respondent's actions that were documented in the videos took place in public locations in which the respondent did not have a subjective or actual expectation of privacy and in which society would not view the respondent's expectation of privacy as reasonable, and the proper operation of the workers' compensation system constitutes a substantial interest. Mont. St. Fund v. Simms, 2012 MT 22, 364 Mont. 14, 270 P.3d 64.

Investigation of Public Employee for Alleged Misuse of Public Funds — Written Results of Investigation — Public's Right to Know Exceeds Employee's Right to Privacy: The Billings police department investigated an employee for using a city credit card for personal purchases. Following the investigation, the city issued to the employee a 16-page due process letter that identified detailed evidence gathered during the investigation. The Billings Gazette sought the letter and the city refused to provide it. Ultimately, the Gazette petitioned for its release, citing

Montana's right to know provisions. The District Court concluded that the employee was in a position of public trust because she was allowed to make purchases with public funds. Next, the District Court performed a balancing test of the employee's right to privacy and the public's right to know and concluded that the public's right to know was greater. The city appealed. The Supreme Court affirmed, concluding that the employee's alleged misconduct went directly to a breach of her public trust and that the investigation was therefore a proper matter for public scrutiny. Billings Gazette v. Billings, 2011 MT 293, 362 Mont. 522, 267 P.3d 11, following Bozeman Daily Chronicle v. Bozeman Police Dept., 260 Mont. 218, 859 P.2d 435 (1993).

Ongoing Criminal Investigation — Possibility of Criminal Charges — Public's Right to Know: The Billings police department investigated an employee for making personal purchases with a city credit card. Following the investigation, the city issued to the employee a 16-page due process letter that identified detailed evidence gathered during the investigation. The Billings Gazette sought the release of the letter, but the city refused to provide it, claiming, in part, that the criminal investigation was ongoing and that the release of the information might compromise any future criminal case against the employee. The District Court concluded that the public's right to know was greater than the employee's right to privacy and ordered the release of the letter. The city appealed. The Supreme Court affirmed, noting that the existence of a criminal case cannot infringe on the public's right to know. Billings Gazette v. Billings, 2011 MT 293, 362 Mont. 522, 267 P.3d 11, following Bozeman Daily Chronicle v. Bozeman Police Dept., 260 Mont. 218, 859 P.2d 435 (1993).

Waiver of Right to Examine Results of Police Employment Background Investigation: When Lee applied for employment with the Missoula Police Department, he signed a release that provided that any background information provided to the Department would be confidential. After Lee's application was denied, he petitioned the District Court for disclosure of the results of the background information on grounds of his constitutional right to know. The court concluded that Lee had validly waived his right to know by signing the release and denied Lee's request for the information. Lee appealed, but the Supreme Court affirmed. For a waiver of the right to know to be effective, the waiver must be voluntary, intelligent, and knowing. When evaluating a waiver of the right to know, courts should inquire simply whether language in the waiver fully and effectively apprised a person in practical terms that the person is giving up any right or ability to examine certain information held by a public body or governmental agency. In this case, whether or not Lee personally knew that he had a constitutional right to know, the waiver informed him in practical terms that he was waiving any such right by agreeing to the terms of the release. Lee v. Missoula Police Dept., 2008 MT 186, 343 M 487, 187 P3d 609 (2008).

Prohibition on Access to Corporate Tax Records Affirmed Absent Constitutional Challenge: A state senator requested certain corporate tax information from the Legislative Auditor, and the auditor compiled the information for tax year 2002 after receiving information from the Department of Revenue. The senator disclosed the information to the public. The senator subsequently requested that the Department provide similar information for other tax years, but the Department declined, citing the prohibition against disclosure of corporate tax information in 15-31-511. The senator petitioned the District Court to order disclosure of the information, but the court denied the petition. On appeal, the senator asserted that the records were subject to disclosure pursuant to the public's constitutional right to know and, without challenging the statute, dismissed the statutory prohibition on grounds that the statute must yield to constitutional law. The Supreme Court agreed with this cardinal premise, but noted that a statute is presumed constitutional unless unconstitutionality is demonstrated beyond a reasonable doubt. Absent a direct constitutional challenge to 15-31-511, the court declined to disturb the statutory prohibition against disclosure of corporate tax records. Elliott v. Dept. of Revenue, 2006 MT 267, 334 M 195, 146 P3d 741 (2006).

Interim Public Defender's Right of Privacy in Deposition Transcript Outweighed by Public's Right to Know: After Yellowstone County's chief public defender, Selvey, resigned because of misconduct toward investigator Schopfer, the county hired Bevolden as the interim chief over then-deputy chief defender Drew. When Bevolden subsequently fired Drew, Drew initiated an internal grievance proceeding that led to her reinstatement as deputy chief. She also filed a human rights complaint and federal discrimination suit against the county, Bevolden, and three other county officials. The Billings Gazette served the county with freedom of information requests and requests for copies of all public records documenting Selvey's, Schopfer's, and Drew's work records, including formal complaints and employee evaluations. Subsequently, the Billings Gazette also asked for copies of the deposition transcripts of Bevolden and other county officials deposed by the county during discovery in Drew's federal discrimination suit. Eight months after

refusing to produce the depositions, the county produced redacted copies not previously reviewed or approved by the court. In a second motion to compel hearing, the District Court authorized redactions of five pages of Bevolden's deposition. The Billings Gazette appealed the District Court's authorization of redactions. Applying its holdings regarding officers holding positions of "great public trust" in Great Falls Tribune Co., Inc. v. Sheriff, 238 M 103, 775 P2d 1267 (1989), Bozeman Daily Chronicle v. Bozeman Police Dept., 260 M 218, 859 P2d 435 (1993), and Svaldi v. Anaconda-Deer Lodge County, 2005 MT 17, 325 M 365, 106 P3d 548 (2005), the Supreme Court held that public defenders, as officers of the courts charged with safeguarding the public's fundamental constitutional rights to counsel and to a fair and speedy trial, hold positions of public trust. As a result, the public's right to access Bevolden's deposition clearly outweighs any asserted privacy interest. However, redaction of nonparty names was appropriate. Yellowstone County v. Billings Gazette, 2006 MT 218, 333 M 390, 143 P3d 135 (2006). In Billings Gazette v. Billings, 2011 MT 293, 362 Mont. 522, 267 P.3d 11, the Supreme Court affirmed the District Court's decision that a city employee who regularly made purchases for the police department was in a position of public trust and that her expectation of privacy in a 16-page letter outlining evidence of her alleged misuse of public funds did not exceed the public's right to know.

Authority of State Agency to Determine Privacy Issues in Records in Agency's Possession: Following settlement of a human rights charge, Owen asked to examine the records of the Billings Police Department (BPD) that had been furnished to the Human Rights Bureau. The BPD objected to release of the information on grounds that the records contained information from individuals who held an expectation that the information that they had given to the BPD would be kept confidential and that the privacy rights of those individuals outweighed Owen's right to know. A Department of Labor and Industry hearings examiner subsequently denied the BPD's objection and ordered that the records be produced for Owen's inspection. The BPD sought judicial review, and the District Court voided the Department's decision, holding that the Department did not have the authority or jurisdiction to decide the constitutional issues raised by Owen. On appeal, the Supreme Court reversed. Consistent with Great Falls Tribune v. Mont. Pub. Serv. Comm'n, 2003 MT 359, 319 M 38, 82 P3d 876 (2003), and Shoemaker v. Denke, 2004 MT 11, 319 M 238, 84 P3d 4 (2004), the Department had original jurisdiction to review its own records and determine if any constitutionally protected privacy rights were implicated by those records and whether those privacy rights clearly outweighed Owen's right to examine the records. The analysis by the Department involved mixed questions of fact and law and thus did not qualify as an exception to the requirement that a person must first exhaust administrative remedies. The court pointed out that denying administrative agencies the authority or jurisdiction to make the initial decision on whether the agencies' own records may be examined would require a lawsuit every time that a request to inspect records was met with an objection by the producing party and thus would put the right to know out of reach for most citizens. Billings v. Owen, 2006 MT 16, 331 M 10, 127 P3d 1044 (2006).

Standard for Publication of Public Notice of County Commission Meetings — Adoption of Formal Guidelines for Public Participation Not Required: Missoula County had policies and procedures for the posting of public meetings to encourage public participation in county business, but the procedures were not formally adopted or published for public distribution under 2-3-103. At a meeting in April 2003, the agenda listed a discussion of adding domestic partner benefits as an amendment to the county employee benefits plan. In May 2003, plaintiffs filed a complaint alleging that the county had failed to give proper notice of the April meeting in violation of the public right to participate in government and sought to void the action of the Board of County Commissioners making the benefits available. The District Court granted summary judgment to the county. Under 2-3-103, notice and public participation are required on actions of significant public interest, and given recent national attention, the issue of adding domestic partner benefits was held to be of significant public interest. However, the statute does not set out a specific method of notification. The standard is simply that a Board of County Commissioners must provide notice that is adequate to ensure public opportunity to participate in the decisionmaking process. Here, the Board published notice of the meeting in the local newspaper, posted notice of the meeting 24 hours in advance, and e-mailed the meeting agenda to the newspaper the day before the meeting. This notice was sufficient to alert plaintiffs, who attended the meeting and voiced their concerns, as well as the general public. Additionally, the fact that the county did not formally adopt or publish the procedures for public distribution under 2-3-103 was irrelevant because the formal adoption requirement applies only to state agencies. Summary judgment was affirmed. Jones v. Missoula County, 2006 MT 2, 330 M 205, 127 P3d 406 (2006). See also Sonstelie v. Bd. of Trustees, 202 M 414, 658 P2d 413 (1983).

No Constitutional Right to Privacy for Nonhuman Entities — Protection of Trade Secrets Under Other Constitutional and Statutory Schemes: Montana's constitutional individual privacy exception to the public's right to know is limited to natural human individuals only and does not apply to nonhuman entities such as corporations. However, nothing in this section requires disclosure of trade secrets and other confidential proprietary information when that data is protected from disclosure elsewhere in the state or federal constitution or by statute. Great Falls Tribune v. Mont. Pub. Serv. Comm'n, 2003 MT 359, 319 M 38, 82 P3d 876 (2003), overruling Mtn. States Tel. & Tel. v. Dept. of Public Service Regulation, 194 M 277, 634 P2d 181 (1981), and its progeny to the extent that those decisions relied on the constitutional balancing test of the right to individual privacy against the public's right to examine documents or observe governmental deliberations as a basis of protecting trade secrets and other confidential proprietary information of nonhuman entities.

Public Service Commission Rules Creating Impermissible Presumption of Confidentiality in Trade Secrets: Several media organizations sought access to power company documents filed with the Public Service Commission. Applying its administrative rules, the Commission evaluated the power company's claims of confidentiality against basic trade secret law, found that the company had met the initial burden of establishing trade secrets, and concluded that because the media had presented no evidence or argument to the contrary, the company information was entitled to constitutional protection as a matter of law. The Supreme Court disagreed. To the extent that the Commission's rules relied on mere company representations that the information contained trade secrets, the Commission unconstitutionally shifted the initial burden of proof to the public to challenge the confidentiality claims, creating a presumption of confidentiality that directly conflicted with the public's right to view public records and the Commission's duty to make its records available to the public. The court held that a nonhuman entity seeking protective measures for alleged confidential materials filed with a governmental regulating agency must support its claim with a supporting affidavit making a prima facie showing that the materials constitute property rights that are protected by due process. Further, the showing must be more than conclusory and specific enough for the Commission, any objecting parties, and reviewing authorities to clearly understand the nature and basis of the confidentiality claim. The agency then must review the materials at the time of filing, in accordance with 30-14-402(4)(b) and supporting case law, and make an independent determination whether the materials are in fact property rights entitled to due process protection. To the extent that Commission rules required less, the court directed revision of Commission rules to comport with this holding. Great Falls Tribune v. Mont. Pub. Serv. Comm'n, 2003 MT 359, 319 M 38, 82 P3d 876 (2003).

Right of Media to Confidential Criminal Justice Information — Balance of Public Right to Know With Individual Right to Privacy — Personal Information Properly Shielded: A Beaverhead County Commissioner was arrested in Jefferson County for DUI. Defendant newspaper requested that Jefferson County release information regarding the arrest, and the District Court ordered the release. The County Commissioner appealed, claiming that the release violated the right to privacy, but the Supreme Court affirmed. Under this section, any person, including a media entity, is entitled to receive confidential criminal justice information. However, that right is not absolute and must be balanced against the individual's right to privacy. The conflict between the public's right to know and the individual's right to privacy is dealt with by requiring the party requesting the information to show that it is entitled to the information, and once that showing is made, the request must be balanced against the privacy interest of the individual in question. To determine if an individual has a protected privacy interest under Art. II, sec. 10, Mont. Const., the test set out in Bozeman Daily Chronicle v. Bozeman Police Dept., 260 M 218, 859 P2d 435 (1993), is applied, namely whether: (1) the individual has a subjective or actual expectation of privacy; and (2) society is willing to recognize that expectation as reasonable. Pursuant to Citizens to Recall Mayor James Whitlock v. Whitlock, 255 M 517, 844 P2d 74 (1992), the public has the right to be informed of the actions and conduct of elected public officials and information related to the official's ability to perform public duties should not be withheld from public scrutiny. Because the information sought by the newspaper related to the County Commissioner's ability to perform public duties, any privacy expectation that the County Commissioner had was unreasonable, and the arrest information was properly released. However, the County Commissioner did retain a privacy interest in personal information unrelated to status as a public official, such as Social Security and driver's license numbers, and it was proper for the District Court to shield that personal information from public scrutiny. Jefferson County v. Mont. Standard, 2003 MT 304, 318 M 173, 79 P3d 805 (2003).

Settlement Agreement Involving Minor Child Open for Public Inspection — No Right of Privacy Recognized — Demands of Privacy Do Not Exceed Merits of Public Disclosure: Pengra and the state agreed to a settlement of Pengra's suit against the state on behalf of his daughter and himself involving the death of his wife. Pengra requested that the settlement document be sealed and thereby made unavailable for public inspection. In a challenge to the sealing of the settlement agreement, the Supreme Court held that: (1) minors have no greater right of privacy than adults in settlement agreements involving claims against the state; (2) Pengra had no subjective expectation of privacy in the settlement agreement; (3) by the Legislature's enactment of 2-9-303, society is not willing to recognize any privacy expectation of Pengra regarding the settlement agreement; (4) compelling policy reasons support the disclosure of the settlement; and (5) any right of privacy by Pengra in the settlement agreement did not outweigh the merits of public disclosure of that agreement. Pengra v. St., 2000 MT 291, 302 M 276, 14 P3d 499, 57 St. Rep. 1231 (2000).

Unconstitutionality of Department of Revenue Rule Concerning Confidentiality of Coal Severance Tax Information: Plaintiffs sought information regarding coal severance tax payments that had been routinely supplied to the Department of Revenue by coal mine operators prior to adoption of ARM 42.2.701 (now repealed), which declared certain information, such as tax returns that taxpayers are required to submit to the Department and Department-prepared documents that identify taxpayers, to be confidential. Plaintiffs challenged the rule on grounds that it violated constitutional and statutory rights to public information. The Department asserted that the rule was adopted to protect taxpayers' constitutional right to privacy and to inform the public of the Department's procedures regarding the confidentiality of tax information. The District Court found that the rule was adopted after balancing the public's right to know with the coal producers' right to privacy and that the producers had a reasonable and ongoing expectation of privacy that outweighed the public's right to know. On appeal, the Supreme Court disagreed, finding ARM 42.2.701 (now repealed) unconstitutional on its face. The rule presumes a wholesale constitutionally protected right to privacy for all taxpayers that prevails over public disclosure without balancing the taxpayers' right to privacy with the public's right to know. Prior to adoption of the rule, coal producers did not have an actual or subjective expectation of privacy in revenue information submitted to the Department. After the rule was adopted, the producers could assert a subjective expectation of privacy. However, based on a facially unconstitutional rule, the expectation was not one society would be willing to recognize as reasonable, especially when the information had been routinely available for nearly 20 years before ARM 42.2.701 (now repealed) was adopted. Neither prong of the two-part privacy test in Great Falls Tribune Co., Inc. v. Day, 1998 MT 133, 289 M 155, 959 P2d 508 (1998), having been met, a constitutionally protected privacy interest in the information was ruled out. Assoc. Press, Inc. v. Dept. of Revenue, 2000 MT 160, 300 M 233, 4 P3d 5, 57 St. Rep. 657 (2000).

Inmate Parole Files Public Files Subject to Public Right to Know Unless Specifically Limited by Privacy Concerns or Legitimate Penological Interest as Determined by Board of Pardons and Parole or Reviewing Court: The Supreme Court overturned a lower court decision denying inmates access to their parole files. The Supreme Court ruled that the Board of Pardons and Parole was a public agency, the inmates' records were public documents, and the public right to know applied to the records. The Supreme Court further held that individual privacy concerns or legitimate penological interests could limit public access to the parole files but that any such limitation would have to be determined on a case-by-case basis by the Board of Pardons and Parole or the reviewing court by determining if privacy concerns or penological interests clearly exceed the merits of public disclosure. Worden v. Bd. of Pardons & Parole, 1998 MT 168, 289 M 459, 962 P2d 1157, 55 St. Rep. 677 (1998), followed in Yellowstone County v. Billings Gazette, 2006 MT 218, 333 M 390, 143 P3d 135 (2006) (the public's right to know about management of a public defender officer and the quality of representation afforded by the office clearly outweighs any privacy interest that nonparties may have in redacted testimony, and the public has a right to inspect the entire deposition so long as names of nonparties are withheld).

Economic Advantage Inadequate Reason for Denial of Public Right to Observe Government Deliberations in Corrections Vendor Process: A newspaper company sought to restrain the Department of Corrections from excluding the public from meetings of the committee that reviewed proposals for operating private prison facilities. The District Court held that the public had no right to observe the negotiation phase of the committee's work, but that once negotiations were completed, the process by which the conclusions were arrived at must be open to public observation. Both parties appealed. The Supreme Court noted that as part of an Executive Branch agency, the Department and the committee were considered governmental bodies pursuant to

2-15-104 for purposes of procurement and that under the constitutional right to know, proposals submitted by private vendors were considered documents of a public body or agency that, under 2-6-102 (now repealed and replaced by 2-6-1003), the public has a right to inspect. Under the two-part test in Missoulian v. Bd. of Regents, 207 M 513, 675 P2d 962 (1984), the only exception to the constitutional provision arises when the demand of individual privacy clearly exceeds the merits of public disclosure. The state contended that the meetings at issue were closed for economic advantage, but economic advantage is neither a privacy interest nor a sufficient reason for denying the public the opportunity to observe deliberations of public bodies or to examine public documents, including proposals submitted to the public body by a vendor, unless the proposal concerns a privacy interest involving legitimate trade secrets or individual safety. A public agency's desire for privacy does not provide an exception to the public's constitutional right to observe its government at work. To the extent that provisions in 18-4-304 or ARM 2.5.602 require exclusion of the public from the competitive bid process, those provisions are unconstitutional and unenforceable. Great Falls Tribune Co., Inc. v. Day, 1998 MT 133, 289 M 155, 959 P2d 508, 55 St. Rep. 524 (1998), following Mtn. States Tel. & Tel. Co. v. Dept. of Public Service Regulation, 194 M 277, 634 P2d 181 (1981), State ex rel. Great Falls Tribune Co., Inc. v. District Court, 238 M 310, 777 P2d 345 (1989), Great Falls Tribune Co., Inc. v. Great Falls Pub. Schools, 255 M 125, 841 P2d 502 (1992), and Common Cause of Mont. v. Statutory Comm. to Nominate Candidates for Comm'r of Political Practices, 263 M 324, 868 P2d 604 (1994).

Full and Accurate Disclosure of Adoption Information Required: The Jacksons' adoptive son required extensive medical and psychological therapy. The Jacksons sued the state, contending that the state had a legal duty to inform them of the boy's condition and of his parents' medical backgrounds and that failure to do so constituted negligent misrepresentation, negligent nondisclosure, negligence based on lack of informed consent, and negligent supervision. The state contended that the imposition of a common-law or statutory duty to disclose the background information would conflict with its duty to maintain confidentiality of the birth parents' medical records. The District Court dismissed the claims, concluding that the state owed the Jacksons no duty of care upon which the negligence claims could be premised. Citing the opinions of several courts of other states, the Supreme Court held that recognizing a cause of action for negligent misrepresentation in the adoption context would promote public policy and ensure that adoptive parents would assume parenting responsibilities in an informed manner. Anything less than the exercise of due care in the dissemination of information to prospective adoptive parents is unacceptable. Although a slight burden is imposed on the state in providing the information, that burden is justified in light of the compelling need for adoptive parents to receive all available information regarding a child who might soon be a permanent member of the family. Full disclosure of a child's medical and familial background is warranted not only to enable adoptive parents to obtain timely and appropriate medical care for the child but also to enable them to make an intelligent and informed decision to adopt. Summary judgment was reversed. (Note: See 42-3-101, wherein the 1997 Legislature enacted a statutory requirement that social and medical histories of the birth families must be provided to a prospective adoptive parent.) Jackson v. St., 1998 MT 46, 287 M 473, 956 P2d 35, 55 St. Rep. 183 (1998).

Admission of Criminal Justice Information as Evidence in Tort Action Upheld: David, his wife Susan, their minor child, and the parties' defunct business sued Pierce Flooring and others for damages, including damages for emotional distress, stemming from criminal acts of vandalism taken against the plaintiffs' competing business. In the course of the trial, the District Court allowed the defendants to inspect, copy, and introduce evidence in police records concerning domestic violence complaints made by Susan against David. The Supreme Court held that the evidence was relevant because it showed that there may have been another cause for the Blacks' emotional distress other than the acts of vandalism. The Supreme Court also held that the record showed that the District Court properly exercised its discretion under Rule 403, M.R.Ev. (Title 26, ch. 10), in allowing the admission of some of the evidence but excluding other evidence because the Blacks' right to privacy exceeded the public's right to know. The Supreme Court held that the District Court's failure to make the written finding required by 44-5-303(1) was harmless error. Rocky Mtn. Enterprises, Inc. v. Pierce Flooring, 286 M 282, 951 P2d 1326, 54 St. Rep. 1410 (1997).

Advisory Body Meeting Without Notice — Mootness of Issues When Ultimate Action Becomes Final: The committee that recommends a list of persons from whom the Governor may select the Commissioner of Political Practices met, without public notice, to discuss who would be recommended. The Governor appointed a recommended person. A suit was filed to void the appointment on the grounds that the submission of the list was void because there was no

notice of the meeting. The committee was granted summary judgment in the District Court, and plaintiffs appealed. Before the appeal was heard, the Senate confirmed the appointment. That the confirmation vested the title to the office in the appointee did not make the appeal and issue moot because alleged violations of the state constitutional right to know and open meeting statutes could occur again, both in the context of this committee and similar advisory entities. To allow an alleged violation to escape judicial scrutiny simply because legal proceedings are not always swift would take away the people's constitutional right to know. Common Cause of Mont. v. Statutory Comm. to Nominate Candidates for Comm'r of Political Practices, 263 M 324, 868 P2d 604, 51 St. Rep. 77 (1994).

Appointment by Governor Not Voided by Failure of Recommending Committee to Give Notice of Meeting at Which Recommended Persons Chosen: The committee that recommends persons to the Governor, who appoints the Commissioner of Political Practices, violated the open meeting law when it met, without public notice, to discuss who would be recommended. The Governor appointed a recommended person, and the Senate confirmed the appointment. Since the Governor is free to disregard the recommended persons, the Governor did not violate the law in appointing one of the recommended persons, and the appointment would not be voided. Common Cause of Mont. v. Statutory Comm. to Nominate Candidates for Comm'r of Political Practices, 263 M 324, 868 P2d 604, 51 St. Rep. 77 (1994).

Decision of Issues on Other Than Constitutional Grounds When Possible: If the open meeting statutes require a meeting of an advisory committee to be open to the public, the court did not have to determine whether the state constitutional right to know provision requires the meeting to be open. It is elementary that courts should avoid constitutional questions if an issue can be otherwise resolved. Common Cause of Mont. v. Statutory Comm. to Nominate Candidates for Comm'r of Political Practices, 263 M 324, 868 P2d 604, 51 St. Rep. 77 (1994).

Failure to Give Notice of Meeting of Committee That Recommends Persons Governor May Appoint as Commissioner of Political Practices: When three members of the four-member committee that recommends a list of persons from whom the Governor may select the Commissioner of Political Practices met to discuss candidates and the transmission of their names to the Governor and gave no public notice of the meeting, the committee violated the open meeting law. Common Cause of Mont. v. Statutory Comm. to Nominate Candidates for Comm'r of Political Practices, 263 M 324, 868 P2d 604, 51 St. Rep. 77 (1994).

"Meeting" Held When Three of Four Members Met to Select Recommended Persons for Position Appointed by Governor: A meeting was held within the meaning of the open meeting law when three members of the four-member committee that recommends a list of persons from whom the Governor may select the Commissioner of Political Practices met to discuss candidates and the transmission of their names to the Governor. Common Cause of Mont. v. Statutory Comm. to Nominate Candidates for Comm'r of Political Practices, 263 M 324, 868 P2d 604, 51 St. Rep. 77 (1994).

Meeting Open in Theory Only When No Public Notice Given: The open meeting law requires public notice of a meeting subject to that law. Without public notice, a meeting is open to the public in theory only, not in practice. Common Cause of Mont. v. Statutory Comm. to Nominate Candidates for Comm'r of Political Practices, 263 M 324, 868 P2d 604, 51 St. Rep. 77 (1994).

Public or Governmental Bodies — Committee to Recommend Commissioner of Political Practices Appointees to Governor: The committee that recommends a list of persons from whom the Governor may select the Commissioner of Political Practices is not a board, bureau, commission, or agency within the meaning of those terms as used in the open meeting law. However, the committee is a "public or governmental body" under the plain meaning of those terms as used in that law because it has a clear public and governmental purpose and was created for a specific governmental task and is thus subject to the open meeting law. Common Cause of Mont. v. Statutory Comm. to Nominate Candidates for Comm'r of Political Practices, 263 M 324, 868 P2d 604, 51 St. Rep. 77 (1994).

Meeting of City Employees and Private Contractors Not Subject to Open Meeting Law: The plaintiff television station argued that it had the right to have a reporter cover a meeting between the city engineer, the public works director, and representatives of a private construction company. The Supreme Court stated that the statutes require agencies to have open meetings and that the definition of "agencies" does not include individual employees. The Supreme Court, after examining the legislative history of this section, concluded that the statutes, which limit the right to know to agencies, are consistent with the intent of the constitution and therefore the plaintiff was not entitled to have a reporter present at the meeting of individual employees and

a private party. SJL of Mont. Associates Ltd. Partnership v. Billings, 263 M 142, 867 P2d 1084, 50 St. Rep. 1726 (1993).

Employees' and Employers' Right to Privacy Outweighed by Public's Right to Inspect Payroll Data and Claims: Following substantial increases in its members workers' compensation premium rates, the State Fund refused to release to the Montana Health Care Association employer-specific payroll data used in calculating the rates on the basis of the employees' and employers' right to privacy. The Supreme Court reversed a District Court decision, ruling that the public's right to know and to determine the propriety of governmental actions that affect the public outweighs the privacy of the employees and employers. Mont. Health Care Ass'n v. St. Fund, 256 M 146, 845 P2d 113, 50 St. Rep. 1 (1993).

No Reasonable Expectation of Privacy by Elected Official in Duty-Related Issues: A citizens' group organized to recall Mayor Whitlock sought public disclosure of a report that was ruled to be confidential by a closed meeting of the City Council. The report explored allegations of the mayor's misconduct in office and did not disclose information related to Whitlock's private activities, general performance evaluations, or proceedings in which his character, integrity, honesty, or personality were discussed. As an elected official, Whitlock's expectation of privacy regarding his public duties was unreasonable. The merits of disclosing the report were substantial and in the public interest of being informed of the actions and conduct of their official and of the expenditure of public funds. In ordering disclosure, the District Court properly found that the right of the public to know should be accorded greater weight than Whitlock's unreasonable claim of privacy. Citizens to Recall Mayor James Whitlock v. Whitlock, 255 M 517, 844 P2d 74, 49 St. Rep. 1113 (1992), distinguishing Mont. Human Rights Div. v. Billings, 199 M 434, 649 P2d 1283 (1982), Missoulian v. Bd. of Regents, 207 M 513, 675 P2d 962 (1984), and Flesh v. Mineral & Missoula Counties, 241 M 158, 786 P2d 4 (1990).

Audit Information Subject to Discovery by Taxpayer: Pacificorp appealed taxes imposed by the Department of Revenue that were in part based on audits by other states belonging to the Multistate Tax Commission. The lower court affirmed the State Tax Appeal Board's refusal to turn over copies of the audits pursuant to discovery requests by Pacificorp. The Supreme Court held that the audits were subject to discovery under 15-1-601 because the action was brought in Montana and its confidentiality rules were controlling and not those of the state performing the audit. Pacificorp v. Dept. of Revenue, 254 M 387, 838 P2d 914, 49 St. Rep. 774 (1992).

Government Entities Not Individuals: The Department of Revenue declined to release an audit report prepared by the Multistate Tax Commission, asserting the privacy rights of the organization. The Supreme Court held that the Commission was a government instrumentality. Government entities are not individuals entitled to assert the right of privacy. Pacificorp v. Dept. of Revenue, 254 M 387, 838 P2d 914, 49 St. Rep. 774 (1992).

Affidavit — Public Document: The provisions of this section apply to local government. The Clerk of the District Court is an office of local government. An affidavit filed with the Clerk of a District Court in support of a motion for leave to file a criminal charge or warrant is a document of a public body or agency of a subdivision of state government. Assoc. Press v. St., 250 M 299, 820 P2d 421, 48 St. Rep. 958 (1991).

Affidavit Supporting Motion to File Criminal Charge or Warrant Subject to Public's Right to Know: The portion of 46-11-701 sealing affidavits filed to support motions for leave to file criminal charges or warrants was unconstitutional because the public's right to know outweighed the privacy concerns of the persons charged. Assoc. Press v. St., 250 M 299, 820 P2d 421, 48 St. Rep. 958 (1991). See also State ex rel. Jones v. District Court, 283 M 1, 938 P2d 1312, 54 St. Rep. 460 (1997).

Damages Not Available: Monetary damages are not available for holding an illegally closed meeting. Irving v. School District No. 1-1A, 248 M 460, 813 P2d 417, 48 St. Rep. 512 (1991).

Release of Police Records to Insurance Company: When an insurer sought access to police files pertaining to the police department's investigation of the death of an insured for use during the insurer's investigation of policy coverage, the police department objected to release of its records. The insurer then filed an application with the District Court, seeking production of the records. The court denied the application, holding that the insurer was not authorized by law to receive the documents and therefore was not entitled to their production under the Montana Criminal Justice Information Act of 1979. The trial court interpreted 44-5-303 to mean that in order to be "authorized by law", one must be specifically authorized by statute to receive criminal justice information. The Supreme Court held that this interpretation does not take into consideration basic tenets of our constitutional system of government and statutory construction. Under its commonly understood meaning, the word "law" includes constitutional as well as statutory law.

Accordingly, one is authorized to receive criminal justice information by the "right to know" provision of the constitution. The only limitation on the right to receive this information is the constitutional right of privacy. Any interpretation of 44-5-303 that requires specific legislative authorization to review criminal justice information would render the statute unconstitutional. In this instance, the District Court shall conduct an in camera inspection of the documents at issue to determine what material could properly be released, balancing the competing interests of the right to know and the right of privacy. Allstate Ins. Co. v. Billings, 239 M 321, 780 P2d 186, 46 St. Rep. 1716 (1989), followed in Bozeman Daily Chronicle v. Bozeman Police Dept., 260 M 218, 859 P2d 435, 50 St. Rep. 1014 (1993).

Self-Executing: This section is a self-executing provision. Legislation is not required to give it effect. Allstate Ins. Co. v. Billings, 239 M 321, 780 P2d 186, 46 St. Rep. 1716 (1989).

Disciplined Police Officers' Right to Privacy Outweighed by Public's Right to Know: Several police officers were disciplined as a result of their actions during the chase and apprehension of a suspect. Law enforcement officials refused to release the names of the officers to the newspaper on the basis that to do so would violate the officers' privacy rights. The Supreme Court upheld the lower court's order to disclose the names on the basis that officers who have been disciplined have only a minimal right of privacy that is easily outweighed by the peoples' right to know. Great Falls Tribune Co., Inc. v. Sheriff, 238 M 103, 775 P2d 1267, 46 St. Rep. 1123 (1989), followed in Lence v. Hagadone Inv., 258 M 433, 853 P2d 1230, 50 St. Rep. 601 (1993), and distinguished in Billings Gazette v. Billings, 2013 MT 334, 372 Mont. 409, 313 P.3d 129.

Request of Law Enforcement Records for School Project — Information Beyond Public Reach: The District Court properly refused the request of a student who sought Sheriff's department information for a school project. Information requested included: (1) records of the daily log of phone calls; (2) case files of criminal investigations; (3) preemployment investigation reports; and (4) lists of arrested persons. Persons involved had an actual expectation of privacy, and the interests of society were furthered by recognition of the privacy interest as reasonable. The student had the right to view and record statistical information pursuant to 44-5-103, but the requested information was protected by the Montana Constitution and the Montana Criminal Justice Information Act of 1979 and was beyond the reach of the public sector. Engrav v. Cragun, 236 M 260, 769 P2d 1224, 46 St. Rep. 344 (1989).

Corporation Able to Assert Privacy Exception: A corporation, as well as a natural person, can assert the right-to-privacy exception to the constitutional right to know. Belth v. Bennett, 227 M 341, 740 P2d 638, 44 St. Rep. 1133 (1987), citing Mtn. States Tel. & Tel. v. Dept. of Pub. Serv. Regulation, 194 M 277, 634 P2d 181, 38 St. Rep. 1479 (1981).

Governmental Agency Able to Assert Privacy Interest of Another: A governmental agency can assert another's privacy interest under this section. Belth v. Bennett, 227 M 341, 740 P2d 638, 44 St. Rep. 1133 (1987), citing Mont. Human Rights Div. v. Billings, 199 M 434, 649 P2d 1283, 39 St. Rep. 1504 (1982), and followed in Newville v. St., 267 M 237, 883 P2d 793, 51 St. Rep. 758 (1994).

Trade Secrets — When to Be Disclosed and to Whom — Protectable Property: A telephone utility was required to disclose trade secrets to the Public Service Commission (PSC) to aid in a decision on its rate increase request. The utility was entitled to a protective order preventing access to the secrets by the general public, but the Montana Consumer Counsel and any citizen whose interest related to the ratemaking function of the PSC could have access to the information. Use or disclosure of the trade secrets except for purposes of the ratemaking proceeding was prohibited. Mtn. States Tel. & Tel. v. Dept. of Public Service Regulation, 194 M 277, 634 P2d 181, 38 St. Rep. 1479 (1981). Mtn. States and its progeny were overruled to the extent that those decisions relied on the constitutional balancing test of the right to individual privacy against the public's right to examine documents or observe governmental deliberations as a basis of protecting trade secrets and other confidential proprietary information of nonhuman entities in Great Falls Tribune v. Mont. Pub. Serv. Comm'n, 2003 MT 359, 319 M 38, 82 P3d 876 (2003).

Action to Void Unlawfully Held Meeting: When respondent County Commissioners failed to give public notice of a meeting so that the result was voidable by the court under 2-3-114 and 2-3-213, a Writ of Mandamus would be appropriate in this case to void the illegal meeting. In future cases, the remedy should take the form of a simple petition to void an action or a petition for declaratory judgment. Bd. of Trustees v. County Comm'rs, 186 M 148, 606 P2d 1069 (1980), followed in Goyen v. Troy, 276 M 213, 915 P2d 824, 53 St. Rep. 353 (1996).

Lack of Notice of Public Meeting as Voiding Decision — Abuse of Discretion: When County Commissioners failed to follow the statutory requirements for notice for a meeting of the Board of County Commissioners, the District Court had discretionary authority to void the results of the meeting, and where the Commissioners failed to fulfill their burden of proving the meeting

legal, it was a clear abuse of discretion for the court not to void the results of the meeting. Bd. of Trustees v. County Comm'rs, 186 M 148, 606 P2d 1069 (1980).

Telephone Conversation as Constituting a "Meeting" — Notice Required to Be Given: When two of three County Commissioners discussed by telephone the approval of a preliminary plat of a subdivision, a "meeting", as defined in 2-3-202, took place and the Commissioners were subject to the requirement that notice of the meeting be given in accordance with statute. The Board failed to comply in that a county newspaper article did not supply sufficient facts concerning the time and place of the meeting to permit further public comment, nor was 2 days' posted public notice ever given. Bd. of Trustees v. County Comm'rs, 186 M 148, 606 P2d 1069 (1980).

"Mini Hearing" by Public Service Commission Limited to "Pass Through Costs" of Purchased Gas and Royalty Expense Constitutional: Commission did not violate constitutional requirements of citizen participation, examination of documents, or due process when it limited the scope of subsequent hearing to cost of purchased gas and royalty expense adjustments and approved resulting rate schedule as just and reasonable when the company's application only sought authority to "pass through" increased gas purchase and royalty costs to consumers in order to maintain existing rate of return and annual net earnings previously approved by the Commission at prior full-scale hearing. Mont. Consumer Counsel, Brazier v. P.S.C. and Mont. Power Co., 168 M 177, 541 P2d 769 (1975).

Attorney General's Opinions

Retirees of Teachers' Retirement System — Disclosure of Benefits: The individual rights of privacy in the amounts of retirement benefits of members of the Montana Teachers' Retirement System do not clearly exceed the public's right to know. Retirement benefits are paid with public funds and, therefore, disclosure is subject to the public's interest in how pension funds are calculated and how taxpayer funds are spent. 54 A.G. Op. 3 (2011).

Public Notice Required for City Council Meetings — Requirement for Agenda Item for Public Comment on Nonagenda Matters Directed Only to Matters of Significant Public Interest but Applicable to Formal and Informal Council Sessions: Public notice is required for any meeting of a City Council. The mandate imposed upon a City Council to include an agenda item for public comment on nonagenda matters applies only to the extent that the public comments are directed to matters of significant interest to the public, but the City Council is not required to take public comments on matters that are not of significant interest to the public. The mandate applies both to formal City Council meetings and to informal City Council work sessions when no action may be taken. 51 A.G. Op. 12 (2005).

Right of Public to Comment on Nonagenda City Council Items Extended to Matters Involving Individual Privacy — Right of Presiding Officer to Close City Council Meeting to Protect Individual Privacy: The right of the public to comment at a City Council meeting on nonagenda items extends to matters that may involve an interest in individual privacy. However, the presiding office of the City Council retains the power to close a City Council meeting to the public if the presiding officer determines that the interest of individual privacy clearly outweighs the public's right to know. 51 A.G. Op. 12 (2005).

What Crime Victim Information Not Subject to Dissemination — Crime Scene Information Subject to Disclosure: If a crime victim requests confidentiality, the plain language of 44-5-311 prohibits a criminal justice agency from disseminating the address, telephone number, or place of employment of the victim or a member of the victim's family unless an exception in 44-5-311(1) applies, nor may information directly or indirectly disclosing the identity of victims of certain sex crimes be publicly disseminated unless an exception in 44-5-311(1) applies. However, disclosure of crime scene location information by a law enforcement agency is generally required, even if the victim has requested confidentiality or is the victim of a sex crime and disclosure may inadvertently implicate the identity of the victim. 50 A.G. Op. 6 (2004).

Applicability of Open Meeting and Public Participation Laws to County Commission Meetings — Notice Required in Matters of Significant Public Interest: The gathering of a quorum of County Commissioners to discuss, either among themselves or with members of the public, issues over which the County Commission has authority is a meeting subject to open meeting laws. Meetings involving the consideration of matters of significant public interest, meaning decisions involving more than a ministerial act requiring no exercise of judgment, are subject to public participation mandates, including notice requirements and the opportunity for public participation in the decisionmaking process. Thus, a County Commission that established the hours of 9:30 a.m. to 5 p.m., Monday through Friday, as its regular meeting time for public notice purposes, did not comply with Montana's constitutional and statutory public participation provisions. 47 A.G. Op. 13 (1998). See also 42 A.G. Op. 51 (1988).

Applicability of Open Meeting Law to Montana Life and Health Insurance Guaranty Association Board of Directors: Noting that the constitutional right to know and open meeting laws are to be liberally construed, the Attorney General found the Montana Life and Health Insurance Guaranty Association to be a public body statutorily organized to protect insured members of the public from the extraordinary event of insurance company insolvency and found that, as such, the meetings of the Association's board of directors are subject to the open meeting law. The Association may close a meeting only when and to the extent that the demands of individual privacy clearly exceed the merits of public disclosure. 46 A.G. Op. 24 (1996).

Proceedings of Workers' Compensation Board of Directors Subject to Open Meeting Law: Because the Board of Directors of the Montana self-insurers guaranty fund fits the definition of "agency" in state law and is considered a public agency because of its legal authority to compel membership, assess its members, and exercise other regulatory powers in the conduct of the people's business, a broad construction of laws guaranteeing the public's right to know requires the Board to comply with the state open meeting law. 46 A.G. Op. 1 (1995).

Lists of Destroyed Personal Property Not Subject to Disclosure: Lists of destroyed personal property, generated by an individual for no governmental function or purpose and not as the result of the fulfillment of a public employee's duty or for documenting government business, do not constitute public writings or records subject to disclosure laws. 45 A.G. Op. 17 (1993).

County Employee Time Records Subject to Public Disclosure: County time records that show an employee's name, the department for which the employee works, and the hours worked, including claims for vacation, holiday, and sick leave pay, are subject to public disclosure, involving only a slight intrusion into individual privacy but a substantial public interest in having access to the records. 44 A.G. Op. 32 (1992).

Buyer's Affidavit and Certification Subject to Public Disclosure: The buyer's affidavit and certification submitted to the Board of Housing pursuant to the mortgage credit certificate program is subject to public disclosure. 43 A.G. Op. 25 (1989).

Availability of Payroll Record Information — Social Security Number Excepted: Applying the balancing test set out in 42 A.G. Op. 64 (1988), the Attorney General concluded that payroll record information reported to the Department of Highways (now Department of Transportation), including the names, addresses, and wages of private employees working on a publicly funded project, is subject to public disclosure. Social security numbers of those employees are not subject to public disclosure. 43 A.G. Op. 6 (1989).

Criminal Investigative Information — Balancing Test: The interests of the public's right to know and an individual's right of privacy must be balanced on a case-by-case basis by the custodian of the criminal justice information sought in determining whether criminal investigative information contained in an initial offense report or an initial arrest record should be publicly disseminated. 42 A.G. Op. 119 (1988).

Original Documents Submitted to Retirement Division Not Subject to Public Inspection for Mailing List Purposes: Original documents submitted by applicants to the Public Employees' Retirement Division of the Department of Administration contain private information about third parties and thus are not open to public inspection for the purpose of compiling a mailing list. 42 A.G. Op. 64 (1988).

Tax Appeal Board Deliberations Regarding Application for Reduction in Valuation — Open to Public: The deliberations of a county tax appeal board regarding an application for a reduction in property valuation must be open to the public unless the presiding officer determines the discussion relates to a matter of individual privacy and the demands of individual privacy clearly exceed the merits of public disclosure. 42 A.G. Op. 61 (1988).

Open Meeting Law Inapplicable to Departmental-Tribal Cooperative Agreement Negotiations: Negotiations between a Department Director and tribal representatives relating to establishment of a cooperative agreement authorized under 18-11-103 are not subject to Montana's open meeting law. Such discussions do not constitute a "meeting" under 2-3-203 because the Director, when acting alone on behalf of the Department, does not fall within the scope of the term "quorum of the constituent membership" as used in 2-3-203. 42 A.G. Op. 51 (1988).

Meetings of Private Corporation Under State Contract to Be Open: A private, nonprofit corporation that contracted with the state to restore and preserve state-owned property was considered a public body within the meaning of the open meeting law because the corporation was performing a public function and was receiving funds generated by public property. As such, meetings of the corporation were subject to the public's right to know and the standards established in 2-3-203. 42 A.G. Op. 42 (1987).

County Commission Meeting as "Meeting" Under Open Meetings Law: A regularly scheduled meeting between a Board of County Commissioners and its staff is a "meeting" within the terms of the open meetings law, Title 2, ch. 3, part 2. 41 A.G. Op. 38 (1985).

Property Record Cards — Public Inspection: The Department of Revenue may not withhold property record cards from public inspection. Although property record cards might not be "public writings", 2-6-102 (now repealed), concerning "public writings", is not controlling with respect to questions of public access. 39 A.G. Op. 17 (1981).

State Employee Title, Salary, and Employment Dates: A state employee's title, dates and duration of employment, and salary are public information. A state agency may require that requests for disclosure of such information be in writing but may not require that justification for the requests be given since the constitutional provision itself is sufficient justification. 38 A.G. Op. 109 (1980). See also 43 A.G. Op. 6 (1989).

State Agency Lists as Mailing Lists: Agencies are prohibited, under 2-6-109 (now repealed and replaced by 2-6-1017), from distributing a list of persons only if the intended use of such list is for unsolicited mass mailings, house calls or distributions, or telephone calls. The prohibition pertains only to lists of natural persons, not businesses, corporations, governmental agencies, or other associations. Agencies are not required to affirmatively ascertain the intended use for which the list is sought; a clear written disclaimer from the agency as to the proscriptions and penalty is sufficient. 38 A.G. Op. 59 (1979), overruled with regard to applicability to corporations in 43 A.G. Op. 73 (1990).

Deliberations of Commission Open to Public: The deliberations of the Human Rights Commission following a contested case hearing are subject to the Montana open meeting law. They must be open to the public unless the presiding officer determines that the discussion relates to a matter of individual privacy and that the demands of individual privacy clearly exceed the merits of public disclosure. 38 A.G. Op. 33 (1979).

Application to Pesticide Laws: Pesticide applicator and dealer records held by the Department of Agriculture are subject to the public disclosure requirements of the Constitution. 38 A.G. Op. 1 (1979).

Public Disclosure — Right to Know Versus Individual Privacy: A public body may close a meeting under 2-3-203 when the matter discussed relates to individual privacy and the demand for individual privacy clearly exceeds the merits of public disclosure. 37 A.G. Op. 170 (1978).

Disclosure of Investigation Reports: County Attorneys, law enforcement personnel, and Coroners must release reports of accident investigations, autopsies, and related tests to persons specifically listed in statutes. Public access to the results of investigations not covered by statute is left to the discretion of the public official following the guidelines set forth in this opinion and 37 A.G. Op. 107 (1978). 37 A.G. Op. 112 (1978).

Public Disclosure of Board of Real Estate Records: The Board of Real Estate, when requested, must disclose the status of any real estate licensee, whether any disciplinary action has been taken against that individual, and if so, the reason. Public access to information relating to complaints or to allegations and to other files on individual licensees is left to the discretion of the Board, within the guidelines of this opinion. All minutes, except those minutes of a meeting closed by the presiding officer pursuant to 2-3-203, must be open to public inspection. 37 A.G. Op. 107 (1978).

Public's Right to Know — Salaries of Teachers and Administrators: The salaries of teachers and administrators of a public school district are subject to inspection by the public. 36 A.G. Op. 28 (1975).

Right to Know Not Applicable to Possible Criminal Investigation: Article II, sec. 9, Mont. Const., does not require the Department of Revenue to release any information to the public regarding supplemental assessments that were issued against Montana banks as a result of an examination of those banks pursuant to 15-1-301, as public disclosure at this time would serve only to scandalize the investigation and to stigmatize by innuendo those banks which may be innocent of any criminal wrongdoing. 35 A.G. Op. 59 (1974).

Confidential Information Versus Right to Know: Confidential information contained in an application to the Department for a hard-rock mining permit cannot be made public through an environmental impact statement because the merits of public disclosure are outweighed by the need for privacy. 35 A.G. Op. 19 (1973).

Law Review Articles

Going With the Flow: The Montana Court's Conservative Approach to Constitutional Interpretation, Tuholske, 72 Mont. L. Rev. 237 (2011).

The Right to Participate, the Right to Know, and Electronic Voting in Montana, Miller, 69 Mont. L. Rev. 371 (2008).

The Right to Participate and the Right to Know in Montana, Snyder, 66 Mont. L. Rev. 297 (2005).

Whose Privacy?, Work, 55 Mont. L. Rev. 209 (1994).

Comments on Government Censorship and Secrecy, Elison & Elison, 55 Mont. L. Rev. 175 (1994).

Rights in Collision: The Individual Right of Privacy and the Public Right to Know, Gorman, 39 Mont. L. Rev. 249 (1978).

Section 10. Right of privacy.

Convention Notes

New provision prohibiting any invasion of privacy unless the good of the state makes it necessary.

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PRIVATE SEARCHES

Search by Private Citizen to Further Own Ends — Exclusionary Rule Inapplicable: When defendants' son was removed from the family home following an argument, the son went to stay at the home of a former babysitter and family friend. The son told the friend that his parents were involved with drugs. The friend went to the police, who stated that nothing could be done without further evidence. The son and friend then entered the family home, recovered drugs from the mother's bedroom, and gave the drugs to the police. Officers then obtained a warrant, searched the home, and arrested the parents. The parents sought to have the evidence suppressed under the exclusionary rule. The motion to suppress was denied, and the parents appealed. The Supreme Court noted that the exclusionary rule does not serve to deter private individuals from engaging in searches that would be illegal if conducted by police. To determine whether a private citizen is acting as a government agent in conducting a search, two critical factors are examined under the test in U.S. v. Miller, 688 F2d 652 (9th Cir. 1982): (1) whether the government knew of and acquiesced in the intrusive conduct; and (2) whether the party performing the search intended to assist law enforcement efforts or to further the party's own ends. Here, police did not know that the friend would conduct the search, and the search was made because of the friend's concern for the welfare and safety of the child. Thus, the search was private, and the evidence was not subject to the exclusionary rule and was properly admitted. St. v. Malkuch, 2007 MT 60, 336 M 219, 154 P3d 558 (2007). See also St. v. Berosik, 2009 MT 260, 352 M 16, 214 P3d 776 (2009).

Unproved Statements of Child Informant as Sole Basis for Issuance of Warrant: A child observed marijuana plants growing on Worrall's property and reported it to police. The child's observation was never corroborated by the police. Worrall averred that allowing a search of his property based on the uncorroborated claim of an unproved 11-year-old child, after only a 15-minute interview, was unreasonable and that the District Court erred in finding probable cause for the search warrant because unverified statements of an unproved informant, much less a child informant, could not serve as the sole basis for the issuance of the warrant. Citing St. v. Adams, 284 M 25, 943 P2d 955, 54 St. Rep. 717 (1997), the Supreme Court noted that corroboration of an informant's testimony through other sources is necessary only when the information is hearsay or the informant is anonymous. In this case, the child was not anonymous and the information was based on personal observation rather than hearsay, so corroboration was unnecessary. The court observed that information provided to police that is motivated by good citizenship is a reliable basis for determining probable cause and that nothing in the record indicated that the child's report should be viewed more critically than a similar report from an adult. Thus, the unproved statement of the child informant may serve as the sole basis for issuance of a search warrant. St. v. Worrall, 1999 MT 55, 293 M 439, 976 P2d 968, 56 St. Rep. 225 (1999).

Privacy Section of Montana Constitution — Contemplates Invasion Only by State Action: Sheriff's officers, armed with a search warrant, gained entrance to the defendants' rented house

after their landlord, who was trespassing at the time, discovered a large number of marijuana plants growing there and reported his discovery to the Sheriff. The narrow issue on appeal was whether the fruits of a search conducted by a private citizen, without any type of governmental involvement, are properly the subject of exclusion. The Supreme Court overruled the well-established holding that private searches invade privacy rights protected by the privacy section of the Montana Constitution. The Supreme Court held that the privacy section of the constitution contemplates privacy invasion only by state action. Unless specifically provided otherwise, citizens' rights articulated in the constitution proscribe only state action. Therefore, if a private citizen, such as the landlord in this case, invades the privacy of another citizen, there is no violation of the constitution. The exclusionary rule is a rule of court procedure to deny admission of the fruits of illegally seized evidence to deter unlawful police activities and to preserve the integrity of the judiciary. In this case, judicial integrity does not require exclusion of the evidence. St. v. Long, 216 M 65, 700 P2d 153, 42 St. Rep. 643 (1985), followed in St. v. Malkuch, 2007 MT 60, 336 M 219, 154 P3d 558 (2007).

"Stop and Frisk" by Private Security Guard — No Violation of Right to Privacy: A "stop and frisk" action by a private security guard taken to protect a hotel and its occupants against trespassers in the process of committing an offense was not a violation of the right to privacy set forth in this section of the Montana Constitution when the security guard had a "reasonable suspicion" that a crime was taking place. St. v. Bradford, 210 M 130, 683 P2d 924, 41 St. Rep. 962 (1984).

Failure to Show Evidence Tainted by Citizen Search: In a motion to suppress evidence, defendant claimed that use of the evidence would violate his constitutional right to privacy because an informant supplying information to a law officer seeking a search warrant had been sent into defendant's home by that law officer. The Supreme Court refused to order the suppression of the evidence because the informant did not take any evidence from defendant's residence and because the defendant had not met the initial burden of establishing an unconstitutional intrusion or a factual nexus between the intrusion and the challenged evidence. St. v. O'Neill, 208 M 386, 679 P2d 760, 41 St. Rep. 420 (1984).

Citizen Searches — Exclusionary Rule Partly Grounded in Judicial Integrity: The Montana Constitution provides that "the right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest". The judicial system must not become an accomplice to constitutional violations by admitting illegally obtained evidence. Therefore, evidence obtained by a private citizen in violation of the state constitutional right to privacy is subject to the exclusionary rule and may not be admitted into evidence in a criminal trial in Montana. St. v. Van Haele, 198 M 522, 649 P2d 1311, 39 St. Rep. 1586 (1982), overruled in St. v. Long, 216 M 65, 700 P2d 153, 42 St. Rep. 643 (1985). Long was followed in St. v. Malkuch, 2007 MT 60, 336 M 219, 154 P3d 558 (2007).

Citizen Searches — Search of Unit by Storage Rental Business Manager: After renter of storage unit entered his unit, manager of the storage unit rental business wanted to know how much longer he would be on the premises and wondered what renter was doing, as the unit's door was closed and there were no windows or lights in the unit. She opened the door after a knock and calling out to renter produced no result. Renter was sitting on the floor pointing a gun at the manager and had two suitcases behind him in the dim interior of the unit. Manager left. Pursuant to a suggestion of the business' home office, the manager removed the hinge pins on the door, cut off the padlock, entered, opened a suitcase, found a number of bottles of pills, and called the police. Based on the manager's information the police obtained a search warrant, found over 100 bottles of pills in the suitcases and a purse, and renter was arrested, charged, and convicted of criminal possession of dangerous drugs with intent to sell them. On appeal it was found that the evidence was obtained in violation of renter's state constitutional right to privacy and should have been excluded. The conviction was reversed because it was not supported by the remaining evidence or the law. St. v. Van Haele, 198 M 522, 649 P2d 1311, 39 St. Rep. 1586 (1982), overruled in St. v. Long, 216 M 65, 700 P2d 153, 42 St. Rep. 643 (1985).

Entry to Defendant's Porch — No Private Search Conducted: There was testimony that two men entered the defendant's porch while the defendant was not at home. The same two men returned and talked to the defendant. The two men returned for a third time with a Deputy Sheriff. After obtaining a search warrant, the Deputy Sheriff searched the defendant's premises. After certain stolen items were found, the defendant was arrested and later convicted of theft. The court rejected the defendant's argument that the two men conducted an unlawful search the first time they entered his porch in violation of the defendant's right of privacy. St. v. Brown, 199 M 472, 649 P2d 1306, 39 St. Rep. 1531 (1982).

Landlord's Inadvertent Observation as Basis for Search Warrant — Controlled Substances: The defendant, who had signed a lease allowing his landlord the right to enter the defendant's apartment, borrowed a vacuum cleaner from the landlord, who, upon entering the defendant's room to retrieve the vacuum, saw light coming from a closet and inadvertently discovered marijuana and drug paraphernalia. The District Court did not err in denying the defendant's motion to suppress the evidence taken after a search warrant was obtained. The landlord was justified in entering the room to show it to prospective lessees or to retrieve the vacuum. Once the landlord was in the apartment, he was justified in inspecting the closet to see if the cause of the light constituted a fire hazard. The landlord could, under the circumstances, permit the police officer to observe the items in the closet, and the officer's observation could be used as a basis for the warrant. St. v. Sayers, 199 M 228, 648 P2d 291, 39 St. Rep. 1309 (1982), overruled in St. v. Long, 216 M 65, 700 P2d 153, 42 St. Rep. 643 (1985).

Citizen Search — Defendants' Right of Privacy Violated: A warrantless citizen search violated defendants' right of privacy without the showing of a compelling state interest. Since the citizens were acting in their individual capacities and not for the State, State action was not involved, and the searchers could never be in a position of showing a compelling State interest, which is the only exception to the restriction against the invasion of individual privacy. Although defendants were aware that their rented house was for sale and being shown to prospective buyers in their absence, defendants did not consent to the search under their bed and thereby waive their right of privacy. St. v. Hyem, 193 M 51, 630 P2d 202, 38 St. Rep. 891 (1981), overruled in St. v. Long, 216 M 65, 700 P2d 153, 42 St. Rep. 643 (1985).

Detaining Suspected Shoplifter Without Arrest — Unconstitutional: The plaintiff was accused of shoplifting by the defendant's employee. Plaintiff's purse was searched, and nothing was found. Plaintiff was then detained under the authority of 46-6-503 (now repealed) until the police arrived and arrested her. After being acquitted of the shoplifting charge, the plaintiff brought suit for false arrest. The trial court instructed the jury in the words of 46-6-503 (now repealed) over plaintiff's objection. On appeal, the Supreme Court said there must be a showing of compelling state interest that would justify the infringement of plaintiff's right to privacy. The mere fact that defendant's conduct comported with the merchants' detention statute does not establish a compelling state interest. No compelling state interest was shown which would justify the very serious invasion of a person's privacy that occurred. Insofar as 46-6-503 (now repealed) permits a merchant with immunity to stop and detain an individual for up to 30 minutes without making an arrest, it is unconstitutional as an invasion of the right to privacy and the right to be secure from unreasonable searches and seizures guaranteed by Art. II, sec. 10 and 11, Mont. Const., as it applies to this case. Duran v. Buttrey Food, Inc., 189 M 381, 616 P2d 327, 37 St. Rep 1545 (1980).

Application to Private Individuals of Montana Search and Seizure Law: Although under the federal constitution illegally obtained evidence is admissible when seized by a nongovernmental agent not acting in concert with any governmental agency, the Montana Constitution, through Art. II, sec. 10 and 11, affords an individual greater explicit protection than do cases interpreting the federal constitution. The search and seizure provisions of Montana law apply to private individuals as well as law enforcement officers. Therefore, evidence obtained through an illegal invasion of privacy by an individual is not to be admitted. A search and seizure performed by a private individual by means of an illegal trespass is a significant invasion of individual privacy. St. v. Helfrich, 183 M 484, 600 P2d 816 (1979), overruled in St. v. Long, 216 M 65, 700 P2d 153, 42 St. Rep. 643 (1985).

Suppression of Evidence: Exclusionary rule of evidence must apply to all searches and seizures, especially when there is also violation of defendant's protection against self-incrimination, and thus motion to suppress was properly granted where employer removed marijuana from defendant's coat in an unconstitutional invasion of defendant's privacy. St. v. Coburn, 165 M 488, 530 P2d 442 (1974), overruled in St. v. Long, 216 M 65, 700 P2d 153, 42 St. Rep. 643 (1985).

POLICE SEARCHES

No Reasonable Expectation of Privacy in Drugs Disclaimed by Defendant — Evidence Properly Allowed — Inevitable Discovery Exception Not Applied: A police officer stopped the defendant's car after recognizing him as a person who had a suspended driver's license. After confirming the license was suspended, the police arrested the defendant and during a pat down discovered a prescription bottle of a controlled substance that was issued to another person. The defendant subsequently informed the police officer that he did not know where the bottle came from or why it was in his pants cuff. The defendant was then cited for driving with a suspended license and for

criminal possession of dangerous drugs. At trial, the District Court denied the defendant's motion to suppress the drugs seized at the time of the arrest on the grounds that the search was incident to the arrest pursuant to 46-5-102 and, alternatively, the drugs would have inevitably been discovered during a standard inventory search at the detention center. On appeal, the Supreme Court affirmed the District Court's ruling, reasoning that the defendant disclaimed knowledge of the drugs and therefore he did not have a reasonable expectation of personal privacy in the prescription bottle. However, the Supreme Court declined to decide the case under the inevitable discovery rule. St. v. McKeever, 2015 MT 177, 379 Mont. 444, 351 P.3d 676.

Authority to Consent to Search Implied From Circumstances — Motion to Suppress Properly Denied: A woman who shared a residence with two men in a rural area requested a civil standby from the Missoula County Sheriff's Department while she removed certain belongings from the property. From halfway up the driveway to the property, which was marked with "no trespassing" signs, officers saw marijuana plants through the open door as the woman entered the residence. Officers obtained a search warrant for the property, and the defendant was charged with cultivation of marijuana in violation of 45-9-110. The defendant moved to suppress the evidence obtained from the civil standby and the search warrant, which the District Court denied. On appeal, the Supreme Court affirmed, holding that although the District Court did not issue a specific finding that the woman had access or control over the property for the limited purpose of retrieving her belongings, such a finding was implicit in the District Court's conclusion that the deputies lawfully saw the marijuana plants in plain view. St. v. Urziceanu, 2015 MT 58, 378 Mont. 313, 344 P.3d 399, following St. v. Gilmore, 2004 MT 363, 324 Mont. 488, 104 P.3d 1051 (2004).

Community Caretaker Doctrine Inapplicable — Denial of Motion to Suppress Affirmed Based On Particularized Suspicion: An officer saw the defendant execute a hard left turn in an area where the officer knew there were no cross streets and then drive on the sidewalk and onto the grass before coming to an abrupt stop and possibly hitting a fire hydrant. While speaking to the defendant, the officer noticed the smell of alcohol and other indicators of intoxication. The defendant failed a field sobriety test and subsequently pleaded guilty to driving under the influence after the Municipal Court denied his motion to suppress. The District Court affirmed on the basis of the community caretaker doctrine. The Supreme Court upheld the denial of the motion to suppress because the officer had particularized suspicion that the defendant had been involved in a property damage accident, but it clarified that the community caretaker doctrine applies to situations in which a citizen is in need of help or is in peril. St. v. Marcial, 2013 MT 242, 371 Mont. 348, 308 P.3d 69, distinguishing St. v. Lovegren, 2002 MT 153, 310 Mont. 358, 51 P.3d 471.

Prompt Judicial Determination of Probable Cause — Reasonableness of Time Between Initial Appearance and Leave to File Information — Separate Matters: A defendant was arrested on suspicion of driving under the influence of alcohol. The next day, the state submitted a complaint and an affidavit of probable cause, and the Justice Court issued an order finding probable cause. Although the defendant argued that he was entitled to a preliminary examination within 48 hours of his arrest, the Supreme Court found that the argument conflated two separate criminal procedures. It noted that the state may use one of three procedures under 46-10-105, and a defendant is not entitled to a specific procedure. In addition, the court held that an affidavit is a proper basis for a probable cause determination as required under the Fourth Amendment to the United States Constitution and that the reasonableness of the time between a defendant's initial appearance and a court's grant of leave to file an information is a separate issue. St. v. Haller, 2013 MT 199, 371 Mont. 86, 306 P.3d 338.

Defendant Unconscious in Public Place, Unresponsive to Medical Care — Search of Purse Lawful — Motion to Suppress Properly Denied — Community Caretaker Doctrine Correctly Applied: A store employee called 9-1-1 to report the defendant was in the store, unconscious and face down on the floor. Emergency personnel, after attempting to rouse her and determining that she was breathing but unresponsive, asked a police officer to check her purse for identification or medical information. The officer located small baggies containing what he believed might be methamphetamine. The defendant was taken to the hospital and the officer took the baggies back to the police station, where a field test on the baggies confirmed they contained meth. By the time the officer called the hospital to report his findings to assist with her medical treatment, however, and without his knowledge, the defendant had regained consciousness, refused medical treatment, and left the hospital. After being charged with possession of a dangerous drug, she filed a motion to suppress the evidence located in her purse. The state claimed that the search was lawful pursuant to the community caretaker doctrine. The defendant claimed that the

community caretaker doctrine did not apply because, at the time the officer searched her purse, she was already being treated by two EMTs and a fireman and therefore was not in peril. The District Court denied the motion to suppress and the defendant appealed. The Supreme Court affirmed, agreeing that the community caretaker doctrine applied because there were objective facts showing that the defendant was in peril at the time of the search, which included her being unconscious in a public place and unresponsive to medical care. St. v. Anders, 2012 MT 62, 364 Mont. 316, 274 P.3d 720.

Probable Cause for Warrant and Search of Binder and Notebooks — Motion to Suppress Properly Denied: After the defendant was linked to a robbery, and while the defendant was also a person of interest in an unrelated homicide investigation, law enforcement officers secured a warrant to search his residence to locate evidence of the robbery, including coins and postage stamps. Law enforcement officers executing the warrant seized items related to the robbery and discovered a binder and several notebooks that were relevant to the homicide investigation; they did not immediately seize the binder and notebooks but sought a second warrant based on what they viewed during the original search. The defendant moved to suppress the binder and notebooks. The District Court denied his motion. On appeal, the defendant argued that the warrant's statement that people sometimes keep diaries, ledgers, and other documents of criminal activity did not establish sufficient probable cause to search the binder and notebooks. The Supreme Court affirmed, concluding that although law enforcement officers may have lacked probable cause to search the writings contained in the binder and notebooks, they possessed probable cause to locate pawn receipts and coins within the binder and notebooks. Therefore, officers could reasonably look through those items, and the contents of the binder and notebooks relevant to the homicide investigation became subject to plain view. Based on the writings contained in the binder and notebooks, law enforcement officers had sufficient probable cause to seize the binder and notebooks through the second warrant. St. v. Covington, 2012 MT 31, 364 Mont. 118, 272 P.3d 43.

Abrupt Stop on Desolate Back Road on Cold Winter's Night — Adequate Basis for Initial Welfare Check — Stop Valid Under Community Caretaker Doctrine: A police officer was driving down a desolate back road in the middle of a cold January night when a vehicle ahead of him abruptly pulled over. The officer pulled up behind it to see if the occupants were lost or needed assistance. The police officer testified at trial that as he approached the vehicle, he considered prior burglaries that had occurred in the area. Upon contact with the driver, the officer smelled alcohol, and he cited the driver for a misdemeanor DUI. The defendant moved to suppress evidence from the stop, claiming that the stop was not permitted under the community caretaker doctrine because the officer did not stop her with the sole intention of performing a welfare check. The District Court denied the motion to suppress, finding that the state had presented objective facts that the officer suspected the occupants might be in need of assistance because they were driving down a desolate back road in the middle of the night and had abruptly pulled over. On appeal, the Supreme Court affirmed and further noted that the community caretaker doctrine does not require an officer to have the sole subjective purpose of conducting a welfare check as long as the officer has adequate grounds for conducting the welfare check initially. St. v. Spaulding, 2011 MT 204, 361 Mont. 445, 259 P.3d 793. See also St. v. Graham, 2007 MT 358, 340 Mont. 366, 175 P.3d 885, and St. v. Lovegren, 2002 MT 153, 310 Mont. 358, 51 P.3d 471.

Parked Car Running in Winter — Indication of Citizen in Peril — Community Caretaker Doctrine Applicable: The police received a call about a suspicious car parked with its engine running and its occupant slumped over on a cold night and were sent to perform a welfare check on the car's occupant. After calling and knocking on the window of the car failed to wake the occupant, the police opened the passenger side door and shook him awake. At that point, the officers smelled alcohol emanating from the car and observed a two-thirds empty bottle of vodka on the passenger seat. In addition, the occupant exhibited slurred speech and disorientation and had red, glassy eyes. The occupant was charged with and convicted of felony DUI. The defendant filed a motion to suppress evidence, arguing that the police did not have particularized suspicion to conduct an investigative stop. The Supreme Court affirmed the District Court's denial of the motion to suppress, stating that the objective and specific facts surrounding the welfare stop sufficiently indicated the occupant might be in peril or in need of assistance and demonstrated that the police officers' conduct was within the community caretaker doctrine. St. v. Burns, 2011 MT 167, 361 Mont. 191, 256 P.3d 944.

Warrantless Entry Justified Under Exigent Circumstances Exception — Evidence Admissible Under Plain View Doctrine: Officer Cameron investigated a report that Kenfield was on the way to a remote small town to purchase alcohol for minors. The officer arrived at Kenfield's

residence and heard loud music and smelled marijuana. Cameron was out of radio range. No one answered when Cameron knocked at the door and announced himself, but Cameron heard running feet. Concerned with the minors' well-being, Cameron entered the residence and saw drug paraphernalia and residue on the kitchen sink. Cameron then called dispatch from the residence and requested backup, and officers subsequently seized drugs and other contraband. Kenfield was arrested for drug production or manufacture, distribution of drugs to minors, and sexual abuse of children. Kenfield moved to suppress the fruits of the warrantless search, but the motion was denied, and Kenfield appealed, but the Supreme Court affirmed. The odor of marijuana, coupled with the facts that the occupants attempted to avoid contact with Cameron and that Kenfield was believed to have been on the way to purchasing alcohol for minors, was sufficient for Cameron to form a reasonable belief that Kenfield had committed or was committing an offense. Additionally, the remoteness of the area, the time of the incident, the failure of Cameron's radio communication, Cameron's concern for the minors, the lack of response to the knock and announce, and the possibility that relevant evidence would be destroyed constituted exigent circumstances warranting immediate entry into the residence. Therefore, warrantless entry into Kenfield's home was justified, as was the seizure of drug evidence in plain view. St. v. Kenfield, 2009 MT 242, 351 M 409, 213 P3d 461 (2009), following St. v. Wakeford, 1998 MT 16, 287 M 220, 953 P2d 1065 (1998), distinguishing St. v. McBride, 1999 MT 127, 294 M 461, 982 P2d 453 (1999).

Disclaimer of Authority to Grant Permission to Search Vehicle Constituting Waiver of Right to Privacy: After stopping Hurlbert for speeding, officers noticed additional behavior that led them to believe that Hurlbert might be engaged in illegal activity. The officers asked Hurlbert for permission to search the vehicle, but Hurlbert declined because the vehicle belonged to his wife. The officers then called the wife, who gave permission to search the vehicle, although Hurlbert initially declined permission for a warrantless search of his personal items in the vehicle. No contraband was found in the vehicle, but while the search was underway, Hurlbert spontaneously admitted that there was drug paraphernalia in his personal possessions in the vehicle. Hurlbert then consented to a search of his possessions, and a search of his backpack indeed revealed drugs and paraphernalia. Hurlbert contended on appeal that because he lawfully possessed the vehicle at the time of the stop, he had a reasonable expectation of privacy in it and was entitled to protection from unlawful searches and seizures. Hurlbert also maintained that his wife's consent to search the vehicle was not valid because she was not in possession of the vehicle at the time of the search and she was coerced into consenting to the search. The Supreme Court affirmed. Hurlbert could not demonstrate that he was prejudiced in any way from the search of the vehicle, because the search revealed nothing unlawful. Additionally, when Hurlbert disclaimed that he had any authority to grant permission to search the vehicle, he thereby conceded that he did not have a reasonable expectation of privacy in the vehicle and waived the right to object to a search of the vehicle. St. v. Hurlbert, 2009 MT 221, 351 M 316, 211 P3d 869 (2009).

Search of Residence on Permission of Minor Child Violative of Parent's Right to Privacy — Evidence Properly Suppressed — Exception: Police were dispatched to a residence in response to a report of a sexual assault on a young woman, who was discovered to be a minor. Following questioning in the living room, the girl led the police to her bedroom, where an alleged assault by her father had occurred. Because police believed that the minor had lawfully granted permission to search the residence, they seized items from the bedroom, including the sheets, comforter, and blanket from the bed and the victim's pajamas. They also had the victim change clothes so they could take possession of the underwear that the victim was wearing at the time of the alleged assault. The girl later signed a form granting permission to search the residence. The father's DNA was found on the bedding and he was charged with felony sexual assault. The father argued that the search and seizure were unconstitutional because they were conducted without his consent or a search warrant. The state contended that in a case such as this where the child granting entrance to the home was the possible victim of a sexual assault, a warrant was unnecessary. The District Court, citing St. v. Schwarz, 2006 MT 120, 332 M 243, 136 P3d 989 (2006), held that because the minor did not have actual authority to consent to a search, police were obligated to obtain consent from the parent or a search warrant prior to seizing items from the bedroom. Because neither consent nor warrant was obtained, the court suppressed all evidence seized from the house. The state appealed. The Supreme Court cited St. v. Goetz, 2008 MT 296, 345 M 421, 191 P3d 489 (2008), for the factors used to determine whether a state action constitutes an unreasonable or unlawful search or seizure: (1) whether the person challenging the state's action has an actual subjective expectation of privacy; (2) whether society is willing to recognize that subjective expectation as objectively reasonable; and (3) the nature of the state's

intrusion. The court also noted that warrantless searches conducted inside a home are per se unreasonable, subject only to a few specifically established and well-delineated exceptions, none of which were present here. The court affirmed the holding in Schwarz, holding that the child did not have authority to consent to the search of her parent's home. The focus was on the violation of the privacy rights of the parent in control of the home, not the general privacy rights of the child, except where, as with the underwear the victim was wearing during the alleged assault, society would recognize as reasonable a person's privacy interest in the intimate apparel that she was wearing at the time. Therefore, the evidence seized from the residence must be suppressed because it was the product of an illegal search and seizure, with the exception of the daughter's underwear, because the father did not have an actual subjective expectation of privacy in the underwear that his daughter was wearing at the time the alleged assault occurred that society would find objectively reasonable. The District Court did not err in granting the motion to suppress all the evidence, with the exception of the underwear. The case was remanded for further proceedings. St. v. Ellis, 2009 MT 192, 351 M 95, 210 P3d 144 (2009).

Inevitable Discovery of Laptop Computer Evidence — Motion to Suppress Properly Denied: Lacey shared a residence with Dozier, although the property was owned by Dozier. Dozier discovered incriminating evidence on Lacey's laptop computer, which was in the common area of the residence and which Dozier was allowed to access. Officers came to the residence and Dozier allowed them to seize the computer. Lacey later asserted that the officers lacked probable cause to seize Lacey's personal property without Lacey's consent. Because Lacey had a possessory interest in the property, Dozier did not have the right or authority to consent to seizure of the computer. However, because the computer was searched pursuant to a federal search warrant rather than on Dozier's consent, Dozier's consent was immaterial. Rather, even if probable cause did not exist for seizure of the laptop, the evidence later discovered pursuant to the federal warrant was admissible under the inevitable discovery exception to the fruit of the poisonous tree doctrine, and Lacey's motion to suppress was properly denied. St. v. Lacey, 2009 MT 62, 349 M 371, 204 P3d 1192 (2009). See also St. v. Notti, 2003 MT 296, 318 M 146, 79 P3d 289 (2003), and St. v. Dasen, 2007 MT 87, 337 M 74, 155 P3d 1282 (2007).

Sufficient Probabilities Supporting Particularized Suspicion to Justify Investigative Stop — Motion to Suppress Properly Denied: McMaster was stopped for investigation after an officer observed apparent traffic violations and erratic driving. The officer was called to make the stop following a police officer's observations of McMaster's possible drug trafficking activities at the Conrad Town Pump. McMaster moved to suppress the fruits of the search on grounds that the officer lacked particularized suspicion to make the investigative stop. The motion was denied, and on appeal the Supreme Court affirmed. The determination whether particularized suspicion supports an investigative stop does not deal with hard certainties, but rather with probabilities. In this case, McMaster was known by officers to be involved in drug deals, and his furtive conduct at the Town Pump led officers to believe that a possible drug deal was in progress. McMaster was identified as the probable driver of the vehicle through a personalized license plate and by physical description. This evidence, coupled with McMaster's apparent traffic violations and erratic driving, constituted sufficient particularized suspicion that McMaster was involved in criminal activity to justify the investigative stop. St. v. McMaster, 2008 MT 294, 345 M 408, 191 P3d 443 (2008). See also St. v. Gopher, 193 M 189, 631 P2d 293 (1981).

Sufficient Probable Cause for Search Warrant — Motion to Suppress on Grounds of Unreliable Sources Properly Denied: Tucker asserted that fruits of a search of his residence should be suppressed because the warrant application was insufficient to establish probable cause because police failed to corroborate information provided by two informants. The Supreme Court examined the information in light of St. v. Reesman, 2000 MT 243, 301 M 408, 10 P3d 83 (2000), and St. v. Barnaby, 2006 MT 203, 333 M 220, 142 P3d 809 (2006), to determine the reliability of the informants. The first test is whether corroboration was required because the informants were anonymous, and in this case both informants were known to officers. The second test is whether the informants' information was based on hearsay, which requires corroboration, or on personal information. Here both informants had personal information of Tucker's activities. The third test is whether the informants were reliable. Neither informant was a confidential informant, but rather acted as concerned citizens, and the warrant application contained the necessary information to establish the reason for the informants' personal exposure to the evidence as well as their motivation for going to the police. Both informants were thus considered reliable, and any necessity for corroboration was satisfied. Therefore, the warrant application demonstrated the necessary probable cause, and Tucker's motion to suppress was properly denied. St. v. Tucker,

2008 MT 273, 345 M 237, 190 P3d 1080 (2008). See also Muir v. Bilderback, 2015 MT 180, 379 Mont. 459, 353 P.3d 473.

Reasonable Cause for Warrantless Probationary Search — Motion to Suppress Properly Denied: Smith's live-in girlfriend was arrested on a probation violation for failing to report her change in residence and subsequently tested positive for drugs, which provided reasonable cause for her probation officer to conduct a warrantless search of her new residence—Smith's trailer. The search revealed weapons, drug paraphernalia, items used to manufacture and distribute drugs, and some of the girlfriend's personal items. The officer then decided to search a bus parked near the trailer, and while waiting for a warrant, Smith arrived. Based on the items found in the trailer and an officer's knowledge that Smith's driver's license was suspended, Smith was arrested and found to be in possession of a large amount of cash, drugs, and paraphernalia. More drugs and chemical precursors of methamphetamine were subsequently found in Smith's vehicle and in the bus. Smith moved to suppress all evidence obtained in the searches on grounds that the initial search was unlawful because it was not justified as a probation search or by any other exception to the warrant requirements, but the motion was denied. On appeal, the Supreme Court affirmed. Because the initial search was a probationary search of the residence of the woman living with Smith and was justified by reasonable cause and because Smith did not challenge the legality of the searches of his person and vehicles, the District Court did not err in determining that the searches were lawful and in denying Smith's motion to suppress the evidence. St. v. Smith, 2008 MT 7, 341 M 82, 176 P3d 258 (2008). See also St. v. Finley, 2011 MT 218, 362 Mont. 35, 260 P.3d 175, which held that the District Court properly denied the defendant's motion to suppress evidence discovered when the defendant's wife's probation officer searched an open and unlocked safe in the couple's bedroom pursuant to a valid probationary search.

No Particularized Suspicion for Stop to Investigate Couple Engaged in Romantic but Not Criminal Behavior — Community Caretaker Doctrine Inapplicable Absent Indication of Citizen in Peril: While on routine patrol, an officer observed a vehicle parked on a pullout adjacent to a public road. The officer thought perhaps the driver was experiencing vehicle problems and drove by to investigate. However, the occupants were not having vehicle problems but were kissing, and the female passenger was observed attempting to "mount" the male driver. Concerned that the occupants were engaged in inappropriate sexual behavior, the officer circled back, parked behind the vehicle and activated the emergency lights, and approached the vehicle with the intent to discourage the couple from engaging in their behavior and to move them along. The officer discovered a cold, sweaty beer can outside the driver's door and also discovered the couple in various states of undress. Upon questioning the couple about what they were doing, the officer noticed that they both appeared intoxicated. The driver, Graham, was tested and subsequently arrested for DUI. Graham moved to suppress the evidence of the DUI on grounds that the officer did not have authority to make an investigative stop or, if that authority did exist, that the officer exceeded the scope of an investigative stop. The District Court agreed that the officer did not have a sufficient particularized suspicion to make an investigative stop, but nevertheless allowed the DUI evidence on grounds that the community caretaker doctrine provided a legal justification for the stop. On appeal, the Supreme Court first noted that if particularized suspicion was absent and no other exception to the warrant requirement applied, the search and seizure were unconstitutional. In this case, once the officer activated the emergency lights, Graham would not have felt free to walk away, so a seizure occurred. The Supreme Court agreed that the totality of the circumstances did not give rise to a particularized suspicion that a crime was occurring or was about to occur. Graham committed no traffic offense, and the couple's conduct was not criminal and did not indicate that a crime was about to occur. Any particularized suspicion occurred only after Graham was seized. The officer did not approach the vehicle because of a belief that a crime was being committed, but rather to discourage the couple from engaging in their behavior and to move them along, so the requisite particularized suspicion of a crime was absent. The Supreme Court also held that the community caretaker doctrine did not apply because under the criteria developed in St. v. Lovegren, 2002 MT 153, 310 M 358, 51 P3d 471 (2002), the first step in determining whether the doctrine applies is whether there are objective, specific, and articulable facts from which an experienced officer would suspect that a citizen is in need of help or is in peril. No such facts existed in this case, and the court declined to extend the doctrine to allow law enforcement officers equipped with nothing more than personal dissatisfaction of a person's otherwise lawful conduct to detain that person without any intention of providing community care or assistance. Dismissal of Graham's motion to suppress the evidence was reversed, and the case was remanded. St. v. Graham, 2007 MT 358, 340 M 366, 175 P3d 885 (2007), distinguishing

St. v. Nelson, 2004 MT 13, 319 M 250, 84 P3d 25 (2004), St. v. Seaman, 2005 MT 307, 329 M 429, 124 P3d 1137 (2005), and St. v. Litschauer, 2005 MT 331, 330 M 22, 126 P3d 456 (2005).

Investigation of Disorderly Conduct — No Expectation of Privacy in Backyard — Fruits of Warrantless Search Properly Admitted: Officers investigated a disorderly conduct complaint at Dunn's residence and found Dunn and six others partying in Dunn's backyard with loud music blaring. Dispatch indicated an outstanding warrant for Dunn, he was searched, officers found drugs and paraphernalia on Dunn's person, and Dunn was arrested. Dunn moved to suppress the evidence on grounds that the search was an unlawful invasion of privacy. The District Court denied the motion, and on appeal, the Supreme Court affirmed. Pursuant to Whitefish v. Large, 2003 MT 322, 318 M 310, 80 P3d 427 (2003), two factors are considered when determining whether a search was unlawful: (1) whether the person had an actual expectation of privacy that society is willing to recognize as objectively reasonable; and (2) the nature of the state's intrusion. Given the unique circumstances of this case, Dunn did not have a reasonable expectation of privacy. The ongoing disorderly conduct invited officers to investigate the complaint. Blasting loud music at 4 a.m. was not conduct that society would be willing to recognize as objectively reasonable. The unobtrusive investigation by officers accessing the backyard by an open and unobstructed path that would be used by any casual visitor was reasonable. Dunn's motion to suppress was properly denied. St. v. Dunn, 2007 MT 296, 340 M 31, 172 P3d 110 (2007).

Admissibility of Arson Evidence in Plain View Seized Under Exigent Circumstances — Warrant Required for Search for Other Evidence: A Deputy Sheriff responded to a fire call at Lewis's house and entered the building as part of fire suppression efforts. While inside, the Deputy Sheriff noticed evidence of possible arson. The Deputy Sheriff went back to his vehicle for a camera, reentered the building, photographed the evidence, and removed it, placing it in his vehicle. After the fire department arrived and suppressed the fire, the Deputy Sheriff reentered the building a third and fourth time to look for additional arson evidence. At trial, Lewis contended that all the evidence should be suppressed as fruits of unlawful warrantless searches. The trial court allowed introduction of evidence from the first entry because exigent circumstances existed to justify the Deputy Sheriff's entry, but the court denied admission of evidence gathered during the second and subsequent entries because exigent circumstances did not exist, holding that the Deputy Sheriff should have acquired a warrant for further investigative searches. The Supreme Court agreed that exigent circumstances surrounding the fire justified the first entry, but also held that the second entry was a continuation of the first and that evidence in plain view during the first entry could be lawfully seized and was admissible. However, a separate entry to search for or gather evidence pursuant to a criminal investigation requires a separate justification, such as a warrant, consent, or an exigency, and none of those justifications applied to the third and subsequent entries, so the motion to suppress evidence gathered during those searches was properly granted. St. v. Lewis, 2007 MT 295, 340 M 10, 171 P3d 731 (2007).

Clarification of Plain View Warrant Exception — Applicable to Seizures, Not Searches: The plain view doctrine allows peace officers to seize evidence in plain view without a warrant under certain circumstances. If an officer discovers evidence in plain view while lawfully present on an individual's property and the incriminating nature of the evidence is immediately apparent, the evidence may be seized and used against a defendant at trial. However, unlike exigent circumstances, valid consent, and lawful arrest, the doctrine does not allow the officer to proceed or intrude to the location of the evidence without a warrant. Rather, the applicability of the doctrine depends on the officer's lawful presence and right of access to the evidence and should not be construed as a stand-in for a search warrant. As an exception to the warrant requirement, the plain view doctrine applies to seizures, not searches. St. v. Lewis, 2007 MT 295, 340 M 10, 171 P3d 731 (2007). See also Horton v. Calif., 496 US 128 (1990).

Truant Smelling of Alcohol — Particularized Suspicion for Arrest — Motion to Suppress Properly Denied: A 14-year-old boy's mother called his school, reported that he had not returned home the previous night, and requested that he be picked up. The school resource officer notified police and asked that the boy be brought to school if found. An officer later found the boy on the street smelling of alcohol and took the boy to the police station where it was discovered that several town businesses had been burglarized during the night, including a bowling alley where money and liquor had been stolen. Money and liquor were found on the youth, and his shoes were taken as evidence to see if they matched prints found at the bowling alley. The youth moved that all evidence be suppressed, but the motion was denied. On appeal, the Supreme Court affirmed. Based on the fact that the officer smelled alcohol on the youth, the officer's particularized suspicion that the youth had been drinking developed into probable cause to believe that the youth committed the offense of consuming or possessing alcohol. Because the officer had probable

cause to make an immediate arrest, including the fact that the boy had been reported missing from home and was truant from school, it was constitutionally permissible to take the boy into custody pursuant to 41-5-321 and reasonable to conduct a search pursuant to that arrest for the youth's safety. In re Z.M., 2007 MT 122, 337 M 278, 160 P3d 490 (2007).

Particularized Suspicion to Support Canine Sniff of Vehicle and Probable Cause for Warrant to Search Vehicle: Following arrest on outstanding warrants, a dog alerted on Stombaugh's vehicle, a warrant was obtained, and a drug search was conducted. Stombaugh contended that fruits of the search should have been suppressed because officers lacked particularized suspicion to conduct the canine sniff and lacked probable cause to obtain a warrant to search the vehicle. The Supreme Court disagreed and affirmed. Based on the facts that Stombaugh's family reported to police regarding Stombaugh's drug use and notified officers that Stombaugh would be visiting the family's home, Stombaugh's admission of pending drug charges in Washington and police confirmation of the pending felony drug charges, Stombaugh's urgency in seeking removal of the vehicle out of the county and an unusual desire to pay more than the vehicle was worth to do so, and discovery of a white pill on the vehicle dashboard and Stombaugh's evasiveness about the pill, the District Court did not err in holding that officers had particularized suspicion to conduct the canine sniff of the vehicle. In addition to the factors considered for particularized suspicion (except the white pill), the warrant application also described the alert of the drug dog on the vehicle, Stombaugh's admission that the vehicle contained drug paraphernalia, and the officers' experience and qualifications with regard to drug crime investigation. Under the totality of the circumstances, the District Court correctly concluded that probable cause existed for issuance of the search warrant. St. v. Stombaugh, 2007 MT 105, 337 M 147, 157 P3d 1137 (2007).

Information Used to Secure Second Search Warrant Ascertained Through Independent Sources — Fruit of Poisonous Tree Doctrine Inapplicable: The state searched Dasen's residence and businesses and seized property pursuant to three search warrants. The warrant applications particularly described the property to be seized, but the warrants did not. When the warrants were served, the officers did not present the applications, so none of the accompanying documents particularly described the property to be seized. Two weeks later, the U.S. Supreme Court decided Groh v. Ramirez, 540 US 551 (2004), holding that if the application is not served with the warrant, the warrant itself must particularly describe the property to be seized. On motion and pursuant to Groh, Dasen's property was returned. The state immediately submitted a second round of warrant applications, and pursuant to a second facially valid warrant particularly describing the property to be seized, Dasen's property was reseized. Dasen asserted that the second warrant was invalid as fruit of the poisonous tree because it was a product of the first invalid search. However, there are three exceptions to the fruit of the poisonous tree doctrine that allow admissibility of independently obtained evidence, as adopted in St. v. Therriault, 2000 MT 286, 302 M 189, 14 P3d 444 (2000). In this case, the information for the second warrant was determined to have been independently obtained. The second warrant information was obtained prior to the first warrant, as well as information from additional sources not connected to or derived from the first search. Although the first search was a factor in obtaining the second warrant, the state nevertheless possessed sufficient independent information to purge the taint of the first search, so the fruit of the poisonous tree doctrine did not apply. St. v. Dasen, 2007 MT 87, 337 M 74, 155 P3d 1282 (2007). See also Murray v. U.S. 487 US 533 (1988).

No Privacy Expectation for Defendant With Respect to Rental Car When Rental Agreement Terminated: Payne, who was driving a rental car, was stopped for speeding and subsequently arrested for driving under the influence. During the stop, based on observations, the officer asked Payne if he was carrying drugs or large amounts of cash, and Payne responded that he was not. Payne also stated that he was traveling from Pittsburgh to Seattle to visit his children and flying back. The officer was suspicious because Payne was driving thousands of miles to visit but flying back after only a few hours. Payne was transported to the Sheriff's office, the vehicle was towed, and the rental company was notified. The rental company immediately terminated its contract with Payne under terms of the agreement and requested that Payne's personal items be removed from the car so that the company could have someone retrieve the vehicle. Payne subsequently consented to a search of the car, but officers obtained a warrant covering Payne's property that was found in the car. When removing Payne's property, the officer found some drugs and paraphernalia in plain view and removed a toolbox from the trunk. The toolbox contained $129,970. A petition for forfeiture was filed for the funds in the toolbox, and Payne argued that the petition should be dismissed, claiming that the search of the vehicle was illegal. The Supreme Court held that Payne did not have a reasonable expectation of privacy in the contents in the vehicle once the rental company had justifiably terminated the agreement based upon Payne's

arrest. The Supreme Court also held that no constitutional protections extended to the items in plain sight in the vehicle and that once Payne was lawfully stopped, the officer's contact with the rental company did not constitute an illegal pretext for securing the company's permission to remove Payne's property from the car. The Supreme Court also held that the rental company's knowing and voluntary request for the removal of Payne's property from the car constituted a recognized exception to the warrant requirement of 46-5-101. St. v. $129,970.00 in U.S. Currency, 2007 MT 148, 337 M 475, 161 P3d 816 (2007).

References in Search Warrant to Currency and Items Connected With Illegal Drug Activity in Violation of Chapter of Code Sufficient: Payne, who was driving a rental car, was stopped for speeding and subsequently arrested for driving under the influence. During the stop, based on observations, the officer asked Payne if he was carrying drugs or large amounts of cash, and Payne responded that he was not. Payne also stated that he was traveling from Pittsburgh to Seattle to visit his children and flying back. The officer was suspicious because Payne was driving thousands of miles to visit but flying back after only a few hours. Payne was transported to the Sheriff's office, the vehicle was towed, and the rental company was notified. The rental company immediately terminated its contract with Payne under terms of the agreement and requested that Payne's personal items be removed from the car so that the company could have someone retrieve the vehicle. Payne subsequently consented to a search of the car, but officers obtained a warrant covering Payne's property that was found in the car. When removing Payne's property, the officer found some drugs and paraphernalia in plain view and removed a toolbox from the trunk. The toolbox contained $129,970. A petition for forfeiture was filed for the funds in the toolbox, and Payne argued that the petition should be dismissed, claiming that the search of the vehicle was illegal because the search warrant was not particular enough with respect to items to be seized because it referred to currency and items connected to illegal drug activity in violation of Title 45, ch. 9. The Supreme Court held that there was sufficient probable cause to issue the search warrant and that the warrant was not overbroad because a more precise description of the items to be seized was not possible because officers could not know in advance the type or amounts of currency or the type or amounts of drugs that the search might uncover. St. v. $129,970.00 in U.S. Currency, 2007 MT 148, 337 M 475, 161 P3d 816 (2007).

Search of Person for Weapons Incident to Lawful Arrest and Prior to Transport Not Unconstitutional — When Showing of Exigent Circumstances Required: While officers were executing a warrant at a Missoula residence, Cooney arrived and requested entry to retrieve his son who was a guest at the residence. Officers requested Cooney's identification before allowing entry and ran a routine check on Cooney for outstanding warrants. The officers discovered an outstanding warrant for Cooney on a traffic offense and placed Cooney under arrest. A pat-down search revealed that Cooney possessed a pipe and a small bag of marijuana. The officers requested a patrol officer to transport Cooney to Municipal Court. Upon transferring custody of Cooney to the patrol officer, the arresting officers indicated that their initial search had not been thorough, so the patrol officer conducted another pat-down search of Cooney before transport to ensure that Cooney had no hidden weapons. The patrol officer felt an object in Cooney's pocket that might have been a weapon, removed the object, and discovered that it was another pipe with methamphetamine residue, so Cooney was also charged with felony possession of methamphetamine. Cooney moved to suppress the methamphetamine pipe on grounds that the patrol officer exceeded the scope of search incident to Cooney's arrest and that the pipe was the fruit of an unconstitutional search and seizure, but the motion was denied. On appeal, the Supreme Court affirmed. Although warrantless searches are per se unreasonable under Montana law, one exception to the warrant requirement is a search conducted pursuant to a lawful arrest. The law does not require a showing of exigent circumstances when an officer conducts a warrantless search incident to arrest in order to protect the officer from attack, to prevent the person from escaping, or to discover and seize the fruits of the crime, but a showing of exigent circumstances is required if the search is conducted to discover and seize any persons, instruments, articles, or things that may have been used in the commission of or that may constitute evidence of the offense. In this case, the state justified the search as protecting the officer from attack and was therefore required to demonstrate that the search was commensurate with the purpose of preventing Cooney from using any weapon hidden on his person to attack the officer. In this case, the search was commensurate because the patrol officer presented substantial evidence of a reasonable belief that the object in Cooney's pocket might have been a weapon, and the patrol officer was not required to trust his personal safety to a perfunctory search performed by other officers who indicated that the initial search was insufficient to ensure the safe transport of a

prisoner. St. v. Cooney, 2006 MT 318, 335 M 55, 149 P3d 554 (2006), followed in St. v. Whisler, 2008 MT 276, 345 M 292, 190 P3d 1098 (2008).

Home Visit of Probationer's Residence by Supervising Officer Not Considered Search — Diminished Expectation of Privacy — When Reasonable Cause Required to Search Probationer's Residence: As part of Moody's conditions of probation, the sentencing court required that Moody's home be open and available for the probation and parole officer to visit as required by state policy. Moody objected to the condition on grounds that it obviated the reasonable cause requirement for searches of probationers' homes and thus violated the constitutional rights of privacy and protection from unreasonable search and seizure. The Supreme Court noted that in Montana, a probation officer may search a probationer's residence without a warrant if the officer has reasonable cause for the search. The reasonable cause standard is substantially less than the probable cause standard required for searches of other citizens' homes because probationers do not enjoy the absolute liberty and heightened expectations of privacy afforded every Montana citizen. Rather, probationers are subject to conditional liberty that is properly dependent upon special restrictions. A convicted felon who is unambiguously aware of the clearly expressed condition that the residence be open and available for home visits does not have a reasonable expectation of privacy that precludes home visits, and because there is no reasonable expectation of privacy, there is no search. Therefore, home visits conducted as a routine and reasonable element of supervising a convicted person are not searches and are not subject to the reasonable cause standard. Although a home visit has the potential to turn into a search pursuant to an officer's plain view observations, it must remain within the parameters of a home visit unless and until reasonable cause exists for the officer to engage in a search. A probationer's diminished expectation of privacy during supervision nevertheless provides that the enclosed areas of the probationer's residence, such as closets, cabinets, and drawers, cannot be searched without reasonable cause. Thus, Moody's constitutional rights to privacy and to be free from unreasonable searches were not violated by the home visit probation condition. St. v. Moody, 2006 MT 305, 334 M 517, 148 P3d 662 (2006), followed in St. v. Greeson, 2007 MT 23, 336 M 1, 152 P3d 695 (2007).

Seized Property Abandoned by Owner in Lawful Possession of State for Purposes Other Than Forfeiture — Subsequent Petition for Forfeiture Not Precluded: After Branam's vehicle was stopped by an officer following a report of an assault, Branam fled. The officer had the vehicle towed to a storage yard. An employee of the storage yard noticed cash and a weapon in the vehicle. A search of the vehicle yielded cash, a weapon, and drug paraphernalia, and a canine alerted to the smell of drugs on the cash but not on the vehicle. Branam was not charged with a drug-related offense, but numerous confidential informants stated that the vehicle had been used in drug transactions. The state petitioned for forfeiture of the property. Branam moved to dismiss the petition on grounds that the state did not have probable cause to seize the property. The District Court agreed and summarily dismissed the petition, and the state appealed. The Supreme Court reversed. Property is subject to forfeiture to the state if it is or has been used in connection with the manufacture, distribution, or sale of dangerous drugs, and property may be seized for the purpose of declaring it forfeit to the state if an officer has probable cause to believe that a conveyance has been or is intended to be used to unlawfully transport, keep, deposit, or conceal a controlled substance. Probable cause is required at the time of seizure if the state seizes property without a warrant solely for purposes of forfeiture. However, if property is lawfully seized for purposes other than forfeiture, nothing in 44-12-103 precludes a later petition for forfeiture when an investigation develops probable cause to believe that the property is subject to forfeiture. Search and seizure without a warrant may not be held illegal if a defendant has disclaimed any right or interest in the place or object searched or the evidence or contraband seized or if a right of the defendant has not been infringed by the search and seizure. Here, Branam's act of fleeing and leaving the vehicle and its contents on the street constituted abandonment sufficient to justify having the vehicle towed, and the warrantless discovery of the cash and weapon by the towing company employee did not infringe on Branam's right of privacy. Probable cause to seize property exists when an officer's knowledge is sufficient to warrant a reasonable person to believe that an offense has been committed, and when a vehicle is stopped and the occupants of the vehicle immediately flee, suspicions of an offense connected to the vehicle arise. Thus, when the officer took possession of the vehicle, sufficient probable cause existed to cause seizure of the property and allow further investigation. Additionally, nothing required that Branam be charged with a criminal offense to allow forfeiture of the property. St. v. Branam, 2006 MT 300, 334 M 457, 148 P3d 635 (2006).

No Privacy Expectation in Videotaping Behavior on Public Street: Ditton, arrested for DUI following an accident, argued that the Municipal Court violated his right to privacy by admitting

into evidence at trial a videotape of his behavior made during the DUI stop. Citing Katz v. U.S., 389 US 347 (1967), the Montana Supreme Court held that although the Montana Constitution affords greater protection to a person's right to privacy than the federal constitution, the protection has never been expanded to protect a person's actions on a public street. Because the videotape captured Ditton's actions on a public street, the court did not violate his right to privacy by admitting it into evidence. St. v. Ditton, 2006 MT 235, 333 M 483, 144 P3d 783 (2006).

Affidavit Lacking Statement as to Reliability of Informant Requires Further Corroboration: Zito moved to suppress evidence of a marijuana growing operation obtained by a police search of his property on the basis that there was insufficient probable cause to issue a search warrant. The affidavit for the warrant did not contain a statement that the informant, upon whose information the police were relying, had provided reliable information in the past, was giving a statement against interest, or was a concerned citizen. The Supreme Court held that under the circumstances, the informant's statements required further corroboration to justify a probable cause determination. The Supreme Court held that in examining the totality of circumstances, including flyovers of the property, statements by another concerned citizen, Zito's criminal record, and the placement of junk cars and a tarp that obscured areas of the premises, the totality of the circumstances was sufficient to support issuing the warrant. St. v. Zito, 2006 MT 211, 333 M 312, 143 P3d 108 (2006).

Statements Made Prior to Miranda Warning Not in Response to Interrogation Admissible: Zito argued that a statement made by him at the time of his arrest that his marijuana operation was a "medical grow" could not be used as a basis for subsequent questioning because he had not been read his rights prior to making the statement. The Supreme Court held that even if Zito was in custody at the time of the statement, he made the remark on his own and not in response to interrogation by the police and therefore it was not elicited in violation of his rights. St. v. Zito, 2006 MT 211, 333 M 312, 143 P3d 108 (2006).

Canine Sniff Search of Defendant's Truck Warranted by Circumstances: Meza argued that the canine sniff search of his truck was illegal because the officer had stopped him for turning without using a turn signal and therefore had no probable cause to use the dog to search around his truck. The Supreme Court held that the stop for the traffic infraction was justified, that before the stop, the officer had observed Meza parked in front of a house known for drug activity talking to an inhabitant of the house, and that upon being stopped, Meza immediately got out of the truck and appeared nervous. Therefore, the totality of the circumstances justified using the dog to search Meza's truck. St. v. Meza, 2006 MT 210, 333 M 305, 143 P3d 422 (2006).

Counsel's Failure to Challenge Parole Search Not Ineffective Assistance of Counsel: Meza was stopped for a traffic violation and because of surrounding circumstances, later upheld by the trial court, the officer conducted a canine sniff search around Meza's truck that indicated the presence of drugs. Meza refused to allow the officer to search inside the truck and was allowed to leave the scene on foot. The officer was informed by dispatch that Meza was on parole and contacted the parole officer who agreed to a parole search of the vehicle. After being convicted, Meza argued that his attorney erred in not challenging the parole search. The Supreme Court ruled that Meza had received effective counsel because his attorney had challenged Meza's being stopped and the canine search on other grounds and that given the strong precedent for upholding parole searches, Meza's attorney was justified in not challenging that search. St. v. Meza, 2006 MT 210, 333 M 305, 143 P3d 422 (2006).

Companion's Activity at Defendant's Residence Sufficient to Justify Search of Defendant's Property: Officers obtained a warrant to search Barnaby's residence based in large part on informants' tips that Barnaby's companion, Sheridan, was operating a clandestine drug laboratory at the residence. Barnaby moved to suppress the evidence on grounds that the search warrant was insufficient because evidence of Sheridan's involvement in methamphetamine production did not establish probable cause to search Barnaby's residence. The Supreme Court cited Zurcher v. Stanford Daily, 436 US 547 (1978), St. v. Gray 2001 MT 250, 307 M 124, 38 P3d 775 (2001), and St. v. St. Marks, 2002 MT 285, 312 M 468, 59 P3d 1113 (2002), for the proposition that the critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific things to be searched for and seized are located on the property to which entry is sought. Thus, corroboration of criminal conduct by Barnaby's companion, Sheridan, could be imputed to Barnaby, even though Sheridan's mere presence at the residence did not amount to probable cause to search Barnaby's residence. However, Sheridan's involvement in the production of methamphetamine and continued presence at Barnaby's house, coupled with two independent reports that Sheridan operated a drug lab at the house and a report of suspicious activity at the house since Sheridan's arrival, amounted to

a substantial basis for determining whether probable cause supported the issuance of a warrant under the totality of the circumstances. The fact that the warrant application did not include a specific account of the circumstances under which some informants viewed the events or whether two citizens based their reports on personal observations did not preclude a court from finding probable cause. Sufficiency of the warrant was affirmed, and Barnaby's motion to suppress was properly denied. St. v. Barnaby, 2006 MT 203, 333 M 220, 142 P3d 809 (2006).

Reasonable Cause for Search of Probationer's Vehicle for Methamphetamine Lab Under Totality of Circumstances: Two probation officers arrived at Feltman's residence to conduct a search and found dangerous drugs and paraphernalia. While there, Fritz arrived at the residence asking for Feltman. Fritz was told to leave and complied, but returned later. After determining Fritz's identity, the officers discovered that there was an outstanding warrant for Fritz for a probation violation. In an effort to avoid incarceration, Feltman told the officers that there was a drug lab in Fritz's truck. After Fritz was arrested, the officers searched his truck and discovered chemicals for manufacturing methamphetamine. Fritz contended that the search was unreasonable because the truck was not registered in his name and because Feltman's statement was not corroborated. The Supreme Court disagreed, concluding that under the totality of the circumstances, reasonable cause existed for the search of the truck. Officers knew that: (1) Fritz was a probationer who failed to report to his probation officer as required; (2) Fritz was associating with Feltman at a residence where drugs and paraphernalia were found; (3) Feltman provided explicit information about a laboratory in the truck, which she backed up with a reasonable explanation; (4) methamphetamine cooks frequently conceal portable laboratories by using vehicles registered in someone else's name; and (5) the truck was under Fritz's control because he was observed driving it two separate times. St. v. Fritz, 2006 MT 202, 333 M 215, 142 P3d 806 (2006).

No Capacity or Actual Authority of Youth to Consent to Search of Parent's Home: While conducting a search for Lowe, officers learned that Lowe was staying at Schwarz's home and drove to Schwarz's residence to initiate an arrest. Schwarz was not home, but Schwarz's 13-year-old daughter answered the door and consented to a search of the residence. Without attempting to contact Schwarz, the officers entered the home without a warrant and discovered drugs. When Schwarz arrived home, she was arrested for possession of dangerous drugs. Following conviction, Schwarz appealed on grounds that the search was illegal because the minor daughter did not have authority to consent to a search of the home. The Supreme Court agreed and reversed, adopting a per se rule that a youth under the age of 16 years has neither the capacity nor the actual authority to relinquish a parent's privacy rights and consent to a search of the parent's home. St. v. Schwarz, 2006 MT 120, 332 M 243, 136 P3d 989 (2006). See also St. v. Melees, 2000 MT 6, 298 M 15, 994 P2d 683 (2000).

Probable Cause for Warrantless Seizure of Vehicle — Odor of Marijuana Coupled With Defendant's Admission That Marijuana Had Been Smoked in Vehicle: Following a single-vehicle accident, the investigating officer discovered that Pierce had over $8,000 in outstanding warrants. Pierce was arrested and placed in the patrol car and then requested that the officer retrieve a telephone book from Pierce's vehicle. When the officer entered the vehicle, he noticed the strong odor of burnt marijuana. Pierce subsequently admitted that someone had smoked marijuana in the vehicle. The officer impounded the vehicle, sealing it with evidence tape. Following an alert by a canine officer 2 days later, the officer obtained a search warrant, discovered drugs and paraphernalia, and arrested Pierce on drug charges. Pierce contended that the state lacked probable cause to impound the vehicle and search it and moved to suppress the evidence. The Supreme Court disagreed. The officer used the marijuana odor in conjunction with Pierce's admission that someone had unlawfully smoked marijuana in the vehicle to establish probable cause to seize the truck, and the affidavit for a warrant to search the vehicle contained sufficient information to support a reasonable belief that the offense of possession of dangerous drugs had been committed and that evidence or contraband might be found in the vehicle. Pierce's motion to suppress the evidence was properly denied. St. v. Pierce, 2005 MT 182, 328 M 33, 116 P3d 817 (2005), following St. v. Broell, 249 M 117, 814 P2d 44 (1991), and distinguishing St. v. Schoendaller, 176 M 376, 578 P2d 730 (1978), and St. v. Olson, 180 M 151, 589 P2d 663 (1979).

No Reasonable Expectation of Privacy in Garbage Placed for Collection — Warrantless Search of Garbage Affirmed: Following an investigation of Pelvit and based on information that Pelvit was operating a methamphetamine lab, agents conducted a warrantless search of garbage cans in a public alley behind Pelvit's house and discovered discarded materials consistent with the manufacture of the drug. The items formed the basis for a search warrant of Pelvit's residence, pickup, and boat, where additional evidence was found. The state instituted forfeiture proceedings

against the pickup, boat, and boat trailer. Pelvit moved to exclude the evidence, arguing that the warrant was not valid because it was based on an unlawful search of the garbage cans. The District Court held that Pelvit had no reasonable expectation of privacy in the garbage and denied the motion to suppress. On appeal, the Supreme Court affirmed. The court held that Pelvit did not have a reasonable expectation of privacy in his trash because he voluntarily relinquished his interest and control over his garbage when he abandoned the property with no express intent to exclude others. In abandoning the trash, Pelvit also abandoned any expectation of privacy in the property, and absent an expectation of privacy, there was neither a search nor a seizure in violation of a constitutionally protected interest. However, the Supreme Court did place certain constraints on the searching of garbage placed for collection, as set out in Litchfield v. St., 824 NE 2d 356 (Ind. 2005): (1) for such a seizure to be reasonable, the garbage must be quickly retrieved by officers in substantially the same manner as the trash collector would take it; and (2) in order to prevent wholesale or random searches, officers must have an articulable individualized suspicion that a crime is being committed in order to justify the garbage seizure. The circumstances in this case met the Litchfield constraints. The state met its burden of proving that Pelvit abandoned the trash, the seizure was conducted in a reasonable and unobtrusive manner, and police had a particularized suspicion that Pelvit was involved in criminal activity to justify the warrantless search. Denial of Pelvit's motion to suppress was not error. St. v. A Blue 1993 Chevrolet Pickup, 2005 MT 180, 328 M 10, 116 P3d 800 (2005), followed in St. v. Shelton, 2008 MT 282, 345 M 330, 191 P3d 420 (2008).

Analysis of Federal Knock and Announce Statute — Involvement of Federal Postal Inspector: A postal inspector suspected that a package addressed to Ochadleus contained drugs. The inspector took the package to the Billings DEA office, and a drug-sniffing dog alerted to the package. The inspector obtained a search warrant, and the package was found to contain marijuana. The inspector then obtained a warrant to search the intended destination of the package. The package was delivered by the inspector later that day, and shortly thereafter, state officers executed the search warrant and arrested Ochadleus for possession with intent to distribute. Ochadleus contended that the state officers violated the federal knock and announce statute, 18 U.S.C. 3109, noting that the officers failed to knock. The Supreme Court disagreed. The statute does not directly apply to state law enforcement officers, but rather applies when federal officers are a significant part of a search conducted pursuant to a state warrant, as in this case involving a federal postal inspector and the federal Drug Enforcement Administration. Additionally, the statute does not contain an express requirement that officers actually knock on the door, but rather requires that officers give notice of their authority and purpose. Here, Ochadleus's roommate saw the officers through the window in the door and then backed away. It was reasonable for the officers to assume that the action of backing away was a refusal to admit them, and it would have been futile for the officers to knock before entering. Thus, the federal statute was not violated, the forced entry was lawful, and Ochadleus's conviction was affirmed. St. v. Ochadleus, 2005 MT 88, 326 M 441, 110 P3d 448 (2005).

Knock and Announce Rule — Exigent Circumstances Exception — Futility Exception — Warrant Requirements: Without knocking and announcing its presence, a SWAT team broke down the doors of a rental home, discovered a methamphetamine lab, and arrested the occupants, including Anyan. Anyan contended that the entry was illegal and that evidence seized should be suppressed. Following a guilty plea, Anyan appealed on grounds of the illegality of the no-knock entry. Absent state statutory or case law, the Supreme Court examined extensive federal precedent, concluding that pursuant to the right of privacy and the right to be free from illegal search and seizure, an officer serving a search warrant must comply with the knock and announce requirement unless there are exigent circumstances that would present a threat of physical violence or the likelihood that evidence would be destroyed. Mere suspicion or evidence that firearms are present in the residence or that a particular resident is armed is not sufficient to create an exigency; rather, there must be specific information to lead the officer to a reasonable conclusion that the presence of firearms raises a concern for officer safety. Another exception to the knock and announce requirement, known as the futility exception, arises when police have a reasonable suspicion that the occupants know of the police presence and purpose prior to entry and that knocking and announcing would be futile. In addition, the decision to make a no-knock entry should ordinarily be made by a neutral and detached magistrate as part of the application for a search warrant, along with any foreknown exigent circumstances justifying a no-knock entry, but an investigating officer may make the decision if unexpected exigent circumstances arise at the scene. The knock and announce rule is flexible, and courts must determine whether an unannounced entry was reasonable under the particular circumstances of each case, including

the time that an officer must wait prior to forced entry. However, unless exigent circumstances exist, the failure of officers to knock and announce their presence renders evidence procured during execution of the search warrant inadmissible. Thus, the officers' no-knock entry into Anyan's house violated federal and state constitutional rights to be free from unreasonable search and seizure, and failure of the District Court to suppress the evidence seized during the search was reversible error. St. v. Anyan, 2004 MT 395, 325 M 245, 104 P3d 511 (2004), followed in St. v. Ochadleus, 2005 MT 88, 326 M 441, 110 P3d 448 (2005), in which the Supreme Court reiterated that no-knock entry into a residence is the exception and not the rule. See also Cassady v. Yellowstone County Sheriff Dept., 2006 MT 217, 333 M 371, 143 P3d 148 (2006), which further articulated Anyan's established "knock and announce" rule by holding that law enforcement officers' stealth entry without a warrant into defendant's home based on indirect consent granted by a person not physically present in the home and without the existence of exigent circumstances did not alleviate the officers' duty to knock and announce their presence and thereby give defendant opportunity to comply with the law. The Anyan futility exception was also applied in St. v. Hill, 2008 MT 260, 345 M 95, 189 P3d 1201 (2008), where officers responding to a domestic disturbance call did not knock but announced their presence through the open door of a trailer and observed defendant moving aggressively toward the back of the trailer, but defendant ignored their order to stop. The officers had a reasonable suspicion that the trailer occupants knew of their presence and purpose prior to entry. A woman screaming in the trailer indicated an ongoing domestic disturbance, and continuing to wait at the open door after defendant failed to respond would have been superfluous, futile, and dangerous.

No Expectation of Privacy for Trespasser — Entry Lawful and Warrantless Search Reasonable: Gilmore kept some belongings in a locked bedroom in Kathie Gilmore's house, and Kathie had no key to the room. Based on a tip from a confidential informant that marijuana plants had been observed in the window of the residence, officers requested and were given permission by Kathie to search the house without a warrant. Although she gave conflicting statements, Kathie stated that some of Gilmore's belongings were in the locked bedroom but he paid no rent, that Gilmore had previously assaulted her and that she was afraid of him, that she did not want him living in the house and had asked him to leave, and that she had no key to the room and advised the officers to kick down the door. Upon entering, the officers observed Gilmore asleep on the couch and drug paraphernalia in plain view. The officers then obtained a warrant and seized drugs and paraphernalia. Gilmore moved to suppress the evidence on grounds that the search was unlawful because Kathie did not have authority to authorize entry into the locked bedroom and that Gilmore had an expectation of privacy in the bedroom. The District Court found that in this case, the officers were acting under the appropriate authority of Kathie to consent to the search and denied the motion to suppress. The Supreme Court held that as a trespasser, Gilmore had no expectation of privacy in the bedroom. The District Court was affirmed. St. v. Gilmore, 2004 MT 363, 324 M 488, 104 P3d 1051 (2004). See also St. v. McLees, 2000 MT 6, 298 M 15, 994 P2d 683 (2000).

Personal Possession of Pipe Insufficient Probable Cause to Search Vehicle — Evidence in Plain View in Vehicle Sufficient Probable Cause for Subsequent Search of Residence: When Griffin was lawfully arrested for driving without a license, the arresting officer found a pipe in Griffin's pocket that, in the officer's opinion, contained drug residue. The officer then obtained a search warrant for Griffin's truck. When approaching the truck, the officer observed items in plain view in the open truck bed that could be used to manufacture methamphetamine. Pursuant to another search warrant based on the evidence in the truck bed, officers searched Griffin's residence and found a drug lab that was booby-trapped with explosives. Griffin moved to suppress all the evidence because the first search warrant was issued without probable cause. The motion was denied, but on appeal, the Supreme Court agreed that the only evidence supporting the vehicle search warrant—the existence of a pipe on Griffin's person and the fact that Griffin recently exited the truck—provided insufficient probable cause for a warrant to search the truck. Just because a person has a pipe in a pocket that contains untested white residue does not mean that the person's vehicle will contain evidence of a drug offense. However, in this case, the majority of evidence seized from the truck was in plain view in the truck bed. Griffin had no expectation of privacy regarding items in plain view, nor was a warrant required to seize the items in the truck bed. Therefore, any error in issuing the search warrant for the truck was harmless and not prejudicial. Additionally, the lawfully seized evidence in the truck bed was sufficient to support a finding of probable cause for issuance of another warrant to search Griffin's residence. Denial of Griffin's motion to suppress was affirmed. St. v. Griffin, 2004 MT 331, 324 M 143, 102 P3d 1206 (2004).

Particularized Suspicion for Investigative Stop of Suspect Vehicle in Area of Crime Under Totality of Circumstances: Following a theft at a grocery store, officers observed a blue Camaro circling the area. Given that almost an hour had elapsed since the reported theft and that the Camaro had the same county license plates as the robbers' suspected truck, officers conducted an investigative stop of the Camaro. Based on inconsistent stories presented by the Camaro's occupants and the fact that a theft had recently occurred in the area, officers requested to search Fellers' Camaro. Fellers signed a written consent to search, and officers discovered drugs and paraphernalia in Fellers' possession. Fellers appealed his conviction on grounds that the officers lacked a particularized suspicion to make the investigative stop. Pursuant to St. v. Bauer, 2001 MT 248, 307 M 105, 36 P3d 892 (2001), for an investigative stop to be reasonable, an officer must have objective data from which to make certain inferences and a resulting suspicion that the person stopped is or has been engaged in wrongdoing. The officer need not actually personally observe illegal activity in order to have a particularized suspicion to justify an investigatory stop, but support for a particularized suspicion must be viewed in light of the totality of the circumstances. Here, the officer had sufficient objective data from which to infer that the occupants of the Camaro were engaged in wrongdoing and a resulting suspicion of illegal activity. Under the totality of the circumstances, the investigative stop was justified, and Fellers' conviction was affirmed. St. v. Fellers, 2004 MT 321, 324 M 62, 101 P3d 764 (2004).

Objective Manifestation to Support Investigation Following Traffic Stop — Time of Stop Extended: Following a traffic stop and observation of Nelson's behavior, officers conducted a DUI investigation, performed field sobriety tests and arrested Nelson for DUI, and then searched Nelson's car and discovered drugs and paraphernalia. Nelson contended that the fruits of the search should be suppressed because the officers did not give the stop advisory required in former 46-5-402 (repealed 2003) or a Miranda advisory and because the DUI investigation at the scene exceeded the scope of the investigative stop. The motion to suppress was denied, and on appeal, the Supreme Court affirmed. The stop advisory issue was not contested, and the Supreme Court declined to address it. Nelson was not entitled to a Miranda warning because the Miranda protections are afforded during a custodial interrogation but do not apply to an investigative stop. In addition, as in St. v. Henderson, 1998 MT 233, 291 M 77, 966 P2d 137 (1998), the initial investigatory stop took on the quality of an escalating situation in which additional information gave rise to further suspicions and enlarged the scope of the investigation to that of a possible DUI. The officers had a particularized suspicion to conduct the DUI investigation, properly extending the time of the stop. Although the Supreme Court has not established specific time parameters to which an officer must adhere when conducting an investigative stop, the 24 minutes taken to conduct the investigative stop in this case was reasonable and not excessive. St. v. Nelson, 2004 MT 310, 323 M 510, 101 P3d 261 (2004).

Valid Consensual Search — Totality of Circumstances: A minimum number of police officers went to Beaupre's residence, requested and were granted permission to enter the residence, inquired whether they could search the residence and were verbally authorized to do so, corroborated the oral permission with Beaupre's husband's written consent, and then discovered evidence of a drug lab upon searching the residence. The District Court held that the search was consensual, but on appeal, Beaupre contended that the search was not valid because the Beaupres were coerced into consenting. The Supreme Court concluded that under the totality of the circumstances, the search was consensual, and the District Court was affirmed. St. v. Beaupre, 2004 MT 300, 323 M 413, 102 P3d 504 (2004). See also St. v. Olson, 2002 MT 211, 311 M 270, 55 P3d 935 (2002).

Transient Party Guest's Reasonable Expectation of Privacy in Host's Bathroom During Warrantless Search — Community Caretaker Doctrine Inapplicable: When officers executed a warrantless search of Tash's apartment based on a complaint of a loud party, Smith, an 18-year-old transient party guest, was in the bathroom vomiting. An officer opened the closed bathroom door, smelled what was believed to be an intoxicating substance, concluded that Smith was intoxicated, and charged Smith with being a minor in (former?) possession of alcohol. Smith moved to suppress the evidence on grounds that the search was illegal and that the officer violated Smith's expectation of privacy in Tash's bathroom. The state contended that Smith lacked the requisite standing to challenge the officers' initial entry into the apartment because Smith was a guest and had no reasonable expectation of privacy in the common rooms of the apartment. Applying the factors in St. v. Bowman, 2004 MT 119, 321 M 176, 89 P3d 986 (2004), the Supreme Court agreed with the state. The state also argued that an officer's intrusion into the closed bathroom was justified under the community caretaker doctrine. On this point, the Supreme Court reversed. The community caretaker doctrine stands for the proposition that officers have

a duty to investigate uncertain situations in order to ensure public safety, but the facts in this case did not warrant the officer's intrusion absent objective, specific, articulable facts supporting a conclusion that Smith was in need of officer assistance. Smith had a legitimate expectation of privacy in Tash's bathroom and was entitled to constitutional privacy protections. St. v. Smith, 2004 MT 234, 322 M 466, 97 P3d 567 (2004), followed, with regard to a guest's lack of standing to challenge a search of common areas of another person's apartment, in St. v. Redlich, 2004 MT 235, 322 M 476, 97 P3d 1090 (2004), and St. v. Shelton, 2008 MT 282, 345 M 330, 191 P3d 420 (2008).

No Privacy Interest in Rental Car by Unauthorized Driver Who Disavows Ownership of Contents: Hill was stopped for speeding and ticketed. After the stop was completed, the officer engaged Hill in small talk, inquiring where Hill was going and where his traveling clothes were. Hill replied that it was a quick trip, so no extra clothes were needed. Although no bags or clothes were in sight, the officer asked if Hill was carrying anything illegal. Hill said no, and the officer asked if Hill would consent to a search of the vehicle, to which Hill initially consented. In going over the terms of the consent form, Hill related that the car had been rented by a friend and that a search of the trunk was probably not a good idea because Hill did not know what the friend might have placed there. The officer then checked on the origin of the car and discovered that it had been acquired through a rental agency, but that the car was 2 days late in being returned, and that Hill was not an authorized driver. The agency asked that the car be impounded and gave permission for a search. The officers found two bags in the trunk, but Hill disclaimed ownership of the bags. A search of the bags revealed drugs and Hill's cell phone charger. Hill was then charged with drug crimes and later moved to suppress the evidence, but the motion was denied. On appeal, the Supreme Court affirmed. Hill had no reasonable expectation of privacy in the car's contents because he was not an authorized driver, had no relation to the car's owner or renter, and voluntarily disclaimed knowledge and ownership of anything in the car. Hill could not expect privacy in a car he illegally possessed, and once Hill waived control over the bags, he implicitly granted permission for the bags to be accessed. The search of the trunk was reasonable because permission was granted by the car owner, and the trunk contents were effectively surrendered by Hill, making the car owner's permission to search the vehicle sufficient to permit a full search of items found in the car. St. v. Hill, 2004 MT 184, 322 M 165, 94 P3d 752 (2004), distinguishing St. v. Elison, 2000 MT 288, 302 M 228, 14 P3d 456 (2000), and St. v. Tackitt, 2003 MT 81, 315 M 59, 67 P3d 295 (2003).

Threat of Cruelty to Animals Sufficient Exigent Circumstance to Justify Warrantless Entry of Probationer's Home — Entry Authorized by Probation Officer: Stone ran an animal zoo at his home. A neighborhood boy who assisted in feeding animals and cleaning cages notified authorities that some animals had died and that numerous others appeared to be without food or water. When officers arrived on Stone's posted property, they confirmed that numerous animals were dead and others had no food or water. Stone was not home, but the boy informed the officers that there were other animals in the house. The officers also learned that Stone was on probation and notified Stone's probation officer, who authorized entry into the house so that the animals inside could be cared for. Stone was convicted of animal cruelty and appealed on grounds that he had an expectation of privacy and that, although probable cause existed, the entry was unlawful because of the absence of exigent circumstances, so the evidence should have been suppressed. In a case of first impression, the Supreme Court concluded that the unrefuted imminent threat to the lives and well-being of the animals and the prevention of needless suffering and death of the animals were adequate exigent circumstances to justify warrantless entry into the house so as not to frustrate legitimate law enforcement efforts in preventing animal cruelty. Having reasonable cause to suspect that Stone was violating probation by committing cruelty to animals inside the house, the warrantless entry was also considered a justifiable probation search, and denial of the motion to suppress was proper. St. v. Stone, 2004 MT 151, 321 M 489, 92 P3d 1178 (2004). See also Tuck v. U.S., 477 A2d 1115 (1984), St. v. Bauer, 379 NW 2d 895 (1985), Pine v. St., 889 SW 2d 625 (1994), and People v. Thornton, 676 NE 2d 1024 (1997).

Lack of Exigent Circumstances Justifying Warrantless Search of Fanny Pack — Motion to Suppress Evidence Properly Granted: After Lanegan was arrested for obstructing a peace officer and handcuffed, the officer proceeded to conduct a warrantless search of Lanegan's fanny pack and discovered drugs and drug paraphernalia. Lanegan was then charged with drug crimes. Lanegan moved to suppress the evidence, and the motion was granted. The state appealed, but the Supreme Court affirmed. A search incident to arrest may be conducted under the conditions in 46-5-102, but in this case, none of the conditions were present. The search would not have protected the officer or prevented Lanegan's escape because Lanegan was already handcuffed,

nor would the search have resulted in discovery of anything that could have been used in or fruits of the crime of obstructing a peace officer. Warrantless searches are per se unreasonable, but one exception is when there are exigent circumstances that would cause a reasonable person to believe that prompt action is necessary to prevent physical harm, destruction of relevant evidence, escape, or some other consequence improperly frustrating legitimate law enforcement efforts. However, the search in this case did not rise to the level of exigent circumstances to allow a warrantless search, and the motion to suppress was properly granted. St. v. Lanegan, 2004 MT 134, 321 M 349, 91 P3d 578 (2004).

No Expectation of Privacy in Animal Cape Taken to Taxidermist: Bowman took an elk cape to a taxidermist for mounting, but the cape was seized without a warrant when wildlife officials received a tip that Bowman had taken the elk out of season. Bowman contended that the evidence should be suppressed because the search was unlawful. On appeal, the Supreme Court noted that a determination of whether a search is lawful depends in part on whether a person has an actual expectation of privacy that society is willing to recognize as reasonable and that one factor in determining a legitimate expectation of privacy is the extent to which the person took measures to shield the property from public view. Here, any expectation of privacy that Bowman had in the cape was relinquished when, without taking any measures to preserve a claim of privacy, the cape was taken to a public business and placed in possession of a third party, even if the transfer was only temporary. St. v. Bowman, 2004 MT 119, 321 M 176, 89 P3d 986 (2004).

Warrants Based on Anonymous Tip Sufficiently Corroborated by Inculpatory Information — Motion to Suppress Evidence Properly Denied: Wildlife officials received an anonymous tip that Bowman had taken an elk out of season and seized evidence at a taxidermy shop and at Bowman's home pursuant to two warrants. Bowman moved to suppress the evidence, contending that the warrant applications did not state probable cause. The motion was denied, and on appeal, the Supreme Court affirmed. After receiving the anonymous tip, the wildlife officials obtained independent data that revealed inculpatory information corroborating the criminal conduct disclosed by the tip, which provided a substantial basis to determine that probable cause existed to issue the warrants. Bowman's motion to suppress was properly denied. St. v. Bowman, 2004 MT 119, 321 M 176, 89 P3d 986 (2004).

Probable Cause for Search Warrant for Vehicle Based on Warrantless Canine Search of Exterior of Vehicle, Outstanding Drug Warrant, and Officer's Experience: Officers went to Hart's home to execute an outstanding warrant for felony sale of dangerous drugs and noticed Hart driving away in his van in the opposite direction. The officers initiated a traffic stop and noticed furtive movements from Hart as he moved quickly toward the floorboard, indicating that he was attempting to retrieve a weapon or hide something in the van. Hart refused a request to search the van, but the officers had a particularized suspicion that Hart was in possession of drugs. The officers conducted a canine search of the exterior of the van, and the dog alerted to the presence of drugs. The officers then acquired a warrant to search the van and discovered methamphetamine and marijuana. On appeal, Hart contended that there was insufficient probable cause for a search warrant. The Supreme Court disagreed. Evaluated in light of an officer's knowledge and all relevant circumstances, probable cause to search exists if the facts and circumstances within the officer's personal knowledge are sufficient to warrant a reasonable person to believe that a suspect has committed an offense. In this case, there was sufficient probable cause based on the fact that the officers were attempting to execute an outstanding drug warrant, the officer's experience in using drug-detecting canines, the dog's positive alert, and Hart's furtive movements at the time of the stop. St. v. Hart, 2004 MT 51, 320 M 154, 85 P3d 1275 (2004).

Carport Not Considered Part of Home — Privacy Standard Inapplicable to DUI Search of Condominium Carport: Large was arrested for misdemeanor DUI while seated in her running car that was parked in the carport outside her condominium. Large moved to suppress the evidence because she was arrested at night at her home for a misdemeanor committed elsewhere, in violation of 46-6-105. She also contended that the arrest was in violation of her right to privacy. The motion was denied, and on appeal, the Supreme Court affirmed. Although a carport may be structurally contiguous with the rest of a private house or dwelling, presence in a carport does not equate to presence in the home, and although lot lines do convey certain concrete ownership rights, the right to be free from misdemeanor arrest at night is reserved for the home, not coterminous property appurtenant to the home. Further, under 61-8-101, ways of the state open to the public include parking areas and other public or private places adapted for public travel that are in common use by the public. Large could not be considered to be in her home while sitting in a car parked in the common-area parking lot in her condominium complex where officers could see what was readily visible to any visitor without being overly intrusive. Thus,

Large had no reasonable expectation of privacy that prohibited her arrest in her own carport, nor did a violation of 46-6-105 occur. Whitefish v. Large, 2003 MT 322, 318 M 310, 80 P3d 427 (2003). See also St. v. Hubbel, 286 M 200, 951 P2d 971 (1997).

Inevitable Discovery of DNA Sample — No Privacy Interest in Sample: The state obtained a voluntary blood sample from Notti during a sexual assault investigation and placed the information in a suspect database. In a later homicide investigation, the information was compared to the crime lab's forensic unknown database and a match linked Notti to the homicide. Notti contended, but never showed, that the state violated his right to privacy when it improperly placed the data in the DNA identification index, because Notti was not a convicted felon at the time that the DNA sample was obtained. However, Notti waived any privacy right in voluntarily giving a blood sample. Further, Notti did not cite any authority to suggest that the state could not maintain a separate suspect database for DNA profiles in ongoing investigations. The Supreme Court held that even if storage of the DNA profiles did raise constitutional privacy issues, the evidence would have inevitably been discovered anyway because the DNA from the assault case would have resulted in posting in the DNA identification index. St. v. Notti, 2003 MT 170, 316 M 345, 71 P3d 1233 (2003), followed in St. v. Lacey, 2009 MT 62, 349 M 371, 204 P3d 1192 (2009), with regard to applicability of inevitable discovery exception. See also St. v. Pearson, 217 M 363, 704 P2d 1056 (1985).

Use of DNA Sample From Unrelated Investigation Not Violative of Right to Privacy — Waiver of Privacy Upon Consent to Particular Search: Notti contended that the use of a DNA profile from an unrelated sexual assault case, in which he was convicted, violated the right to privacy on a subsequent charge of deliberate homicide. The argument failed because Notti had consented to the withdrawal of a blood sample to be used for DNA testing, and a defendant's voluntary consent to a search constitutes waiver of any reasonable expectation of privacy with respect to the place searched (or blood or DNA), and the permitted search is lawful. St. v. Notti, 2003 MT 170, 316 M 345, 71 P3d 1233 (2003). See also St. v. Rodgers, 257 M 413, 849 P2d 1028 (1993).

Exigent Circumstances and Probable Cause Justifying Warrantless Entry Into Private Home — Motion to Suppress Evidence of Warrantless Search Properly Denied: In response to an urgent domestic violence 9-1-1 call from Saxton, officers arrived at Saxton's mobile home, but because they received no response to their calls and knocking, the officers entered the home to protect the lives of possible victims inside. Once inside, the officers discovered a marijuana growing operation and subsequently arrested Saxton on drug charges. Saxton moved to suppress the evidence on grounds that the warrantless entry was unlawful, but the motion was denied, and Saxton appealed. The Supreme Court recognized the general rule that warrantless searches conducted inside a person's home are per se unreasonable, with few exceptions. Pursuant to St. v. Wakeford, 1998 MT 16, 287 M 220, 953 P2d 1065 (1998), one exception occurs when an officer concludes that there are exigent circumstances and probable cause to conduct the search, and in this case, exigent circumstances and probable cause justified entry into the home. It was reasonable for the responding officers to conclude that it was necessary to enter the home to discover and protect Saxton or other potentially incapacitated victims. Because entry was justified, the District Court did not err in denying Saxton's motion to suppress evidence obtained as a result of the search. St. v. Saxton, 2003 MT 105, 315 M 315, 68 P3d 721 (2003).

Warrantless Search of Vehicle Exterior by Drug-Sniffing Dog — Expectation of Privacy in Vehicle Parked in Public Area — Particularized Suspicion Required: Following an anonymous tip that Tackitt was involved in drug trafficking and that he had a quantity of marijuana in the trunk of his car, a drug task force officer conducted an exterior canine search of Tackitt's car when it was parked outside Tackitt's residence. The dog alerted to the presence of drugs in the vehicle. The officer checked Tackitt's criminal record and verified some of the public information received in the tip and then obtained a warrant to search the vehicle and Tackitt's residence. The vehicle search revealed no evidence, but during the search of the residence, officers found drugs and paraphernalia. Tackitt moved to suppress on grounds that use of the dog violated the right to privacy. The District Court denied the motion, holding that Tackitt had no reasonable expectation of privacy in the odors emanating from his vehicle while it was parked in an area open to the public or, alternatively, that if particularized suspicion was required for use of the dog, the search in this case was supported by proper particularized suspicion. Tackitt appealed, and the Supreme Court reversed. Pursuant to St. v. Elison, 2000 MT 288, 302 M 228, 14 P3d 456 (2000), Tackitt had an expectation of privacy in the trunk of the vehicle, and the canine sniff did constitute a search. However, the expectation was in no way dependent on where the vehicle was parked, nor did the expectation necessitate a search warrant for the use of the canine to survey the exterior of the vehicle. Federal law allows the use of drug-detecting dogs to sniff

closed containers in public areas when police have a particularized suspicion to believe that a crime involving drugs is taking place. Under the greater protection afforded individual privacy under the Montana Constitution, the balance between governmental interests and individual interests is best struck by requiring particularized suspicion as a prerequisite for the use of a drug-sniffing dog. Particularized suspicion must be based on objective data from which an experienced police officer can make the inference that a person is engaged in wrongdoing, and an anonymous tip lacking appropriate corroboration simply cannot qualify as objective data to support a particularized suspicion any more than it can support probable cause. Therefore, because the District Court improperly concluded that there was a particularized suspicion for use of the dog to survey the exterior of Tackitt's vehicle and because the application for the search warrant failed to establish probable cause for the issuance of the warrant, the District Court's denial of the motion to suppress was reversible error. (Note: this holding is limited to the use of drug-sniffing dogs during police investigations and does not apply to the human detection of the odor of drugs.) St. v. Tackitt, 2003 MT 81, 315 M 59, 67 P3d 295 (2003), distinguishing St. v. Scheetz, 286 M 41, 950 P2d 722 (1997), and followed in St. v. Hart, 2004 MT 51, 320 M 154, 85 P3d 1275 (2004).

Reasonable Expectation of Privacy in Lost Wallet — Evidence Obtained From Search of Lost Wallet Subject to Suppression: Hamilton's lost wallet was turned into the Bozeman police, who opened it to determine ownership. In doing so, the police discovered prescription drugs. Hamilton confessed that the drugs were not prescribed for her, and she was arrested and convicted. On appeal, Hamilton asserted that she retained an expectation of privacy in the lost wallet and that the fruits of the search of the wallet should be suppressed. The Supreme Court agreed. In determining whether an unlawful search of the wallet occurred, the court applied St. v. Scheetz, 286 M 41, 950 P2d 722 (1997), looking at whether Hamilton had an actual expectation of privacy that society was willing to recognize as objectively reasonable and at the nature of the state's intrusion. When a person intentionally abandons property, the expectation of privacy is abandoned as well. However, when property is not intentionally or voluntarily abandoned, the expectation of privacy remains substantially intact. Thus, Hamilton's expectation of privacy was diminished only to the extent necessary for the police to determine ownership. The police search exceeded what was necessary to determine ownership of the wallet and was not justified by any exception to the warrant requirements. Therefore, the warrantless search was illegal, and the evidence obtained as a result of the search should have been suppressed. Hamilton's conviction was reversed. St. v. Hamilton, 2003 MT 71, 314 M 507, 67 P3d 871 (2003), distinguished in St. v. Demontiney, 2014 MT 66, 374 Mont. 211, 324 P.3d 344.

Evaluation of Reliability of Confidential Tip — Unreliable Tip as Only Grounds for Investigative Stop — Infringement of Right to Privacy: Following weeks of surveillance instigated by a confidential tip intimating drug activities, the Billings police observed no suspicious drug-related activities conducted by defendants, but after receiving a confidential tip that defendants would be driving from Billings to Bozeman to sell marijuana, officers stopped and searched defendants' vehicle and arrested defendants for drug possession. Defendants contended that insufficient objective data inferring criminality existed to justify the investigative stop. The Supreme Court applied the analysis in St. v. Pratt, 286 M 156, 951 P2d 37 (1997), to evaluate the reliability of the informant's tip. The court distinguished between a concerned citizen who reports a chance encounter with crime as a civic duty and a confidential informant who works with police by reporting on the illegal activities of others. A citizen informant is presumed to be telling the truth, but a confidential informant does not enjoy the same presumption of veracity. Further, for a tip to support a finding of probable cause, police must know the identity of the informant, trust from experience or presumption that the informant is telling the truth, and discern that the informant's information about the alleged crime derives from the informant's personal observations. Officers must then evaluate the veracity, reliability, and basis of knowledge of the informant to determine whether the report supports reasonable suspicion. If a tip is anonymous and lacks any indication of the basis for the informant's opinion, the tip must be corroborated through the observation of suspicious activity that alerts officers to the possibility of a violation. Corroboration of a tip with innocent information may lend an unknown or untested tipster some credibility, but this indicia of reliability does not obviate the relevance of the tipster's basis of knowledge as a factor in the evaluation. In the context of particularized suspicion, because the quantum of suspicion is less, an unreliable tip requires corroboration that supports an inference of criminality by direct police observation of suspicious activity and consideration of the modes of patterns of operation of certain kinds of lawbreakers, and mere police corroboration of innocent facts is insufficient. Here, defendants engaged in no observed criminal activity, and their travel

plans were equally consistent with innocent behavior. Although the traffic stop was initially made to check a temporary sticker on the vehicle, once the sticker was found to be valid, grounds for the stop ended and no further police intrusion was warranted. St. v. Martinez, 2003 MT 65, 314 M 434, 67 P3d 207 (2003), following St. v. Henderson, 1998 MT 233, 291 M 77, 966 P2d 137 (1998), and distinguishing Ala. v. White, 496 US 325 (1990). See also St. v. Reesman, 2000 MT 243, 301 M 408, 10 P3d 83 (2000).

Unusual but Legal Driving and Unsupported Tip Insufficient Grounds for Particularized Suspicion to Make Investigative Stop: An officer received a tip concerning suspicious activity in a high crime area of Billings. The officer observed Fisher's car in the area and followed the car. The officer observed that the vehicle had a temporary sticker, which could not be read, but no license plate. The vehicle made several turns and ended up on the street where the officer originally saw it. The officer then stopped the vehicle, and Fisher was subsequently arrested for possession of drugs and drug paraphernalia. Fisher moved to suppress the evidence on grounds that the officer had no particularized suspicion to make the stop. The motion was denied and Fisher was convicted and appealed. The state initially claimed that the officer had a particularized suspicion that Fisher was in violation of vehicle registration laws, but the state waived that argument when the officer did not testify to that effect. Further, none of the information in the anonymous tip was connected to Fisher; rather, the officer stated that he wanted to obtain the identity of the vehicle occupants for later investigation of the tip. However, under St. v. Anderson, 258 M 510, 853 P2d 1245 (1993), an investigative stop is not justified in order to corroborate a tip. Lastly, Fisher maintained an appropriate speed, violated no traffic laws, and made no unusual turns, and Fisher's driving was not headlong flight or evasive. The simple fact that Fisher drove back to the original street where the officer saw the vehicle, absent more objective data, was insufficient for the officer to form a particularized suspicion that Fisher was engaged in criminal activity based on operation of the vehicle. Thus, the stop violated Fisher's right to be free from unreasonable search and seizure and the Supreme Court reversed. St. v. Fisher, 2002 MT 335, 313 M 274, 60 P3d 1004 (2002), distinguishing St. v. Henderson, 1998 MT 233, 291 M 77, 966 P2d 137 (1998), and Ill. v. Wardlow, 528 US 119 (2000), and distinguished in St. v. Flemings, 2008 MT 229, 344 M 360, 188 P3d 1020 (2008).

Involuntary Written Consent to Search — Suppression of Illegally Seized Evidence Under Exclusionary Rule: Olson was arrested when officers entered her home pursuant to a warrant for Olson's failure to appear at a Justice's Court hearing. While the arrest was taking place in the kitchen, an officer looked into the living room and observed drug paraphernalia. Officers then searched other rooms of the house and found drugs and paraphernalia in each room. An officer requested that Olson sign a form consenting to a further search of the residence, and Olson agreed. A further search revealed more drugs and paraphernalia. Olson later made a taped statement in jail. The District Court denied Olson's motion to suppress on grounds that the written consent was voluntary. The Supreme Court disagreed and reversed. Although the knowing and voluntary consent by a citizen to a search is a recognized exception to warrant requirements, consent is not voluntary when it is given only after law enforcement officers have already conducted an illegal search because the consent flows directly from the unlawful intrusion. Further, the taped statement should have also been suppressed under the exclusionary rule, because the incriminating statement was gathered as a result of the unlawful search. St. v. Olson, 2002 MT 211, 311 M 270, 55 P3d 935 (2002).

Warrantless Search of Home Subsequent to Lawful Arrest Unjustified Under Plain View Doctrine and Protective Sweep: Olson was arrested when officers entered her home pursuant to a warrant for Olson's failure to appear at a Justice's Court hearing. While the arrest was taking place in the kitchen, an officer looked into the living room and observed drug paraphernalia. Officers then searched other rooms of the house and found drugs and paraphernalia in each room. Olson moved to suppress the evidence and subsequent statement on grounds that the warrantless search was unreasonable. The District Court denied the motion pursuant to the plain view doctrine and concluded that the search was justified as a precautionary sweep. The Supreme Court reversed. Under Chimel v. Calif., 395 US 752 (1969), there is no comparable justification for routinely searching any room other than that in which the arrest occurs. Further, under Md. v. Buie, 494 US 325 (1990), a protective sweep is justified when there are articulable facts that, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene. In this case, the arresting officers were informed that there was no one else in the house at the time of the arrest and had no indication to believe otherwise. Neither the

plain view doctrine nor a protective sweep justified a further search of the residence without a warrant. St. v. Olson, 2002 MT 211, 311 M 270, 55 P3d 935 (2002).

Absence of Exigent Circumstances — Warrantless Search Unjustified: Logan was one of two passengers in a vehicle that was stopped for failure to have the rear license plate illuminated. The officer recognized the driver, who had a history of carrying weapons and of violence toward police officers, and called for backup. The officer then approached the vehicle but did not smell or observe any illegal drugs or drug paraphernalia or observe any behavior that led the officer to believe that anyone in the vehicle was under the influence of drugs. After obtaining identification from the driver and passengers, the officer ran a check for outstanding warrants on all the parties and learned that all three persons had past drug arrests and that an extreme officer caution alert was in effect for the driver. The officer then called for another officer who had a drug-sniffing dog. The dog alerted to the passenger-side door of the car, and the officer removed a purse from the back seat containing drug paraphernalia and a paper bindle. The dog entered the vehicle and indicated additional drugs. Logan was subsequently arrested for possession of dangerous drugs but moved to suppress the evidence on grounds that the officer did not have a particularized suspicion of the presence of drugs to support a canine sniff search of the vehicle. The Supreme Court agreed. In St. v. Elison, 2000 MT 288, 302 M 228, 14 P3d 456 (2000), the Supreme Court held that there is no automobile exception to constitutional search warrant requirements and that the mobility of a vehicle, without more, is not sufficient to justify a warrantless search. In addition to particularized suspicion, a warrantless search of a vehicle requires probable cause and a generally applicable exception to the warrant requirement, such as plain view search, a search incident to arrest, or exigent circumstances, which was the only applicable exception at issue here. The District Court held that the exigent circumstance in this case was that allowing Logan to reenter the vehicle to retrieve the purse would have provided the opportunity to destroy the evidence. However, the officer testified that there was nothing that prevented obtaining a search warrant, and that testimony itself belied the fact that exigent circumstances existed. Because the state failed to meet the heavy burden of proving exigent circumstances, the District Court erred in denying Logan's motion to suppress, so the case was reversed. St. v. Logan, 2002 MT 206, 311 M 239, 53 P3d 1285 (2002).

Elements of Community Caretaker Doctrine — Particularized Suspicion Not Required in Case of Safety Stop: About 3:05 a.m., an officer on routine patrol stopped to investigate a vehicle parked beside a highway with its lights out but with its motor running. Lovegren was in the driver's seat and appeared to be asleep, but he did not respond when the officer knocked on the window. When the officer opened the door, Lovegren awoke and stated, "I was drinking." The officer noticed that Lovegren's eyes were bloodshot and smelled alcohol. The officer had Lovegren perform field sobriety tests, which Lovegren failed, and arrested Lovegren for DUI. Lovegren moved to suppress all evidence, claiming that the search was illegal because the officer had no particularized suspicion of any wrongdoing. The District Court denied the motion on grounds that a particularized suspicion was not necessary because the officer had a duty to investigate for Lovegren's own safety. Lovegren appealed, but the Supreme Court affirmed pursuant to the community caretaker doctrine. The court applied the following test to determine whether an officer's actions fall under the doctrine: (1) as long as there are objective, specific, and articulable facts from which an experienced officer would suspect that a citizen is in need of help or is in peril, the officer has a right to stop and investigate; (2) if the citizen is in need of aid, the officer may take appropriate action to render assistance or mitigate the peril; and (3) once the officer is assured that the citizen is not in peril and is not in need of assistance or that the peril has been mitigated, any actions beyond that constitute a seizure implicating constitutional protections afforded by the right of privacy and the right against illegal search and seizure. In this case, when the officer opened the door to check on Lovegren's well-being and Lovegren awoke and voluntarily stated that he had been drinking, the officer then noticed other signs of intoxication that constituted a particularized suspicion to make a further investigative stop that eventually developed into probable cause for an arrest. It would have been a dereliction of the officer's duty if, after knocking on the window and receiving no response, the officer had walked away and continued on patrol. Thus, the escalation of events leading to Lovegren's arrest was proper, and denial of the motion to suppress the evidence of the investigation was not erroneous. St. v. Lovegren, 2002 MT 153, 310 M 358, 51 P3d 471 (2002), following Grinde v. St., 249 M 77, 813 P2d 473 (1991), and Hulse v. St., 1998 MT 108, 289 M 1, 961 P2d 75 (1998), and followed in St. v. Reiner, 2003 MT 243, 317 M 304, 77 P3d 210 (2003), St. v. Nelson, 2004 MT 13, 319 M 250, 84 P3d 25 (2004), St. v. Litschauer, 2005 MT 331, 330 M 22, 126 P3d 456 (2005), St. v. Wheeler, 2006 MT 38, 331 M 179, 134 P3d 38 (2006), and St. v. Vaughn, 2007 MT 164, 338 M 97, 164 P3d

873 (2007). The Lovegren community caretaker doctrine was also applied in St. v. Seaman, 2005 MT 307, 329 M 429, 124 P3d 1137 (2005), and in St. v. Burns, 2011 MT 167, 361 Mont. 191, 256 P.3d 944. See also Henry v. U.S., 361 US 98 (1959), Terry v. Ohio, 392 US 1 (1968), and Cady v. Dombrowski, 413 US 433 (1973).

No Reasonable Expectation of Privacy in Possession of Game Fish — Probable Cause Not Required for Game Warden's Inspection of Angler's Concealed Catch: Initially concerned for the safety of the occupants of a seemingly unoccupied watercraft, a game warden approached the watercraft. When informed that Boyer had been fishing, the warden asked to see Boyer's license and catch. After Boyer requested a later inspection, he reluctantly exhibited eight fish. At that point, the warden looked into the live well of Boyer's boat, and in the process found unlawfully killed game fish. Boyer contended that the warden needed probable cause to believe that Boyer had committed a violation at the time that the request was made in order to inspect his catch, and that conducting a warrantless search of Boyer's live well was impermissible. The Supreme Court noted that under the Montana Constitution, an impermissible search occurs only when a reasonable expectation of privacy exists. To determine whether the warden unlawfully intruded into Boyer's privacy, the court considered: (1) whether Boyer had an actual expectation of privacy; (2) whether society was willing to recognize that expectation as objectively reasonable; and (3) the nature of the state's intrusion (see St. v. Bassett, 1999 MT 109, 294 M 327, 982 P2d 410 (1999)). The court concluded that Boyer's subjective expectation of privacy in his catch was not one that society would recognize as reasonable. Under Art. IX, sec. 1, Mont. Const., the state must maintain a clean and healthful environment, and the Legislature has provided for game wardens to enforce the environmental laws regarding fish and game by implementing a system that includes the ability of wardens to inspect game in the field, which encompasses proper licensing and game limitation requirements. In this capacity, wardens act as public trustees protecting and conserving Montana wildlife and habitat for all citizens. Fishing is a privilege accorded by the state, not a private right, and anglers must assume the burdens of the sport, as well as its benefits, and acknowledge the prospect of at least some governmental intrusion into their activities, including license checks, inquiries about game taken, and requests to inspect game in the field. Because Boyer had no reasonable expectation of privacy in his catch, the warden's request for and inspection of the catch was not considered a search, so probable cause was not necessary. St. v. Boyer, 2002 MT 33, 308 M 276, 42 P3d 771 (2002).

Invalid Warrantless Search of Defendant's Hands Absent Exigent Circumstances: Officers responding to a break-in found blood on doorknobs, light switches, broken glass, and other objects in the house and garage. Matching the description of the suspect, Hardaway was picked up near the scene and found to have blood on his hands. Hardaway was arrested for burglary, and during postarrest processing, blood was swabbed from his hands without permission or a warrant. The blood sample matched the blood evidence found at the scene. Hardaway moved to suppress blood swab evidence obtained from his hands after arrest, but the motion was denied. The District Court reasoned that the swabbing either was not a search, pursuant to St. v. Holzapfel, 230 M 105, 748 P2d 953 (1988), or was justified as a search incident to arrest, pursuant to St. v. Ulrich, 187 M 347, 609 P2d 1218 (1980). Hardaway appealed on grounds that the swabbing was clearly a search that was required to be justified by both probable cause and exigent circumstances and that no exigent circumstances existed because he was in custody at the time and a warrant could have been obtained. The Supreme Court agreed and reversed. The court adopted the analysis of what constitutes a search set out in Cupp v. Murphy, 412 US 291 (1973), holding that Hardaway had a reasonable expectation of privacy as to his person and personal security (overruling Holzapfel) and that the swabbing constituted a search subject to federal and Montana constitutional protections. Although his hands and the blood on them were exposed to the public for viewing, it was not the viewing that constituted a search, but rather the swabbing. Further, even though the swabbing could be considered a search incident to arrest pursuant to federal law and the bright-line rule in U.S. v. Robinson, 414 US 218 (1973), that requires no further justification than a lawful arrest for the search exception to apply, the Supreme Court opted to grant greater individual privacy rights protection to Hardaway based on the Montana Constitution, consistent with the prior holding in St. v. Sawyer, 174 M 512, 571 P2d 1131 (1977). The court noted its consistent holdings that a warrantless search incident to an arrest must be commensurate with its underlying purpose of preventing an arrestee from using any weapons, escaping, or destroying incriminating evanescent evidence in the arrestee's possession, considered inherently anticipated exigent circumstances under 46-5-102(1) through (3); however, to the extent that a warrantless search incident to a lawful arrest is conducted pursuant to 46-5-102(4), which deals with discovering and seizing any persons, instruments, articles, or things that may have been

used in the commission of or that may constitute evidence of the offense, specific and articulable exigent circumstances are also required to justify and render the search lawful (distinguishing and partially overruling Ulrich). Here, there were simply no exigent circumstances requiring a warrantless search. Hardaway was at the station house, under the full control of the police, with no present means of destroying the blood evidence. Hardaway could have consented to the swab or waited in discomfort until a warrant was obtained, but either way the evidence was going nowhere. Therefore, the swabbing of Hardaway's hands was not a valid search incident to arrest. St. v. Hardaway, 2001 MT 252, 307 M 139, 36 P3d 900 (2001), distinguished in St. v. Madplume, 2007 MT 11, 335 M 290, 150 P3d 956 (2007).

Arrest and Detention for Nonjailable Offense Unreasonable Absent Circumstances to Justify Immediate Arrest: A Havre police officer responded to a 2:47 a.m. complaint that two people were "messing around with cars" and were running toward the post office, but no physical description was provided. While searching the post office area, the officer noticed a person walking down the street. Upon seeing the police car, the person began running. Bauer was eventually found and arrested for minor in possession (MIP), second offense. During booking, Bauer was also found to be in possession of drugs, but moved to suppress on grounds that his arrest and detention for a nonjailable offense was an unlawful violation of the right to privacy, the right to be free from unreasonable search and seizure, and the right to be free from cruel and unusual punishment. The District Court concluded that the arrest was lawful because once the officer had probable cause to arrest, the right to detain was inherent. The Supreme Court disagreed, reversed, and suppressed the fruits of the search. When determining the reasonableness of a warrantless search, the state's interest must be balanced against the level of intrusion into an individual's privacy resulting from the search, and this analysis applies equally to the seizure of a person. Although 46-6-311 gives officers the discretion to either arrest or issue a notice to appear, to be constitutional, the officer's exercise of that discretion must be reasonable, and in addition to probable cause, there must also be circumstances that require immediate arrest. It is unreasonable for an officer to effect an arrest and detention for a nonjailable offense when there are no circumstances to justify an immediate arrest, and a person stopped for such an offense should not be subjected to the indignity of an arrest and police station detention when a simple, nonintrusive notice to appear will serve the interests of law enforcement. Here, the officer knew that imprisonment was not a potential punishment for Bauer's second offense MIP, and there were no circumstances that required Bauer's immediate arrest, so Bauer should have been issued a notice to appear in lieu of arrest. St. v. Bauer, 2001 MT 248, 307 M 105, 36 P3d 892 (2001).

Exigency Requirements for Warrantless Search of Vehicle Clarified — Automobile Exception to Search Warrant Requirement Inapplicable: In order to justify the warrantless search of an automobile, the state must show exigent circumstances under which it was not practical to obtain a warrant. Taking the opportunity to clarify the source of the exigency requirement, the Supreme Court noted that Montana's unique constitutional language affords citizens a greater right to privacy and broader protection than the federal constitution in cases involving searches of private property, and as a result, the category of warrantless searches that may be conducted under the Montana Constitution is narrower than the category of warrantless searches that may be conducted under the federal constitution. The Montana Constitution provides greater protection from warrantless search of automobiles, and such searches are restricted to the purpose of safeguarding articles within plain view of the officer. In this case, Elison had items stowed out of view behind the seat of his car, creating an actual and reasonable expectation of privacy, and the state needed a compelling interest beyond the mere existence of probable cause to search the car without a warrant. The warrantless search of an automobile also requires the existence of a generally applicable exception to the warrant requirement, such as a plain view search, a search incident to arrest, or exigent circumstances. Here, the District Court found exigent circumstances, including the mobility of the vehicle, the possibility that a confederate could move the vehicle, and the fact that it would have been difficult to obtain a warrant at the time that the stop was made at 12:05 a.m. The Supreme Court disagreed and held that the state failed to carry the heavy burden of proving exigent circumstances. Mere mobility of a vehicle, without more, is insufficient to justify a warrantless search. The possibility that a confederate could move the vehicle did not apply because Elison was alone and without means to contact a confederate. The validity of a warrantless search also does not turn solely on the time of day that the search is conducted. Although Montana magistrates may prefer not to be disturbed late at night, Montana's constitutional protections apply at all times and do not simply fade away with the setting sun. Absent exigency, the search of Elison's vehicle was unlawful, and Elison's motion

to suppress the fruits of the warrantless search was improperly denied. The case was reversed. St. v. Elison, 2000 MT 288, 302 M 228, 14 P3d 456, 57 St. Rep. 1206 (2000).

Entry of Intensive Supervision Program Officer Into Probationer's Home Without Consent Unlawful — Information Gathered Via Search Admissible as Independent Source or Inevitable Discovery Exceptions to Fruit of Poisonous Tree Doctrine: As a condition of suspended sentencing, Therriault was placed in the intensive supervision program (ISP). Near the end of the program, Therriault's supervising officer, McCarty, arrived at Therriault's residence for a routine check. Although Therriault was not there, McCarty entered the residence and found, in plain view, what he thought might be a note for him from Therriault, but which turned out to be a high school registration form for a female student. McCarty then went to Therriault's sister's home next door. Therriault's sister informed McCarty that she had seen a girl at Therriault's home during the prior 2 weeks and inquired about the lawful age of consent. McCarty then reentered Therriault's home and reviewed the form, discovering that the applicant was 14 years old. McCarty left a note for Therriault to contact him and left the residence but returned later that night to discover a 14-year-old girl in Therriault's basement. Upon petition to revoke his probation, Therriault alleged that the discovery directly resulted from an illegal search and seizure and moved to suppress all evidence under the fruit of the poisonous tree doctrine. The District Court denied the motion, revoked Therriault's suspended sentence, and sentenced him to prison for the remainder of the term. Therriault appealed. The state contended that as a participant in ISP, Therriault enjoyed little or no expectation of privacy and that McCarty's conduct did not constitute a search. The Supreme Court disagreed, finding that ISP is merely a rigid condition imposed on certain probationers and that it is the sentencing tribunal, not the ISP officer, that establishes the conditions for any search of the probationer's person or property and that any ISP rules, terms or conditions, or means of supervision that conflict with a court-ordered condition of probation will be superseded by the court's conditions. The state misconstrued Therriault's expectation of privacy under ISP because the court's probationary condition stated that Therriault would submit his residence "to search at any time by lawful authorities upon reasonable request of his Probation Officer", so Therriault could expect that an intrusion into the privacy of his home would not occur unless McCarty had reasonable cause and first posed a reasonable request. Accordingly, McCarty's conduct constituted an illegal search and evidence obtained through the unlawful conduct would not generally be admissible under the fruit of the poisonous tree doctrine. However, under St. v. New, 276 M 529, 917 P2d 919 (1996), such derivative evidence is admissible if it is: (1) attenuated from the constitutional violation so as to remove its primary taint; (2) obtained from an independent source; or (3) determined to be evidence that would have been inevitably discovered apart from the constitutional violation. In this case, the second exception applied. McCarty received independent incriminating evidence from Therriault's sister; thus, it was not the tainted evidence of the girl's name or age or the fact that she was transferring to a different school that led to her discovery, but rather the independent information that a girl of questionable age had been residing with Therriault. This irrefutable evidence, ascertained through a source sufficiently independent of McCarty's unlawful conduct, warranted exclusion from the fruit of the poisonous tree doctrine. The District Court's revocation of Therriault's suspended sentence was affirmed. St. v. Therriault, 2000 MT 286, 302 M 189, 14 P3d 444, 57 St. Rep. 1185 (2000).

Traffic Stop of Illegally Operated Vehicle Not Considered Pretext for Search of Vehicle for Narcotics: Officers conducting surveillance of a house where drug activities were suspected noticed that a vehicle leaving the area was missing a headlight. The officers believed that the driver, Farabee, may have just completed a drug transaction at the house and pulled over the vehicle, based on the fact that the vehicle appeared to be in violation of 61-9-104, which requires two working headlights. Upon receiving permission and searching the vehicle, the officers discovered marijuana and paraphernalia. On appeal, Farabee argued that the evidence should be suppressed because the officers used the equipment violation as a pretext to stop him and investigate their hunch, in violation of section 11 of this article and this section. The Supreme Court disagreed, applying the rationale in Whren v. U.S., 517 US 806 (1996), that an officer's motive for a traffic stop does not render an objectively reasonable stop invalid. The constitutional reasonableness of a traffic stop does not depend on the subjective motivations of the individual officers involved. In this case, based on the objective and particularized data that the vehicle appeared to be missing a headlight, the officers made the reasonable inference that the headlight was inoperable, so the totality of the circumstances justified the investigative stop. Farabee's motion to suppress was properly denied. St. v. Farabee, 2000 MT 265, 302 M 29, 22 P3d 175, 57 St. Rep. 1106 (2000), distinguishing St. v. Lahr, 172 M 32, 560 P2d 527 (1977).

Search of Probationer's Residence or Vehicle — Reasonable Grounds and Probable Cause Distinguished: One condition of Kriesel's probation was a provision that Kriesel be subject to search and seizure of his residence, person, or vehicle upon the request of his probation officer at any time with or without a warrant and with or without probable cause. Kriesel was arrested for violating probation and released to await revocation proceedings but failed to report to his probation officer, so a bench warrant was issued for his arrest. Following a vehicle stop based on an informant's description of his car, Kriesel was arrested on the outstanding warrant and methamphetamine and drug paraphernalia were found in the car. Kriesel tested positive for marijuana and amphetamine. On appeal, Kriesel moved to suppress the evidence found in the search, alleging that the informant supplied information that was not sufficiently corroborated and that there was thus insufficient particularized suspicion to stop his vehicle, as required under 46-5-401. However, in this case, the stop was initiated to detain Kriesel under the authority of a valid outstanding warrant, satisfying the probable cause requirement of 46-6-201, and as a result, the particularized suspicion requirement was satisfied. Further, under St. v. Olmsted, 1998 MT 301, 292 M 66, 968 P2d 1154 (1998), a search of a probationer's residence or vehicle does not require probable cause, but rather reasonable grounds as determined by the totality of the circumstances. The reasonable grounds standard requires substantially less than the probable cause standard because of a probationer's diminished expectation of privacy and the superior position of the probation officer to determine what level of supervision is necessary to provide rehabilitation and community safety. The District Court found that given Kriesel's status as a probationer, the search of his vehicle was properly executed. Given the evidence that there was probable cause for the stop and reasonable grounds for the search, the court's findings were not clearly erroneous, were correctly applied as a matter of law, and thus were affirmed. St. v. Kriesel, 2000 MT 144, 300 M 44, 2 P3d 831, 57 St. Rep. 564 (2000).

Warrantless Strip Search of Prison Visitor Permissible if Supported by Reasonable Suspicion: Deserly traveled to the state prison to visit her husband who was an inmate, but upon attempting to enter, her underwire bra set off the metal detector. She was informed that she could consent to a strip search and that if she refused, she would be denied contact visitation but would be allowed noncontact visitation. Deserly was a former jailer and knew what a strip search entailed, but nevertheless consented to the search. Later, Deserly sued the Department of Corrections, seeking unspecified damages for emotional distress allegedly caused when the prison officers required her to submit to the strip search, complaining that her privacy was invaded and that she was humiliated and visually raped as a result of the search. The District Court found that the search was justified and that no privacy invasion occurred and summarily dismissed the case. Deserly conceded on appeal that because the state has an interest in the security of its penal institutions, searches of inmate visitors are justifiable only on satisfying a reasonable suspicion standard, but maintained that the legitimate penalogical need to conduct the search could have been satisfied by more narrow means than a strip search. The Supreme Court acknowledged that one of the clearest forms of degradation in Western society is to strip a person of the person's clothes and that a strip search, regardless of how professionally and courteously conducted, is an embarrassing and humiliating experience. Further, a prison visitor retains the constitutional right to be free from unreasonable searches and seizures. However, a prisoner does not have a due process right to unfettered visitation, nor does a citizen have a right to unfettered visitation of a prisoner that rises to a constitutional dimension. Moreover, in seeking entry into a controlled prison environment, a visitor simultaneously acknowledges a lesser expectation of privacy because of the insistence on access. Because prisons are dangerous places for employees, visitors, and inmates, the basic constitutional issue becomes one of balancing the legitimate governmental interest in and need for searching inmate and prison visitors against the intrusions into personal rights and residual privacy interests that such searches entail. Although prison visitors can be subjected to some searches, such as pat-downs or metal detector sweeps, merely as a condition of visitation, more intrusive searches, such as strip searches, are permissible as exceptions to the constitutional warrant requirements only if the search is supported by reasonable suspicion. Thus, the ultimate question was not simply whether there was some alternative means of conducting the search, but whether prison officials acted reasonably and used the least intrusive means under the circumstances. In Deserly's case, the strip search was supported by reasonable suspicion and was conducted in a manner that took into account Deserly's privacy interest and yet fulfilled the Department's penalogical need to ensure that Deserly was not carrying metal contraband in some article of her clothing. Deserly v. Dept. of Corrections, 2000 MT 42, 298 M 328, 995 P2d 972, 57 St. Rep. 199 (2000), following St. v. Bassett, 1999 MT 109, 294 M 327, 982

P2d 410, 56 St. Rep. 447 (1999), and distinguishing Hunter v. Auger, 672 F2d 668 (8th Cir. 1982), and Thorne v. Jones, 765 F2d 1270 (5th Cir. 1985).

Lack of Evidence That Investigating Officers Went Above High-Water Mark to Obtain Photograph of Marijuana Plant on Private Property — Motion to Suppress Properly Denied: An anonymous caller informed the Rosebud County Sheriff's office that Mogen was growing marijuana on Mogen's private land abutting the Yellowstone River. A Sheriff's officer and a game warden traveled by boat down the river to begin surveillance operations. The officers did not have a search warrant or permission to be on Mogen's property, nor was the property posted along the river. The Sheriff testified that the game warden came along to identify and prevent trespass above the ordinary high-water mark, below which public access is allowed pursuant to Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984). The officers used binoculars to view the suspected marijuana plant and took photographs of the plant from a point that they testified was below the ordinary high-water mark. Mogen moved to suppress the evidence, asserting that the officers must have crossed above the ordinary high-water mark, without an invitation or warrant, to observe and take the photographs in a portion of his property where he had an expectation of privacy and that the evidence was thus illegally seized. The District Court denied the motion to suppress. The Supreme Court affirmed, finding nothing in the record to indicate that the District Court's finding of fact was clearly erroneous or incorrectly applied. St. v. Mogen, 2000 MT 14, 298 M 87, 993 P2d 699, 57 St. Rep. 82 (2000), following St. v. Siegal, 281 M 250, 934 P2d 176, 54 St. Rep. 158 (1997).

Invalid Third-Party Consent to Warrantless Search of Private Residence — Consenting Party to Have Actual Authority to Consent to Search: A warrantless search conducted inside a home is per se unreasonable, subject to only a few exceptions, one of which is when the search is conducted pursuant to consent that is freely and voluntarily given. The state may justify a warrantless search by showing that permission was obtained from defendant or from a third party who possessed common authority over or other sufficient relationship to the premises or effect sought to be inspected, but the state has the burden of showing that consent was voluntary. However, for third-party consent to be valid, the consenting party must have actual authority to consent, as opposed to apparent authority. In the present case, McLees lived with his father, Scott, in an apartment owned by his grandfather, Earl, and investigating officers obtained Earl's voluntary consent before searching the residence. The District Court held that Earl had common authority to consent to the search and denied McLees' motion to suppress incriminating evidence found in the search. The Supreme Court disagreed. Under U.S. v. Matlock, 415 US 164, 39 L Ed 2d 249, 94 S Ct 988 (1974), common authority may not be implied from the mere property interest of a third party in the property to be searched. Rather, the authority that justifies third-party consent rests on the mutual use of the property by persons having joint access or control for most purposes. Here, the record was insufficient to show that Earl had common authority over McLees' apartment. Earl never went to the apartment unless Scott was there. Earl did not have free access to and was not a cohabitant of the apartment and did not share in its use. The fact that Earl owned the property was not dispositive when McLees had a reasonable expectation of privacy by living there. Earl therefore did not have a sufficient relationship with the apartment that would give him actual authority to consent to a warrantless search. While declining to address whether the seized evidence was admissible under the independent source rule or the inevitable discovery rule, the Supreme Court held that it was inadmissible under the third-party consent rule and reversed for further proceedings. St. v. McLees, 2000 MT 6, 298 M 15, 994 P2d 683, 57 St. Rep. 25 (2000), following St. v. Sorenson, 180 M 269, 590 P2d 136 (1979), St. v. Lopez, 896 P2d 889 (Hawaii 1995), and St. v. Hubbel, 286 M 200, 951 P2d 971, 54 St. Rep. 1373 (1997), distinguishing Ill. v. Rodriguez, 497 US 177, 111 L Ed 2d 148, 110 S Ct 2793 (1990), and followed, with regard to third-party authority to consent to search, in St. v. Gilmore, 2004 MT 363, 324 M 488, 104 P3d 1051 (2004), and St. v. Lacey, 2009 MT 62, 349 M 371, 204 P3d 1192 (2009).

Lawful Entry Into Home by Firefighter — Reasonable Expectation of Privacy Retained — Plain View Exception Inapplicable: A firefighter legally in Bassett's home performing mopup after a fire discovered apparent marijuana growing in a closet. The plants, visible because the closet door had burned away, were subsequently seized by a Deputy Sheriff without a warrant. When told that the plants had been discovered, Bassett waived Miranda rights and admitted growing marijuana but later moved to suppress the statement because it was the direct product of an unconstitutional search. The District Court admitted evidence from the search under the plain view exception and denied suppression of Bassett's confession. The court further held that Bassett no longer held a reasonable expectation of privacy in his closet because he did nothing to restrict entry into the home and because society would not view entry into a burned residence

that was largely destroyed and open to the elements as an invasion of privacy. To determine the threshold question of whether the search was an unlawful intrusion into Bassett's privacy, the Supreme Court applied the criteria in St. v. Hubbel, 286 M 200, 951 P2d 971, 54 St. Rep. 1373 (1997): (1) whether Bassett had an actual expectation of privacy; (2) whether society would recognize that expectation as objectively reasonable; and (3) the nature of the state's intrusion. Citing Mich. v. Tyler, 436 US 499, 56 L Ed 2d 486, 98 S Ct 1942 (1978), the court noted that a person retains a reasonable privacy interest in that person's home even when it has been damaged by fire. The court also followed U.S. v. Hoffman, 607 F2d 280 (9th Cir. 1979), for the proposition that the privacy expectation remains even when firefighters discover contraband. Although a firefighter is obviously justified and in fact expected by Montanans to enter a home to extinguish a fire, this does not mean that Montanans reasonably expect that the private sanctity of their homes will then be open to other government officials to search for evidence of unrelated criminal activity simply because the firefighter was already legitimately on the premises. The firefighter and the Deputy Sheriff each had separate reasons for entering the home. Therefore, two entirely separate justifications for each entry were required. There was no exigent circumstance, such as an immediate emergency, that justified the Deputy Sheriff's warrantless entry, nor did the plain view exception apply because the officer was not legally in the home when the evidence was seen. Further, Bassett did not need to take any affirmative steps to demonstrate that he retained his privacy interest. The warrantless search was unjustified, and Bassett's incriminating statement was the direct product of an illegal search and thus inadmissible by virtue of the exclusionary rule. St. v. Bassett, 1999 MT 109, 294 M 327, 982 P2d 410, 56 St. Rep. 447 (1999), distinguishing St. v. Bell, 737 P2d 254 (Wash. 1987), and St. v. Loh, 275 M 460, 913 P2d 592, 53 St. Rep. 226 (1996), and followed in Deserly v. Dept. of Corrections, 2000 MT 42, 298 M 328, 995 P2d 972, 57 St. Rep. 199 (2000). However, see St. v. Lewis, 2007 MT 295, 340 M 10, 171 P3d 731 (2007), in which the plain view doctrine did apply to the seizure and admissibility of potential evidence of arson seen by a Deputy Sheriff who initially entered a burning residence for fire suppression and who subsequently reentered the residence to secure the evidence.

Discovery of Shotgun Case During Routine Walk-Through of Probationer's Residence Constituting Reasonable Grounds for Further Warrantless Search: Probationer Stucker allowed a voluntary tour of his residence by probation officers, who discovered two weapons cases in plain view in the master bedroom. One case contained a bow, which Stucker was allowed to possess under the terms of his probation; the other contained a semiautomatic shotgun, which constituted contraband under the probation conditions. The discovery of the shotgun case in plain view constituted reasonable grounds for the officers to conduct a warrantless search of the residence to determine if additional weapons were present. The District Court did not err in denying Stucker's motion to suppress the fruits of the search. St. v. Stucker, 1999 MT 14, 293 M 123, 973 P2d 835, 56 St. Rep. 65 (1999).

Enforceability of Civil Judgment Insufficient Compelling State Interest to Justify Warrantless Search of Judgment Debtor's Residence: Police officers searched Dorwart's home pursuant to writs of execution and seized his personal property, but without Dorwart's permission or a search warrant. The argument was made that the compelling state interest justifying the warrantless search and seizure was the enforcement of monetary judgments by the seizure of the judgment debtor's property and the preservation of the credibility of the judicial system. Although the Supreme Court has held that a compelling state interest justifying an intrusion into a person's privacy may exist when the state is acting to enforce its criminal laws for the benefit and protection of other fundamental rights of its citizens, in this case, entry was not effectuated to enforce the state's criminal laws or to protect society in general from the actions of criminal wrongdoers, but rather for the purpose of enforcing a civil judgment between two private citizens. The state's interest in postjudgment execution cases is not so compelling as to justify an intrusion into a person's private home, without the person's consent, for purposes of searching that home and seizing any property that might have some value. Dorwart v. Caraway, 1998 MT 191, 290 M 196, 966 P2d 1121, 55 St. Rep. 777 (1998).

Entry of Residence to Levy Upon Personal Property While Judgment Debtor Incarcerated — Entry and Search of Private Home Not Authorized by Writ of Execution: Dorwart was named defendant in two small claims actions, resulting in the entry of default judgments against him and the issuance of writs of execution to enforce the judgments. About 1 month later, while driving his truck, Dorwart was stopped and served with the two writs and was subsequently also arrested for driving under the influence and incarcerated. While Dorwart was in jail, two Sheriff's deputies entered Dorwart's home and garage without his permission or a warrant and seized various items of personal property pursuant to the writs, relying on the writs as the sole

authority for authorization to enter the residence and conduct the search and seizure. Dorwart later filed a complaint, alleging various state and federal claims and common-law tort claims and contending that Montana's postjudgment execution statutes are unconstitutional. The District Court found that the deputies did not violate Dorwart's constitutional right to be free from unreasonable search and seizure because the writs constituted judicial authorization for their actions. On appeal, the prosecution relied on Ramsey v. Burns, 27 M 154, 69 P 711 (1902), for the proposition that one of the implied powers authorized by a writ of execution includes the levying officer's entry into a judgment debtor's residence or place of business in order to execute the writ and that on that basis, entry of the home was not unreasonable. The Supreme Court distinguished Ramsey because no constitutional search and seizure issue was raised in that case. Dorwart had a legitimate expectation of privacy in his home, and government intrusion without a search warrant was per se unreasonable, subject to only a few exceptions that did not apply. Citing Camara v. Municipal Court, 387 US 523, 18 L Ed 2d 930, 87 S Ct 1727 (1967), and G.M. Leasing Corp. v. U.S., 429 US 338, 50 L Ed 2d 530, 97 S Ct 619 (1977), the court found that the constitutional prohibition against unreasonable search and seizure applies in civil as well as criminal contexts because all citizens have a strong interest in securing their homes from government intrusion, regardless of the reason for the intrusion, and that placing limitations on the discretion of when, where, and how to conduct a search that intrudes upon a private area is the precise reason behind the search warrant requirement. Postjudgment execution procedures and writs of execution issued under the procedures did not sufficiently limit the deputies' discretion in executing the writs to satisfy constitutional search and seizure provisions. Thus, entry into Dorwart's residence and seizure of his property without permission or a warrant, relying only on the authority of the writs, violated Dorwart's constitutional search and seizure rights. Dorwart v. Caraway, 1998 MT 191, 290 M 196, 966 P2d 1121, 55 St. Rep. 777 (1998), following Neb. v. Hinchey, 374 NW 2d 14 (Nebr. 1985).

Constitutionality of Warrantless Police Search of Private Land Up to and Including Threshold of Residence — Concept of Curtilage Inapplicable: Hubbel sought to suppress evidence gathered by police from the common parking area, sidewalk, and porch of Hubbel's residence on grounds that the officers were not on the property legally when they first observed evidence, rendering the search and seizure unlawful. Rather than analyzing the facts in the context of curtilage, the Supreme Court applied St. v. Bullock, 272 M 361, 901 P2d 61 (1995), in deciding the extent to which Hubbel had a legitimate expectation of privacy on his private property. The police parked in a general parking area used by other visitors, and after observing blood evidence in the driveway, they walked along the sidewalk to the front porch and discovered bullet holes in the front door, as well as other evidence in plain view. The officers did not ignore any posted warnings, hop fences, open gates, or slip through bushes intended to screen the home from view. In fact, the officers did nothing other than what any casual visitor to the Hubbel home would do. Because the intrusion in this case was minimal, the entry onto Hubbel's property leading up to and including the threshold of the residence did not require a warrant. The concept of curtilage did not apply because there was no evidence that the area surrounding the home was put to any special use that would indicate that the surrounding area was intimately connected with the home itself or that Hubbel reasonably expected that the surrounding area should be treated the same as the home itself. St. v. Hubbel, 286 M 200, 951 P2d 971, 54 St. Rep. 1373 (1997).

Retroactive Consent to Warrantless Search Disallowed: Hubbel voluntarily gave retroactive consent to a search of her property 5 months after police searched and seized evidence inside the Hubbel home. However, the requirement of advance justification, by virtue of a warrant or a carefully carved exception, is fundamental and inherent to all search and seizure cases. Applying the rationale in Terry v. Ohio, 392 US 1, 20 L Ed 2d 889, 88 S Ct 1868 (1968), the Supreme Court noted that exigent circumstances for conducting a warrantless search consist of circumstances that involve factors that exist when it is not practicable to secure a warrant, such as a mobile vehicle, the possible destruction of evidence, safety of police officers, or other emergency situations, and must be apparent at the inception of the search. Requiring prior consent is the only view that makes sense in light of the purposes behind the suppression rule, which serves to deter lawless police conduct by excluding illegally obtained evidence. Thus, retroactive consent may not be used to validate a search, and the evidence seized as a result of the unlawful search in this case was inadmissible. St. v. Hubbel, 286 M 200, 951 P2d 971, 54 St. Rep. 1373 (1997).

State Use of Drug-Detecting Canine to Inspect Luggage Lawful — No Unconstitutional "Search" or "Seizure": When a Tucson airport police officer noticed the defendant acting nervously prior to checking in for his flight to Billings, the officer called ahead and informed the Billings police department of his suspicion that the defendant was trafficking narcotics. A Billings police

officer, accompanied by a drug-detecting canine, met the flight when it landed in Billings. Before the luggage was loaded onto the airport carousel, the canine was directed to sniff the luggage from the flight, upon which the canine's reaction indicated that the suitcase matching the description given by the Tucson officer contained drugs. After picking up the suitcase off the carousel, the defendant was approached by a Billings police officer, who advised him of his rights and escorted him to the airport office. After the defendant refused to consent to a search, the officer obtained a search warrant and found that the suitcase contained 18 pounds of marijuana. The defendant, charged with possession of dangerous drugs, filed a motion to suppress the evidence, alleging that the state's use of a drug-detecting canine violated his right of privacy. The District Court denied the motion, concluding that the use of a drug-detecting canine did not constitute a search. On appeal, the Supreme Court affirmed, ruling that a person lacks a reasonable expectation of privacy in the smell of luggage brought to an airport. As a result, the state's use of a drug-detecting canine to inspect checked airline luggage does not violate a person's right of privacy under this section, and such an inspection is neither a search nor a seizure under section 11 of this article. St. v. Scheetz, 286 M 41, 950 P2d 722, 54 St. Rep. 1286 (1997). However, see St. v. Carlson, 2000 MT 320, 302 M 508, 15 P3d 893, 57 St. Rep. 1348 (2000), citing Scheetz but holding that the canine sniff of the vehicle during a routine trespass investigation was illegally used as pretext for performing a drug search for which a particularized suspicion was required.

"Open Fields" Doctrine Expanded — Privacy Expectation Includes Fenced or Posted Property Beyond Curtilage — Warrantless Search Unlawful: Following a tip that defendants had illegally killed and transported game, officers found a cabin owned by one defendant and located in a wooded area at the end of a private road some 330 feet off of a Forest Service road. A fence and metal gate separated the cabin from the road, and "No Trespassing" signs were visibly posted on trees on both sides of the gate. Upon arrival, officials found the gate open and, without permission or a warrant, drove down the private road to the cabin, where they subsequently observed an elk carcass, which could not be seen from the public road, hanging near the defendant's cabin. After officers confiscated the elk, defendants pleaded guilty but preserved and appealed the District Court's denial of their motion to suppress evidence obtained after officers entered the property without permission or a warrant. In ruling that the District Court erred in granting defendants' motion to suppress, the Supreme Court refused to apply the U.S. Supreme Court's decision in Oliver v. U.S., 466 US 170 (1984), which held that the protection of the fourth amendment does not include open fields but extends only to the curtilage area immediately surrounding a home, to Art. II, sec. 11, Mont. Const. The Supreme Court ruled that a person may have an expectation of privacy in an area of land beyond the curtilage that society recognizes as reasonable and where the expectation of privacy is evidenced by fencing, "no trespassing" signs, or some other means that unmistakably indicates that entry by law enforcement officers requires permission or a warrant. The court refused to apply the requirement to observations of private land from public property, but specifically overruled inconsistencies in its prior decisions in Charvat, Dess, Bennett, and Sorensen, which were decided prior to Oliver under the old two-part test in Katz v. U.S., 389 US 347 (1967). St. v. Bullock, 272 M 361, 901 P2d 61, 52 St. Rep. 717 (1995), followed in St. v. Romain, 1999 MT 161, 295 M 152, 983 P2d 322, 56 St. Rep. 638 (1999), and St. v. Shults, 2006 MT 100, 332 M 130, 136 P3d 507 (2006).

Constitutionality of Routine, Administrative Inventory Search — Compelling State Interest: Under Montana's Constitution, the right of individual privacy is a fundamental right, but the guarantee of individual privacy is not absolute. That right may not be infringed without a showing of a compelling state interest, which must be closely tailored to effectuate only that compelling interest. With regard to a routine, administrative inventory search of personal property on or in the possession of an arrestee at the station following a lawful arrest, the compelling state interest is the protection of the arrestee, the police, other inmates and persons, and property in and around the station from harm and the potential for harm posed by weapons, dangerous instrumentalities, or hazardous substances that might be concealed on or in the possession of the arrestee. In these instances, the "less intrusive means rule" discussed in St. v. Sawyer, 174 M 512, 571 P2d 1131 (1977), and St. v. Sierra, 214 M 472, 692 P2d 1273 (1985), is not mandated because it is impractical and unreasonable to expect police to make decisions on a daily basis about which containers to search and what, if any, would be the least intrusive means to inventory an arrestee's personal property on or in his possession. Further, the state has an interest in protecting an arrestee's property by accounting for money and articles to protect police against false claims for items taken while the arrestee is in custody, and an inventory search is a reasonable way to ensure protection of the arrestee's property during detention. Sawyer continues to be law regarding routine automobile searches when a defendant has been arrested

and the vehicle impounded and when there are no exigent circumstances or other recognized exceptions from warrant requirements that justify a warrantless search. However, police may conduct a routine, administrative inventory search of an arrestee and of closed containers in the arrestee's possession at the time of arrest if the search is conducted pursuant to standardized policy or procedures adopted by police and routinely used in the booking process. St. v. Pastos, 269 M 43, 887 P2d 199, 51 St. Rep. 1441 (1994), following Ill. v. Lafayette, 462 US 640, 77 L Ed 2d 65, 103 S Ct 2605 (1983), and Colo. v. Bertine, 479 US 367, 93 L Ed 2d 739, 107 S Ct 738 (1987), distinguishing St. v. Sawyer, 174 M 512, 571 P2d 1131 (1977), and overruling St. v. Sierra, 214 M 472, 692 P2d 1273 (1985), to the extent of any inconsistencies with this decision. Pastos was reaffirmed in St. v. Demontiney, 2014 MT 66, 374 Mont. 211, 324 P.3d 344.

Frisk and Search Incidental to Termination of Employment: An employment dispute, including threats by an employee against company management, led to a termination meeting. Because of the nature of the dispute, one of the managers requested the presence of a Sheriff at the meeting "to keep the peace". The Sheriff asked that the request and reasons for asking assistance be made in writing. The manager provided a written request, giving details of the threats. The Sheriff and two deputies were present and frisked the employee upon his arrival. The frisk and search lasted less than 2 minutes. On appeal, the employee contended that the company requested the Sheriff's presence at the meeting and that the ensuing frisk was an invasion of the employee's right of privacy, citing Johnson v. Supersave Mkt., Inc., 211 M 465, 686 P2d 209 (1984), for the premise that a person's right to liberty is legally protected from invasion and that emotional distress proximately caused thereby constitutes recoverable damages for invasion of privacy. The District Court properly held that the officer's search was not a substantial invasion of a legally protected interest, that the employee had provided no authority to support an invasion of privacy tort theory, and that the search was part of and could not be separated from the termination. There was no evidence that the employer participated in the decision to frisk and search, and an agency relationship was not established. Koepplin v. Zortman Min., Inc., 267 M 53, 881 P2d 1306, 51 St. Rep. 880 (1994).

Open Fields Doctrine Applied to Wooded Land: A criminal defendant argued that a warrantless search of his property was an invasion of privacy. The Supreme Court ruled that the right of privacy in one's home does not extend to open fields within view of the public and that the fact that the property was heavily wooded created no legitimate expectation of privacy. St. v. Sorensen, 243 M 321, 792 P2d 363, 47 St. Rep. 873 (1990), distinguished and overruled in part in St. v. Bullock, 272 M 361, 901 P2d 61, 52 St. Rep. 717 (1995). Bullock was followed in St. v. Romain, 1999 MT 161, 295 M 152, 983 P2d 322, 56 St. Rep. 638 (1999).

Warrantless Search by Probation Officer Lawful if Based on Reasonable Suspicion of Probation Violation: Defendant's deferred sentence was revoked after a warrantless search initiated by her probation officer pursuant to the terms of her probation revealed that defendant possessed dangerous drugs in violation of the terms of her probation. Search by a probation officer of his probationer's car, premises, or other belongings is lawful if it is based on the probation officer's reasonable suspicion of a probation violation. St. v. Small, 235 M 309, 767 P2d 316, 46 St. Rep. 9 (1989), followed in St. v. New, 276 M 529, 917 P2d 919, 53 St. Rep. 510 (1996), and St. v. Olmsted, 1998 MT 301, 292 M 66, 968 P2d 1154, 55 St. Rep. 1235 (1998).

Warrantless Police Search of Probationers' Car and Residence Allowed — Reasonable Grounds Standard — Fogarty Overruled: A police officer's warrantless search of the probationers' car and residence based on the officer's observations and with permission of the probation officer, in compliance with probationary conditions, did not violate the fourth amendment. St. v. Fogarty, 187 M 393, 610 P2d 140 (1980), is specifically overruled and the "reasonable grounds" standard of Griffin v. Wis., 483 US 868, 97 L Ed 2d 709, 107 S Ct 3164 (1987), is adopted. Police cooperation with probation officers is to be encouraged as an important aid to effective administration of the probation system. To impose a warrant requirement for residential searches, on the basis of rights enjoyed by persons not on probation, would artificially raise a probationer's privacy interest to a level inconsistent with conditional liberty status. St. v. Burke, 235 M 165, 766 P2d 254, 45 St. Rep. 2278 (1988), followed in St. v. Hawkins, 239 M 404, 781 P2d 259, 46 St. Rep. 1786 (1989), St. v. Boston, 269 M 300, 889 P2d 814, 51 St. Rep. 1142 (1994), St. v. Burchett, 277 M 192, 921 P2d 854, 53 St. Rep. 590 (1996), St. v. Stucker, 1999 MT 14, 293 M 123, 973 P2d 835, 56 St. Rep. 65 (1999), and St. v. Moody, 2006 MT 305, 334 M 517, 148 P3d 662 (2006), and clarified, regarding the fact that probation officers, other than the one assigned to a probationer, are not precluded from authorizing a probationary search, in St. v. Olmsted, 1998 MT 301, 292 M 66, 968 P2d 1154, 55 St. Rep. 1235 (1998). See also St. v. Charlie, 2010 MT 195, 357 Mont. 355, 239 P.3d 934.

Taking of Blood Sample Without Consent but Pursuant to Search Warrant — No Privacy Invasion: In the instance of a non-DUI offense, an involuntary blood test supported by a valid search warrant issued with sufficient probable cause serves to protect the state's interest in enforcing its criminal laws and is not a violation of a person's right to privacy. Collins v. St., 232 M 73, 755 P2d 1373, 45 St. Rep. 878 (1988).

Defendant's Lack of Interest in Automobile — No Standing to Contest Search or Seizure: Defendant convicted of theft contended that the trial court erred in admitting evidence obtained from police placement of fluorscent detection powder on the exterior of his brother's automobile. The Supreme Court found that defendant lacked standing to contest the validity of the search and seizure because he could claim neither property nor possessory interest in the vehicle. St. v. Gonzales, 231 M 242, 751 P2d 1063, 45 St. Rep. 579 (1988), followed in St. v. Powers, 233 M 54, 758 P2d 761, 45 St. Rep. 1286 (1988).

When Duty of Law Enforcement Officer to Investigate Overrides Individual Right of Privacy: When a trained and experienced officer has a particularized suspicion that the occupant of a vehicle is or has been engaged in criminal activity or is a witness thereto, that officer has a duty to investigate, and a limited and reasonable investigatory stop and search is justified. St. v. Morris, 230 M 311, 749 P2d 1379, 45 St. Rep. 234 (1988); St. v. Gopher, 193 M 189, 631 P2d 293, 38 St. Rep. 1078 (1981).

Shining of Ultraviolet Light Not Considered Search: Agents dusted money used in a drug deal with invisible detection powder that showed up only under an ultraviolet light. After defendant's arrest, his hands and wallet were inspected under ultraviolet light for traces of the dust and the positive results admitted into evidence. The Supreme Court adopted the rationale in Commonwealth v. DeWitt, 314 A2d 27 (Pa. Super. 1973), in holding that the shining of the ultraviolet light did not constitute a search so as to implicate privacy rights under either the U.S. or Montana Constitution. The court found persuasive the fact that defendant was validly arrested, that the wallet was properly seized, and that the light only afforded an opportunity to learn if defendant may have touched the drug money. St. v. Holzapfel, 230 M 105, 748 P2d 953, 45 St. Rep. 53 (1988).

Valid Search of Wallet After Arrest: The District Court properly allowed into evidence the results of a postarrest, nonconsensual, warrantless search of defendant's wallet. The Supreme Court adopted the reasoning in U.S. v. Passaro, 624 F2d 938 (9th Cir. 1980), that a wallet is an element of clothing "which is, for a reasonable time following a legal arrest, taken out of the realm of protection from police interest". The search also satisfied the privacy guaranties of the Montana Constitution because the arrest reduced the arrestee's expectation of privacy. St. v. Holzapfel, 230 M 105, 748 P2d 953, 45 St. Rep. 53 (1988).

Search of Person Distinguished From Search of Possessions — Reduced Expectation of Privacy: The Supreme Court, citing U.S. v. Monclavo-Cruz, 662 F2d 1285 (9th Cir. 1981), distinguished between searches of person and searches of possessions, holding that once a person is lawfully seized and arrested, the reasonable expectation of privacy is diminished as to a routine search of open personal property seized prior to incarceration since the state has a compelling interest in protecting prisoners from potential danger. Helena v. Lamping, 221 M 370, 719 P2d 1245, 43 St. Rep. 901 (1986), followed in St. v. Lamere, 226 M 323, 735 P2d 511, 44 St. Rep. 690 (1987). See also Colo. v. Bertine, 479 US 367, 93 L Ed 2d 739, 107 S Ct 738 (1987).

Warrantless Search — Third-Party Right of Privacy: Police officers may not constitutionally enter the home of a third person in search of an escaped felon for whom they have a valid arrest warrant unless exigent circumstances exist and probable cause leads them to believe the suspect will be found on the premises. The duty of police officers to search for and arrest those who commit crimes must be balanced with the right of innocent citizens to be secure in the privacy of their homes against unreasonable police invasion. St. v. Kao, 215 M 277, 697 P2d 903, 42 St. Rep. 356 (1985).

Warrantless Search of Dwelling — Defendant's Expectation of Privacy: The defendant escaped from prison and hid in his girlfriend's nearby home. Police officers, who had a valid arrest warrant for the defendant, discovered him when they conducted a warrantless search of the dwelling. On appeal, the Supreme Court ruled that the defendant had a legitimate expectation of privacy in his girlfriend's home and has standing to challenge the constitutionality of the search based on an arrest warrant rather than a search warrant. Admission of the evidence obtained from the search was not harmless error even though the defendant had testified to the circumstances surrounding his escape. St. v. Kao, 215 M 286, 698 P2d 403, 42 St. Rep. 363 (1985).

Privacy Right More Expansive Than Federal Provision: Defendant was arrested on suspicion of being an illegal alien even though he was legally in the United States. Defendant

spoke no English, and an interpreter was not used to advise him of his rights. During booking, defendant was ordered to empty his pockets, and a small amount of what was later determined to be marijuana was found. Immediately the arresting officers opened defendant's suitcase and found 7 pounds of marijuana. At trial, defendant moved to suppress the marijuana seized from the suitcase. The trial court suppressed the evidence, and the State appealed. The Supreme Court held that under St. v. Sawyer, 174 M 512, 571 P2d 1131 (1977), an inventory search is a substantial infringement upon individual privacy and is subject to Art. II, sec. 10 and 11, Mont. Const. Montana's constitutional right of privacy does not make obtaining a search warrant any more difficult, but it does require that in many inventory searches, the least intrusive means possible must be used. The Montana Constitution's privacy right is broader than that under the guaranty against unreasonable search and seizure contained in the fourth amendment to the U.S. Constitution. Because less intrusive means were available for handling the suitcase, its contents were properly suppressed. St. v. Sierra, 214 M 472, 692 P2d 1273, 42 St. Rep. 106 (1985), overruled in St. v. Pastos, 269 M 43, 887 P2d 199, 51 St. Rep. 1441 (1994), but Sawyer continues to be law regarding routine automobile searches.

Apprehension of Felony Suspects — Compelling State Interest: Defendant issued 13 bad checks totaling $231.76 between July 17, 1981, and October 30, 1981. On November 23, 1981, a Justice of the Peace issued an arrest warrant on the charge of issuing a bad check. There were no previous efforts to secure defendant's presence to answer the charge or post bond. On December 4, 1981, a Sheriff arrested defendant at his home. During booking, a full search of defendant was conducted and a gram of hashish was discovered. Defendant pleaded guilty to the bad check charge. The District Court granted his motion to suppress the contraband as an invasion of privacy under St. v. Carlson, 198 M 113, 644 P2d 498 (1982). The State appealed, and the Supreme Court vacated and remanded, stating that Carlson was clearly limited to traffic-related misdemeanors. The court held that full custodial arrests supported by a warrant for felonies are proper, and that the apprehension of felony suspects is a compelling state interest which justifies a full custodial arrest pursuant to warrant. The right of privacy must yield to a compelling state interest. St. v. Wood, 205 M 141, 666 P2d 753, 40 St. Rep. 1173 (1983).

Marijuana in Unfenced Garden — Observation From Road by Police With Spotting Scope: When the State does not violate an individual's legitimate expectation of privacy, an unreasonable search has not taken place. Where no reasonable expectation of privacy exists, there is neither a search nor a seizure under the fourth amendment to the United States Constitution or Art. II, sec. 11, Mont. Const. There was no search when police stood on a county road and used a spotting scope to look for marijuana in a garden surrounded by open fields, and the marijuana obtained pursuant to a warrant to search garden was properly used as direct evidence in a prosecution for criminal possession of dangerous drugs. St. v. Bennett, 205 M 117, 666 P2d 747, 40 St. Rep. 1133 (1983), distinguished and overruled in part in St. v. Bullock, 272 M 361, 901 P2d 61, 52 St. Rep. 717 (1995). Bullock was followed in St. v. Romain, 1999 MT 161, 295 M 152, 983 P2d 322, 56 St. Rep. 638 (1999).

No Necessity for Arrest — Subtle Coercion for Consent to Enter Home — Subsequent Search Invalid: Defendant was involved in a minor traffic accident that was not his fault. He failed to produce his driver's license. The investigating officer later learned that the license was revoked. The officer made out "Notice to Appear and Complaint" forms for operating a vehicle while driver's license was revoked and obstructing an officer, both misdemeanors. The officer gave the citations to the City Clerk for mailing to the defendant, but this was never done. A week later, the officer, thinking the citations had been mailed, requested and received an arrest warrant. Two officers went to defendant's house, awakened him, and informed him he was under arrest. Defendant requested he be allowed to get dressed. The officers told defendant they would have to accompany him and observed marijuana and bongs. They obtained a search warrant, returned and searched the house, and found small quantities of drugs and a stolen pistol. Defendant moved to suppress the evidence as obtained through an illegal search. The State contended that full custodial arrest was reasonable, was not connected to any pretextual arrangement that the police suspected defendant as a drug user, and that the search warrant based on the "plain view" observation of the officers in the home was valid. The District Court declined to determine whether the arrest was a pretext but decided there was no necessity for a full custodial arrest and suppressed the evidence. The court held that under the totality of the circumstances, the defendant had not consented to the officers' entry. The validity of the officers' entry into the home is the fulcrum upon which the case turns. The State justified the entry on the claim of defendant's consent. The Supreme Court found that the subjective state of defendant, "half asleep" and in his underwear, and the unqualified statement of the officers that if defendant were to get dressed they would

have to come into his house, without any other explanation of his rights, constituted subtle coercion, and the search was unconstitutional. The court found no prior justification or exigency for the entry by the officers. Their entry under the facts of the case was unreasonable, and it is that factor which converted their observation in the house into a warrantless search, which is always presumed unreasonable. This was especially true in light of the requirement of the State to establish a compelling interest in order to overcome defendant's reasonable expectation of privacy in his home. St. v. Carlson, 198 M 113, 644 P2d 498, 39 St. Rep. 802 (1982).

Prisoner on Furlough — Lesser Right of Privacy Under Federal Constitution: Plaintiff was released from prison on an educational furlough to attend the University of Montana (now University of Montana-Missoula). A deputy received a tip that plaintiff had drugs in his dorm room. The deputy called plaintiff's parole officer who determined that plaintiff had not signed a consent to be searched when furloughed. No search warrant was procured, but the search was conducted and drugs were seized. The evidence was suppressed and plaintiff's furlough reinstated. Plaintiff then brought this action seeking damages for violation of his civil rights. The federal courts have distinguished between a private citizen and a convict who is paroled prior to the expiration of his term, stating that a parolee does not have the expectations of privacy (see Art. II, sec. 10, Mont. Const.) enjoyed by other citizens. One of these restrictions is that the parolee and his home are subject to search by the parole officer when he reasonably believes that such search is necessary in the performance of his duties. Montana law may differ (see St. v. Fogarty, 187 M 393, 610 P2d 140 (1980)), but this case charged violation of the United States Constitution, and under it the search was not constitutionally infirm. Quigg v. France, 502 F. Supp. 516 (D.C. Mont. 1980).

Unlimited Search and Polygraph Provisions on Probation Unconstitutional: As conditions for imposition of a suspended sentence, defendant was required to submit to an unlimited search provision by any lawful authorities and to submit to a polygraph examination upon the request of any law enforcement officer. The Supreme Court when reviewing the revocation of defendant's suspended sentence held that the unlimited polygraph examination condition was overly broad and thus an invalid condition of probation and that the unlimited warrantless search provision is an unconstitutional condition of probation. The Supreme Court said that a sentencing court cannot inject prosecuting attorneys or law enforcement officials into the probation process by granting them direct rights to search the probationer, his home, or vehicle. A type of probable cause or some identifiable reason is required before a search clause may be exercised to search the probationer or his vehicle. The legal interests of innocent third persons living with a probationer are to be protected by requiring a search warrant before searching the probationer's home. Polygraph examinations as a condition of probation can be effectively contained within constitutional parameters by confining the right to demand a polygraph examination to the probation officer. St. v. Fogarty, 187 M 393, 610 P2d 140 (1980), overruled in St. v. Burke, 235 M 165, 766 P2d 254, 45 St. Rep. 2278 (1988).

Odor Insufficient Probable Cause for Search Warrant: The odor of burning marijuana does not by itself establish probable cause to issue a search warrant nor is it sufficient to justify the invasion of the privacy of one's home. St. v. Olson, 181 M 151, 589 P2d 663 (1979).

Inventory Search — Not Justified: Contraband found under a seat during inventory of an automobile held in police custody was not in plain view, thus it was seized in violation of individual privacy and freedom from unreasonable searches. The inventory search was not justified by protection of the contents for the owner's benefit or protection of the police from claims for lost property beyond articles in plain view from outside the vehicle. St. v. Sawyer, 174 M 512, 571 P2d 1161 (1977), followed in St. v. Sierra, 214 M 472, 692 P2d 1273, 42 St. Rep. 106 (1985). Sawyer continues to be law regarding routine automobile searches, but Sierra overruled in St. v. Pastos, 269 M 43, 887 P2d 199, 51 St. Rep. 1441 (1994).

ELECTRONIC SURVEILLANCE

Admission of Warrantless Pretext Recordings Harmless Error: When the defendant portrayed the recordings as inculpatory on appeal and took the opposite position at trial, arguing the recordings were exculpatory or ambiguous, and used the recordings for his benefit as impeachment evidence at trial, the qualitative impact of the tainted recordings was harmless. St. v. Stewart, 2012 MT 317, 367 Mont. 503, 291 P.3d 1187.

Defendant Entitled to Benefit of Change in Law Applied Retroactively: When a defendant's case is pending on direct review or otherwise not final, the defendant is entitled to the benefit of a new rule for the conduct of criminal prosecutions. In this case, the defendant was entitled to argue that his rights under Art. II, secs. 10 and 11, Mont. Const., were violated by warrantless

electronic recording of telephone conversations without his consent. St. v. Stewart, 2012 MT 317, 367 Mont. 503, 291 P.3d 1187.

Defendant's Rights Violated by Warrantless Pretext Recordings of Defendant's Cell Phone Conversations: When the defendant was in his own vehicle when phone conversations were recorded, he hung up when he stopped at a gas station where privacy would be more precarious, the only other person in the vehicle was his wife whom he trusted, and the calls originated from his home landline with no indication that anyone else was present, defendant had a subjective expectation of privacy. Because the state failed to address whether society was willing to accept an expectation of privacy in this situation as reasonable or whether the recording of the conversations was justified by a compelling state interest, the recordings constituted searches. Further, because the state failed to provide a recognized exception to the warrant requirement, the searches were unreasonable under Art. II, secs. 10 and 11, Mont. Const. St. v. Stewart, 2012 MT 317, 367 Mont. 503, 291 P.3d 1187.

Defendant Need Not Be Informed of Decision — Denial of Motion to Withdraw Guilty Plea Affirmed: Ferris pleaded guilty to felony criminal distribution of dangerous drugs after he sold hydrocodone to an undercover informant. After Ferris pleaded guilty, but before he was sentenced, the Supreme Court issued St. v. Goetz, 2008 MT 296, 345 Mont. 421, 191 P.3d 489, which held that a search warrant is required for electronic monitoring of a defendant's conversations with an informant in the defendant's home, despite the informant's consent. The District Court did not err in denying Ferris's motion to withdrawal his guilty plea. Ferris's guilty plea was entered voluntarily and counsel was not required to advise Ferris of cases pending on appeal. St. v. Ferris, 2010 MT 252, 358 Mont. 244, 244 P.3d 732, distinguishing St. v. Goetz, 2008 MT 296, 345 Mont. 421, 191 P.3d 489.

Error in Denial of Motion to Suppress Warrantless Recording of Phone Conversation: At trial the state presented a warrantless recording of a cell phone conversation between the defendant and a confidential informant. The District Court denied the defendant's motion to suppress the recording. In reversing the District Court, the Supreme Court overruled State v. Coleman and its progeny and concluded that on retrial, the defendant was entitled to suppress the recorded cell phone conversation because the defendant had a reasonable expectation of privacy under Art. II, sec. 10 and 11, Mont. Const. St. v. Allen, 2010 MT 214, 357 Mont. 495, 241 P.3d 1045.

Counsel Not Ineffective in Failing to Object to Defendant's Statements Recorded in Interrogation Room Without Defendant's Knowledge Absent Expectation of Privacy: While being held in a police interrogation room alone, Meredith made incriminating statements that were recorded without his knowledge and subsequently admitted into evidence during Meredith's homicide trial. Meredith contended that he received ineffective assistance of counsel when his attorney failed to object to admission of the statements at trial. The Supreme Court disagreed. Although Meredith may have had an expectation of privacy in the statements, that expectation was not one that society would recognize as objectively reasonable, nor would Meredith have made the statements if he wished to preserve his privacy. Therefore, no unlawful search occurred, and counsel's failure to object was not short of the range of conduct reasonably demanded by the constitutional right to effective assistance. Additionally, Meredith failed to demonstrate that, even if counsel's conduct could be considered deficient, the result of the proceeding would have been different without admission of the incriminating statements. Meredith's ineffective assistance claim based on admission of the incriminating statements was denied. St. v. Meredith, 2010 MT 27, 355 Mont. 148, 226 P.3d 571, distinguishing St. v. Goetz, 2008 MT 296, 345 Mont. 421, 191 P.3d 489.

Admissible Evidence in Drug Case Obtained Through Informant — Actual Informant Testimony Allowed: A confidential informant wearing a wire purchased drugs from Schwartz, but no search warrant was issued for the electronic monitoring. The state indicated that it would call the informant to testify but would not introduce the results of the electronic monitoring. Schwartz moved to suppress all evidence seized as the result of a search conducted by the informant. The motion was denied, and on appeal, the Supreme Court affirmed. The evidence derived through the informant and not through contemporaneous electric monitoring was admissible. Thus, the District Court was correct in declining to suppress actual testimony by the confidential informant, including identification of Schwartz as the seller and identification of the actual drugs purchased. St. v. Schwartz, 2009 MT 234, 351 M 384, 212 P3d 1060 (2009), followed in St. v. Harlow, 2010 MT 60, 355 Mont. 373, 228 P.3d 446. See also St. v. Hanley, 186 M 410, 608 P2d 104 (1980), St. v. Bassett, 189 M 28, 614 P2d 1054 (1980), and St. v. Deskins, 245 Mont. 158, 799 P.2d 1070 (1999).

Recording Face-to-Face Conversation With Consent of Informant Without Warrant Violates Defendant's Right to Privacy and Constitutes Unreasonable Search: In two separate cases, consolidated by the Supreme Court, the defendants Goetz and Hamper pleaded guilty to felony

distribution of dangerous drugs but reserved their right to appeal the denial of their motions to suppress the warrantless monitoring and recording of their face-to-face conversations with an informant wearing a wire who had consented to the procedure. In the case of Goetz the recorded conversation had taken place in Goetz's residence, and in Hamper's case the recorded conversation had taken place in his vehicle. The Supreme Court stated that Art. II, sec. 10 and 11, Mont. Const., when taken together afford citizens a greater right to privacy that, in turn, provides broader protection than the Fourth Amendment of the United States Constitution in situations involving searches and seizures occurring in private settings. The Supreme Court overruled St. v. Brown, 232 M 1, 755 P2d 1364 (1988), to the extent that it relied only on federal law and held that warrantless electronic monitoring of face-to-face conversations with the consent of one party is lawful. The Supreme Court found that the recorded conversations between the defendants and the informant took place in the private residences or vehicles of the defendants and were not conducted where other individuals were present, and therefore the defendants had exhibited actual subjective expectations of privacy in the face-to-face conversations. The Supreme Court also found that the defendants' privacy expectations were expectations that society was willing to accept as reasonable, and the conversations therefore constituted searches within the contemplation of Art. II, sec. 10 and 11, Mont. Const. The Supreme Court further held that the consent of the informant did not fall under the consent exception to unlawful warrantless searches and that the state could not rely on the particularized suspicion standard rather than the probable cause requirement in Art. II, sec. 11, Mont. Const., for the issuance of a warrant because the state's intrusion into the defendants' privacy expectations by electronic monitoring and recording of their conversations was not a minimal intrusion not rising to a level requiring probable cause. The Supreme Court concluded that the electronic monitoring and recording of the defendants' conversations without a warrant or the existence of an established exception to the warrant requirement violated the defendants' rights under Art. II, sec. 10 and 11, Mont. Const. St. v. Goetz, 2008 MT 296, 345 M 421, 191 P3d 489 (2008).

No Error in Admission of Recorded Telephone Calls Made While Defendant in Prison — No Expectation of Privacy: At DuBray's homicide trial, the state introduced into evidence recordings of telephone calls between DuBray and others while DuBray was incarcerated in state and federal facilities. DuBray argued that the evidence was inadmissible under state and federal wiretap laws. Although monitoring and recording telephone conversations are a search within the meaning of state and federal constitutions, under St. v. Scheetz, 286 M 41, 950 P2d 722 (1997), when no reasonable expectation of privacy exists, there is neither a search nor a seizure. At both the state and federal facilities, DuBray was notified that telephone calls were subject to monitoring and recording, so no reasonable expectation of privacy in the calls existed. Evidence of the calls was properly admitted because DuBray consented to the recording. St. v. DuBray, 2003 MT 255, 317 M 377, 77 P3d 247 (2003).

Warrantless Use of Thermal Imaging as Unconstitutional Search: The use of thermal imaging in a criminal investigation to detect heat and infrared radiation from outside a structure, such as that generated by an indoor marijuana growing operation, constitutes a search under Art. II, sec. 11, Mont. Const. The privacy interests of this section are also implicated by the use of thermal imaging technology. In the present case, defendants housed activities that they wished to keep private in an enclosed structure on posted, fenced property behind locked gates. As such, defendants had a subjective expectation of privacy in the heat signatures of activities, intimate or otherwise, pursued within the confines of their private homes and enclosed structures, which they did not knowingly expose to the public. Montana's Constitution affords citizens broader protection from warrantless governmental intrusion in search and seizure cases than does the United States Constitution. This heightened expectation of privacy is one that society is willing to recognize as objectively reasonable. Therefore, use of thermal imaging technology by the government in the absence of a search warrant requires the demonstration of a compelling state interest closely tailored to effectuate only that compelling interest, not simply enforcement of the criminal statutes. In the absence of these factors, use of the technology violated defendants' right to privacy. St. v. Siegal, 281 M 250, 934 P2d 176, 54 St. Rep. 158 (1997), following St. v. Solis, 214 M 310, 693 P2d 518 (1984), St. v. Young, 867 P2d 593 (Wash. 1994), U.S. v. Ishmael, 48 F3d 850 (5th Cir. 1995), U.S. v. Cusumano, 67 F3d 1497 (10th Cir. 1995), and St. v. Bullock, 272 M 361, 901 P2d 61 (1995).

Admissibility of Recording of Warrantless Face-to-Face Conversation by Police Use of Body Wire Transmitting Device: Warrantless consensual electronic monitoring of face-to-face conversations by the use of a body wire transmitting device, when performed by law enforcement officers while pursuing their official duties, does not violate the constitutional right to be free of

unreasonable search and seizure or the right of privacy. Consent must be clearly obtained from at least one party to the conversation and must be freely made and without compulsion. As in telephone conversations, the consenting party may be an informant or police officer. Evidence obtained from such monitoring is admissible in a subsequent criminal trial. St. v. Brown, 232 M 1, 755 P2d 1364, 45 St. Rep. 818 (1988), overruling St. v. Brackman, 178 M 105, 582 P2d 1216 (1978). See also St. v. Staat, 251 M 1, 822 P2d 643, 48 St. Rep. 1041 (1991). Brown was overruled in St. v. Goetz, 2008 MT 296, 345 M 421, 191 P3d 489 (2008).

Interpretation of Largely Inaudible Tape Recording by Police — No Prejudice: It was not prejudicial to allow introduction of mostly inaudible tape recordings made with the consent and participation of an informant nor to allow a police officer who was present when the recordings were made to act as an oral transcriber to interpret what was said and what occurred while the tapes were being made. St. v. Morse, 229 M 222, 746 P2d 108, 44 St. Rep. 1919 (1987).

Warrantless Covert Videotaping of Defendant's Conversation With Undercover Agent: An undercover agent videotaped the conversation without defendant's knowledge or consent. Defendant successfully moved to suppress the tape as violative of his right to privacy under the Montana Constitution. The Supreme Court ruled that the trial court properly found defendant's right to privacy was violated because he had an actual expectation of privacy, the expectation was reasonable, and the State had not exhibited a compelling interest justifying its invasion of defendant's privacy. The court held that in face-to-face encounters in a private setting, there is a reasonable expectation that monitoring is not taking place. The right to privacy is the cornerstone of protections against unreasonable searches and seizures. St. v. Solis, 214 M 310, 693 P2d 518, 41 St. Rep. 2493 (1984), distinguished in St. v. Goetz, 2008 MT 296, 345 M 421, 191 P3d 489 (2008).

Consent to Monitor Telephone Conversation: In holding that the recording of a telephone conversation between an informant and defendant was not a violation of this section, the Supreme Court, following St. v. Hanley, 186 M 410, 608 P2d 104 (1980), held that a court order is not necessary to monitor a telephone conversation if one of the parties to the telephone conversation consents. The Supreme Court distinguished St. v. Brackman, 178 M 105, 582 P2d 1216 (1978), because in Brackman it held there was an invasion of privacy because persons engaged in conversation in an open parking lot have a reasonable expectation of privacy whereas with a telephone conversation no such expectation exists. St. v. Coleman, 189 M 492, 616 P2d 1090, 37 St. Rep. 1661 (1980), followed in St. v. Canon, 212 M 157, 687 P2d 705, 41 St. Rep. 1659 (1984). Coleman and cases following Coleman are overruled, to the extent that those cases are inconsistent with the conclusion that society is willing to recognize as reasonable the expectation that private cell phone conversations are not being surreptitiously monitored and recorded by government agents, in St. v. Allen, 2010 MT 214, 357 Mont. 495, 241 P.3d 1045.

Standard for Issuance of Order Allowing Electronic Surveillance — Compelling State Interest: Where police officers obtained an order for electronic surveillance of the defendant, an affidavit supporting the request for the order which recited facts showing the defendant to be in possession of dangerous drugs satisfied the standard for issuance of electronic surveillance orders announced in St. v. Brackman, 178 M 105, 582 P2d 1216 (1978), in which the Supreme Court held that the state must show a compelling state interest to obtain this kind of order. The enforcement of criminal laws is essential to the preservation of an orderly society and is a compelling state interest sufficient to support the issuance of the order. St. v. Coleman, 189 M 492, 616 P2d 1090, 37 St. Rep. 1661 (1980), followed in St. v. Canon, 212 M 157, 687 P2d 705, 41 St. Rep. 1659 (1984). Coleman and cases following Coleman are overruled, to the extent that those cases are inconsistent with the conclusion that society is willing to recognize as reasonable the expectation that private cell phone conversations are not being surreptitiously monitored and recorded by government agents, in St. v. Allen, 2010 MT 214, 357 Mont. 495, 241 P.3d 1045.

Grounds for Granting Motion for Directed Verdict — Invasion of Privacy Action: Where respondent telephone company conducted a recording on a party line for a period of 6 days for the alleged purpose of protecting the quality of its services, the District Court erred in granting a motion for a directed verdict filed by respondent at the close of appellant's case. Considering the nature and extent of the recording and comparing it to recordings in other cases in which the recordings are allowed only in limited circumstances, namely, where telephone fraud is at issue, reasonable men could draw different conclusions as to whether the recording could be classified in such a way as to be allowable under the federal statute; thus the directed verdict should not have been granted. Sistok v. NW. Tel. Systems, 189 M 82, 615 P2d 176, 37 St. Rep. 1247 (1980), citing Lawlor v. Flathead County, 177 M 508, 582 P2d 751 (1978).

Requirements for Electronic Surveillance: Under Title III of the federal Omnibus Crime Control and Safe Streets Act, states are required to have a specific statutory scheme for electronic surveillance before public officials can lawfully monitor oral and wire communications in the state. If a state chooses to allow electronic surveillance by adopting a statutory scheme, the scheme must be at least as or more restrictive than the regulations of Title III. Montana statutes 45-8-213, defining the offense of violating privacy in communications, and 46-5-202 (renumbered 46-5-221), setting forth the grounds for issuance of a search warrant, fail to meet the minimum requirements of Title III or the standard enumerated by the U.S. Supreme Court in the Berger and Katz decisions. Among other things, Montana's statutes fail: (1) to require a showing of exigent circumstances to overcome the defect of not giving prior notice; (2) to state what items of information should be included in the application for a warrant; and (3) to outline the general procedures by which law enforcement officials obtain warrants for electronic surveillance. In St. v. Brackman the court held that in view of Montana's constitutional right of privacy, law enforcement officials must first obtain a warrant before intercepting any communication. This will no longer suffice, since the requirements of Title III are not met. Any evidence seized by electronic surveillance must be suppressed since Montana's statutory scheme for allowing such surveillance does not meet the federal requirements. St. v. Hanley, 185 M 459, 605 P2d 1087 (1979), opinion withdrawn on rehearing, St. v. Hanley, 186 M 410, 608 P2d 104 (1980), and followed in St. v. Lynch, 1998 MT 308, 292 M 144, 969 P2d 920, 55 St. Rep. 1278 (1998). Lynch was followed in St. v. Pizzichiello, 1999 MT 123, 294 M 436, 983 P2d 888, 56 St. Rep. 499 (1999).

Unauthorized Recording of Telephone Call — Third Person's Right to Privacy Invaded: Recording of telephone conversation by police undercover officer of a call received from an acquaintance of defendant setting up a drug sale did not taint all evidence against defendant even though the recording was not authorized by court order. The undercover officer personally contacted police regarding the setting up of the drug buy which resulted in defendant's conviction. Furthermore, defendant cannot invoke a breach of right of privacy of his acquaintance; he must assert his own privacy rights. The recording was not introduced into evidence, but the undercover officer testified concerning it. St. v. Hanley, 186 M 410, 608 P2d 104 (1980), superseding on rehearing St. v. Hanley, 185 M 459, 605 P2d 1087 (1979).

Police Monitoring: Article II, sec. 10 and 11, Mont. Const., protects the individual from any monitoring and recording by the state without a search warrant or prior showing of compelling state interest of conversations between the individual and police informants even though the informants consented to the monitoring and recording. Section 45-8-213 does not give consensual participant monitoring the status of a compelling state interest. St. v. Brackman, 178 M 105, 582 P2d 1216 (1978), overruled in St. v. Brown, 232 M 1, 755 P2d 1364, 45 St. Rep. 818 (1988). Brown was overruled in St. v. Goetz, 2008 MT 296, 345 M 421, 191 P3d 489 (2008).

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Reliance on Document Not Admitted — Court Required to Balance Privacy Interests Against Disclosure: After the defendant's conviction for negligent endangerment, a hearing was held on the amount of restitution to be awarded to the Department of Justice's crime victims compensation program, which had provided counseling services to the defendant's victim. The Municipal Court denied the defendant's request to examine the form based on the victim's right of privacy in the information that the form contained and subsequently awarded restitution to the program. Because the defendant had a right to receive and rebut the treatment plan form because it was relied on by witnesses to establish how much of the counseling costs were related to the defendant's offense and because the victim may have had a protectable expectation of privacy regarding some of the contents, the Municipal Court erred by not determining the contents of the document and balancing the competing interests of privacy and disclosure. St. v. McClelland, 2015 MT 281, 381 Mont. 164, 357 P.3d 906.

Individual Privacy Outweighed by Public's Right to Know — Position of Public Trust: The respondents sought information under the public's constitutional right to know from the petitioner school district concerning an individual who held a position of public trust. The petitioner sought judicial review of the documents to be released. The District Court conducted an in camera review, ruling that the public's right to know outweighed the individual's privacy interests for several documents in the individual's personnel file. On appeal, the Supreme Court affirmed, holding that for a person occupying a position of public trust, there is no blanket exemption from the public's right to know simply because the documents are contained in a personnel file. In re Petition of Missoula County v. Bitterroot Star, 2015 MT 95, 378 Mont. 451, 345 P.3d 1035.

Constitutional Right to Privacy Infringed by Statutorily Authorized Ex Parte Communication Between Insurer's Agent and Claimant's Health Care Providers Without Prior Notice to Claimant: The claimant filed a workers' compensation claim after being injured as a manager of a restaurant. The defendant insurer terminated the claimant's benefits after the claimant withdrew her consent to allow the defendant insurer and its agents to have ex parte communication with the claimant's medical care providers. The defendant insurer claimed that the claimant's withdrawal of consent violated 39-71-604. The claimant sued to have the Workers' Compensation Court reinstate the claimant's benefits. The Workers' Compensation Court held that 39-71-604(3), as applied, violated the claimant's constitutional right of privacy and directed the defendant insurer to reinstate the benefits and further held that the defendant insurer could not have ex parte communications with the claimant's medical team without the claimant's knowledge and opportunity to participate. On appeal, the Supreme Court affirmed, reiterating that an individual's medical records are constitutionally protected private information and that the constitutional right to privacy includes the right to control circulation of private information. The Supreme Court held that the unconstitutionality of 39-71-604(3) has been established beyond a reasonable doubt and that the statute is facially unconstitutional because it would impose the same violation of privacy interests on every injured worker to whom it was applied. The Supreme Court also held that the Workers' Compensation Court did not err in concluding that a narrowly crafted release authorizing insurers to have ex parte contact with health care providers solely for administrative purposes would not violate a claimant's right of privacy. Malcomson v. Liberty Northwest, 2014 MT 242, 376 Mont. 306, 339 P.3d 1235.

Reasonable Expectation of Privacy in City Employee Identity in Disciplinary Matters: The defendant city of Billings appealed the District Court's order that the identity of five city employees who were disciplined for viewing pornography on their work computers be released to the plaintiff newspaper. The Supreme Court reversed. The employees had an actual or subjective expectation of privacy regarding their identities in internal disciplinary matters that society would be willing to accept as reasonable because the employees were not in positions of public trust and the misconduct involved did not violate a duty requiring a high level of public trust, and the employees' reasonable expectation of privacy in the disciplinary action outweighed the limited merits of public disclosure. Billings Gazette v. Billings, 2013 MT 334, 372 Mont. 409, 313 P.3d 129.

Dissemination of Confidential Criminal Justice Information — Videos of Workers' Compensation Claimant — Release to Montana State Fund Upheld: After the respondent was injured in the course and scope of his employment, Montana State Fund (MSF), which provided workers' compensation insurance to the respondent's employer, accepted the respondent's claim, settled with the respondent, and continued to pay the respondent's medical benefits. While performing a routine verification of the respondent's disabilities, MSF investigators recorded multiple videos of the respondent that indicated that the respondent may have faked or exaggerated his injuries and that were classified as confidential criminal justice information. MSF petitioned the District Court for the release of the videos pursuant to 44-5-303, and the District Court granted the petition. The respondent appealed, arguing that MSF lacked standing to bring the petition and that the District Court erred when balancing the demands of individual privacy against the merits of disclosure. The Supreme Court affirmed, concluding that MSF had standing to bring the petition under 44-5-303(6), which allows an organization to file any action for the release of information that the organization believes is appropriate and permissible. The Supreme Court examined the two-part balancing test to determine whether the respondent's right to privacy clearly exceeded the merits of disclosure and concluded that the District Court adequately engaged in the balancing of competing concerns. The respondent's actions that were documented in the videos took place in public locations in which the respondent did not have a subjective or actual expectation of privacy and in which society would not view the respondent's expectation of privacy as reasonable, and the proper operation of the workers' compensation system constitutes a substantial interest. Mont. St. Fund v. Simms, 2012 MT 22, 364 Mont. 14, 270 P.3d 64.

Investigation of Public Employee for Alleged Misuse of Public Funds — Written Results of Investigation — Public's Right to Know Exceeds Employee's Right to Privacy: The Billings police department investigated an employee for using a city credit card for personal purchases. Following the investigation, the city issued to the employee a 16-page due process letter that identified detailed evidence gathered during the investigation. The Billings Gazette sought the letter and the city refused to provide it. Ultimately, the Gazette petitioned for its release, citing Montana's right to know provisions. The District Court concluded that the employee was in a

position of public trust because she was allowed to make purchases with public funds. Next, the District Court performed a balancing test of the employee's right to privacy and the public's right to know and concluded that the public's right to know was greater. The city appealed. The Supreme Court affirmed, concluding that the employee's alleged misconduct went directly to a breach of her public trust and that the investigation was therefore a proper matter for public scrutiny. Billings Gazette v. Billings, 2011 MT 293, 362 Mont. 522, 267 P.3d 11, following Bozeman Daily Chronicle v. Bozeman Police Dept., 260 Mont. 218, 859 P.2d 435 (1993).

Ongoing Criminal Investigation — Possibility of Criminal Charges — Public's Right to Know: The Billings police department investigated an employee for making personal purchases with a city credit card. Following the investigation, the city issued to the employee a 16-page due process letter that identified detailed evidence gathered during the investigation. The Billings Gazette sought the release of the letter, but the city refused to provide it, claiming, in part, that the criminal investigation was ongoing and that the release of the information might compromise any future criminal case against the employee. The District Court concluded that the public's right to know was greater than the employee's right to privacy and ordered the release of the letter. The city appealed. The Supreme Court affirmed, noting that the existence of a criminal case cannot infringe on the public's right to know. Billings Gazette v. Billings, 2011 MT 293, 362 Mont. 522, 267 P.3d 11, following Bozeman Daily Chronicle v. Bozeman Police Dept., 260 Mont. 218, 859 P.2d 435 (1993).

Collection of Social Security Number for Issuance of Conservation License Rationally Related to Legitimate State Interests — Right to Privacy Not Violated: Plaintiffs contended that the state's collection of a partial Social Security number as a condition for issuance of a wildlife conservation license violated the fundamental right to privacy. After concluding that plaintiffs' privacy rights were not implicated, the Supreme Court applied rational basis review and held that the state's interest in collecting the last four digits of Social Security numbers from applicants for wildlife conservation licenses was legitimate and rationally related to the state's interest in maintaining access to federal funding and federal tools for locating parents owing child support under 42 U.S.C. 666(a)(13). Thus, the District Court correctly denied plaintiffs' request that they not be required to supply a Social Security number when applying for a wildlife conservation license. Mont. Shooting Sports Ass'n, Inc. v. St., 2010 MT 8, 355 Mont. 49, 224 P.3d 1240.

Statute Not Facially Unconstitutional: Plaintiff, an entity authorized to obtain child abuse information pursuant to 41-3-205, reported allegations of child abuse and neglect at the Swan Valley Youth Academy, which prompted an investigation. Plaintiff was provided a final report and wished to disseminate the report without seeking a court order. Plaintiff filed an action to allow public dissemination and to invalidate 41-3-205(7) as facially unconstitutional because of the alleged failure of the statute to balance the public's right to know against the right of individual privacy. The District Court determined that disclosure of child abuse and neglect records required a case-by-case analysis and review of redacted materials. The court refused to provide plaintiff with prospective relief and granted summary judgment to the state, so plaintiff appealed. The Supreme Court noted that any future report prepared by the state regarding alleged abuse or neglect will present a unique factual scenario that requires a careful balancing of the constitutional provisions at issue, to be conducted according to the mechanism for balancing of interests provided in 41-3-205(2), which then properly permits public disclosure following in camera inspection and further redaction of private information. Thus, in light of the myriad of future factual scenarios to which 41-3-205 must be applied, the statute could not be determined to be facially unconstitutional. Disability Rights Mont. v. St., 2009 MT 100, 350 M 101, 207 P3d 1092 (2009). See also Havre Daily News, LLC v. Havre, 2006 MT 215, 333 M 331, 142 P3d 864 (2006).

Release of Sealed Involuntary Commitment Records — Redacted Records Sufficiently Protective of Personal Privacy Rights: The Montana Advocacy Program (MAP) sought to disclose redacted District Court documents related to T.L.S.'s involuntary commitment for a serious developmental disability after T.L.S. died while residing at the Montana Developmental Center. The District Court held that MAP was required to establish a compelling state interest warranting public disclosure of the sealed court documents and denied the motion to release the court file. On appeal, the Supreme Court noted that the documents were sealed under 53-21-103 but that the commitment proceedings were conducted pursuant to Title 53, ch. 20, part 1, which does not contain any provisions relating to sealing and opening court records. Therefore, 53-21-103 did not apply, and MAP was not required to establish good cause before the court record could be opened. It was not disputed that the records were subject to public inspection under the constitutional right to know, which is presumed absent a showing of individual privacy rights sufficient to

override the right to know, so the District Court erred in requiring MAP to show a compelling state interest. Thus, the question was whether T.L.S.'s privacy interest clearly exceeded the merits of public disclosure. It is the party asserting individual privacy rights that carries the burden to establish that those privacy rights exceed the merits of public disclosure. MAP contended, and the Supreme Court agreed, that the merits of public disclosure were substantial in light of the need to inform the public regarding the actions of the officials and employees involved in the commitment proceedings and to effectively advocate for legislative, administrative, and judicial reforms for the protection of the developmentally disabled. The Supreme Court concluded that T.L.S.'s privacy interests were sufficiently protected by redacting personal information from the record and ordered that the redacted documents be immediately released. In re T.L.S. v. Mont. Advocacy Program, 2006 MT 262, 334 M 146, 144 P3d 818 (2006).

Interim Public Defender's Right of Privacy in Deposition Transcript Outweighed by Public's Right to Know: After Yellowstone County's chief public defender, Selvey, resigned because of misconduct toward investigator Schopfer, the county hired Bevolden as the interim chief over then-deputy chief defender Drew. When Bevolden subsequently fired Drew, Drew initiated an internal grievance proceeding that led to her reinstatement as deputy chief. She also filed a human rights complaint and federal discrimination suit against the county, Bevolden, and three other county officials. The Billings Gazette served the county with freedom of information requests and requests for copies of all public records documenting Selvey's, Schopfer's, and Drew's work records, including formal complaints and employee evaluations. Subsequently, the Billings Gazette also asked for copies of the deposition transcripts of Bevolden and other county officials deposed by the county during discovery in Drew's federal discrimination suit. Eight months after refusing to produce the depositions, the county produced redacted copies not previously reviewed or approved by the court. In a second motion to compel hearing, the District Court authorized redactions of five pages of Bevolden's deposition. The Billings Gazette appealed the District Court's authorization of redactions. Applying its holdings regarding officers holding positions of "great public trust" in Great Falls Tribune Co., Inc. v. Sheriff, 238 M 103, 775 P2d 1267 (1989), Bozeman Daily Chronicle v. Bozeman Police Dept., 260 M 218, 859 P2d 435 (1993), and Svaldi v. Anaconda-Deer Lodge County, 2005 MT 17, 325 M 365, 106 P3d 548 (2005), the Supreme Court held that public defenders, as officers of the courts charged with safeguarding the public's fundamental constitutional rights to counsel and to a fair and speedy trial, hold positions of public trust. As a result, the public's right to access Bevolden's deposition clearly outweighs any asserted privacy interest. However, redaction of nonparty names was appropriate. Yellowstone County v. Billings Gazette, 2006 MT 218, 333 M 390, 143 P3d 135 (2006). In Billings Gazette v. Billings, 2011 MT 293, 362 Mont. 522, 267 P.3d 11, the Supreme Court affirmed the District Court's decision that a city employee who regularly made purchases for the police department was in a position of public trust and that her expectation of privacy in a 16-page letter outlining evidence of her alleged misuse of public funds did not exceed the public's right to know.

Authority of State Agency to Determine Privacy Issues in Records in Agency's Possession: Following settlement of a human rights charge, Owen asked to examine the records of the Billings Police Department (BPD) that had been furnished to the Human Rights Bureau. The BPD objected to release of the information on grounds that the records contained information from individuals who held an expectation that the information that they had given to the BPD would be kept confidential and that the privacy rights of those individuals outweighed Owen's right to know. A Department of Labor and Industry hearings examiner subsequently denied the BPD's objection and ordered that the records be produced for Owen's inspection. The BPD sought judicial review, and the District Court voided the Department's decision, holding that the Department did not have the authority or jurisdiction to decide the constitutional issues raised by Owen. On appeal, the Supreme Court reversed. Consistent with Great Falls Tribune v. Mont. Pub. Serv. Comm'n, 2003 MT 359, 319 M 38, 82 P3d 876 (2003), and Shoemaker v. Denke, 2004 MT 11, 319 M 238, 84 P3d 4 (2004), the Department had original jurisdiction to review its own records and determine if any constitutionally protected privacy rights were implicated by those records and whether those privacy rights clearly outweighed Owen's right to examine the records. The analysis by the Department involved mixed questions of fact and law and thus did not qualify as an exception to the requirement that a person must first exhaust administrative remedies. The court pointed out that denying administrative agencies the authority or jurisdiction to make the initial decision on whether the agencies' own records may be examined would require a lawsuit every time that a request to inspect records was met with an objection by the producing party and thus would put the right to know out of reach for most citizens. Billings v. Owen, 2006 MT 16, 331 M 10, 127 P3d 1044 (2006).

No Federal Civil Rights Privacy Claim Against State or Municipal Entities: Barr sued the state and a municipal airport authority for violating his civil rights under 42 U.S.C. 1983 and 42 U.S.C. 1985 when the airport failed to hire him as a permanent security officer after discovering Barr's past public criminal record. The District Court summarily dismissed the claims, and the Supreme Court affirmed. In order for the municipality to be liable under the federal statutes, it was necessary for Barr to show that the municipality had a policy or custom that inflicted the injury of which Barr complained, which Barr could not show. Further, Barr's civil rights claims stemmed from a privacy invasion that did not occur, so he was unable to establish a federal privacy violation. Barr's claim against the state was also barred because states are not persons for purposes of the federal statutes. Barr v. Great Falls Int'l Airport Authority, 2005 MT 36, 326 M 93, 107 P3d 471 (2005). See also Monell v. Dept. of Social Services, 436 US 658 (1978), and Will v. Mich. Dept. of State Police, 491 US 58 (1989).

No Right to Expectation of Privacy in Public Criminal Records or Negligence in Use of Records: In 1998, Barr applied for a part-time airport security officer position and consented to a background check. A 10-year check revealed no arrests, and Barr was hired. About 1 month later, another security officer requested a criminal background check on Barr, which revealed a 1968 arrest in Alaska for criminal nonsupport. Prior to the end of Barr's probationary period, his employment was terminated, and he sued the airport authority. Barr's claim was summarily dismissed. On appeal, the Supreme Court held that under 44-5-103, Barr's Alaska arrest was public information that anyone could access and its dissemination was not improper and that coupled with Barr's consent to the background check, Barr had no constitutional expectation of privacy in the criminal record. Barr's negligence claims also failed because he failed to offer proof of all elements of common-law negligence. Summary judgment for defendants was affirmed. Barr v. Great Falls Int'l Airport Authority, 2005 MT 36, 326 M 93, 107 P3d 471 (2005).

Possible Deferred Prosecution Agreement Not Considered Confidential Criminal Justice Information — Discussion by Prosecutor With Newspaper of Possible Deferred Prosecution Agreement Not Privacy Violation or Breach of Duty: Plaintiff alleged that the County Attorney negligently breached a legal duty and violated the Montana Criminal Justice Information Act of 1979 when the County Attorney told a local newspaper that plaintiff was considering a deferred criminal prosecution agreement. Plaintiff asserted that the information was confidential and that dissemination of the information was tortious. The District Court granted summary judgment to defendant. On appeal, the Supreme Court noted that criminal justice information is defined as information relating to criminal justice that is collected, processed, or preserved by a criminal justice agency and held that mere discussion of a possible deferred criminal prosecution agreement does not constitute a discussion of criminal justice information. Although there may be circumstances in which a person suspected of having committed a crime has a reasonable expectation that the person's privacy will not be violated by the release of details of an investigation, plaintiff here could not seriously claim a privacy violation when it was already public knowledge that the allegations were against her, what the allegations were, who was involved as complainants, that she was the subject of a school board investigation concerning the allegations, and that her intended retirement from teaching was connected to the allegations. There was no material issue of fact concerning whether the County Attorney negligently breached a duty owed to plaintiff by discussing a possible deferred criminal prosecution agreement with the newspaper or by releasing a copy of the initial offense report, and summary judgment was affirmed. Svaldi v. Anaconda-Deer Lodge County, 2005 MT 17, 325 M 365, 106 P3d 548 (2005), following Great Falls Tribune Co., Inc. v. Sheriff, 238 M 103, 775 P2d 1267(1989), and Citizens to Recall Mayor James Whitlock v. Whitlock, 255 M 517, 844 P2d 74 (1992).

Discovery of Medical Records Upon Commencement of Action for Damages Placing Mental and Physical Condition at Issue — Waiver of Physician-Patient Privilege as to Condition in Controversy: Plaintiff's child fell through the second story railing at the Montana State University-Bozeman library and suffered brain injuries. Plaintiff brought damage claims related to the child's injuries and claims related to plaintiff's own emotional distress, loss of consortium, and posttraumatic stress disorder. The state moved to compel production of all of plaintiff's health care records from before and after the fall. The District Court denied the motion, holding that the records were constitutionally protected and irrelevant to the case and therefore not discoverable. On appeal, the Supreme Court noted plaintiff's constitutional right to confidentiality of medical records, but cited State ex rel. Mapes v. District Court, 250 M 524, 822 P2d 91 (1991), for the holding that that right must be balanced against a defendant's right to defend itself in an informed manner and that records of prior physical or mental conditions are discoverable only if they relate to currently claimed damages. Here, plaintiff commenced an action for damages that placed in issue

the mental and physical condition arising from the accident, thus waiving any physician-patient privilege as to the condition in controversy, and the state had the right to discover evidence related to prior medical conditions that was possibly connected to plaintiff's current damages. Denial of the discovery motion prejudiced the state's right to defend itself in an informed manner, constituting reversible error. Henricksen v. St., 2004 MT 20, 319 M 307, 84 P3d 38 (2004).

Financial Documents, School Transcripts, and Personnel Records Irrelevant to Medical Damages Claim — Discovery Properly Disallowed: Plaintiff's child fell through the second story railing at the Montana State University-Bozeman library and suffered brain injuries. Plaintiff brought damage claims related to the child's injuries and claims related to plaintiff's own medical problems stemming from trauma associated with the fall. The state moved to compel production of plaintiff's financial documents, school transcript, and personnel records. The District Court denied the motion, finding that plaintiff's statement of damages was sufficient and that the requested documents were unlikely to lead to discovery of any relevant information. On appeal, the Supreme Court affirmed. Plaintiff did not claim lost earnings or lost earning capacity. Only plaintiff's mental and emotional conditions were at issue, and the documents were irrelevant to those legitimate issues, so absent a showing of prejudice to the state's case, denial of discovery was proper. Henricksen v. St., 2004 MT 20, 319 M 307, 84 P3d 38 (2004).

No Constitutional Right to Privacy for Nonhuman Entities — Protection of Trade Secrets Under Other Constitutional and Statutory Schemes: Montana's constitutional individual privacy exception to the public's right to know is limited to natural human individuals only and does not apply to nonhuman entities such as corporations. However, nothing in Art. II, sec. 9, Mont. Const., requires disclosure of trade secrets and other confidential proprietary information when that data is protected from disclosure elsewhere in the state or federal constitution or by statute. Great Falls Tribune v. Mont. Pub. Serv. Comm'n, 2003 MT 359, 319 M 38, 82 P3d 876 (2003), overruling Mtn. States Tel. & Tel. v. Dept. of Public Service Regulation, 194 M 277, 634 P2d 181 (1981), and its progeny to the extent that those decisions relied on the constitutional balancing test of the right to individual privacy against the public's right to examine documents or observe governmental deliberations as a basis of protecting trade secrets and other confidential proprietary information of nonhuman entities.

Right of Media to Confidential Criminal Justice Information — Balance of Public Right to Know With Individual Right to Privacy — Personal Information Properly Shielded: A Beaverhead County Commissioner was arrested in Jefferson County for DUI. Defendant newspaper requested that Jefferson County release information regarding the arrest, and the District Court ordered the release. The County Commissioner appealed, claiming that the release violated the right to privacy, but the Supreme Court affirmed. Under Art. II, sec. 9, Mont. Const., any person, including a media entity, is entitled to receive confidential criminal justice information. However, that right is not absolute and must be balanced against the individual's right to privacy. The conflict between the public's right to know and the individual's right to privacy is dealt with by requiring the party requesting the information to show that it is entitled to the information, and once that showing is made, the request must be balanced against the privacy interest of the individual in question. To determine if an individual has a protected privacy interest under this section, the test set out in Bozeman Daily Chronicle v. Bozeman Police Dept., 260 M 218, 859 P2d 435 (1993), is applied, namely whether: (1) the individual has a subjective or actual expectation of privacy; and (2) society is willing to recognize that expectation as reasonable. Pursuant to Citizens to Recall Mayor James Whitlock v. Whitlock, 255 M 517, 844 P2d 74 (1992), the public has the right to be informed of the actions and conduct of elected public officials and information related to the official's ability to perform public duties should not be withheld from public scrutiny. Because the information sought by the newspaper related to the County Commissioner's ability to perform public duties, any privacy expectation that the County Commissioner had was unreasonable, and the arrest information was properly released. However, the County Commissioner did retain a privacy interest in personal information unrelated to status as a public official, such as Social Security and driver's license numbers, and it was proper for the District Court to shield that personal information from public scrutiny. Jefferson County v. Mont. Standard, 2003 MT 304, 318 M 173, 79 P3d 805 (2003).

Confidentiality of Patients' Health Care Information — Costs of Producing Copies of Nonconfidential Information to Be Borne by Health Care Providers: In a class action suit seeking monetary damages for excessive fees allegedly charged for copies of patient medical records, the District Court concluded that patient names were not confidential and ordered that the health care providers produce the names and bear the cost of producing the information as to requests for copies. The Supreme Court held that names of medical patients are protected under

constitutional and statutory law and vacated the portion of the order requiring the production of patients' names, noting that patient notification would have to be accomplished through other means, such as an opt-in notification. The order was affirmed to the extent that names of nonpatient requesters, such as attorneys and insurance companies whose privacy was not at issue, be provided. Further, because 50-16-525 requires health care providers to maintain patient records for 3 years, the District Court did not abuse it discretion in ordering the providers to bear the cost of producing the information. St. James Community Hosp., Inc. v. District Court, 2003 MT 261, 317 M 419, 77 P3d 534 (2003).

Revealing Limited Medical Information During Police Interview Not Considered Waiver of Constitutional Right to Confidentiality in Medical Records — Voluntary Medical Information Outside Scope of Fruit of Poisonous Tree Doctrine — Adequate Probable Cause for Investigative Subpoena of Medical Records: Bilant was involved in a three-car accident and was subsequently arrested for DUI and a seat belt violation. During an interview following the arrest, Bilant revealed to an officer that he had taken pain medication on the day of the accident. The officer called Bilant's health care provider for confirmation, and the provider confirmed that Bilant had a prescription for a drug similar to the pain medication that he mentioned. The officer then procured an investigative subpoena regarding documentation on all prescriptions issued to Bilant, including any advisory warnings, and the provider sent Bilant's entire medical file. Bilant contended that the state violated both his constitutional right to privacy and the statutory protections of 50-16-535. The state maintained that Bilant waived his claim of confidentiality in his medical information when he voluntarily revealed his use of pain medication to the officer. The Supreme Court agreed with Bilant. Medical records are quintessentially private and deserve the utmost constitutional protection. None of the statutory prerequisites for disclosure of the medical records were met. In deciding to reveal limited medical information in a police interview, Bilant did not forfeit his constitutional right to subsequently claim confidentiality in his medical records. The officer conducted an illegal search in seeking the constitutionally protected private medical information without probable cause and the benefit of an investigative subpoena under 46-4-301, and the information gleaned from the telephone call should have been suppressed. Bilant then contended that the use of the illegally obtained information formed an improper basis for the investigative subpoena and that the results of the subpoena should also have been suppressed pursuant to the fruit of the poisonous tree doctrine, which forbids the use of evidence that comes to light as the result of an initially illegal act. However, on this point, the Supreme Court disagreed with Bilant. One exception to the doctrine is that the derivative evidence is admissible if it is obtained from an independent source. Here, Bilant himself provided the source by giving voluntary medical information from other than the illegal telephone inquiry. The Supreme Court recognized that an investigative subpoena seeking constitutionally protected medical information requires greater justification for state access than the administration of justice rationale used to obtain public information under 46-4-301, so in reviewing the probable cause basis for constitutionally protected material, the court excised the illegal evidence from the application and reviewed the remaining information de novo to determine whether probable cause existed for issuing the subpoena. In this case, even when the information subject to suppression was excised, the remaining evidence established probable cause that a DUI was committed and underscored a compelling state interest in medical records related to prescription medicines in order to confirm Bilant's initial admission to the officer. Thus, the subpoena was issued in accordance with the statutory requirements for constitutionally protected medical records, and Bilant's conviction was affirmed. St. v. Bilant, 2001 MT 249, 307 M 113, 36 P3d 883 (2001). See also St. v. New, 276 M 529, 917 P2d 919 (1996), and St. v. Nelson, 283 M 231, 941 P2d 441 (1997).

Settlement Agreement Involving Minor Child Open for Public Inspection — No Right of Privacy Recognized — Demands of Privacy Do Not Exceed Merits of Public Disclosure: Pengra and the state agreed to a settlement of Pengra's suit against the state on behalf of his daughter and himself involving the death of his wife. Pengra requested that the settlement document be sealed and thereby made unavailable for public inspection. In a challenge to the sealing of the settlement agreement, the Supreme Court held that: (1) minors have no greater right of privacy than adults in settlement agreements involving claims against the state; (2) Pengra had no subjective expectation of privacy in the settlement agreement; (3) by the Legislature's enactment of 2-9-303, society is not willing to recognize any privacy expectation of Pengra regarding the settlement agreement; (4) compelling policy reasons support the disclosure of the settlement; and (5) any right of privacy by Pengra in the settlement agreement did not outweigh the merits of public disclosure of that agreement. Pengra v. St., 2000 MT 291, 302 M 276, 14 P3d 499, 57 St. Rep. 1231 (2000).

Unconstitutionality of Department of Revenue Rule Concerning Confidentiality of Coal Severance Tax Information: Plaintiffs sought information regarding coal severance tax payments that had been routinely supplied to the Department of Revenue by coal mine operators prior to adoption of ARM 42.2.701 (now repealed), which declared certain information, such as tax returns that taxpayers are required to submit to the Department and Department-prepared documents that identify taxpayers, to be confidential. Plaintiffs challenged the rule on grounds that it violated constitutional and statutory rights to public information. The Department asserted that the rule was adopted to protect taxpayers' constitutional right to privacy and to inform the public of the Department's procedures regarding the confidentiality of tax information. The District Court found that the rule was adopted after balancing the public's right to know with the coal producers' right to privacy and that the producers had a reasonable and ongoing expectation of privacy that outweighed the public's right to know. On appeal, the Supreme Court disagreed, finding ARM 42.2.701 (now repealed) unconstitutional on its face. The rule presumes a wholesale constitutionally protected right to privacy for all taxpayers that prevails over public disclosure without balancing the taxpayers' right to privacy with the public's right to know. Prior to adoption of the rule, coal producers did not have an actual or subjective expectation of privacy in revenue information submitted to the Department. After the rule was adopted, the producers could assert a subjective expectation of privacy. However, based on a facially unconstitutional rule, the expectation was not one society would be willing to recognize as reasonable, especially when the information had been routinely available for nearly 20 years before ARM 42.2.701 (now repealed) was adopted. Neither prong of the two-part privacy test in Great Falls Tribune Co., Inc. v. Day, 1998 MT 133, 289 M 155, 959 P2d 508 (1998), having been met, a constitutionally protected privacy interest in the information was ruled out. Assoc. Press, Inc. v. Dept. of Revenue, 2000 MT 160, 300 M 233, 4 P3d 5, 57 St. Rep. 657 (2000).

In Camera Review of Criminal Justice Information Required to Balance Privacy Interests Against Right to Know: As part of its complaint, the Lincoln County Board of County Commissioners requested an evidentiary hearing, seeking the release of criminal justice system information related to an investigation of the Commission by the state. The state Criminal Investigation Bureau contended that the investigative file contained confidential information, the release of which would compromise both the investigation and the privacy interests of informants and witnesses. The District Court canceled the hearing, denied the request for dissemination of the investigative materials, and dismissed the complaint with prejudice. On appeal, the Supreme Court reversed, noting that an analysis of potentially competing privacy interests of the parties was necessary in order to balance those interests against the Commission's right to know. On remand, the District Court was instructed to conduct an in camera inspection of the investigative file in order to determine what material could be released to the Commission while maintaining the privacy of witnesses and informants and was instructed to limit the release of any investigative information by protective order. Lincoln County Comm'n v. Nixon, 1998 MT 298, 292 M 42, 968 P2d 1141, 55 St. Rep. 1222 (1998).

Full and Accurate Disclosure of Adoption Information Required: The Jacksons' adoptive son required extensive medical and psychological therapy. The Jacksons sued the state, contending that the state had a legal duty to inform them of the boy's condition and of his parents' medical backgrounds and that failure to do so constituted negligent misrepresentation, negligent nondisclosure, negligence based on lack of informed consent, and negligent supervision. The state contended that the imposition of a common-law or statutory duty to disclose the background information would conflict with its duty to maintain confidentiality of the birth parents' medical records. The District Court dismissed the claims, concluding that the state owed the Jacksons no duty of care upon which the negligence claims could be premised. Citing the opinions of several courts of other states, the Supreme Court held that recognizing a cause of action for negligent misrepresentation in the adoption context would promote public policy and ensure that adoptive parents would assume parenting responsibilities in an informed manner. Anything less than the exercise of due care in the dissemination of information to prospective adoptive parents is unacceptable. Although a slight burden is imposed on the state in providing the information, that burden is justified in light of the compelling need for adoptive parents to receive all available information regarding a child who might soon be a permanent member of the family. Full disclosure of a child's medical and familial background is warranted not only to enable adoptive parents to obtain timely and appropriate medical care for the child but also to enable them to make an intelligent and informed decision to adopt. Summary judgment was reversed. (Note: See 42-3-101, wherein the 1997 Legislature enacted a statutory requirement that social and medical

histories of the birth families must be provided to a prospective adoptive parent.) Jackson v. St., 1998 MT 46, 287 M 473, 956 P2d 35, 55 St. Rep. 183 (1998).

Right of Privacy Encompasses "Autonomy" and "Informational" Privacy — Probable Cause Needed for Discovery of Medical Information: While treating the defendant for a broken jaw received during an automobile accident, the physician, concerned over the defendant's lack of pain, ordered a blood test to determine his alcohol concentration level. During a subsequent interview with the investigating officer, the physician referred to the victim's blood concentration level without divulging the actual numerical concentration level. Based on the physician's comments, the officer obtained the test results, using an investigative subpoena, and the defendant was subsequently charged with and convicted of driving under the influence of alcohol. The defendant appealed, alleging that release of the blood alcohol information violated his right to privacy. Although it affirmed the defendant's conviction, the Supreme Court ruled that absent a compelling state interest, medical records are protected by the right of privacy. The court adopted an interpretation of the state's privacy guarantee, outlined by California in Hill v. Nat'l Collegiate Athletic Ass'n, 865 P2d 633 (Calif. 1994). The court ruled that Montana's guarantee of privacy encompasses "autonomy privacy" as well as confidential "informational privacy". In this case, the state was able to establish the existence of a compelling state interest for the issuance of an investigative subpoena for discovery of medical records by showing that there was probable cause to believe that an offense had been committed and that the medical information relative to the offense was in the possession of a person to whom the subpoena was directed. St. v. Nelson, 283 M 231, 941 P2d 441, 54 St. Rep. 576 (1997), followed in St. v. Dolan, 283 M 245, 940 P2d 436, 54 St. Rep. 583 (1997), but ruling that information concerning a request that a hospital obtain a routine blood sample was insufficient to establish probable cause for issuance of an investigative subpoena, St. v. Ingraham, 1998 MT 156, 290 M 18, 966 P2d 103, 55 St. Rep. 611 (1998), St. v. Bilant, 2001 MT 249, 307 M 113, 36 P3d 883 (2001), and Malcomson v. Liberty Northwest, 2014 MT 242, 376 Mont. 306, 339 P.3d 1235.

No Reasonable Expectation of Privacy by Elected Official in Duty-Related Issues: A citizens' group organized to recall Mayor Whitlock sought public disclosure of a report that was ruled to be confidential by a closed meeting of the City Council. The report explored allegations of the mayor's misconduct in office and did not disclose information related to Whitlock's private activities, general performance evaluations, or proceedings in which his character, integrity, honesty, or personality were discussed. As an elected official, Whitlock's expectation of privacy regarding his public duties was unreasonable. The merits of disclosing the report were substantial and in the public interest of being informed of the actions and conduct of their official and of the expenditure of public funds. In ordering disclosure, the District Court properly found that the right of the public to know should be accorded greater weight than Whitlock's unreasonable claim of privacy. Citizens to Recall Mayor James Whitlock v. Whitlock, 255 M 517, 844 P2d 74, 49 St. Rep. 1113 (1992), distinguishing Mont. Human Rights Div. v. Billings, 199 M 434, 649 P2d 1283 (1982), Missoulian v. Bd. of Regents, 207 M 513, 675 P2d 962 (1984), and Flesh v. Mineral & Missoula Counties, 241 M 158, 786 P2d 4 (1990).

In Camera Inspection of Private Employment Records — Court Discretion in Suppressing Discovery Proper: The state attempted to compel discovery of defendant's personnel files from the Helena Catholic Diocese. The state sought information regarding reports of similar misconduct, disciplinary actions, transfer records, and witness names to use in rebutting and cross-examining defendant's character witnesses. After initial refusal to surrender the records, the parties agreed to an in camera review of the records by the presiding judge. The judge ruled that the information was not discoverable because it contained personal and private information. The in camera review and the subsequent prohibition on discovery of material that was not probative were held to be within the discretionary power of the judge in controlling discovery. Absent an abuse of that discretion, denial of access to the records was affirmed. St. v. Burns, 253 M 37, 830 P2d 1318, 49 St. Rep. 353 (1992).

Defendant's Discovery Needs Balanced by Plaintiff's Right to Privacy: The defendant in a personal injury case sought access to the files of Mapes's psychologist. Mapes resisted the motion on the basis that it violated his right to privacy. The Supreme Court held that granting the supervisory writ was necessary because the defendant's discovery rights and the plaintiff's statutory privacy rights were in conflict. The court further held that the defendant could seek information pertaining only to prior physical or mental conditions that might relate to the damages being claimed in the present action. State ex rel. Mapes v. District Court, 250 M 524, 822 P2d 91, 48 St. Rep. 954 (1991). See also Park v. District Court, 1998 MT 164, 289 M 367, 961

P2d 1267, 55 St. Rep. 657 (1998), and Winslow v. Mont. Rail Link, Inc., 2001 MT 269, 307 M 269, 38 P3d 148 (2001).

Release of Police Records to Insurance Company: When an insurer sought access to police files pertaining to the police department's investigation of the death of an insured for use during the insurer's investigation of policy coverage, the police department objected to release of its records. The insurer then filed an application with the District Court, seeking production of the records. The court denied the application, holding that the insurer was not authorized by law to receive the documents and therefore was not entitled to their production under the Montana Criminal Justice Information Act of 1979. The trial court interpreted 44-5-303 to mean that in order to be "authorized by law", one must be specifically authorized by statute to receive criminal justice information. The Supreme Court held that this interpretation does not take into consideration basic tenets of our constitutional system of government and statutory construction. Under its commonly understood meaning, the word "law" includes constitutional as well as statutory law. Accordingly, one is authorized to receive criminal justice information by the "right to know" provision of the constitution. The only limitation on the right to receive this information is the constitutional right of privacy. Any interpretation of 44-5-303 that requires specific legislative authorization to review criminal justice information would render the statute unconstitutional. In this instance, the District Court shall conduct an in camera inspection of the documents at issue to determine what material could properly be released, balancing the competing interests of the right to know and the right of privacy. Allstate Ins. Co. v. Billings, 239 M 321, 780 P2d 186, 46 St. Rep. 1716 (1989), followed in Bozeman Daily Chronicle v. Bozeman Police Dept., 260 M 218, 859 P2d 435, 50 St. Rep. 1014 (1993).

Closure of Probation Revocation Hearing — Interruption a Contempt — Prior Notice of Closure Not Required: The public and the press have the right, with limited exception, to attend and observe probation revocation hearings. In a proper case, a District Court may close such a hearing. When a hearing is properly closed, no member of the public or representative of the press may interrupt the due course of the hearing in a manner that might defeat the reason for closure. Such an interruption constitutes a contempt of court. A District Court may proceed on an ad hoc basis, without giving prior notice, to make a closure decision in accordance with the facts and circumstances facing it at the time. State ex rel. Great Falls Tribune Co., Inc. v. District Court, 238 M 310, 777 P2d 345, 46 St. Rep. 1292 (1989).

Disciplined Police Officers' Right to Privacy Outweighed by Public's Right to Know: Several police officers were disciplined as a result of their actions during the chase and apprehension of a suspect. Law enforcement officials refused to release the names of the officers to the newspaper on the basis that to do so would violate the officers' privacy rights. The Supreme Court upheld the lower court's order to disclose the names on the basis that officers who have been disciplined have only a minimal right of privacy that is easily outweighed by the peoples' right to know. Great Falls Tribune Co., Inc. v. Sheriff, 238 M 103, 775 P2d 1267, 46 St. Rep. 1123 (1989), followed in Lence v. Hagadone Inv., 258 M 433, 853 P2d 1230, 50 St. Rep. 601 (1993), and distinguished in Billings Gazette v. Billings, 2013 MT 334, 372 Mont. 409, 313 P.3d 129.

Request of Law Enforcement Records for School Project — Information Beyond Public Reach: The District Court properly refused the request of a student who sought Sheriff's department information for a school project. Information requested included: (1) records of the daily log of phone calls; (2) case files of criminal investigations; (3) preemployment investigation reports; and (4) lists of arrested persons. Persons involved had an actual expectation of privacy, and the interests of society were furthered by recognition of the privacy interest as reasonable. The student had the right to view and record statistical information pursuant to 44-5-103, but the requested information was protected by the Montana Constitution and the Montana Criminal Justice Information Act of 1979 and was beyond the reach of the public sector. Engrav v. Cragun, 236 M 260, 769 P2d 1224, 46 St. Rep. 344 (1989).

Limited Disclosure of Realty Transfer Certificate Information: The language of this section protects the confidentiality of a realty transfer certificate (RTC) when the demand for individual privacy exceeds the merits of public disclosure. However, when limited disclosure of relevant RTC information is crucial to a fair and informed decision by a tax appeal board or court, such disclosure outweighs individual privacy. Therefore, in contested tax proceedings, relevant information from an RTC must be disclosed to the taxpayer party, tax boards, and reviewing courts. During pendency of the proceedings, RTC information will not be available to the public, and after the proceedings any portion of the record containing disclosed RTC information must be sealed. Under this holding, a taxpayer may apply to the District Court for a subpoena to compel the Department of Revenue to release relevant RTC information. The subpoena must identify

the specific information requested with as much precision as possible. Issuance and scope of the subpoena lies within the discretion of the District Court. O'Neill v. Dept. of Revenue, 227 M 226, 739 P2d 456, 44 St. Rep. 1037 (1987).

Investigation of Human Rights Violations — Personnel Files: The Human Rights Commission (HRC) requested access to personnel files in connection with its investigation of a discrimination complaint. The court found that information sought by the HRC is protected by the right of privacy. The court also found that a sufficient showing of compelling state interest was made under Art. II, sec. 4, Mont. Const., and Title 49, ch. 2, allowing the HRC access to the information. To protect the privacy of the individuals whose files are disclosed, the court directed that the HRC may not disclose the information unless it is altered so as to provide for the anonymity of the persons involved. If the information must be released in such a way as to disclose the identity of the persons involved, HRC must, prior to the release, obtain an order from the District Court authorizing the release. Mont. Human Rights Div. v. Billings, 199 M 434, 649 P2d 1283, 39 St. Rep. 1504 (1982), followed in Flesh v. Bd. of Trustees, 241 M 158, 786 P2d 4, 47 St. Rep. 161 (1990).

No Expectation of Privacy in Telephone Records — State Action Theory Rejected: Where defendant examined telephone company records of telephone calls made by plaintiff and plaintiff alleged violation of right to privacy under Art. II, sec. 10, Mont. Const., the Supreme Court held that there is no reasonable expectation of privacy in telephone records justifying bringing them under constitutional protection. The Supreme Court, however, rejected the District Court's reasoning for granting summary judgment to defendant, which was based on an interpretation of this section as requiring state action and as not protecting against violations by private persons. Hastetter v. Behan, 196 M 280, 639 P2d 510, 39 St. Rep. 100 (1982).

Telephone Records Not Protected by Federal Law: Where defendant examined telephone company records of telephone calls made by plaintiff and plaintiff alleged violation of 47 U.S.C. § 605, court held that as amended in 1968 and as interpreted in federal cases, that law protected only radio communications and exempted wire communications; hence, plaintiff had no cause of action. Hastetter v. Behan, 196 M 280, 639 P2d 510, 39 St. Rep. 100 (1982).

Trade Secrets — When to Be Disclosed and to Whom — Protectable Property: A telephone utility was required to disclose trade secrets to the Public Service Commission (PSC) to aid in a decision on its rate increase request. The utility was entitled to a protective order preventing access to the secrets by the general public, but the Montana Consumer Counsel and any citizen whose interest related to the ratemaking function of the PSC could have access to the information. Use or disclosure of the trade secrets except for purposes of the ratemaking proceeding was prohibited. Mtn. States Tel. & Tel. v. Dept. of Public Service Regulation, 194 M 277, 634 P2d 181, 38 St. Rep. 1479 (1981). Mtn. States and its progeny were overruled to the extent that those decisions relied on the constitutional balancing test of the right to individual privacy against the public's right to examine documents or observe governmental deliberations as a basis of protecting trade secrets and other confidential proprietary information of nonhuman entities in Great Falls Tribune v. Mont. Pub. Serv. Comm'n, 2003 MT 359, 319 M 38, 82 P3d 876 (2003).

MISCELLANEOUS

24/7 Sobriety and Drug Monitoring Program Testing Requirements — Not Unreasonable Search or Violation of Privacy: Requiring a defendant who is a repeat DUI arrestee to provide twice daily breath samples as a condition of release under the Montana 24/7 Sobriety and Drug Monitoring Program Act does not constitute an unreasonable search and does not infringe upon a significant privacy interest. The state's compelling interest in keeping the public safe by preventing repeat DUI arrestees from driving while drunk outweighs any privacy concerns. St. v. Spady, 2015 MT 218, 380 Mont. 179, 354 P.3d 590.

Violent Offender Registration and Disclosure Requirements Not Violative of Privacy or Right of Convicted to Restoration of Rights: The defendant was convicted of arson and received a 4-year suspended sentence. In addition, the sentencing court required him to register as a violent offender for at least 10 years. The defendant appealed the registration requirement. Similar to the defendant in Mount, he argued that the Sexual or Violent Offender Registration Act, as applied to a violent offender, violated his right to privacy. The Supreme Court disagreed, ruling that the state has a compelling state interest to protect the public and that the Act is narrowly tailored to achieve that interest. St. v. Brooks, 2012 MT 263, 367 Mont. 59, 289 P.3d 105, following St. v. Mount, 2003 MT 275, 317 Mont. 481, 78 P.3d 829.

Right to Privacy — Access to Medical Marijuana Not Fundamental Right: The District Court determined that statutory restrictions on medical marijuana substantially implicated the

fundamental right to privacy. On appeal, the Supreme Court reversed the District Court and determined that the right to privacy does not encompass the affirmative right of access to medical marijuana. The Supreme Court reasoned that while the right to privacy is certainly implicated when a statute infringes on a person's ability to obtain or reject a "lawful" medical treatment, it does not follow that the right to privacy is necessarily implicated when a statute regulates a particular medication. Mont. Cannabis Indus. Ass'n v. St., 2012 MT 201, 366 Mont. 224, 286 P.3d 1161, following Wiser v. St., 2006 MT 20, 331 Mont. 28, 129 P.3d 133, and distinguishing Armstrong v. St., 1999 MT 261, 296 Mont. 361, 989 P.2d 364.

Good Cause Required for Court-Ordered Psychological Examination — Condition Must Be at Issue: After being hit by a vehicle that left the scene, the plaintiff sought compensation from her insurer under her uninsured motorist coverage for past and future medical expenses and for physical and emotional pain, suffering, and anxiety associated with the physical injuries. The District Court issued an order for an independent psychological examination under Rule 35, M.R.Civ.P. (Title 25, ch. 20), for the purpose of determining whether the plaintiff's chronic pain was caused or exacerbated by preexisting mental health issues. Subsequently, the Supreme Court vacated the order, reasoning that the plaintiff made only a general claim for emotional pain, suffering, and anxiety without placing her mental condition in controversy within the meaning of Rule 35. Constitutionally based privacy concerns require that Rule 35 examinations be ordered only when the party to be examined has put the party's physical or mental condition at issue and when there is good cause for the examination. Lewis v. District Court, 2012 MT 200, 366 Mont. 217, 286 P.3d 577, citing In re Marriage of Binsfield, 269 Mont. 336, 888 P.2d 889 (1995), and Simms v. District Court, 2003 MT 89, 315 Mont. 135, 68 P.3d 678.

Physician Aid in Dying Not Against Public Policy — Protection of Participating Physician From Prosecution: The District Court held that a competent terminally ill patient has a right to die with dignity pursuant to the rights to individual dignity and privacy in the Montana Constitution, which includes protection of the patient's physician from prosecution for homicide. The Supreme Court held that the issue could be resolved at the statutory level and therefore declined to rule on the constitutional issue. Because suicide is not a crime under Montana law, the only person who might be subject to criminal prosecution is a physician who prescribes a lethal dose of medication to a terminally ill patient. Thus, the court addressed the possible culpability of a physician who extends aid in dying, whether the patient's consent could constitute a statutory defense against a homicide charge against the assisting physician, and whether patient consent is rendered ineffective by 45-2-211(2)(d) because permitting the conduct or resulting harm is against public policy. The court noted that the consent defense is effective only if none of the exceptions in 45-2-211(2) apply. By law, consent is ineffective if it is (1) given by a person who is legally incompetent to authorize the conduct charged to constitute the offense; (2) given by a person who by reason of youth, mental disease or defect, or intoxication is unable to make a reasonable judgment as to the nature or harmfulness of the conduct charged to constitute the offense; (3) induced by force, duress, or deception; or (4) against public policy to permit the conduct or the resulting harm, even though consented to. The first three exceptions require case-by-case factual determinations, so the court confined its analysis to whether consent to physician aid in dying is against public policy and concluded that physician aid in dying provided to terminally ill, mentally competent adult patients is not against public policy. The exception to consent applies only to conduct that disrupts public peace and physically endangers others, to which the act of a physician handing medicine to a terminally ill patient and the patient's subsequent peaceful and private act of taking the medicine is not comparable. The physician is not directly involved in the final decision or the final act, and the patient's private decision whether to take the medicine does not breach public peace or endanger others, so the patient's consent to physician aid in dying constitutes a statutory defense to a homicide charge against the physician when no other exceptions apply. Baxter v. St., 2009 MT 449, 354 M 234, 224 P3d 1211 (2009).

Rights of the Terminally Ill Act Not Against Public Policy: The Montana Rights of the Terminally Ill Act clearly provides that terminally ill patients are entitled to autonomous end-of-life decisions even if enforcement of those decisions involves direct participation by a physician through withdrawing or withholding treatment. It is not against public policy to honor the patient's wishes when the patient is conscious and able to vocalize and carry out the decision with self-administered medication and no immediate or direct physician assistance. The Act's encompassing immunity for medical professionals reinforces the patient's right to enforce the decisions without fear that those who give effect to the patient's wishes will be prosecuted. There is nothing in the plain language of the law that indicates that the Act is against public policy. Baxter v. St., 2009 MT 449, 354 M 234, 224 P3d 1211 (2009).

No Expectation of Privacy in Radio Conversation Held Over Public Airways: A game warden monitored Cotterell's two-way radio conversations held with his son while hunting. Cotterell asserted that, absent a warrant, the warden's surreptitious third-party electronic surveillance of the radio conversations was unlawful. The Supreme Court noted that it held in St. v. Goetz, 2008 MT 296, 345 M 421, 191 P3d 489 (2008), that warrantless electronic monitoring and recording of face-to-face conversations, even with the consent of one participant in the conversation, violates the other participant's right to privacy and the right to be free from unreasonable search and seizure. However, the initial inquiry under Goetz is to determine whether the electronic monitoring constitutes an unreasonable or unlawful search or seizure, and the factors in determining whether such a search or seizure occurred are whether the person challenging the state's action had an actual subjective expectation of privacy that society would recognize as objectively reasonable and the nature of the state's intrusion. In this case, Cotterell had no reasonable expectation of privacy. The electronic conversations were held using widely available hand-held radios over a public channel that could be monitored by anyone using the same equipment and thus could not be considered private. Absent a reasonable expectation of privacy, no search occurred and the warden did not need a warrant to monitor and record the conversations. St. v. Cotterell, 2008 MT 409, 347 M 231, 198 P3d 254 (2008).

Posting of Private Property Not Sufficient to Shield Items Not Protected From View Outside Property: Two fish and game agents returning by air from an out-of-town meeting observed a wildlife feeding stand and hunting platform on Cotterell's property. Further investigation by a warden revealed Cotterell's illegal hunting activities. Cotterell contended that because his property was posted against trespassing, he had a reasonable expectation of privacy and that the aerial observation of the property constituted a warrantless unlawful search. The aerial observations were not part of any surveillance of Cotterell's property but were accidental inasmuch as the agents were not looking for anything in particular or fulfilling any law enforcement activities during the flight. Citing Calif. v. Ciraolo, 476 US 207 (1986), the Supreme Court held that Cotterell's posting of his property was not sufficient to shield any and all observation of items not shielded or protected from view from places exterior to the property. The agents' innocent observation of the property was not an unconstitutional search. St. v. Cotterell, 2008 MT 409, 347 M 231, 198 P3d 254 (2008), distinguishing St. v. Bullock, 272 M 361, 901 P2d 61 (1995), St. v. Siegal, 281 M 250, 934 P2d 176 (1997), and St. v. Romain, 1999 MT 161, 295 M 152, 983 P2d 322 (1999).

No Standing by Nonattorney to Assert Attorney-Client Privacy Rights: O'Neil was a paralegal and state senator who was investigated by the Commission on the Unauthorized Practice of Law and permanently enjoined from engaging in conduct that constituted the practice of law. O'Neil filed a counterclaim against the Commission and the State Bar, asserting that the Commission and the State Bar violated his, his customers', and his constituents' right to privacy by interfering with their discussion and disclosure of matters involving the preparation and strategy of their personal and legal matters with whom they chose. The Supreme Court disagreed. O'Neil was not licensed to practice law, and his customers therefore had no privacy right in seeking services from O'Neil that he was not authorized to perform, nor did O'Neil have representational standing to assert, on behalf of his customers, a privacy right that by law did not exist. Additionally, O'Neil's own right to privacy was not violated because a person has no privacy interest to misrepresent to the public that the person is a licensed professional when that person is not. The motions for summary judgment by the Commission and the State Bar were properly granted. Mont. Supreme Court Comm'n on Unauthorized Practice of Law v. O'Neil, 2006 MT 284, 334 M 311, 147 P3d 200 (2006).

Capacity of Defendant to Withdraw Appeals — Rees Standard: Dawson was convicted of a capital crime and sentenced to death, and after years of appeals, Dawson decided to fire his attorneys, discontinue all appeals, and proceed with imposition of the death penalty. Dawson filed a pro se motion in state and federal courts to dismiss all pending appeals, and the Supreme Court considered whether to grant the motion. To decide whether a person under a death sentence has the mental competence to waive the right to further judicial review, the court applied the federal standard in Rees v. Payton, 384 US 312 (1966). The standard is whether the defendant has the capacity to appreciate the defendant's position and make a rational choice with respect to continuing or abandoning further litigation or whether the defendant is suffering from a mental disease, disorder, or defect that may substantially affect the defendant's capacity in the premises. After examining the record, the Supreme Court determined that Dawson did not suffer from a mental disease, disorder, or defect, that he had the capacity to appreciate his position, that he had made a rational choice to abandon further litigation, and that his motion to

dismiss the appeal was voluntarily made. Once Dawson's competency was determined and the voluntariness of his action was established, Dawson was protected by his right to privacy from further medical examination and evaluation and from testimony from his doctor, and was entitled to the individual autonomy to make his private decision. Absent any showing that Dawson was denied any right while incarcerated or evidence of prison conditions that would cause him to abandon his desire to live, the Supreme Court dismissed Dawson's appeal and remanded to the District Court for execution of the original death sentence. St. v. Dawson, 2006 MT 69, 331 M 444, 133 P3d 236 (2006). See also Rumbaugh v. Procunier, 753 F2d 395 (5th Cir. 1985), and Dennis v. Budge, 378 F3d 880 (9th Cir. 2004).

Rule Requiring Dentist Referrals Prior to Performance of Partial Denture Work by Denturists Not Violative of Right of Privacy: Denturist plaintiffs challenged the rule of the Board of Dentistry, promulgated pursuant to 37-29-403, requiring dentist referrals before denturists may perform partial denture work, on grounds that the rule violated the private right of patients to seek the medical professional of their choice. The District Court upheld the constitutionality of the rule, and on appeal, the Supreme Court affirmed. Although the Supreme Court affirmed the right of an individual to obtain and reject medical treatment in Armstrong v. St., 1999 MT 261, 296 M 361, 989 P2d 364 (1999), that general rule does not translate into a fundamental right of a patient to obtain medical care free of regulation. The state may exercise its police power to regulate for the health and safety of its citizens, and that power often implicates individual rights. However, when the rights affected are not fundamental, the state need demonstrate only a rational basis for the regulation rather than a compelling state interest. Plaintiffs did not argue whether the partial denture rule was rationally related to a legitimate state interest, and absent a showing of a fundamental right, the privacy argument failed. Wiser v. St., 2006 MT 20, 331 M 28, 129 P3d 133 (2006).

Requirement for DNA Testing Proper Condition of Suspended Sentence for Defined Felony Offense: As a condition of Johnson's three suspended nonviolent felony sentences, including a burglary conviction, the District Court ordered Johnson to submit to DNA testing. Johnson appealed the testing requirement on grounds that it violated the right to privacy and the right against unlawful search and seizure, but the Supreme Court affirmed. Under 44-6-103, a person convicted of a felony offense shall submit to DNA testing. Johnson's burglary conviction met the definition of a felony offense, as defined in 44-6-101, so the DNA testing requirement as part of the sentences was legal. St. v. Johnson, 2005 MT 48, 326 M 161, 108 P3d 485 (2005).

Sex Offender Registration and Disclosure Requirements Not Violative of Privacy or Right of Convicted to Restoration of Rights: Mount was convicted of sexual intercourse without consent and served his sentence. Nine days after final discharge from prison in 1996, Mount registered as a sexual offender, but he was convicted in 2000 of failing to update the registration as required in 46-23-507. On appeal, Mount asserted that the ongoing registration and disclosure requirements of the Sexual or Violent Offender Registration Act violated the right to privacy under this section and constitutional and statutory provisions for reinstatement of the rights of a citizen under Art. II, sec. 28, Mont. Const., and 46-18-801. The Supreme Court disagreed. As a fundamental right, the right to individual privacy may be infringed only by a compelling state interest; however, protection of the public from the recidivism of sex offenders, prevention of the victimization of vulnerable children, and assistance in keeping track of sex offenders constitute the requisite compelling interest. Further, Art. II, sec. 28, Mont. Const., and 46-18-801 apply only to the restoration of civil and political rights, and a conviction for sexual intercourse without consent does not fall under this category of protected rights. Thus, Mount was not deprived of any rights by the registration and disclosure requirements of the Sexual or Violent Offender Registration Act. St. v. Mount, 2003 MT 275, 317 M 481, 78 P3d 829 (2003), followed in Wagner v. St., 2004 MT 31, 319 M 413, 85 P3d 750 (2004). See also St. v. Brooks, 2012 MT 263, 367 Mont. 59, 289 P.3d 105 (ruling that SVORA did not violate privacy rights of a violent offender).

Good Cause Required for Court-Ordered Medical Examination — Scope of Medical Examination Rule: Pursuant to former Rule 35, M.R.Civ.P. (now superseded), the District Court ordered plaintiff to undergo an extensive independent medical examination by an expert 750 miles away. The examination would have subjected plaintiff to burdensome, painful, invasive, elective, and potentially harmful procedures. After accepting supervisory control, the Supreme Court reversed. Former Rule 35 does not permit any proposed examination simply because a plaintiff puts the plaintiff's physical or mental condition at issue. A District Court must consider whether good cause for a proposed examination has been demonstrated because of the constitutional protections afforded to a person's right to privacy, safety, health, and happiness. Good cause for an examination may not constitute good cause for a specific examination requested

by a defendant. Further, bringing a suit to recover for personal injury may place a plaintiff's physical or mental condition at issue, but it does not waive the inalienable right to the integrity of and personal control over the plaintiff's body. In determining whether there is good cause, the court should consider both the location and the nature of the examination. Requiring a party to travel any farther than necessary is an abuse of discretion, and out-of-state examinations should be viewed with disfavor when an adequate examination can be conducted in Montana. Here, the District Court abused its discretion in ordering plaintiff to undergo a potentially invasive, painful, and burdensome examination at a distant location when the same test was available in Montana. Simms v. District Court, 2003 MT 89, 315 M 135, 68 P3d 678 (2003).

Noninvestigatory, Work-Related Entry Into Judge's Chamber Not Considered Search: Smartt, a Justice of the Peace, left his office computer on after work hours. A county employee and another judge entered Smartt's chambers to shut down the computer so that a network backup could be performed and discovered pornographic images displayed on the computer screen. They reentered the chambers to note websites from the computer history file and took digital photographs of the long-term history of internet activity on Smartt's computer. The information was turned over to the FBI, and Smartt's computer was confiscated and searched. Smartt contended that the evidence seized from his chambers was obtained through an unlawful search, violated the right to privacy, and should be suppressed. The Supreme Court disagreed. Under St. v. Boyer, 2002 MT 33, 308 M 276, 42 P3d 771 (2002), the Supreme Court considers three factors when determining whether there has been an unlawful government intrusion into one's privacy: (1) whether the person has an actual expectation of privacy; (2) whether society is willing to recognize that expectation as objectively reasonable; and (3) the nature of the state's intrusion. When no reasonable expectation of privacy exists, there is neither a search nor seizure. Although the Montana Constitution affords broader protection than the federal constitution in cases involving searches of and seizure from private property, a person may not expect the same degree of privacy in public that is afforded in the privacy of one's home. In this case, entry into the judge's chambers was for a legitimate, noninvestigatory, work-related purpose. Irrespective of whether Smartt had any expectation of privacy with regard to the computer images, the nature of the intrusion did not rise to the level of a search, and denial of the motion to suppress the evidence was proper. Harris v. Smartt, 2002 MT 239, 311 M 507, 57 P3d 58 (2002), distinguishing Gryczan v. St., 283 M 433, 942 P2d 112 (1997). See also St. v. Scheetz, 286 M 41, 950 P2d 722 (1997).

Action for Damages Allowed Against Local Peace Officers Violating Person's Self-Executing State Constitutional Rights to Privacy, Due Process, and Freedom From Unreasonable Searches and Seizures: Plaintiffs filed a civil action against the Sheriff and two deputies for damages for violation of plaintiffs' Montana constitutional rights to privacy, due process, and freedom from unreasonable searches and seizures. The court held that those three rights are self-executing. The court also held that plaintiffs were entitled to damages. The court based the right to recover damages on: (1) federal cases allowing damage suits for violation of rights under the U.S. Constitution; (2) Restatement (Second) of Torts 874A (1979), which follows the principle in those federal cases by stating that when a constitutional provision protects a class of persons and does not provide a remedy for a violation of the provision, the court may, if appropriate, allow an action under an existing tort or a new cause of action similar to an existing tort; (3) 1-1-109 providing that the common law of England is the rule of decision in Montana courts to the extent that it is not repugnant to or inconsistent with the U.S. or Montana Constitution or Montana statutes, and cases from other states using the English common law as a basis for granting a remedy for a state official's violation of a person's state constitutional rights; (4) 27-1-202 allowing recovery of damages by a person who suffers detriment from the unlawful act or omission of another; and (5) the Montana Constitution, Art. II, sec. 16, right to a remedy for every injury. The court stated that there is a great distinction between wrongs, such as assault, conversion, and trespass, by a private individual against another private individual and wrongs against a private individual by a person acting under authority of the state in violation of a person's constitutional rights and stated that common-law causes of action remedying the former are not adequate to remedy the latter. Dorwart v. Caraway, 2002 MT 240, 312 M 1, 58 P3d 128 (2002).

Writs of Execution Used to Enter, Search, and Seize — Damages for Violation of Constitutional Rights — Immunity of Peace Officers: Two brothers sued the Sheriff and two deputies for violating their Montana constitutional rights to privacy, due process, and freedom from unreasonable searches and seizures. Neither writs of execution issued to enforce default judgments against one brother nor the postjudgment statutes under which they were issued expressly directed or authorized local peace officers to enter the other brother's house and search for and seize property

of the brother against whom the writs were issued and who lived in the house. Therefore, 2-9-103 did not give the peace officers immunity from suit on the basis that they acted "under the authority of law". However, to the extent that any claim for damages for violation of due process is based on failure to provide the brother against whom the writs were issued with notice of property that is exempt from execution and a timely hearing, the claim results from the execution statutes' constitutional inadequacy, and recovery for those procedural inadequacies is barred by the provision in 2-9-103 for immunity for an action under authority of a law subsequently found unconstitutional. The District Court's dismissal, based on statutory immunity, of the brothers' other claims was reversed. Dorwart v. Caraway, 2002 MT 240, 312 M 1, 58 P3d 128 (2002).

Prohibition Against Abortion by Physician Assistant-Certified Unconstitutional Violation of Right of Privacy: After the decision in Mazurek v. Armstrong, 520 US 968, 138 L Ed 2d 162, 117 S Ct 1865 (1997), ibid., Dr. Armstrong and Cahill, a physician assistant-certified, filed this case in state District Court challenging the constitutionality of 37-20-103 and 50-20-109, which prohibited a physician assistant-certified from performing abortions. The District Court found that the prohibition affected a woman's right to obtain a legal first trimester abortion and that the state had advanced no compelling interest to justify prohibiting Cahill from performing abortions, as she had for 20 years, and granted plaintiffs' motion for a preliminary injunction. Noting that Montana adheres to one of the most stringent protections of its citizens' right of privacy in the United States, exceeding even the federal constitution, the Supreme Court affirmed, holding that legislation that infringes on the exercise of the right of privacy must be reviewed under a strict scrutiny analysis. Under this section, every individual is guaranteed the right to make medical judgments affecting that person's bodily integrity and health, in partnership with a chosen health care provider and free from government interference, except in very limited circumstances not at issue here. The court agreed that the statutory restrictions in question impacted a woman's right to procreative autonomy and her right to seek and obtain a specific lawful medical procedure from the health care provider of her choice, in this case a previability abortion from a physician assistant-certified, and were thus an unconstitutional violation of the right of privacy. Armstrong v. St., 1999 MT 261, 296 M 361, 989 P2d 364, 56 St. Rep. 1045 (1999), following Gryczan v. St., 283 M 433, 942 P2d 112, 54 St. Rep. 699 (1997). See also Intermtn. Planned Parenthood v. St. (Cause No. BDV 97-477) (June 29, 1998) (First Judicial District Court ruling (not appealed to Montana Supreme Court) that the law banning partial-birth abortion procedure infringed on a woman's right to privacy under this section), and Planned Parenthood of Missoula v. St. (judgment of the First Judicial District, Lewis & Clark County, Dec. 29, 1999, declaring provisions of the Montana Abortion Control Act and the Woman's Right-to-Know Act unconstitutional under this section).

Standing of Health Care Providers to Litigate Privacy Right of Patient to Obtain Previability Abortion: In a case of first impression, the Supreme Court relied on federal law to decide that the statutes directed at health care providers in 37-20-103 and 50-20-109, which prohibit a physician assistant-certified from performing abortions, interfered with the normal functioning of the physician-patient relationship by criminalizing certain procedures. To establish standing to challenge government action: (1) the complaining party must clearly allege past, present, or threatened injury to a property right or civil right; and (2) the alleged injury must be distinguishable from the injury to the public generally but need not be exclusive to the complaining party. In this case, based on the closeness of the physician-patient relationship, the health care providers had standing, on behalf of their women patients, to assert the women's constitutional privacy right under this section to obtain a previability abortion from the health care provider of their choosing. Armstrong v. St., 1999 MT 261, 296 M 361, 989 P2d 364, 56 St. Rep. 1045 (1999), following Singleton v. Wulff, 428 US 106, 49 L Ed 2d 826, 96 S Ct 2868 (1976). See also Intermtn. Planned Parenthood v. St. (Cause No. BDV 97-477) (June 29, 1998) (First Judicial District Court ruling (not appealed to Montana Supreme Court) that the law banning partial-birth abortion procedure infringed on a woman's right to privacy under this section), and Planned Parenthood of Missoula v. St. (judgment of the First Judicial District, Lewis & Clark County, Dec. 29, 1999, declaring provisions of the Montana Abortion Control Act and the Woman's Right-to-Know Act unconstitutional under this section).

Theology as Impermissible Basis on Which to Make Law or Interpret Constitution: In deciding that statutory provisions prohibiting a physician assistant-certified from performing abortions were an unconstitutional invasion of the right of privacy and personal procreative autonomy, the Supreme Court clarified that its opinion was not a comment on the merits of sectarian doctrine or on the deep and sincerely held beliefs, values, and convictions of those who either favor abortion or oppose it on moral or religious grounds. The right of expression aimed at changing individual values and convictions and at fostering respect for the intrinsic value of all life is protected by

the first amendment to the U.S. Constitution and by sections 5 and 7 of this article. However, the doctrine of separation of church and state that is also embodied in the first amendment and section 5 of this article makes theology an impermissible basis on which to make law or interpret the constitution. Religious arguments do not count as legal arguments. The cost of a person's enjoyment of fundamental constitutional rights does not permit the government's infringement of personal and procreative autonomy in the name of political ideology. Armstrong v. St., 1999 MT 261, 296 M 361, 989 P2d 364, 56 St. Rep. 1045 (1999). See also Intermtn. Planned Parenthood v. St. (Cause No. BDV 97-477) (June 29, 1998) (First Judicial District Court ruling (not appealed to Montana Supreme Court) that the law banning partial-birth abortion procedure infringed on a woman's right to privacy under this section), and Planned Parenthood of Missoula v. St. (judgment of the First Judicial District, Lewis & Clark County, Dec. 29, 1999, declaring provisions of the Montana Abortion Control Act and the Woman's Right-to-Know Act unconstitutional under this section).

Inmate Parole Files Public Files Subject to Public Right to Know Unless Specifically Limited by Privacy Concerns or Legitimate Penological Interest as Determined by Board of Pardons and Parole or Reviewing Court: The Supreme Court overturned a lower court decision denying inmates access to their parole files. The Supreme Court ruled that the Board of Pardons and Parole was a public agency, the inmates' records were public documents, and the public right to know applied to the records. The Supreme Court further held that individual privacy concerns or legitimate penological interests could limit public access to the parole files but that any such limitation would have to be determined on a case-by-case basis by the Board of Pardons and Parole or the reviewing court by determining if privacy concerns or penological interests clearly exceed the merits of public disclosure. Worden v. Bd. of Pardons & Parole, 1998 MT 168, 289 M 459, 962 P2d 1157, 55 St. Rep. 677 (1998), followed in Yellowstone County v. Billings Gazette, 2006 MT 218, 333 M 390, 143 P3d 135 (2006) (the public's right to know about management of a public defender officer and the quality of representation afforded by the office clearly outweighs any privacy interest that nonparties may have in redacted testimony, and the public has a right to inspect the entire deposition so long as names of nonparties are withheld).

Statute Unconstitutional as Applied — Invasion of Right to Privacy: Gryczan and others, all of whom were homosexuals, brought a declaratory judgment action to determine whether 45-5-505 (renumbered 45-8-218), as applied, violated their right of privacy. After reviewing the case of Bowers v. Hardwick, 478 US 186 (1986), in which the U.S. Supreme Court held that the federal constitution does not confer a fundamental right on homosexuals to engage in sodomy, the Supreme Court noted that it had long held that the Montana Constitution affords citizens broader protection of a right to privacy than does the U.S. Constitution and that since privacy is explicit in the Montana Constitution, privacy is a fundamental right and any statute limiting the right must pass the strict scrutiny test. The Supreme Court then applied the test enunciated in Katz v. U.S., 389 US 347 (1967), and adopted by the Montana Supreme Court in Hastetter v. Behan, 196 M 280, 639 P2d 510 (1982), and found that all adults have an expectation of privacy in noncommercial, consensual sexual conduct and that, while society may disapprove of homosexual conduct, society still recognizes that expectation of privacy, even concerning homosexual acts. The Supreme Court then determined that the interests advanced by the state in support of the constitutionality of the statute, the protection of public health by preventing the spread of the HIV-related virus, and the protection of public morals were not supported by the facts and were therefore not compelling state interests justifying an invasion of privacy. For these reasons, the Supreme Court determined the statute to be unconstitutional as applied to noncommercial, same-sex consensual sex between adults. Gryczan v. St., 283 M 433, 942 P2d 112, 54 St. Rep. 699 (1997), followed in Armstrong v. St., 1999 MT 261, 296 M 361, 989 P2d 364, 56 St. Rep. 1045 (1999). (See 2013 amendments to 45-2-101 and 45-8-218.)

Privacy Interest of Witness Held Sufficient for Closure of City Council Meeting — "Generally Known" Incident: Goyen, the Chief of Police of Troy, was not notified of a meeting of the Troy City Council on May 10 at which an incident involving Goyen and a city gravel pile ("gravel-gate") was discussed. That meeting was closed at the request of the Mayor of Troy and at the request of a witness, Denton, who testified regarding indiscretions with Goyen in a patrol car. Later, after Goyen was discharged, he brought an action arguing that Denton's privacy interest was not at issue and that, in any event, the facts of her indiscretions with him were well known in the community, so much so that the demands of Denton's privacy could not outweigh the merits of public disclosure. The Supreme Court held that the plain meaning of 2-3-203 clearly allows a witness to assert the witness's privacy interest. Citing Missoulian v. Bd. of Regents of Higher Educ., 207 M 513, 675 P2d 962 (1984), the Supreme Court held that even harmless or generally

known information is subject to constitutional protection and that Denton's relationship with Goyen, while known by others, was private in nature and Denton therefore had a reasonable expectation of privacy that society would recognize. Goyen v. Troy, 276 M 213, 915 P2d 824, 53 St. Rep. 353 (1996).

Elements of Invasion of Privacy Action: As set out in Rucinsky v. Hentchel, 266 M 502, 881 P2d 616, 51 St. Rep. 887 (1994), an invasion of privacy cause of action is defined as a wrongful intrusion into one's private activities in such a manner as to outrage or cause mental suffering, shame, or humiliation to a person of ordinary sensibilities. An attempted invasion of privacy is not the equivalent of an actual invasion of privacy. St. v. Kandarian, 268 M 408, 886 P2d 954, 51 St. Rep. 1381 (1994).

Statute of Limitations in Invasion of Privacy Action — Summary Judgment Proper: In 1988, Hentchel told Rucinsky that he had tape recorded her telephone conversations. She asked to hear them, and he agreed to play them, but neither party pursued the issue further. In 1992, Hentchel's wife found the tapes and notified Rucinsky, who brought a claim for invasion of privacy. The District Court granted Hentchel's summary judgment motion on grounds that the 3-year statute of limitations for an action on a liability not founded on an instrument in writing, as set out in 27-2-204, had run. Under 27-2-102, a cause of action accrues when all of its elements exist or have occurred, the right to maintain an action is complete, and a court is authorized to accept jurisdiction. Rucinsky claimed that because a reasonable person would not have taken Hentchel seriously when he originally confessed that the taping had occurred, the statute of limitations was tolled until the tapes were discovered. The Supreme Court affirmed summary judgment. That Rucinsky chose not to believe the confession did not negate the existence of the elements of her cause of action in 1988. She had the right to the cause of action when she was put on notice that the tapes existed, and the cause of action began regardless of whether she was convinced of the success of the action. Rucinsky v. Hentchel, 266 M 502, 881 P2d 616, 51 St. Rep. 887 (1994).

False Light Invasion of Privacy: Plaintiff alleged that newspaper reports concerning him were the basis for a claim of false light invasion of privacy. False light invasion of privacy is (1) the publishing of a matter concerning another that (2) places the other before the public in a false light when (3) the false light in which the other is placed would be highly offensive to a reasonable person and (4) the actor knew of or acted in a reckless disregard as to the falsity of the publicized matter. Plaintiff failed to establish the falsity of the newspaper reports, so the District Court properly declined to recognize the claim. Lence v. Hagadone Inv., 258 M 433, 853 P2d 1230, 50 St. Rep. 601 (1993), followed in St. v. Kandarian, 268 M 408, 886 P2d 954, 51 St. Rep. 1381 (1994).

Refusal to Hook Up to City Water Supply Not Protected by Constitution: The defendants argued that a city ordinance requiring them to hook up to the city water system violated their right to privacy by denying them the freedom to choose the type of water they wanted to use. The Supreme Court held that the interest asserted did not involve matters so fundamentally affecting the defendants' rights as to invoke constitutional protection. The court also stated that nothing prevented the defendants from using their well water after having complied with the city ordinance because the ordinance only required hooking up to the system; the ordinance did not mandate using the city's water. Ennis v. Stewart, 247 M 355, 807 P2d 179, 48 St. Rep. 228 (1991), distinguished in Gryczan v. St., 283 M 433, 942 P2d 112, 54 St. Rep. 699 (1997).

Discharge of Police Officer Based on Off-Duty Activities: The constitutional right of privacy does not completely protect a police officer from discharge based solely upon his off-duty activities. The State has an overriding and compelling interest in protecting the public and preserving the integrity of the police department, and this interest overrode respondent's right to privacy. In re Raynes, 215 M 484, 698 P2d 856, 42 St. Rep. 569 (1985).

University President Evaluation Protected: The Missoulian challenged the closure by the Board of Regents of a job performance evaluation of the presidents of the six units of the university system. The court applied a two-part test to determine whether the presidents have a constitutionally protected privacy interest: (1) whether the presidents have a subjective or actual expectation of privacy, and (2) whether society is willing to recognize that expectation as reasonable. The first part of the test is satisfied because the presidents were assured the evaluation would be confidential, as were others providing input to the Regents. The second part of the test is also satisfied to assure an unabashed and candid evaluation of presidents. University presidents' job performance evaluations were matters of individual privacy protected by this section. Missoulian v. Bd. of Regents, 207 M 513, 675 P2d 962, 41 St. Rep. 110 (1984), followed in Flesh v. Bd. of Trustees, 241 M 158, 786 P2d 4, 47 St. Rep. 161 (1990), Goyen v. Troy,

276 M 213, 915 P2d 824, 53 St. Rep. 353 (1996), and Billings Gazette v. Billings, 2013 MT 334, 372 Mont. 409, 313 P.3d 129.

Voluntary Statements Made to Civilians in Criminal Case — No Invasion of Privacy: On two occasions while the defendant and his stepson were alone, the stepson received serious injuries. On both occasions the defendant made statements to his wife and to several doctors explaining how the injuries occurred. The defendant was charged with aggravated assault and filed a motion to suppress his statements. The defendant contended that the statements violated his right of privacy guaranteed by the Montana Constitution. The court found that there was no element of surreptitious obtaining of the information. Additionally, constitutional provisions on right of privacy permit its invasion upon a showing of a compelling state interest. That compelling state interest is clearly shown in child abuse cases by the declaration of policy contained in 41-3-101. St. v. Hall, 183 M 511, 600 P2d 1180 (1979).

Compelling State Interest in Protecting Against Burglary: When police officers discovered marijuana after entering defendant's home believing a burglary was in progress, the Supreme Court rejected defendant's contention, based on the "right of privacy", that there is no compelling state interest justifying intrusion into a private home. Such compelling state interest exists by virtue of state enforcement of its criminal laws for the benefit and protection of other fundamental rights of its citizens as in the protection of a citizen's home and its contents from unlawful intrusion. State ex rel. Zander v. District Court, 180 M 548, 591 P2d 656 (1979).

Expectation to Be Reasonable: Marijuana plants were left on plywood sheets in an open field on defendant's abandoned ranch. There were no locked gates on the property, and it was not posted. The court held that although defendant may have had subjective expectations of privacy in the property, those expectations were not objectively reasonable. The marijuana plants were not in an area where any reasonable expectation of privacy existed, so a search warrant was not required. St. v. Charvat, 175 M 267, 573 P2d 660 (1978).

Discharge of Probationary State Employee Based Upon His Private Life: Dismissal of drug abuse consultant based upon his personal lifestyle is not an infringement upon his substantive due process right of privacy as he was engaged in counseling people with personal problems, thus his own personal philosophies became relevant to his job performance. What an employee does in his private life should not be his employer's concern unless, as in this case, it can be shown to affect in some degree his efficiency in the performance of his duties. Storch v. Bd. of Directors, 169 M 176, 545 P2d 644 (1976).

Attorney General's Opinions

Retirees of Teachers' Retirement System — Disclosure of Benefits: The individual rights of privacy in the amounts of retirement benefits of members of the Montana Teachers' Retirement System do not clearly exceed the public's right to know. Retirement benefits are paid with public funds and, therefore, disclosure is subject to the public's interest in how pension funds are calculated and how taxpayer funds are spent. 54 A.G. Op. 3 (2011).

What Crime Victim Information Not Subject to Dissemination — Crime Scene Information Subject to Disclosure: If a crime victim requests confidentiality, the plain language of 44-5-311 prohibits a criminal justice agency from disseminating the address, telephone number, or place of employment of the victim or a member of the victim's family unless an exception in 44-5-311(1) applies, nor may information directly or indirectly disclosing the identity of victims of certain sex crimes be publicly disseminated unless an exception in 44-5-311(1) applies. However, disclosure of crime scene location information by a law enforcement agency is generally required, even if the victim has requested confidentiality or is the victim of a sex crime and disclosure may inadvertently implicate the identity of the victim. 50 A.G. Op. 6 (2004).

County Employee Time Records Subject to Public Disclosure: County time records that show an employee's name, the department for which the employee works, and the hours worked, including claims for vacation, holiday, and sick leave pay, are subject to public disclosure, involving only a slight intrusion into individual privacy but a substantial public interest in having access to the records. 44 A.G. Op. 32 (1992).

Buyer's Affidavit and Certification Subject to Public Disclosure: The buyer's affidavit and certification submitted to the Board of Housing pursuant to the mortgage credit certificate program is subject to public disclosure. 43 A.G. Op. 25 (1989).

Availability of Payroll Record Information — Social Security Number Excepted: Applying the balancing test set out in 42 A.G. Op. 64 (1988), the Attorney General concluded that payroll record information reported to the Department of Highways (now Department of Transportation), including the names, addresses, and wages of private employees working on a publicly funded

project, is subject to public disclosure. Social security numbers of those employees are not subject to public disclosure. 43 A.G. Op. 6 (1989).

Criminal Investigative Information — Balancing Test: The interests of the public's right to know and an individual's right of privacy must be balanced on a case-by-case basis by the custodian of the criminal justice information sought in determining whether criminal investigative information contained in an initial offense report or an initial arrest record should be publicly disseminated. 42 A.G. Op. 119 (1988).

Original Documents Submitted to Retirement Division Not Subject to Public Inspection for Mailing List Purposes: Original documents submitted by applicants to the Public Employees' Retirement Division of the Department of Administration contain private information about third parties and thus are not open to public inspection for the purpose of compiling a mailing list. 42 A.G. Op. 64 (1988).

Disclosure of Merit Pay of School District Administrators: The administrators of a school district do not have a constitutionally protected right to privacy regarding the amount of merit pay awarded to them pursuant to the district's Leadership Evaluation and Compensation Plan. Therefore, the amounts should be disclosed to the public. 41 A.G. Op. 35 (1985).

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Is the Government in My Pocket? An Overview of Government Location Tracking of Cell Phones Under the Federal System and in Montana, Schwendt, 72 Mont. L. Rev. 261 (2011).

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The Right to Privacy, Nelson, 68 Mont. L. Rev. 257 (2007).

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Criminal Procedure: The Exclusionary Rule, Lovas, 40 Mont. L. Rev. 132 (1979).

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A Growing Awareness of Privacy in America, Towe, 37 Mont. L. Rev. 39 (1976).

Privacy, Law Enforcement, and Public Interest: Computerized Criminal Records, Uda, 36 Mont. L. Rev. 60 (1975).

Abortion: Roe v. Wade and the Montana Dilemma, Uda, 35 Mont. L. Rev. 103 (1974).

State v. Brecht: Evolution or Offshoot of the Fourth Amendment Exclusionary Rule?, Johnson, 34 Mont. L. Rev. 187 (1973).

Right of Privacy: Knowing or Reckless Falsity in Publication Required to Sustain Liability Under New York Right of Privacy Statute, Carl, 28 Mont. L. Rev. 243 (1967).

Electronic Surveillance and the Right of Privacy, Davis, 27 Mont. L. Rev. 173 (1966).

Collateral References

Right of Privacy — Implementing Article II, Section 10, of the Montana Constitution, Interim Report, Montana Legislative Council (1975-76).

Section 11. Searches and seizures.

Convention Notes

Identical to 1889 constitution.

Compiler's Comments

Former Constitutional Provision: This section is identical to Art. III, sec. 7, 1889 Mont. Const., except for minor grammatical changes.

Case Notes

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DECISIONS UNDER 1972 CONSTITUTION

RIGHT OF PRIVACY

Counsel Not Ineffective in Failing to Object to Defendant's Statements Recorded in Interrogation Room Without Defendant's Knowledge Absent Expectation of Privacy: While being held in a police interrogation room alone, Meredith made incriminating statements that were recorded without his knowledge and subsequently admitted into evidence during Meredith's homicide trial. Meredith contended that he received ineffective assistance of counsel when his attorney failed to object to admission of the statements at trial. The Supreme Court disagreed. Although Meredith may have had an expectation of privacy in the statements, that expectation was not one that society would recognize as objectively reasonable, nor would Meredith have made the statements if he wished to preserve his privacy. Therefore, no unlawful search occurred, and counsel's failure to object was not short of the range of conduct reasonably demanded by the constitutional right to effective assistance. Additionally, Meredith failed to demonstrate that, even if counsel's conduct could be considered deficient, the result of the proceeding would have been different without admission of the incriminating statements. Meredith's ineffective assistance claim based on admission of the incriminating statements was denied. St. v. Meredith, 2010 MT 27, 355 Mont. 148, 226 P.3d 571, distinguishing St. v. Goetz, 2008 MT 296, 345 Mont. 421, 191 P.3d 489.

Disclaimer of Authority to Grant Permission to Search Vehicle Constituting Waiver of Right to Privacy: After stopping Hurlbert for speeding, officers noticed additional behavior that led them to believe that Hurlbert might be engaged in illegal activity. The officers asked Hurlbert for permission to search the vehicle, but Hurlbert declined because the vehicle belonged to his wife. The officers then called the wife, who gave permission to search the vehicle, although Hurlbert initially declined permission for a warrantless search of his personal items in the vehicle. No contraband was found in the vehicle, but while the search was underway, Hurlbert spontaneously admitted that there was drug paraphernalia in his personal possessions in the vehicle. Hurlbert then consented to a search of his possessions, and a search of his backpack indeed revealed drugs and paraphernalia. Hurlbert contended on appeal that because he lawfully possessed the vehicle at the time of the stop, he had a reasonable expectation of privacy in it and was entitled to protection from unlawful searches and seizures. Hurlbert also maintained that his wife's consent

to search the vehicle was not valid because she was not in possession of the vehicle at the time of the search and she was coerced into consenting to the search. The Supreme Court affirmed. Hurlbert could not demonstrate that he was prejudiced in any way from the search of the vehicle, because the search revealed nothing unlawful. Additionally, when Hurlbert disclaimed that he had any authority to grant permission to search the vehicle, he thereby conceded that he did not have a reasonable expectation of privacy in the vehicle and waived the right to object to a search of the vehicle. St. v. Hurlbert, 2009 MT 221, 351 M 316, 211 P3d 869 (2009).

No Expectation of Privacy in Radio Conversation Held Over Public Airways: A game warden monitored Cotterell's two-way radio conversations held with his son while hunting. Cotterell asserted that, absent a warrant, the warden's surreptitious third-party electronic surveillance of the radio conversations was unlawful. The Supreme Court noted that it held in St. v. Goetz, 2008 MT 296, 345 M 421, 191 P3d 489 (2008), that warrantless electronic monitoring and recording of face-to-face conversations, even with the consent of one participant in the conversation, violates the other participant's right to privacy and the right to be free from unreasonable search and seizure. However, the initial inquiry under Goetz is to determine whether the electronic monitoring constitutes an unreasonable or unlawful search or seizure, and the factors in determining whether such a search or seizure occurred are whether the person challenging the state's action had an actual subjective expectation of privacy that society would recognize as objectively reasonable and the nature of the state's intrusion. In this case, Cotterell had no reasonable expectation of privacy. The electronic conversations were held using widely available hand-held radios over a public channel that could be monitored by anyone using the same equipment and thus could not be considered private. Absent a reasonable expectation of privacy, no search occurred and the warden did not need a warrant to monitor and record the conversations. St. v. Cotterell, 2008 MT 409, 347 M 231, 198 P3d 254 (2008).

Posting of Private Property Not Sufficient to Shield Items Not Protected From View Outside Property: Two fish and game agents returning by air from an out-of-town meeting observed a wildlife feeding stand and hunting platform on Cotterell's property. Further investigation by a warden revealed Cotterell's illegal hunting activities. Cotterell contended that because his property was posted against trespassing, he had a reasonable expectation of privacy and that the aerial observation of the property constituted a warrantless unlawful search. The aerial observations were not part of any surveillance of Cotterell's property but were accidental inasmuch as the agents were not looking for anything in particular or fulfilling any law enforcement activities during the flight. Citing Calif. v. Ciraolo, 476 US 207 (1986), the Supreme Court held that Cotterell's posting of his property was not sufficient to shield any and all observation of items not shielded or protected from view from places exterior to the property. The agents' innocent observation of the property was not an unconstitutional search. St. v. Cotterell, 2008 MT 409, 347 M 231, 198 P3d 254 (2008), distinguishing St. v. Bullock, 272 M 361, 901 P2d 61 (1995), St. v. Siegal, 281 M 250, 934 P2d 176 (1997), and St. v. Romain, 1999 MT 161, 295 M 152, 983 P2d 322 (1999).

Recording Face-to-Face Conversation With Consent of Informant Without Warrant Violates Defendant's Right to Privacy and Constitutes Unreasonable Search: In two separate cases, consolidated by the Supreme Court, the defendants Goetz and Hamper pleaded guilty to felony distribution of dangerous drugs but reserved their right to appeal the denial of their motions to suppress the warrantless monitoring and recording of their face-to-face conversations with an informant wearing a wire who had consented to the procedure. In the case of Goetz the recorded conversation had taken place in Goetz's residence, and in Hamper's case the recorded conversation had taken place in his vehicle. The Supreme Court stated that Art. II, sec. 10 and 11, Mont. Const., when taken together afford citizens a greater right to privacy that, in turn, provides broader protection than the Fourth Amendment of the United States Constitution in situations involving searches and seizures occurring in private settings. The Supreme Court overruled St. v. Brown, 232 M 1, 755 P2d 1364 (1988), to the extent that it relied only on federal law and held that warrantless electronic monitoring of face-to-face conversations with the consent of one party is lawful. The Supreme Court found that the recorded conversations between the defendants and the informant took place in the private residences or vehicles of the defendants and were not conducted where other individuals were present, and therefore the defendants had exhibited actual subjective expectations of privacy in the face-to-face conversations. The Supreme Court also found that the defendants' privacy expectations were expectations that society was willing to accept as reasonable, and the conversations therefore constituted searches within the contemplation of Art. II, sec. 10 and 11, Mont. Const. The Supreme Court further held that the consent of the informant did not fall under the consent exception to unlawful warrantless

searches and that the state could not rely on the particularized suspicion standard rather than the probable cause requirement in Art. II, sec. 11, Mont. Const., for the issuance of a warrant because the state's intrusion into the defendants' privacy expectations by electronic monitoring and recording of their conversations was not a minimal intrusion not rising to a level requiring probable cause. The Supreme Court concluded that the electronic monitoring and recording of the defendants' conversations without a warrant or the existence of an established exception to the warrant requirement violated the defendants' rights under Art. II, sec. 10 and 11, Mont. Const. St. v. Goetz, 2008 MT 296, 345 M 421, 191 P3d 489 (2008).

No Privacy Expectation for Defendant With Respect to Rental Car When Rental Agreement Terminated: Payne, who was driving a rental car, was stopped for speeding and subsequently arrested for driving under the influence. During the stop, based on observations, the officer asked Payne if he was carrying drugs or large amounts of cash, and Payne responded that he was not. Payne also stated that he was traveling from Pittsburgh to Seattle to visit his children and flying back. The officer was suspicious because Payne was driving thousands of miles to visit but flying back after only a few hours. Payne was transported to the Sheriff's office, the vehicle was towed, and the rental company was notified. The rental company immediately terminated its contract with Payne under terms of the agreement and requested that Payne's personal items be removed from the car so that the company could have someone retrieve the vehicle. Payne subsequently consented to a search of the car, but officers obtained a warrant covering Payne's property that was found in the car. When removing Payne's property, the officer found some drugs and paraphernalia in plain view and removed a toolbox from the trunk. The toolbox contained $129,970. A petition for forfeiture was filed for the funds in the toolbox, and Payne argued that the petition should be dismissed, claiming that the search of the vehicle was illegal. The Supreme Court held that Payne did not have a reasonable expectation of privacy in the contents in the vehicle once the rental company had justifiably terminated the agreement based upon Payne's arrest. The Supreme Court also held that no constitutional protections extended to the items in plain sight in the vehicle and that once Payne was lawfully stopped, the officer's contact with the rental company did not constitute an illegal pretext for securing the company's permission to remove Payne's property from the car. The Supreme Court also held that the rental company's knowing and voluntary request for the removal of Payne's property from the car constituted a recognized exception to the warrant requirement of 46-5-101. St. v. $129,970.00 in U.S. Currency, 2007 MT 148, 337 M 475, 161 P3d 816 (2007).

Home Visit of Probationer's Residence by Supervising Officer Not Considered Search — Diminished Expectation of Privacy — When Reasonable Cause Required to Search Probationer's Residence: As part of Moody's conditions of probation, the sentencing court required that Moody's home be open and available for the probation and parole officer to visit as required by state policy. Moody objected to the condition on grounds that it obviated the reasonable cause requirement for searches of probationers' homes and thus violated the constitutional rights of privacy and protection from unreasonable search and seizure. The Supreme Court noted that in Montana, a probation officer may search a probationer's residence without a warrant if the officer has reasonable cause for the search. The reasonable cause standard is substantially less than the probable cause standard required for searches of other citizens' homes because probationers do not enjoy the absolute liberty and heightened expectations of privacy afforded every Montana citizen. Rather, probationers are subject to conditional liberty that is properly dependent upon special restrictions. A convicted felon who is unambiguously aware of the clearly expressed condition that the residence be open and available for home visits does not have a reasonable expectation of privacy that precludes home visits, and because there is no reasonable expectation of privacy, there is no search. Therefore, home visits conducted as a routine and reasonable element of supervising a convicted person are not searches and are not subject to the reasonable cause standard. Although a home visit has the potential to turn into a search pursuant to an officer's plain view observations, it must remain within the parameters of a home visit unless and until reasonable cause exists for the officer to engage in a search. A probationer's diminished expectation of privacy during supervision nevertheless provides that the enclosed areas of the probationer's residence, such as closets, cabinets, and drawers, cannot be searched without reasonable cause. Thus, Moody's constitutional rights to privacy and to be free from unreasonable searches were not violated by the home visit probation condition. St. v. Moody, 2006 MT 305, 334 M 517, 148 P3d 662 (2006), followed in St. v. Greeson, 2007 MT 23, 336 M 1, 152 P3d 695 (2007).

No Capacity or Actual Authority of Youth to Consent to Search of Parent's Home: While conducting a search for Lowe, officers learned that Lowe was staying at Schwarz's home and drove to Schwarz's residence to initiate an arrest. Schwarz was not home, but Schwarz's 13-year-

old daughter answered the door and consented to a search of the residence. Without attempting to contact Schwarz, the officers entered the home without a warrant and discovered drugs. When Schwarz arrived home, she was arrested for possession of dangerous drugs. Following conviction, Schwarz appealed on grounds that the search was illegal because the minor daughter did not have authority to consent to a search of the home. The Supreme Court agreed and reversed, adopting a per se rule that a youth under the age of 16 years has neither the capacity nor the actual authority to relinquish a parent's privacy rights and consent to a search of the parent's home. St. v. Schwarz, 2006 MT 120, 332 M 243, 136 P3d 989 (2006). See also St. v. Melees, 2000 MT 6, 298 M 15, 994 P2d 683 (2000).

Probable Cause for Warrantless Seizure of Vehicle — Odor of Marijuana Coupled With Defendant's Admission That Marijuana Had Been Smoked in Vehicle: Following a single-vehicle accident, the investigating officer discovered that Pierce had over $8,000 in outstanding warrants. Pierce was arrested and placed in the patrol car and then requested that the officer retrieve a telephone book from Pierce's vehicle. When the officer entered the vehicle, he noticed the strong odor of burnt marijuana. Pierce subsequently admitted that someone had smoked marijuana in the vehicle. The officer impounded the vehicle, sealing it with evidence tape. Following an alert by a canine officer 2 days later, the officer obtained a search warrant, discovered drugs and paraphernalia, and arrested Pierce on drug charges. Pierce contended that the state lacked probable cause to impound the vehicle and search it and moved to suppress the evidence. The Supreme Court disagreed. The officer used the marijuana odor in conjunction with Pierce's admission that someone had unlawfully smoked marijuana in the vehicle to establish probable cause to seize the truck, and the affidavit for a warrant to search the vehicle contained sufficient information to support a reasonable belief that the offense of possession of dangerous drugs had been committed and that evidence or contraband might be found in the vehicle. Pierce's motion to suppress the evidence was properly denied. St. v. Pierce, 2005 MT 182, 328 M 33, 116 P3d 817 (2005), following St. v. Broell, 249 M 117, 814 P2d 44 (1991), and distinguishing St. v. Schoendaller, 176 M 376, 578 P2d 730 (1978), and St. v. Olson, 180 M 151, 589 P2d 663 (1979).

No Reasonable Expectation of Privacy in Garbage Placed for Collection — Warrantless Search of Garbage Affirmed: Following an investigation of Pelvit and based on information that Pelvit was operating a methamphetamine lab, agents conducted a warrantless search of garbage cans in a public alley behind Pelvit's house and discovered discarded materials consistent with the manufacture of the drug. The items formed the basis for a search warrant of Pelvit's residence, pickup, and boat, where additional evidence was found. The state instituted forfeiture proceedings against the pickup, boat, and boat trailer. Pelvit moved to exclude the evidence, arguing that the warrant was not valid because it was based on an unlawful search of the garbage cans. The District Court held that Pelvit had no reasonable expectation of privacy in the garbage and denied the motion to suppress. On appeal, the Supreme Court affirmed. The court held that Pelvit did not have a reasonable expectation of privacy in his trash because he voluntarily relinquished his interest and control over his garbage when he abandoned the property with no express intent to exclude others. In abandoning the trash, Pelvit also abandoned any expectation of privacy in the property, and absent an expectation of privacy, there was neither a search nor a seizure in violation of a constitutionally protected interest. However, the Supreme Court did place certain constraints on the searching of garbage placed for collection, as set out in Litchfield v. St., 824 NE 2d 356 (Ind. 2005): (1) for such a seizure to be reasonable, the garbage must be quickly retrieved by officers in substantially the same manner as the trash collector would take it; and (2) in order to prevent wholesale or random searches, officers must have an articulable individualized suspicion that a crime is being committed in order to justify the garbage seizure. The circumstances in this case met the Litchfield constraints. The state met its burden of proving that Pelvit abandoned the trash, the seizure was conducted in a reasonable and unobtrusive manner, and police had a particularized suspicion that Pelvit was involved in criminal activity to justify the warrantless search. Denial of Pelvit's motion to suppress was not error. St. v. A Blue 1993 Chevrolet Pickup, 2005 MT 180, 328 M 10, 116 P3d 800 (2005), followed in St. v. Shelton, 2008 MT 282, 345 M 330, 191 P3d 420 (2008).

Analysis of Federal Knock and Announce Statute — Involvement of Federal Postal Inspector: A postal inspector suspected that a package addressed to Ochadleus contained drugs. The inspector took the package to the Billings DEA office, and a drug-sniffing dog alerted to the package. The inspector obtained a search warrant, and the package was found to contain marijuana. The inspector then obtained a warrant to search the intended destination of the package. The package was delivered by the inspector later that day, and shortly thereafter, state officers executed the search warrant and arrested Ochadleus for possession with intent to

distribute. Ochadleus contended that the state officers violated the federal knock and announce statute, 18 U.S.C. 3109, noting that the officers failed to knock. The Supreme Court disagreed. The statute does not directly apply to state law enforcement officers, but rather applies when federal officers are a significant part of a search conducted pursuant to a state warrant, as in this case involving a federal postal inspector and the federal Drug Enforcement Administration. Additionally, the statute does not contain an express requirement that officers actually knock on the door, but rather requires that officers give notice of their authority and purpose. Here, Ochadleus's roommate saw the officers through the window in the door and then backed away. It was reasonable for the officers to assume that the action of backing away was a refusal to admit them, and it would have been futile for the officers to knock before entering. Thus, the federal statute was not violated, the forced entry was lawful, and Ochadleus's conviction was affirmed. St. v. Ochadleus, 2005 MT 88, 326 M 441, 110 P3d 448 (2005).

Requirement for DNA Testing Proper Condition of Suspended Sentence for Defined Felony Offense: As a condition of Johnson's three suspended nonviolent felony sentences, including a burglary conviction, the District Court ordered Johnson to submit to DNA testing. Johnson appealed the testing requirement on grounds that it violated the right to privacy and the right against unlawful search and seizure, but the Supreme Court affirmed. Under 44-6-103, a person convicted of a felony offense shall submit to DNA testing. Johnson's burglary conviction met the definition of a felony offense, as defined in 44-6-101, so the DNA testing requirement as part of the sentences was legal. St. v. Johnson, 2005 MT 48, 326 M 161, 108 P3d 485 (2005).

No Right to Expectation of Privacy in Public Criminal Records or Negligence in Use of Records: In 1998, Barr applied for a part-time airport security officer position and consented to a background check. A 10-year check revealed no arrests, and Barr was hired. About 1 month later, another security officer requested a criminal background check on Barr, which revealed a 1968 arrest in Alaska for criminal nonsupport. Prior to the end of Barr's probationary period, his employment was terminated, and he sued the airport authority. Barr's claim was summarily dismissed. On appeal, the Supreme Court held that under 44-5-103, Barr's Alaska arrest was public information that anyone could access and its dissemination was not improper and that coupled with Barr's consent to the background check, Barr had no constitutional expectation of privacy in the criminal record. Barr's negligence claims also failed because he failed to offer proof of all elements of common-law negligence. Summary judgment for defendants was affirmed. Barr v. Great Falls Int'l Airport Authority, 2005 MT 36, 326 M 93, 107 P3d 471 (2005).

Knock and Announce Rule — Exigent Circumstances Exception — Futility Exception — Warrant Requirements: Without knocking and announcing its presence, a SWAT team broke down the doors of a rental home, discovered a methamphetamine lab, and arrested the occupants, including Anyan. Anyan contended that the entry was illegal and that evidence seized should be suppressed. Following a guilty plea, Anyan appealed on grounds of the illegality of the no-knock entry. Absent state statutory or case law, the Supreme Court examined extensive federal precedent, concluding that pursuant to the right of privacy and the right to be free from illegal search and seizure, an officer serving a search warrant must comply with the knock and announce requirement unless there are exigent circumstances that would present a threat of physical violence or the likelihood that evidence would be destroyed. Mere suspicion or evidence that firearms are present in the residence or that a particular resident is armed is not sufficient to create an exigency; rather, there must be specific information to lead the officer to a reasonable conclusion that the presence of firearms raises a concern for officer safety. Another exception to the knock and announce requirement, known as the futility exception, arises when police have a reasonable suspicion that the occupants know of the police presence and purpose prior to entry and that knocking and announcing would be futile. In addition, the decision to make a no-knock entry should ordinarily be made by a neutral and detached magistrate as part of the application for a search warrant, along with any foreknown exigent circumstances justifying a no-knock entry, but an investigating officer may make the decision if unexpected exigent circumstances arise at the scene. The knock and announce rule is flexible, and courts must determine whether an unannounced entry was reasonable under the particular circumstances of each case, including the time that an officer must wait prior to forced entry. However, unless exigent circumstances exist, the failure of officers to knock and announce their presence renders evidence procured during execution of the search warrant inadmissible. Thus, the officers' no-knock entry into Anyan's house violated federal and state constitutional rights to be free from unreasonable search and seizure, and failure of the District Court to suppress the evidence seized during the search was reversible error. St. v. Anyan, 2004 MT 395, 325 M 245, 104 P3d 511 (2004), followed in St. v. Ochadleus, 2005 MT 88, 326 M 441, 110 P3d 448 (2005), in which the Supreme

Court reiterated that no-knock entry into a residence is the exception and not the rule. See also Cassady v. Yellowstone County Sheriff Dept., 2006 MT 217, 333 M 371, 143 P3d 148 (2006), which further articulated Anyan's established "knock and announce" rule by holding that law enforcement officers' stealth entry without a warrant into defendant's home based on indirect consent granted by a person not physically present in the home and without the existence of exigent circumstances did not alleviate the officers' duty to knock and announce their presence and thereby give defendant the opportunity to comply with the law. The Anyan futility exception was also applied in St. v. Hill, 2008 MT 260, 345 M 95, 189 P3d 1201 (2008), where officers responding to a domestic disturbance call did not knock but announced their presence through the open door of a trailer and observed defendant moving aggressively toward the back of the trailer, but defendant ignored their order to stop. The officers had a reasonable suspicion that the trailer occupants knew of their presence and purpose prior to entry. A woman screaming in the trailer indicated an ongoing domestic disturbance, and continuing to wait at the open door after defendant failed to respond would have been superfluous, futile, and dangerous.

No Privacy Interest in Rental Car by Unauthorized Driver Who Disavows Ownership of Contents: Hill was stopped for speeding and ticketed. After the stop was completed, the officer engaged Hill in small talk, inquiring where Hill was going and where his traveling clothes were. Hill replied that it was a quick trip, so no extra clothes were needed. Although no bags or clothes were in sight, the officer asked if Hill was carrying anything illegal. Hill said no, and the officer asked if Hill would consent to a search of the vehicle, to which Hill initially consented. In going over the terms of the consent form, Hill related that the car had been rented by a friend and that a search of the trunk was probably not a good idea because Hill did not know what the friend might have placed there. The officer then checked on the origin of the car and discovered that it had been acquired through a rental agency, but that the car was 2 days late in being returned, and that Hill was not an authorized driver. The agency asked that the car be impounded and gave permission for a search. The officers found two bags in the trunk, but Hill disclaimed ownership of the bags. A search of the bags revealed drugs and Hill's cell phone charger. Hill was then charged with drug crimes and later moved to suppress the evidence, but the motion was denied. On appeal, the Supreme Court affirmed. Hill had no reasonable expectation of privacy in the car's contents because he was not an authorized driver, had no relation to the car's owner or renter, and voluntarily disclaimed knowledge and ownership of anything in the car. Hill could not expect privacy in a car he illegally possessed, and once Hill waived control over the bags, he implicitly granted permission for the bags to be accessed. The search of the trunk was reasonable because permission was granted by the car owner, and the trunk contents were effectively surrendered by Hill, making the car owner's permission to search the vehicle sufficient to permit a full search of items found in the car. St. v. Hill, 2004 MT 184, 322 M 165, 94 P3d 752 (2004), distinguishing St. v. Elison, 2000 MT 288, 302 M 228, 14 P3d 456 (2000), and St. v. Tackitt, 2003 MT 81, 315 M 59, 67 P3d 295 (2003).

Carport Not Considered Part of Home — Privacy Standard Inapplicable to DUI Search of Condominium Carport: Large was arrested for misdemeanor DUI while seated in her running car that was parked in the carport outside her condominium. Large moved to suppress the evidence because she was arrested at night at her home for a misdemeanor committed elsewhere, in violation of 46-6-105. She also contended that the arrest was in violation of her right to privacy. The motion was denied, and on appeal, the Supreme Court affirmed. Although a carport may be structurally contiguous with the rest of a private house or dwelling, presence in a carport does not equate to presence in the home, and although lot lines do convey certain concrete ownership rights, the right to be free from misdemeanor arrest at night is reserved for the home, not coterminous property appurtenant to the home. Further, under 61-8-101, ways of the state open to the public include parking areas and other public or private places adapted for public travel that are in common use by the public. Large could not be considered to be in her home while sitting in a car parked in the common-area parking lot in her condominium complex where officers could see what was readily visible to any visitor without being overly intrusive. Thus, Large had no reasonable expectation of privacy that prohibited her arrest in her own carport, nor did a violation of 46-6-105 occur. Whitefish v. Large, 2003 MT 322, 318 M 310, 80 P3d 427 (2003). See also St. v. Hubbel, 286 M 200, 951 P2d 971 (1997).

No Error in Admission of Recorded Telephone Calls Made While Defendant in Prison — No Expectation of Privacy: At DuBray's homicide trial, the state introduced into evidence recordings of telephone calls between DuBray and others while DuBray was incarcerated in state and federal facilities. DuBray argued that the evidence was inadmissible under state and federal wiretap laws. Although monitoring and recording telephone conversations are a search within

the meaning of state and federal constitutions, under St. v. Scheetz, 286 M 41, 950 P2d 722 (1997), when no reasonable expectation of privacy exists, there is neither a search nor a seizure. At both the state and federal facilities, DuBray was notified that telephone calls were subject to monitoring and recording, so no reasonable expectation of privacy in the calls existed. Evidence of the calls was properly admitted because DuBray consented to the recording. St. v. DuBray, 2003 MT 255, 317 M 377, 77 P3d 247 (2003).

Use of DNA Sample From Unrelated Investigation Not Violative of Right to Privacy — Waiver of Privacy Upon Consent to Particular Search: Notti contended that the use of a DNA profile from an unrelated sexual assault case, in which he was convicted, violated the right to privacy on a subsequent charge of deliberate homicide. The argument failed because Notti had consented to the withdrawal of a blood sample to be used for DNA testing, and a defendant's voluntary consent to a search constitutes waiver of any reasonable expectation of privacy with respect to the place searched (or blood or DNA), and the permitted search is lawful. St. v. Notti, 2003 MT 170, 316 M 345, 71 P3d 1233 (2003). See also St. v. Rodgers, 257 M 413, 849 P2d 1028 (1993).

Warrantless Search of Vehicle Exterior by Drug-Sniffing Dog — Expectation of Privacy in Vehicle Parked in Public Area — Particularized Suspicion Required: Following an anonymous tip that Tackitt was involved in drug trafficking and that he had a quantity of marijuana in the trunk of his car, a drug task force officer conducted an exterior canine search of Tackitt's car when it was parked outside Tackitt's residence. The dog alerted to the presence of drugs in the vehicle. The officer checked Tackitt's criminal record and verified some of the public information received in the tip and then obtained a warrant to search the vehicle and Tackitt's residence. The vehicle search revealed no evidence, but during the search of the residence, officers found drugs and paraphernalia. Tackitt moved to suppress on grounds that use of the dog violated the right to privacy. The District Court denied the motion, holding that Tackitt had no reasonable expectation of privacy in the odors emanating from his vehicle while it was parked in an area open to the public or, alternatively, that if particularized suspicion was required for use of the dog, the search in this case was supported by proper particularized suspicion. Tackitt appealed, and the Supreme Court reversed. Pursuant to St. v. Elison, 2000 MT 288, 302 M 228, 14 P3d 456 (2000), Tackitt had an expectation of privacy in the trunk of the vehicle, and the canine sniff did constitute a search. However, the expectation was in no way dependent on where the vehicle was parked, nor did the expectation necessitate a search warrant for the use of the canine to survey the exterior of the vehicle. Federal law allows the use of drug-detecting dogs to sniff closed containers in public areas when police have a particularized suspicion to believe that a crime involving drugs is taking place. Under the greater protection afforded individual privacy under the Montana Constitution, the balance between governmental interests and individual interests is best struck by requiring particularized suspicion as a prerequisite for the use of a drug-sniffing dog. Particularized suspicion must be based on objective data from which an experienced police officer can make the inference that a person is engaged in wrongdoing, and an anonymous tip lacking appropriate corroboration simply cannot qualify as objective data to support a particularized suspicion any more than it can support probable cause. Therefore, because the District Court improperly concluded that there was a particularized suspicion for use of the dog to survey the exterior of Tackitt's vehicle and because the application for the search warrant failed to establish probable cause for the issuance of the warrant, the District Court's denial of the motion to suppress was reversible error. (Note: this holding is limited to the use of drug-sniffing dogs during police investigations and does not apply to the human detection of the odor of drugs.) St. v. Tackitt, 2003 MT 81, 315 M 59, 67 P3d 295 (2003), distinguishing St. v. Scheetz, 286 M 41, 950 P2d 722 (1997), and followed in St. v. Hart, 2004 MT 51, 320 M 154, 85 P3d 1275 (2004).

Noninvestigatory, Work-Related Entry Into Judge's Chamber Not Considered Search: Smartt, a Justice of the Peace, left his office computer on after work hours. A county employee and another judge entered Smartt's chambers to shut down the computer so that a network backup could be performed and discovered pornographic images displayed on the computer screen. They reentered the chambers to note websites from the computer history file and took digital photographs of the long-term history of internet activity on Smartt's computer. The information was turned over to the FBI, and Smartt's computer was confiscated and searched. Smartt contended that the evidence seized from his chambers was obtained through an unlawful search, violated the right to privacy, and should be suppressed. The Supreme Court disagreed. Under St. v. Boyer, 2002 MT 33, 308 M 276, 42 P3d 771 (2002), the Supreme Court considers three factors when determining whether there has been an unlawful government intrusion into one's privacy: (1) whether the person has an actual expectation of privacy; (2) whether society is

willing to recognize that expectation as objectively reasonable; and (3) the nature of the state's intrusion. When no reasonable expectation of privacy exists, there is neither a search nor seizure. Although the Montana Constitution affords broader protection than the federal constitution in cases involving searches of and seizure from private property, a person may not expect the same degree of privacy in public that is afforded in the privacy of one's home. In this case, entry into the judge's chambers was for a legitimate, noninvestigatory, work-related purpose. Irrespective of whether Smartt had any expectation of privacy with regard to the computer images, the nature of the intrusion did not rise to the level of a search, and denial of the motion to suppress the evidence was proper. Harris v. Smartt, 2002 MT 239, 311 M 507, 57 P3d 58 (2002), distinguishing Gryczan v. St., 283 M 433, 942 P2d 112 (1997). See also St. v. Scheetz, 286 M 41, 950 P2d 722 (1997).

No Reasonable Expectation of Privacy in Possession of Game Fish — Probable Cause Not Required for Game Warden's Inspection of Angler's Concealed Catch: Initially concerned for the safety of the occupants of a seemingly unoccupied watercraft, a game warden approached the watercraft. When informed that Boyer had been fishing, the warden asked to see Boyer's license and catch. After Boyer requested a later inspection, he reluctantly exhibited eight fish. At that point, the warden looked into the live well of Boyer's boat, and in the process found unlawfully killed game fish. Boyer contended that the warden needed probable cause to believe that Boyer had committed a violation at the time that the request was made in order to inspect his catch, and that conducting a warrantless search of Boyer's live well was impermissible. The Supreme Court noted that under the Montana Constitution, an impermissible search occurs only when a reasonable expectation of privacy exists. To determine whether the warden unlawfully intruded into Boyer's privacy, the court considered: (1) whether Boyer had an actual expectation of privacy; (2) whether society was willing to recognize that expectation as objectively reasonable; and (3) the nature of the state's intrusion (see St. v. Bassett, 1999 MT 109, 294 M 327, 982 P2d 410 (1999)). The court concluded that Boyer's subjective expectation of privacy in his catch was not one that society would recognize as reasonable. Under Art. IX, sec. 1, Mont. Const., the state must maintain a clean and healthful environment, and the Legislature has provided for game wardens to enforce the environmental laws regarding fish and game by implementing a system that includes the ability of wardens to inspect game in the field, which encompasses proper licensing and game limitation requirements. In this capacity, wardens act as public trustees protecting and conserving Montana wildlife and habitat for all citizens. Fishing is a privilege accorded by the state, not a private right, and anglers must assume the burdens of the sport, as well as its benefits, and acknowledge the prospect of at least some governmental intrusion into their activities, including license checks, inquiries about game taken, and requests to inspect game in the field. Because Boyer had no reasonable expectation of privacy in his catch, the warden's request for and inspection of the catch was not considered a search, so probable cause was not necessary. St. v. Boyer, 2002 MT 33, 308 M 276, 42 P3d 771 (2002).

Revealing Limited Medical Information During Police Interview Not Considered Waiver of Constitutional Right to Confidentiality in Medical Records — Voluntary Medical Information Outside Scope of Fruit of Poisonous Tree Doctrine — Adequate Probable Cause for Investigative Subpoena of Medical Records: Bilant was involved in a three-car accident and was subsequently arrested for DUI and a seat belt violation. During an interview following the arrest, Bilant revealed to an officer that he had taken pain medication on the day of the accident. The officer called Bilant's health care provider for confirmation, and the provider confirmed that Bilant had a prescription for a drug similar to the pain medication that he mentioned. The officer then procured an investigative subpoena regarding documentation on all prescriptions issued to Bilant, including any advisory warnings, and the provider sent Bilant's entire medical file. Bilant contended that the state violated both his constitutional right to privacy and the statutory protections of 50-16-535. The state maintained that Bilant waived his claim of confidentiality in his medical information when he voluntarily revealed his use of pain medication to the officer. The Supreme Court agreed with Bilant. Medical records are quintessentially private and deserve the utmost constitutional protection. None of the statutory prerequisites for disclosure of the medical records were met. In deciding to reveal limited medical information in a police interview, Bilant did not forfeit his constitutional right to subsequently claim confidentiality in his medical records. The officer conducted an illegal search in seeking the constitutionally protected private medical information without probable cause and the benefit of an investigative subpoena under 46-4-301, and the information gleaned from the telephone call should have been suppressed. Bilant then contended that the use of the illegally obtained information formed an improper basis for the investigative subpoena and that the results of the subpoena should also have been

suppressed pursuant to the fruit of the poisonous tree doctrine, which forbids the use of evidence that comes to light as the result of an initially illegal act. However, on this point, the Supreme Court disagreed with Bilant. One exception to the doctrine is that the derivative evidence is admissible if it is obtained from an independent source. Here, Bilant himself provided the source by giving voluntary medical information from other than the illegal telephone inquiry. The Supreme Court recognized that an investigative subpoena seeking constitutionally protected medical information requires greater justification for state access than the administration of justice rationale used to obtain public information under 46-4-301, so in reviewing the probable cause basis for constitutionally protected material, the court excised the illegal evidence from the application and reviewed the remaining information de novo to determine whether probable cause existed for issuing the subpoena. In this case, even when the information subject to suppression was excised, the remaining evidence established probable cause that a DUI was committed and underscored a compelling state interest in medical records related to prescription medicines in order to confirm Bilant's initial admission to the officer. Thus, the subpoena was issued in accordance with the statutory requirements for constitutionally protected medical records, and Bilant's conviction was affirmed. St. v. Bilant, 2001 MT 249, 307 M 113, 36 P3d 883 (2001). See also St. v. New, 276 M 529, 917 P2d 919 (1996), and St. v. Nelson, 283 M 231, 941 P2d 441 (1997).

Warrantless Strip Search of Prison Visitor Permissible if Supported by Reasonable Suspicion: Deserly traveled to the state prison to visit her husband who was an inmate, but upon attempting to enter, her underwire bra set off the metal detector. She was informed that she could consent to a strip search and that if she refused, she would be denied contact visitation but would be allowed noncontact visitation. Deserly was a former jailer and knew what a strip search entailed, but nevertheless consented to the search. Later, Deserly sued the Department of Corrections, seeking unspecified damages for emotional distress allegedly caused when the prison officers required her to submit to the strip search, complaining that her privacy was invaded and that she was humiliated and visually raped as a result of the search. The District Court found that the search was justified and that no privacy invasion occurred and summarily dismissed the case. Deserly conceded on appeal that because the state has an interest in the security of its penal institutions, searches of inmate visitors are justifiable only on satisfying a reasonable suspicion standard, but maintained that the legitimate penalogical need to conduct the search could have been satisfied by more narrow means than a strip search. The Supreme Court acknowledged that one of the clearest forms of degradation in Western society is to strip a person of the person's clothes and that a strip search, regardless of how professionally and courteously conducted, is an embarrassing and humiliating experience. Further, a prison visitor retains the constitutional right to be free from unreasonable searches and seizures. However, a prisoner does not have a due process right to unfettered visitation, nor does a citizen have a right to unfettered visitation of a prisoner that rises to a constitutional dimension. Moreover, in seeking entry into a controlled prison environment, a visitor simultaneously acknowledges a lesser expectation of privacy because of the insistence on access. Because prisons are dangerous places for employees, visitors, and inmates, the basic constitutional issue becomes one of balancing the legitimate governmental interest in and need for searching inmate and prison visitors against the intrusions into personal rights and residual privacy interests that such searches entail. Although prison visitors can be subjected to some searches, such as pat-downs or metal detector sweeps, merely as a condition of visitation, more intrusive searches, such as strip searches, are permissible as exceptions to the constitutional warrant requirements only if the search is supported by reasonable suspicion. Thus, the ultimate question was not simply whether there was some alternative means of conducting the search, but whether prison officials acted reasonably and used the least intrusive means under the circumstances. In Deserly's case, the strip search was supported by reasonable suspicion and was conducted in a manner that took into account Deserly's privacy interest and yet fulfilled the Department's penalogical need to ensure that Deserly was not carrying metal contraband in some article of her clothing. Deserly v. Dept. of Corrections, 2000 MT 42, 298 M 328, 995 P2d 972, 57 St. Rep. 199 (2000), following St. v. Bassett, 1999 MT 109, 294 M 327, 982 P2d 410, 56 St. Rep. 447 (1999), and distinguishing Hunter v. Auger, 672 F2d 668 (8th Cir. 1982), and Thorne v. Jones, 765 F2d 1270 (5th Cir. 1985).

Lack of Evidence That Investigating Officers Went Above High-Water Mark to Obtain Photograph of Marijuana Plant on Private Property — Motion to Suppress Properly Denied: An anonymous caller informed the Rosebud County Sheriff's office that Mogen was growing marijuana on Mogen's private land abutting the Yellowstone River. A Sheriff's officer and a game warden traveled by boat down the river to begin surveillance operations. The officers did not have a search warrant or permission to be on Mogen's property, nor was the property posted

along the river. The Sheriff testified that the game warden came along to identify and prevent trespass above the ordinary high-water mark, below which public access is allowed pursuant to Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984). The officers used binoculars to view the suspected marijuana plant and took photographs of the plant from a point that they testified was below the ordinary high-water mark. Mogen moved to suppress the evidence, asserting that the officers must have crossed above the ordinary high-water mark, without an invitation or warrant, to observe and take the photographs in a portion of his property where he had an expectation of privacy and that the evidence was thus illegally seized. The District Court denied the motion to suppress. The Supreme Court affirmed, finding nothing in the record to indicate that the District Court's finding of fact was clearly erroneous or incorrectly applied. St. v. Mogen, 2000 MT 14, 298 M 87, 993 P2d 699, 57 St. Rep. 82 (2000), following St. v. Siegal, 281 M 250, 934 P2d 176, 54 St. Rep. 158 (1997).

Lawful Entry Into Home by Firefighter — Reasonable Expectation of Privacy Retained — Plain View Exception Inapplicable: A firefighter legally in Bassett's home performing mopup after a fire discovered apparent marijuana growing in a closet. The plants, visible because the closet door had burned away, were subsequently seized by a Deputy Sheriff without a warrant. When told that the plants had been discovered, Bassett waived Miranda rights and admitted growing marijuana but later moved to suppress the statement because it was the direct product of an unconstitutional search. The District Court admitted evidence from the search under the plain view exception and denied suppression of Bassett's confession. The court further held that Bassett no longer held a reasonable expectation of privacy in his closet because he did nothing to restrict entry into the home and because society would not view entry into a burned residence that was largely destroyed and open to the elements as an invasion of privacy. To determine the threshold question of whether the search was an unlawful intrusion into Bassett's privacy, the Supreme Court applied the criteria in St. v. Hubbel, 286 M 200, 951 P2d 971, 54 St. Rep. 1373 (1997): (1) whether Bassett had an actual expectation of privacy; (2) whether society would recognize that expectation as objectively reasonable; and (3) the nature of the state's intrusion. Citing Mich. v. Tyler, 436 US 499, 56 L Ed 2d 486, 98 S Ct 1942 (1978), the court noted that a person retains a reasonable privacy interest in that person's home even when it has been damaged by fire. The court also followed U.S. v. Hoffman, 607 F2d 280 (9th Cir. 1979), for the proposition that the privacy expectation remains even when firefighters discover contraband. Although a firefighter is obviously justified and in fact expected by Montanans to enter a home to extinguish a fire, this does not mean that Montanans reasonably expect that the private sanctity of their homes will then be open to other government officials to search for evidence of unrelated criminal activity simply because the firefighter was already legitimately on the premises. The firefighter and the Deputy Sheriff each had separate reasons for entering the home. Therefore, two entirely separate justifications for each entry were required. There was no exigent circumstance, such as an immediate emergency, that justified the Deputy Sheriff's warrantless entry, nor did the plain view exception apply because the officer was not legally in the home when the evidence was seen. Further, Bassett did not need to take any affirmative steps to demonstrate that he retained his privacy interest. The warrantless search was unjustified, and Bassett's incriminating statement was the direct product of an illegal search and thus inadmissible by virtue of the exclusionary rule. St. v. Bassett, 1999 MT 109, 294 M 327, 982 P2d 410, 56 St. Rep. 447 (1999), distinguishing St. v. Bell, 737 P2d 254 (Wash. 1987), and St. v. Loh, 275 M 460, 913 P2d 592, 53 St. Rep. 226 (1996), and followed in Deserly v. Dept. of Corrections, 2000 MT 42, 298 M 328, 995 P2d 972, 57 St. Rep. 199 (2000). However, see St. v. Lewis, 2007 MT 295, 340 M 10, 171 P3d 731 (2007), in which the plain view doctrine did apply to the seizure and admissibility of potential evidence of arson seen by a Deputy Sheriff who initially entered a burning residence for fire suppression and who subsequently reentered the residence to secure the evidence.

Entry of Residence to Levy Upon Personal Property While Judgment Debtor Incarcerated — Entry and Search of Private Home Not Authorized by Writ of Execution: Dorwart was named defendant in two small claims actions, resulting in the entry of default judgments against him and the issuance of writs of execution to enforce the judgments. About 1 month later, while driving his truck, Dorwart was stopped and served with the two writs and was subsequently also arrested for driving under the influence and incarcerated. While Dorwart was in jail, two Sheriff's deputies entered Dorwart's home and garage without his permission or a warrant and seized various items of personal property pursuant to the writs, relying on the writs as the sole authority for authorization to enter the residence and conduct the search and seizure. Dorwart later filed a complaint, alleging various state and federal claims and common-law tort claims and contending that Montana's postjudgment execution statutes are unconstitutional. The

District Court found that the deputies did not violate Dorwart's constitutional right to be free from unreasonable search and seizure because the writs constituted judicial authorization for their actions. On appeal, the prosecution relied on Ramsey v. Burns, 27 M 154, 69 P 711 (1902), for the proposition that one of the implied powers authorized by a writ of execution includes the levying officer's entry into a judgment debtor's residence or place of business in order to execute the writ and that on that basis, entry of the home was not unreasonable. The Supreme Court distinguished Ramsey because no constitutional search and seizure issue was raised in that case. Dorwart had a legitimate expectation of privacy in his home, and government intrusion without a search warrant was per se unreasonable, subject to only a few exceptions that did not apply. Citing Camara v. Municipal Court, 387 US 523, 18 L Ed 2d 930, 87 S Ct 1727 (1967), and G.M. Leasing Corp. v. U.S., 429 US 338, 50 L Ed 2d 530, 97 S Ct 619 (1977), the court found that the constitutional prohibition against unreasonable search and seizure applies in civil as well as criminal contexts because all citizens have a strong interest in securing their homes from government intrusion, regardless of the reason for the intrusion, and that placing limitations on the discretion of when, where, and how to conduct a search that intrudes upon a private area is the precise reason behind the search warrant requirement. Postjudgment execution procedures and writs of execution issued under the procedures did not sufficiently limit the deputies' discretion in executing the writs to satisfy constitutional search and seizure provisions. Thus, entry into Dorwart's residence and seizure of his property without permission or a warrant, relying only on the authority of the writs, violated Dorwart's constitutional search and seizure rights. Dorwart v. Caraway, 1998 MT 191, 290 M 196, 966 P2d 1121, 55 St. Rep. 777 (1998), following Neb. v. Hinchey, 374 NW 2d 14 (Nebr. 1985).

State Use of Drug-Detecting Canine to Inspect Luggage Lawful — No Unconstitutional "Search" or "Seizure": When a Tucson airport police officer noticed the defendant acting nervously prior to checking in for his flight to Billings, the officer called ahead and informed the Billings police department of his suspicion that the defendant was trafficking narcotics. A Billings police officer, accompanied by a drug-detecting canine, met the flight when it landed in Billings. Before the luggage was loaded onto the airport carousel, the canine was directed to sniff the luggage from the flight, upon which the canine's reaction indicated that the suitcase matching the description given by the Tucson officer contained drugs. After picking up the suitcase off the carousel, the defendant was approached by a Billings police officer, who advised him of his rights and escorted him to the airport office. After the defendant refused to consent to a search, the officer obtained a search warrant and found that the suitcase contained 18 pounds of marijuana. The defendant, charged with possession of dangerous drugs, filed a motion to suppress the evidence, alleging that the state's use of a drug-detecting canine violated his right of privacy. The District Court denied the motion, concluding that the use of a drug-detecting canine did not constitute a search. On appeal, the Supreme Court affirmed, ruling that a person lacks a reasonable expectation of privacy in the smell of luggage brought to an airport. As a result, the state's use of a drug-detecting canine to inspect checked airline luggage does not violate a person's right of privacy under section 10 of this article and such an inspection is neither a search nor a seizure under this section. St. v. Scheetz, 286 M 41, 950 P2d 722, 54 St. Rep. 1286 (1997). However, see St. v. Carlson, 2000 MT 320, 302 M 508, 15 P3d 893, 57 St. Rep. 1348 (2000), citing Scheetz but holding that the canine sniff of the vehicle during a routine trespass investigation was illegally used as pretext for performing a drug search for which a particularized suspicion was required.

Right of Privacy Encompasses "Autonomy" and "Informational" Privacy — Probable Cause Needed for Discovery of Medical Information: While treating the defendant for a broken jaw received during an automobile accident, the physician, concerned over the defendant's lack of pain, ordered a blood test to determine his alcohol concentration level. During a subsequent interview with the investigating officer, the physician referred to the victim's blood concentration level without divulging the actual numerical concentration level. Based on the physician's comments, the officer obtained the test results, using an investigative subpoena, and the defendant was subsequently charged with and convicted of driving under the influence of alcohol. The defendant appealed, alleging that release of the blood alcohol information violated his right to privacy. Although it affirmed the defendant's conviction, the Supreme Court ruled that absent a compelling state interest, medical records are protected by the right of privacy. The court adopted an interpretation of the state's privacy guarantee, outlined by California in Hill v. Nat'l Collegiate Athletic Ass'n, 865 P2d 633 (Calif. 1994). The court ruled that Montana's guarantee of privacy encompasses "autonomy privacy" as well as confidential "informational privacy". In this case, the state was able to establish the existence of a compelling state interest for the issuance of an investigative subpoena for discovery of medical records by showing that there was probable

cause to believe that an offense had been committed and that the medical information relative to the offense was in the possession of a person to whom the subpoena was directed. St. v. Nelson, 283 M 231, 941 P2d 441, 54 St. Rep. 576 (1997), followed in St. v. Dolan, 283 M 245, 940 P2d 436, 54 St. Rep. 583 (1997), but ruling that information concerning a request that a hospital obtain a routine blood sample was insufficient to establish probable cause for issuance of an investigative subpoena, St. v. Ingraham, 1998 MT 156, 290 M 18, 966 P2d 103, 55 St. Rep. 611 (1998), St. v. Bilant, 2001 MT 249, 307 M 113, 36 P3d 883 (2001), and Malcomson v. Liberty Northwest, 2014 MT 242, 376 Mont. 306, 339 P.3d 1235.

Warrantless Use of Thermal Imaging as Unconstitutional Search: The use of thermal imaging in a criminal investigation to detect heat and infrared radiation from outside a structure, such as that generated by an indoor marijuana growing operation, constitutes a search under this section. The privacy interests of Art. II, sec. 10, Mont. Const., are also implicated by the use of thermal imaging technology. In the present case, defendants housed activities that they wished to keep private in an enclosed structure on posted, fenced property behind locked gates. As such, defendants had a subjective expectation of privacy in the heat signatures of activities, intimate or otherwise, pursued within the confines of their private homes and enclosed structures, which they did not knowingly expose to the public. Montana's Constitution affords citizens broader protection from warrantless governmental intrusion in search and seizure cases than does the United States Constitution. This heightened expectation of privacy is one that society is willing to recognize as objectively reasonable. Therefore, use of thermal imaging technology by the government in the absence of a search warrant requires the demonstration of a compelling state interest closely tailored to effectuate only that compelling interest, not simply enforcement of the criminal statutes. In the absence of these factors, use of the technology violated defendants' right to privacy. St. v. Siegal, 281 M 250, 934 P2d 176, 54 St. Rep. 158 (1997), following St. v. Solis, 214 M 310, 693 P2d 518 (1984), St. v. Young, 867 P2d 593 (Wash. 1994), U.S. v. Ishmael, 48 F3d 850 (5th Cir. 1995), U.S. v. Cusumano, 67 F3d 1497 (10th Cir. 1995), and St. v. Bullock, 272 M 361, 901 P2d 61 (1995).

Media Coverage of Search Involving Alleged Wildlife Violation Outside Scope of Warrant — Open Fields Doctrine and Invited Informer Doctrine Inapplicable: Federal agents who suspected a wildlife violation searched the Bergers' ranch pursuant to a search warrant and to a written contract with two national broadcasting networks authorizing the filming and recording of the search for broadcast on environmental television shows. After Berger was convicted of one misdemeanor count of improper use of a pesticide, he sued both the networks and the federal agents for violations of constitutional rights. On appeal, the Ninth Circuit Court held that activities conducted pursuant to the search were not authorized by the open fields doctrine, which allows law enforcement officers to obtain evidence while on privately owned open fields, because Berger had a reasonable expectation of privacy with regard to outbuildings that were photographed and because that doctrine does not authorize trespass by third parties. Further, the invited informer doctrine, which allows the use of informers with recording devices to obtain information as part of a good faith government investigation, did not apply in this instance because the recording of Berger's conversations was used to assist commercial television, not to further law enforcement objectives. Pursuant to the joint action test, the networks were considered to be acting under color of law and, as such, were liable for damages as government actors for contractually engaging in a search enterprise that only the government could lawfully institute for the mutual benefit of both private and governmental interests in publicity. The case was reversed for further consideration of Berger's state claims of trespass and intentional infliction of emotional distress. Berger v. Hanlon, 129 F3d 505 (9th Cir. 1997).

Gaming Compact — No Liberty or Property Interest: The Crow Tribe had no right under a gaming compact with the state to own and operate mechanical slot machines. The tribe lacked the liberty of property interest necessary for a section 1983 claim that the seizure of the machines by state officials violated due process. Crow Tribe of Indians v. Racicot, 87 F3d 1039 (9th Cir. 1996).

Constitutionality of Routine, Administrative Inventory Search — Compelling State Interest: Under Montana's Constitution, the right of individual privacy is a fundamental right, but the guarantee of individual privacy is not absolute. That right may not be infringed without a showing of a compelling state interest, which must be closely tailored to effectuate only that compelling interest. With regard to a routine, administrative inventory search of personal property on or in the possession of an arrestee at the station following a lawful arrest, the compelling state interest is the protection of the arrestee, the police, other inmates and persons, and property in and around the station from harm and the potential for harm posed by weapons, dangerous

instrumentalities, or hazardous substances that might be concealed on or in the possession of the arrestee. In these instances, the "less intrusive means rule" discussed in St. v. Sawyer, 174 M 512, 571 P2d 1131 (1977), and St. v. Sierra, 214 M 472, 692 P2d 1273 (1985), is not mandated because it is impractical and unreasonable to expect police to make decisions on a daily basis about which containers to search and what, if any, would be the least intrusive means to inventory an arrestee's personal property on or in his possession. Further, the state has an interest in protecting an arrestee's property by accounting for money and articles to protect police against false claims for items taken while the arrestee is in custody, and an inventory search is a reasonable way to ensure protection of the arrestee's property during detention. Sawyer continues to be law regarding routine automobile searches when a defendant has been arrested and the vehicle impounded and when there are no exigent circumstances or other recognized exceptions from warrant requirements that justify a warrantless search. However, police may conduct a routine, administrative inventory search of an arrestee and of closed containers in the arrestee's possession at the time of arrest if the search is conducted pursuant to standardized policy or procedures adopted by police and routinely used in the booking process. St. v. Pastos, 269 M 43, 887 P2d 199, 51 St. Rep. 1441 (1994), following Ill. v. Lafayette, 462 US 640, 77 L Ed 2d 65, 103 S Ct 2605 (1983), and Colo. v. Bertine, 479 US 367, 93 L Ed 2d 739, 107 S Ct 738 (1987), distinguishing St. v. Sawyer, 174 M 512, 571 P2d 1131 (1977), and overruling St. v. Sierra, 214 M 472, 692 P2d 1273 (1985), to the extent of any inconsistencies with this decision. Pastos was reaffirmed in St. v. Demontiney, 2014 MT 66, 374 Mont. 211, 324 P.3d 344.

Frisk and Search Incidental to Termination of Employment: An employment dispute, including threats by an employee against company management, led to a termination meeting. Because of the nature of the dispute, one of the managers requested the presence of a Sheriff at the meeting "to keep the peace". The Sheriff asked that the request and reasons for asking assistance be made in writing. The manager provided a written request, giving details of the threats. The Sheriff and two deputies were present and frisked the employee upon his arrival. The frisk and search lasted less than 2 minutes. On appeal, the employee contended that the company requested the Sheriff's presence at the meeting and that the ensuing frisk was an invasion of the employee's right of privacy, citing Johnson v. Supersave Mkt., Inc., 211 M 465, 686 P2d 209 (1984), for the premise that a person's right to liberty is legally protected from invasion and that emotional distress proximately caused thereby constitutes recoverable damages for invasion of privacy. The District Court properly held that the officer's search was not a substantial invasion of a legally protected interest, that the employee had provided no authority to support an invasion of privacy tort theory, and that the search was part of and could not be separated from the termination. There was no evidence that the employer participated in the decision to frisk and search, and an agency relationship was not established. Koepplin v. Zortman Min., Inc., 267 M 53, 881 P2d 1306, 51 St. Rep. 880 (1994).

Standing to Raise Fourth Amendment Objection — Guest in Motel Room Without Standing: Smith was arrested in a motel room on an outstanding warrant for sale of dangerous drugs (now criminal distribution of dangerous drugs). The room was registered to Williams. Smith testified that he did not intend to stay in the room overnight but was only waiting for Williams to get out of the shower. Williams requested a pen from the arresting officers who went through drawers and found cocaine in attempting to locate a pen. Williams and Smith were arrested for possession of dangerous drugs with intent to sell. Citing Rakas v. Ill., 439 US 128 (1978), the Supreme Court held that under the circumstances, Smith had no expectation of privacy in the room and therefore did not have standing to raise the defense of an unlawful search and seizure of drugs from the room. St. v. Williams, 268 M 428, 887 P2d 1171, 51 St. Rep. 556 (1994).

Nonapplicability of Exclusionary Rule Extended to Private Felonious Conduct: The state sought to convict the defendant on drug charges, relying in part on the testimony of two individuals who had burglarized the defendant's home. The Supreme Court ruled that it was extending nonapplicability of the exclusionary rule to the felonious conduct of private individuals unless those individuals are acting as agents of the state. St. v. Christensen, 244 M 312, 797 P2d 893, 47 St. Rep. 1449 (1990), followed in St. v. Nelson, 283 M 231, 941 P2d 441, 54 St. Rep. 576 (1997).

Defendant With One Foot Inside Doorway Considered Home: The arresting officer followed the defendant to his home, intending to give him a citation for an illegal turn. The officer stopped the defendant after the defendant had one foot inside his doorway and ordered him to return to his car that was parked in the driveway. The officer then gave the defendant field sobriety tests and charged him with driving under the influence. The Supreme Court held that the defendant was in his home because he had one foot inside his doorway and that the officer's restraining the defendant for the illegal turn constituted an illegal, warrantless arrest of the defendant in his

home for a misdemeanor committed at some other place and time. The court went on to state that all evidence acquired after the illegal arrest pertaining to the DUI charge was inadmissible. Billings v. Whalen, 242 M 293, 790 P2d 471, 47 St. Rep. 706 (1990), followed in St. v. Ellington, 2006 MT 219, 333 M 411, 143 P3d 119 (2006).

Taking of Blood Sample Without Consent but Pursuant to Search Warrant — No Privacy Invasion: In the instance of a non-DUI offense, an involuntary blood test supported by a valid search warrant issued with sufficient probable cause serves to protect the state's interest in enforcing its criminal laws and is not a violation of a person's right to privacy. Collins v. St., 232 M 73, 755 P2d 1373, 45 St. Rep. 878 (1988).

Admissibility of Recording of Warrantless Face-to-Face Conversation by Police Use of Body Wire Transmitting Device: Warrantless consensual electronic monitoring of face-to-face conversations by the use of a body wire transmitting device, when performed by law enforcement officers while pursuing their official duties, does not violate the constitutional right to be free of unreasonable search and seizure or the right of privacy. Consent must be clearly obtained from at least one party to the conversation and must be freely made and without compulsion. As in telephone conversations, the consenting party may be an informant or police officer. Evidence obtained from such monitoring is admissible in a subsequent criminal trial. St. v. Brown, 232 M 1, 755 P2d 1364, 45 St. Rep. 818 (1988), overruling St. v. Brackman, 178 M 105, 582 P2d 1216 (1978). See also St. v. Staat, 251 M 1, 822 P2d 643, 48 St. Rep. 1041 (1991). Brown was overruled in St. v. Goetz, 2008 MT 296, 345 M 421, 191 P3d 489 (2008).

Drugs Found in Search for Marital Property — No Expectation of Privacy: When search of a storage shed pursuant to a court order to retrieve marital property revealed illegal drugs, the search was not for contraband or any illegally possessed property and defendant could not claim a legitimate expectation of privacy, especially since he disclaimed any interest in the shed's contents. St. v. Clausen, 228 M 20, 740 P2d 679, 44 St. Rep. 1308 (1987).

Search of Person Distinguished From Search of Possessions — Reduced Expectation of Privacy: The Supreme Court, citing U.S. v. Monclavo-Cruz, 662 F2d 1285 (9th Cir. 1981), distinguished between searches of person and searches of possessions, holding that once a person is lawfully seized and arrested, the reasonable expectation of privacy is diminished as to a routine search of open personal property seized prior to incarceration since the state has a compelling interest in protecting prisoners from potential danger. Helena v. Lamping, 221 M 370, 719 P2d 1245, 43 St. Rep. 901 (1986), followed in St. v. Lamere, 226 M 323, 735 P2d 511, 44 St. Rep. 690 (1987). See also Colo. v. Bertine, 479 US 367, 93 L Ed 2d 739, 107 S Ct 738 (1987).

Insufficient Findings by Trial Court: In considering a motion to suppress evidence discovered during a search of the defendant's motel room, the trial judge made inadequate findings of fact; therefore, the matter was remanded for a second evidentiary hearing. The trial judge made no finding of whether the defendant knowingly exposed his motel room to the police officer; whether the officer intruded beyond any invitation extended by the defendant; whether, if the officer did intrude, the intrusion had any effect on what the officer was able to observe in the motel room; or what the officer could observe from his position at the doorway of the motel room. St. v. Wilson, 218 M 359, 708 P2d 270, 42 St. Rep. 1647 (1985).

No Right to Object to Search of Another's Home and Seizure of Another's Property: No illegal search or seizure was made when a private citizen, after allegedly promising a Deputy Sheriff to do so, went to the home of the woman who hired petitioner to kill her husband and obtained a gun (evidence of the alleged crime) from her. Petitioner's lawyer was not negligent for not moving to suppress introduction of the pistol as evidence at the time of the trial and not making it a subject for appeal. In re Gillham, 218 M 187, 707 P2d 1100, 42 St. Rep. 1508 (1985).

Privacy Section of Montana Constitution — Contemplates Invasion Only by State Action: Sheriff's officers, armed with a search warrant, gained entrance to the defendants' rented house after their landlord, who was trespassing at the time, discovered a large number of marijuana plants growing there and reported his discovery to the Sheriff. The narrow issue on appeal was whether the fruits of a search conducted by a private citizen, without any type of governmental involvement, are properly the subject of exclusion. The Supreme Court overruled the well-established holding that private searches invade privacy rights protected by the privacy section of the Montana Constitution. The Supreme Court held that the privacy section of the constitution contemplates privacy invasion only by state action. Unless specifically provided otherwise, citizens' rights articulated in the constitution proscribe only state action. Therefore, if a private citizen, such as the landlord in this case, invades the privacy of another citizen, there is no violation of the constitution. The exclusionary rule is a rule of court procedure to deny admission of the fruits of illegally seized evidence to deter unlawful police activities and to preserve the

integrity of the judiciary. In this case, judicial integrity does not require exclusion of the evidence. St. v. Long, 216 M 65, 700 P2d 153, 42 St. Rep. 643 (1985), followed in St. v. Malkuch, 2007 MT 60, 336 M 219, 154 P3d 558 (2007).

Warrantless Search of Dwelling — Defendant's Expectation of Privacy: The defendant escaped from prison and hid in his girlfriend's nearby home. Police officers, who had a valid arrest warrant for the defendant, discovered him when they conducted a warrantless search of the dwelling. On appeal, the Supreme Court ruled that the defendant had a legitimate expectation of privacy in his girlfriend's home and has standing to challenge the constitutionality of the search based on an arrest warrant rather than a search warrant. Admission of the evidence obtained from the search was not harmless error even though the defendant had testified to the circumstances surrounding his escape. St. v. Kao, 215 M 286, 698 P2d 403, 42 St. Rep. 363 (1985).

Privacy Right More Expansive Than Federal Provision: Defendant was arrested on suspicion of being an illegal alien even though he was legally in the United States. Defendant spoke no English, and an interpreter was not used to advise him of his rights. During booking, defendant was ordered to empty his pockets, and a small amount of what was later determined to be marijuana was found. Immediately the arresting officers opened defendant's suitcase and found 7 pounds of marijuana. At trial, defendant moved to suppress the marijuana seized from the suitcase. The trial court suppressed the evidence, and the State appealed. The Supreme Court held that under St. v. Sawyer, 174 M 512, 571 P2d 1131 (1977), an inventory search is a substantial infringement upon individual privacy and is subject to Art. II, sec. 10 and 11, Mont. Const. Montana's constitutional right of privacy does not make obtaining a search warrant any more difficult, but it does require that in many inventory searches, the least intrusive means possible must be used. The Montana Constitution's privacy right is broader than that under the guaranty against unreasonable search and seizure contained in the fourth amendment to the U.S. Constitution. Because less intrusive means were available for handling the suitcase, its contents were properly suppressed. St. v. Sierra, 214 M 472, 692 P2d 1273, 42 St. Rep. 106 (1985), overruled in St. v. Pastos, 269 M 43, 887 P2d 199, 51 St. Rep. 1441 (1994), but Sawyer continues to be law regarding routine automobile searches.

Private Search — Federal Exclusionary Rule: Montana has adopted an exclusionary rule, based on its state constitution, that is more stringent than the federal rule. Montana suppresses evidence obtained by state officers through information resulting from a trespass or unlawful search by private citizens. In contrast, private searches are not prohibited by the federal constitution, and the fruit of private searches is not subject to the federal exclusionary rule unless the private searcher acted as a government agent. Although information in this case was secured through a private search in violation of Montana law, the totality of the circumstances set forth in the remaining portions of the affidavit supporting the search warrant provided substantial basis for concluding that there was probable cause. U.S. v. Henderson, 721 F2d 662 (9th Cir. 1983).

Warrantless Testing and Reopening of Evidence After Lawful Search and Seizure Upheld: An agriculture inspector in Hawaii lawfully opened a package in Hawaii, had its contents chemically tested in Hawaii, and shipped the package to Bozeman, Montana. Police officers in Bozeman opened the package without a warrant and made a controlled delivery to and arrested the defendant. The District Court did not err in denying the defendant's motion to suppress the evidence in the package. Once the agriculture inspector in Hawaii had recognized and seized the package under federal law, the defendant had no further reasonable expectation of privacy in the seized package. Under the rationale of U.S. v. Andrews, 618 F2d 646 (10th Cir. 1980) and U.S. v. Ford, 525 F2d 1308 (10th Cir. 1975), no privacy interest of the defendant was violated by transmission of the package for testing in Hawaii and shipment and opening of the package in Montana. Because government dominion over the package "continued unbroken" for all reasonable purposes, from its seizure in Hawaii to its delivery in Montana, the package could be opened without a warrant. St. v. Kelly, 205 M 417, 668 P2d 1032, 40 St. Rep. 1400 (1983).

Apprehension of Felony Suspects — Compelling State Interest: Defendant issued 13 bad checks totaling $231.76 between July 17, 1981, and October 30, 1981. On November 23, 1981, a Justice of the Peace issued an arrest warrant on the charge of issuing a bad check. There were no previous efforts to secure defendant's presence to answer the charge or post bond. On December 4, 1981, a Sheriff arrested defendant at his home. During booking, a full search of defendant was conducted and a gram of hashish was discovered. Defendant pleaded guilty to the bad check charge. The District Court granted his motion to suppress the contraband as an invasion of privacy under St. v. Carlson, 198 M 113, 644 P2d 498 (1982). The State appealed, and the Supreme Court vacated and remanded, stating that Carlson was clearly limited to traffic-related

misdemeanors. The court held that full custodial arrests supported by a warrant for felonies are proper, and that the apprehension of felony suspects is a compelling state interest which justifies a full custodial arrest pursuant to warrant. The right of privacy must yield to a compelling state interest. St. v. Wood, 205 M 141, 666 P2d 753, 40 St. Rep. 1173 (1983).

Marijuana in Unfenced Garden — Observation From Road by Police With Spotting Scope: When the State does not violate an individual's legitimate expectation of privacy, an unreasonable search has not taken place. Where no reasonable expectation of privacy exists, there is neither a search nor a seizure under the fourth amendment to the United States Constitution or Art. II, sec. 11, Mont. Const. There was no search when police stood on county road and used a spotting scope to look for marijuana in a garden surrounded by open field, and the marijuana obtained pursuant to a warrant to search the garden was properly used as direct evidence in prosecution for criminal possession of dangerous drugs. St. v. Bennett, 205 M 117, 666 P2d 747, 40 St. Rep. 1133 (1983), distinguished and overruled in part in St. v. Bullock, 272 M 361, 901 P2d 61, 52 St. Rep. 717 (1995). Bullock was followed in St. v. Romain, 1999 MT 161, 295 M 152, 983 P2d 322, 56 St. Rep. 638 (1999).

Entry to Defendant's Porch — No Private Search Conducted: There was testimony that two men entered the defendant's porch while the defendant was not at home. The same two men returned and talked to the defendant. The two men returned for a third time with a Deputy Sheriff. After obtaining a search warrant, the Deputy Sheriff searched the defendant's premises. After certain stolen items were found, the defendant was arrested and later convicted of theft. The court rejected the defendant's argument that the two men conducted an unlawful search the first time they entered his porch in violation of the defendant's right of privacy. St. v. Brown, 199 M 472, 649 P2d 1306, 39 St. Rep. 1531 (1982).

Landlord's Inadvertent Observation as Basis for Search Warrant — Controlled Substances: The defendant, who had signed a lease allowing his landlord the right to enter the defendant's apartment, borrowed a vacuum cleaner from the landlord, who, upon entering the defendant's room to retrieve the vacuum, saw light coming from a closet and inadvertently discovered marijuana and drug paraphernalia. The District Court did not err in denying the defendant's motion to suppress the evidence taken after a search warrant was obtained. The landlord was justified in entering the room to show it to prospective lessees or to retrieve the vacuum. Once the landlord was in the apartment, he was justified in inspecting the closet to see if the cause of the light constituted a fire hazard. The landlord could, under the circumstances, permit the police officer to observe the items in the closet, and the officer's observation could be used as a basis for the warrant. St. v. Sayers, 199 M 228, 648 P2d 291, 39 St. Rep. 1309 (1982), overruled on other grounds in St. v. Long, 216 M 65, 700 P2d 153, 42 St. Rep. 643 (1985).

No Necessity for Arrest — Subtle Coercion for Consent to Enter Home — Subsequent Search Invalid: Defendant was involved in a minor traffic accident that was not his fault. He failed to produce his driver's license. The investigating officer later learned that the license was revoked. The officer made out "Notice to Appear and Complaint" forms for operating a vehicle while driver's license was revoked and obstructing an officer, both misdemeanors. The officer gave the citations to the City Clerk for mailing to the defendant, but this was never done. A week later, the officer, thinking the citations had been mailed, requested and received an arrest warrant. Two officers went to defendant's house, awakened him, and informed him he was under arrest. Defendant requested he be allowed to get dressed. The officers told defendant they would have to accompany him and observed marijuana and bongs. They obtained a search warrant, returned and searched the house, and found small quantities of drugs and a stolen pistol. Defendant moved to suppress the evidence as obtained through an illegal search. The State contended that full custodial arrest was reasonable, was not connected to any pretextual arrangement that the police suspected defendant as a drug user, and that the search warrant based on the "plain view" observation of the officers in the home was valid. The District Court declined to determine whether the arrest was a pretext but decided there was no necessity for a full custodial arrest and suppressed the evidence. The court held that under the totality of the circumstances, the defendant had not consented to the officers' entry. The validity of the officers' entry into the home is the fulcrum upon which the case turns. The State justified the entry on the claim of defendant's consent. The Supreme Court found that the subjective state of defendant, "half asleep" and in his underwear, and the unqualified statement of the officers that if defendant were to get dressed they would have to come into his house, without any other explanation of his rights, constituted subtle coercion, and the search was unconstitutional. The court found no prior justification or exigency for the entry by the officers. Their entry under the facts of the case was unreasonable, and it is that factor which converted their observation in the house into a warrantless search, which is

always presumed unreasonable. This was especially true in light of the requirement of the State to establish a compelling interest in order to overcome defendant's reasonable expectation of privacy in his home. St. v. Carlson, 198 M 113, 644 P2d 498, 39 St. Rep. 802 (1982).

Trade Secrets — When to Be Disclosed and to Whom — Protectable Property: A telephone utility was required to disclose trade secrets to the Public Service Commission (PSC) to aid in a decision on its rate increase request. The utility was entitled to a protective order preventing access to the secrets by the general public, but the Montana Consumer Counsel and any citizen whose interest related to the ratemaking function of the PSC could have access to the information. Use or disclosure of the trade secrets except for purposes of the ratemaking proceeding was prohibited. Mtn. States Tel. & Tel. v. Dept. of Public Service Regulation, 194 M 277, 634 P2d 181, 38 St. Rep. 1479 (1981). Mtn. States and its progeny were overruled to the extent that those decisions relied on the constitutional balancing test of the right to individual privacy against the public's right to examine documents or observe governmental deliberations as a basis of protecting trade secrets and other confidential proprietary information of nonhuman entities in Great Falls Tribune v. Mont. Pub. Serv. Comm'n, 2003 MT 359, 319 M 38, 82 P3d 876 (2003).

Letters Written by Defendant While Incarcerated Inadmissible: Absent a showing of some compelling justifiable purpose in the nature of prison security and discipline, the interception and photocopying of a letter written by the defendant while in jail to a friend is violative of the first and fourth amendments to the United States Constitution (similar to Art. II, sec. 7 and 11, Mont. Const.), and such a letter is inadmissible. St. v. Sheriff, 190 M 131, 619 P2d 181, 37 St. Rep. 1793 (1981).

Detaining Suspected Shoplifter Without Arrest — Unconstitutional: The plaintiff was accused of shoplifting by the defendant's employee. Plaintiff's purse was searched, and nothing was found. Plaintiff was then detained under the authority of 46-6-503 (now repealed) until the police arrived and arrested her. After being acquitted of the shoplifting charge, the plaintiff brought suit for false arrest. The trial court instructed the jury in the words of 46-6-503 (now repealed) over plaintiff's objection. On appeal, the Supreme Court said there must be a showing of compelling state interest that would justify the infringement of plaintiff's right to privacy. The mere fact that defendant's conduct comported with the merchants' detention statute does not establish a compelling state interest. No compelling state interest was shown which would justify the very serious invasion of a person's privacy that occurred. Insofar as 46-6-503 (now repealed) permits a merchant with immunity to stop and detain an individual for up to 30 minutes without making an arrest, it is unconstitutional as an invasion of the right to privacy and the right to be secure from unreasonable searches and seizures guaranteed by Art. II, sec. 10 and 11, Mont. Const., as it applies to this case. Duran v. Buttrey Food, Inc., 189 M 381, 616 P2d 327, 37 St. Rep. 1545 (1980).

Standing to Suppress Evidence — Person Living in Searched Apartment Rented by Another: The defendant had a legitimate expectation of privacy in the apartment searched. He shared it with his girlfriend and except with respect to her had complete dominion and control over the apartment and could exclude others from it. The defendant had standing to contest the legality of a search and seizure within the apartment. St. v. Allen, 188 M 135, 612 P2d 199 (1980).

Prisoner on Furlough — Lesser Right of Privacy Under Federal Constitution: Plaintiff was released from prison on an educational furlough to attend the University of Montana (now University of Montana-Missoula). A deputy received a tip that plaintiff had drugs in his dorm room. The deputy called plaintiff's parole officer who determined that plaintiff had not signed a consent to be searched when furloughed. No search warrant was procured, but the search was conducted and drugs were seized. The evidence was suppressed and plaintiff's furlough reinstated. Plaintiff then brought this action seeking damages for violation of his civil rights. The federal courts have distinguished between a private citizen and a convict who is paroled prior to the expiration of his term, stating that a parolee does not have the expectations of privacy (see Art. II, sec. 10, Mont. Const.) enjoyed by other citizens. One of these restrictions is that the parolee and his home are subject to search by the parole officer when he reasonably believes that such search is necessary in the performance of his duties. Montana law may differ (see St. v. Fogarty, 187 M 393, 610 P2d 140 (1980), overruled in St. v. Burke, 235 M 165, 766 P2d 254, 45 St. Rep. 2278 (1988)), but this case charged violation of the United States Constitution, and under it the search was not constitutionally infirm. Quigg v. France, 502 F. Supp. 516, 37 St. Rep. 2113 (D.C. Mont. 1980).

Unauthorized Recording of Telephone Call — Third Person's Right to Privacy Invaded: Recording of telephone conversation by police undercover officer of a call received from an acquaintance of defendant setting up a drug sale did not taint all evidence against defendant

even though the recording was not authorized by court order. The undercover officer personally contacted police regarding the setting up of the drug buy which resulted in defendant's conviction. Furthermore, defendant cannot invoke a breach of right of privacy of his acquaintance; he must assert his own privacy rights. The recording was not introduced into evidence, but the undercover officer testified concerning it. St. v. Hanley, 186 M 410, 608 P2d 104 (1980), superseding on rehearing St. v. Hanley, 185 M 459, 605 P2d 1087 (1979).

Requirements for Electronic Surveillance: Under Title III of the federal Omnibus Crime Control and Safe Streets Act, states are required to have a specific statutory scheme for electronic surveillance before public officials can lawfully monitor oral and wire communications in the state. If a state chooses to allow electronic surveillance by adopting a statutory scheme, the scheme must be at least as or more restrictive than the regulations of Title III. Montana statutes 45-8-213, defining the offense of violating privacy in communications, and 46-5-202 (renumbered 46-5-221), setting forth the grounds for issuance of a search warrant, fail to meet the minimum requirements of Title III or the standard enumerated by the U.S. Supreme Court in the Berger and Katz decisions. Among other things, Montana's statutes fail: (1) to require a showing of exigent circumstances to overcome the defect of not giving prior notice; (2) to state what items of information should be included in the application for a warrant; and (3) to outline the general procedures by which law enforcement officials obtain warrants for electronic surveillance. In St. v. Brackman the court held that in view of Montana's constitutional right of privacy, law enforcement officials must first obtain a warrant before intercepting any communication. This will no longer suffice, since the requirements of Title III are not met. Any evidence seized by electronic surveillance must be suppressed since Montana's statutory scheme for allowing such surveillance does not meet the federal requirements. St. v. Hanley, 185 M 459, 605 P2d 1087 (1979), opinion withdrawn on rehearing, St. V. Hanley, 186 M 410, 608 P2d 104 (1980), and followed in St. v. Lynch, 1998 MT 308, 292 M 144, 969 P2d 920, 55 St. Rep. 1278 (1998). Lynch was followed in St. v. Pizzichiello, 1999 MT 123, 294 M 436, 983 P2d 888, 56 St. Rep. 499 (1999).

Application to Private Individuals — Montana Search and Seizure Law: Although under the federal Constitution illegally obtained evidence is admissible when seized by a nongovernmental agent not acting in concert with any governmental agency, the Montana Constitution, through Art. II, sec. 10 and 11, affords an individual greater explicit protection than do cases interpreting the federal Constitution. The search and seizure provisions of Montana law apply to private individuals as well as law enforcement officers. Therefore, evidence obtained through an illegal invasion of privacy by an individual is not to be admitted. St. v. Helfrich, 183 M 484, 600 P2d 816 (1979), overruled in St. v. Long, 216 M 65, 700 P2d 153, 42 St. Rep. 643 (1985).

Search Warrant and Search Based on Marijuana Obtained by Trespassing Neighbor Illegal: The issuance of a search warrant and the subsequent search based only on a sample of marijuana obtained by defendant's curious neighbor by means of an illegal trespass were improper and illegal. The evidence obtained by the search was properly suppressed by the District Court. St. v. Helfrich, 183 M 484, 600 P2d 816 (1979), overruled in St. v. Long, 216 M 65, 700 P2d 153, 42 St. Rep. 643 (1985).

Seizure Performed by Individual by Means of Illegal Trespass Invasion of Right of Privacy: A search and seizure performed by a private individual by means of an illegal trespass is a significant invasion of individual privacy. St. v. Helfrich, 183 M 484, 600 P2d 816 (1979), overruled in St. v. Long, 216 M 65, 700 P2d 153, 42 St. Rep. 643 (1985).

Use of Recording Device on Undercover Agent: It is not an illegal search to record conversations with defendant when defendant revealed information knowingly and voluntarily in course of business dealings to undercover agent of Department of Fish, Wildlife, and Parks and which defendant did not reasonably expect to keep private. St. v. Leighty, 179 M 366, 588 P2d 526 (1978).

Police Monitoring: Article II, sec. 10 and 11, Mont. Const., protects the individual from any monitoring and recording by the state without a search warrant or prior showing of compelling state interest of conversations between the individual and police informants even though the informants consented to the monitoring and recording. Section 45-8-213 does not give consensual participant monitoring the status of a compelling state interest. St. v. Brackman, 178 M 105, 582 P2d 1216 (1978), overruled in St. v. Brown, 232 M 1, 755 P2d 1364, 45 St. Rep. 818 (1988). Brown was overruled in St. v. Goetz, 2008 MT 296, 345 M 421, 191 P3d 489 (2008).

Inventory Search — Not Justified: Contraband found under a seat during inventory of an automobile held in police custody was not in plain view. It was seized in violation of individual privacy and freedom from unreasonable searches. The inventory search was not justified by protection of the contents for the owner's benefit or protection of the police from claims for lost

property beyond articles in plain view from outside the vehicle. St. v. Sawyer, 174 M 512, 571 P2d 1161 (1977), followed in St. v. Sierra, 214 M 472, 692 P2d 1273, 42 St. Rep. 106 (1985). Sawyer continues to be law regarding routine automobile searches, but Sierra overruled in St. v. Pastos, 269 M 43, 887 P2d 199, 51 St. Rep. 1441 (1994).

Video Taping of Defendant: The procedure of video taping defendant arrested for driving under the influence of alcohol was not an unreasonable search. St. v. Finley, 173 M 162, 566 P2d 1119 (1977).

Coerced Consent Ineffective: When defendant was held incommunicado until consenting to search and probable cause did not exist in the factual situation, search of car trunk was unlawful and marijuana seized was properly suppressed. St. v. Brough, 171 M 182, 556 P2d 1239 (1976).

SEARCH AND SEIZURE GENERALLY

Particularized Suspicion From Weaving Car — Totality of Circumstances Justifying Stop: The investigating officer witnessed the defendant's car cross the fog line three times and drive onto the rumble strip twice. The officer was concerned that the driver was impaired, falling asleep, distracted, or experiencing a medical problem. After the defendant consented to a search of the vehicle, the officer found drugs. The defendant eventually pleaded no contest to possession of dangerous drugs with intent to distribute, reserving his right to appeal. On appeal, the defendant argued that the officer lacked particularized suspicion. The Supreme Court disagreed, finding that considering all factors, the investigatory stop was warranted. St. v. Duong, 2015 MT 70, 378 Mont. 345, 343 P.3d 1218.

SUFFICIENCY OF SEARCH WARRANT

Offense Not Explicitly Stated — Suspected Offense Clearly Indicated by Facts — Search Warrant Proper: Although the defendant argued that a search warrant was impermissibly based on an out-of-state offense, the Supreme Court upheld the issuance of the search warrant for the defendant's vehicle because an affidavit supporting the search warrant provided substantial information about the defendant's involvement in drug trafficking into Montana and his use of vehicles to transport drugs. Muir v. Bilderback, 2015 MT 180, 379 Mont. 459, 353 P.3d 473.

Search Warrant Properly Issued — Description of Searched Lockbox Not Improperly General: A search warrant for secured or locked containers that was used to search a lockbox in the defendant's vehicle was sufficiently specific, considering the totality of the circumstances, based on an affidavit that the defendant was interested in locked containers that could reasonably be used to hide drugs or drug transaction cash. Muir v. Bilderback, 2015 MT 180, 379 Mont. 459, 353 P.3d 473.

Probable Cause for Warrant and Search of Binder and Notebooks — Motion to Suppress Properly Denied: After the defendant was linked to a robbery, and while the defendant was also a person of interest in an unrelated homicide investigation, law enforcement officers secured a warrant to search his residence to locate evidence of the robbery, including coins and postage stamps. Law enforcement officers executing the warrant seized items related to the robbery and discovered a binder and several notebooks that were relevant to the homicide investigation; they did not immediately seize the binder and notebooks but sought a second warrant based on what they viewed during the original search. The defendant moved to suppress the binder and notebooks. The District Court denied his motion. On appeal, the defendant argued that the warrant's statement that people sometimes keep diaries, ledgers, and other documents of criminal activity did not establish sufficient probable cause to search the binder and notebooks. The Supreme Court affirmed, concluding that although law enforcement officers may have lacked probable cause to search the writings contained in the binder and notebooks, they possessed probable cause to locate pawn receipts and coins within the binder and notebooks. Therefore, officers could reasonably look through those items, and the contents of the binder and notebooks relevant to the homicide investigation became subject to plain view. Based on the writings contained in the binder and notebooks, law enforcement officers had sufficient probable cause to seize the binder and notebooks through the second warrant. St. v. Covington, 2012 MT 31, 364 Mont. 118, 272 P.3d 43.

Error in Denial of Motion to Suppress Warrantless Recording of Phone Conversation: At trial the state presented a warrantless recording of a cell phone conversation between the defendant and a confidential informant. The District Court denied the defendant's motion to suppress the recording. In reversing the District Court, the Supreme Court overruled State v. Coleman and its progeny and concluded that on retrial, the defendant was entitled to suppress the recorded cell phone conversation because the defendant had a reasonable expectation of privacy under Art. II, sec. 10 and 11, Mont. Const. St. v. Allen, 2010 MT 214, 357 Mont. 495, 241 P.3d 1045.

Seized Evidence Not Considered "Other Evidence of a Crime" Not Subject to Suppression: Cotterell moved to suppress evidence of illegal hunting activity that was seized under a search warrant that allowed seizure of numerous hunting-related items, but also allowed seizure of "any other evidence of a crime", on grounds that the warrant was overbroad. The motion was denied. On appeal, the state conceded that the phrase "any other evidence of a crime" was overbroad (see St. v. Seader, 1999 MT 290, 297 M 60, 990 P2d 180 (1999), and Hauge v. District Court, 2001 MT 255, 307 M 195, 36 P3d 947 (2001)) but asserted that journals and calendars found in searching Cotterell's property were directly related to the crimes being investigated and thus were not subject to suppression. The Supreme Court agreed with the state. Although the journals and calendars were not specifically mentioned in the warrant, they were found during execution of a validly executed warrant in places that could lawfully be searched, were found in the course of a search for items that were specifically set out in the warrant, and were related to hunting and fishing activities. Even if the overbroad phrase was excised from the warrant, the journals and calendars were within the scope of the warrant, so denial of the motion to suppress was affirmed. St. v. Cotterell, 2008 MT 409, 347 M 231, 198 P3d 254 (2008).

Failure to Prove Falsity of Warrant Application — Motion to Suppress Properly Denied: Shelton moved to suppress evidence from a drug search based on the assertion that the warrant application mischaracterized statements upon which the application was based. The Supreme Court found that the alleged mischaracterization was merely a difference in semantics, not proof of a false statement in the application. The trial court gave Shelton the opportunity to challenge the veracity of the application but denied the motion to suppress, and the Supreme Court affirmed. St. v. Shelton, 2008 MT 282, 345 M 330, 191 P3d 420 (2008). Following conviction on drug charges in a different county but stemming from the same incident, Shelton raised an identical claim of the insufficiency of the search warrant based on false information. Having considered and dismissed the argument in Shelton, id., the Supreme Court denied review of the claim under res judicata. Further, there was no indication that the District Court in the subsequent case considered information not contained in the warrant application, so Shelton's second conviction was also affirmed in St. v. Shelton, 2008 MT 321, 346 M 114, 193 P3d 943 (2008).

Sufficient Probable Cause for Search Warrant — Motion to Suppress on Grounds of Unreliable Sources Properly Denied: Tucker asserted that fruits of a search of his residence should be suppressed because the warrant application was insufficient to establish probable cause because police failed to corroborate information provided by two informants. The Supreme Court examined the information in light of St. v. Reesman, 2000 MT 243, 301 M 408, 10 P3d 83 (2000), and St. v. Barnaby, 2006 MT 203, 333 M 220, 142 P3d 809 (2006), to determine the reliability of the informants. The first test is whether corroboration was required because the informants were anonymous, and in this case both informants were known to officers. The second test is whether the informants' information was based on hearsay, which requires corroboration, or on personal information. Here both informants had personal information of Tucker's activities. The third test is whether the informants were reliable. Neither informant was a confidential informant, but rather acted as concerned citizens, and the warrant application contained the necessary information to establish the reason for the informants' personal exposure to the evidence as well as their motivation for going to the police. Both informants were thus considered reliable, and any necessity for corroboration was satisfied. Therefore, the warrant application demonstrated the necessary probable cause, and Tucker's motion to suppress was properly denied. St. v. Tucker, 2008 MT 273, 345 M 237, 190 P3d 1080 (2008). See also St. v. Deshaw, 2012 MT 284, 367 Mont. 218, 291 P.3d 561.

Warrant Sufficient to Show Probable Cause That Crime Occurring Under Totality of Circumstances — Motion to Suppress Properly Denied: Wing asserted that evidence seized during a search should be suppressed because the search warrant was not supported by sufficient facts for a finding of probable cause. The trial court denied a motion to suppress the evidence, and Wing appealed. The Supreme Court applied the totality of circumstances test and affirmed. The warrant application contained a narrative account of a confidential informant's alleged controlled purchase of drugs from Wing and of Wing's subsequent arrest. Wing did not argue that the drug purchase was illegal or that it was improperly controlled by law enforcement officials. The warrant application provided facts sufficient to show that a crime was occurring and thus supported the issuance of the warrant, so the trial court did not err in denying Wing's motion to suppress. St. v. Wing, 2008 MT 218, 344 M 243, 188 P3d 999 (2008).

Information Used to Secure Second Search Warrant Ascertained Through Independent Sources — Fruit of Poisonous Tree Doctrine Inapplicable: The state searched Dasen's residence

and businesses and seized property pursuant to three search warrants. The warrant applications particularly described the property to be seized, but the warrants did not. When the warrants were served, the officers did not present the applications, so none of the accompanying documents particularly described the property to be seized. Two weeks later, the U.S. Supreme Court decided Groh v. Ramirez, 540 US 551 (2004), holding that if the application is not served with the warrant, the warrant itself must particularly describe the property to be seized. On motion and pursuant to Groh, Dasen's property was returned. The state immediately submitted a second round of warrant applications, and pursuant to a second facially valid warrant particularly describing the property to be seized, Dasen's property was reseized. Dasen asserted that the second warrant was invalid as fruit of the poisonous tree because it was a product of the first invalid search. However, there are three exceptions to the fruit of the poisonous tree doctrine that allow admissibility of independently obtained evidence, as adopted in St. v. Therriault, 2000 MT 286, 302 M 189, 14 P3d 444 (2000). In this case, the information for the second warrant was determined to have been independently obtained. The second warrant information was obtained prior to the first warrant, as well as information from additional sources not connected to or derived from the first search. Although the first search was a factor in obtaining the second warrant, the state nevertheless possessed sufficient independent information to purge the taint of the first search, so the fruit of the poisonous tree doctrine did not apply. St. v. Dasen, 2007 MT 87, 337 M 74, 155 P3d 1282 (2007). See also Murray v. U.S. 487 US 533 (1988).

References in Search Warrant to Currency and Items Connected With Illegal Drug Activity in Violation of Chapter of Code Sufficient: Payne, who was driving a rental car, was stopped for speeding and subsequently arrested for driving under the influence. During the stop, based on observations, the officer asked Payne if he was carrying drugs or large amounts of cash, and Payne responded that he was not. Payne also stated that he was traveling from Pittsburgh to Seattle to visit his children and flying back. The officer was suspicious because Payne was driving thousands of miles to visit but flying back after only a few hours. Payne was transported to the Sheriff's office, the vehicle was towed, and the rental company was notified. The rental company immediately terminated its contract with Payne under terms of the agreement and requested that Payne's personal items be removed from the car so that the company could have someone retrieve the vehicle. Payne subsequently consented to a search of the car, but officers obtained a warrant covering Payne's property that was found in the car. When removing Payne's property, the officer found some drugs and paraphernalia in plain view and removed a toolbox from the trunk. The toolbox contained $129,970. A petition for forfeiture was filed for the funds in the toolbox, and Payne argued that the petition should be dismissed, claiming that the search of the vehicle was illegal because the search warrant was not particular enough with respect to items to be seized because it referred to currency and items connected to illegal drug activity in violation of Title 45, ch. 9. The Supreme Court held that there was sufficient probable cause to issue the search warrant and that the warrant was not overbroad because a more precise description of the items to be seized was not possible because officers could not know in advance the type or amounts of currency or the type or amounts of drugs that the search might uncover. St. v. $129,970.00 in U.S. Currency, 2007 MT 148, 337 M 475, 161 P3d 816 (2007).

Affidavit Lacking Statement as to Reliability of Informant Requires Further Corroboration: Zito moved to suppress evidence of a marijuana growing operation obtained by a police search of his property on the basis that there was insufficient probable cause to issue a search warrant. The affidavit for the warrant did not contain a statement that the informant, upon whose information the police were relying, had provided reliable information in the past, was giving a statement against interest, or was a concerned citizen. The Supreme Court held that under the circumstances, the informant's statements required further corroboration to justify a probable cause determination. The Supreme Court held that in examining the totality of circumstances, including flyovers of the property, statements by another concerned citizen, Zito's criminal record, and the placement of junk cars and a tarp that obscured areas of the premises, the totality of the circumstances was sufficient to support issuing the warrant. St. v. Zito, 2006 MT 211, 333 M 312, 143 P3d 108 (2006).

Companion's Activity at Defendant's Residence Sufficient to Justify Search of Defendant's Property: Officers obtained a warrant to search Barnaby's residence based in large part on informants' tips that Barnaby's companion, Sheridan, was operating a clandestine drug laboratory at the residence. Barnaby moved to suppress the evidence on grounds that the search warrant was insufficient because evidence of Sheridan's involvement in methamphetamine production did not establish probable cause to search Barnaby's residence. The Supreme Court cited Zurcher v. Stanford Daily, 436 US 547 (1978), St. v. Gray 2001 MT 250, 307 M 124, 38 P3d 775 (2001),

and St. v. St. Marks, 2002 MT 285, 312 M 468, 59 P3d 1113 (2002), for the proposition that the critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific things to be searched for and seized are located on the property to which entry is sought. Thus, corroboration of criminal conduct by Barnaby's companion, Sheridan, could be imputed to Barnaby, even though Sheridan's mere presence at the residence did not amount to probable cause to search Barnaby's residence. However, Sheridan's involvement in the production of methamphetamine and continued presence at Barnaby's house, coupled with two independent reports that Sheridan operated a drug lab at the house and a report of suspicious activity at the house since Sheridan's arrival, amounted to a substantial basis for determining whether probable cause supported the issuance of a warrant under the totality of the circumstances. The fact that the warrant application did not include a specific account of the circumstances under which some informants viewed the events or whether two citizens based their reports on personal observations did not preclude a court from finding probable cause. Sufficiency of the warrant was affirmed, and Barnaby's motion to suppress was properly denied. St. v. Barnaby, 2006 MT 203, 333 M 220, 142 P3d 809 (2006).

Totality of Circumstances, Including Odor of Marijuana, Sufficient Probable Cause to Support Search Warrant: The Department of Public Health and Human Services received a call alleging that Morse was selling drugs in the presence of her juvenile daughter, and the local drug task force received two additional calls alleging that Morse was distributing drugs from her apartment. When police visited Morse's apartment, there were four other people there, all of whom had prior drug-related arrests, including Morse. The officers smelled marijuana and observed an empty electric digital scale in the living room. Morse refused a search of the apartment, so officers obtained a search warrant. In executing the warrant, the officers found drugs and paraphernalia. At trial, Morse moved to suppress the evidence based on lack of probable cause for the warrant. The motion was denied, and on appeal, the Supreme Court reviewed the totality of the circumstances and affirmed. The smell of marijuana did not in itself establish probable cause, nor did the telephone calls. However, when considered with Morse's drug history, the criminal backgrounds of the other four people, and the presence of the scale, the search warrant application established probable cause, and the motion to suppress was properly denied. St. v. Morse, 2006 MT 54, 331 M 300, 132 P3d 528 (2006).

Reasonable Relationship Between Items Seized and Motive for Crimes Charged — Scope of Warrant Not Exceeded: Bar-Jonah was charged with impersonating a police officer and carrying a stun gun. During a search of Bar-Jonah's residence, police seized cameras, photo albums, film negatives, and various other items that Bar-Jonah contended were not related to the charges in the search warrant. Bar-Jonah's motion to suppress the items was denied, and on appeal, the Supreme Court affirmed. Relying on U.S. v. Clark, 31 F3d 831 (9th Cir. 1994), Bar-Jonah contended that allowing the seizure of fruits and instrumentalities of the offense was overbroad; however, in St. v. Quigg, 155 M 119, 467 P2d 692 (1970), the Supreme Court held that items may be seized if there is a reasonable relationship between the items and the motive for the charged crime and that it is sufficient to establish a fair probability that items sought in a warrant application are connected to that crime. In this case, based on all the facts and circumstances, the items were reasonably related to the criminal behavior enumerated in the warrant application and to Bar-Jonah's motive for impersonating a police officer and carrying a stun gun. Additionally, under Andresen v. Md., 427 US 463 (1976), the fact that items seized may later be used to form an evidentiary basis of another charge does not require suppression of the evidence. St. v. Bar-Jonah, 2004 MT 344, 324 M 278, 102 P3d 1229 (2004).

Valid Consensual Search — Totality of Circumstances: A minimum number of police officers went to Beaupre's residence, requested and were granted permission to enter the residence, inquired whether they could search the residence and were verbally authorized to do so, corroborated the oral permission with Beaupre's husband's written consent, and then discovered evidence of a drug lab upon searching the residence. The District Court held that the search was consensual, but on appeal, Beaupre contended that the search was not valid because the Beaupres were coerced into consenting. The Supreme Court concluded that under the totality of the circumstances, the search was consensual, and the District Court was affirmed. St. v. Beaupre, 2004 MT 300, 323 M 413, 102 P3d 504 (2004). See also St. v. Olson, 2002 MT 211, 311 M 270, 55 P3d 935 (2002).

Catchall Phrase in Warrant — Particularity Requirement — Suppression of Only Articles Seized Pursuant to Invalid Portions of Search Warrant: A lawful search warrant authorized officers to search Hauge's mobile home and seize drugs, drug paraphernalia, records of drug transactions, weapons, and the proceeds of drug transactions, including "anything else of value

furnished or intended to be furnished in the exchange of controlled substances". Hauge argued that the catchall phrase "anything else of value" rendered the warrant overbroad and invalid and that any evidence seized pursuant to the warrant must be suppressed. After initially citing the requirement that a search warrant must particularly describe who or what is to be seized, the Supreme Court noted that in St. v. Seader, 1999 MT 290, 297 M 60, 990 P2d 180 (1999), warrant language authorizing seizure of anything else of value was a catchall phrase encompassing everything conceivable, giving officers unbridled discretion to engage in a general exploratory rummaging without any guidance in distinguishing between items that could and could not be seized and that the language rendered the warrant facially overbroad and all fruits of the search inadmissible. However, the court also noted the adoption of the doctrine of severance, explained in U.S. v. Gomez-Soto, 723 F2d 649 (9th Cir. 1984), which provides that invalid portions of a search warrant may be stricken and valid portions preserved and that only articles seized pursuant to the invalid portions of the warrant need be suppressed. In Hauge's case, officers acting pursuant to a lawfully issued and otherwise sufficiently particularized warrant did not seize any property related to the catchall phrase and no criminal charges resulted from the presence of the catchall language in the warrant. The overbroad catchall clause was thus severable, and because no evidence was seized pursuant to the clause, no evidence was subject to suppression. Hauge v. District Court, 2001 MT 255, 307 M 195, 36 P3d 947 (2001). See also St. v. Kuneff, 1998 MT 287, 291 M 474, 970 P2d 556 (1998).

Warrant Authorizing Search for "Anything Else of Value" as Overbroad: Authorities suspected that Seader's van would contain drugs and drug-related evidence, and a search warrant was issued in part authorizing the seizure of "proceeds of drug sales whether in monies, precious metals, property or anything else of value furnished or intended to be furnished in the exchange for the evidence or contraband relating to the use, sale or manufacture of dangerous drugs". Seader moved to suppress the results of the search, including a stolen ATV discovered in the van. The Supreme Court noted that the specificity required of a search warrant may vary depending on the circumstances and the type of items involved and that generic categories or general descriptions of items are not necessarily invalid if a more precise description of items to be seized is not possible. However, the language in this warrant authorizing seizure of "anything else of value" was a catchall phrase encompassing everything conceivable, giving officers unbridled discretion to engage in a general exploratory rummaging in Seader's belongings without any guidance in distinguishing between items that could and could not be seized. The language rendered the warrant facially overbroad and all fruits of the search inadmissible. St. v. Seader, 1999 MT 290, 297 M 60, 990 P2d 180, 56 St. Rep. 1165 (1999). See also Coolidge v. N.H., 403 US 443, 29 L Ed 2d 564, 91 S Ct 2022 (1971), U.S. v. Leary, 846 F2d 592 (10th Cir. 1988), and St. v. Perrone, 834 P2d 611 (Wash. 1992).

Failure by Investigating Officer to Preserve Record of Citizen Informant Statement Made in Controlled Environment — Judicial Distrust Extended to Truthfulness of Declarations: When a law enforcement officer, absent exigent circumstances or another compelling reason, fails to memorialize in some manner the statement of a witness or informant made at the station house or in a similarly controlled environment and when the statement forms the substantial basis for the issuance of a search warrant or otherwise provides the grounds for the state's invasion of a fundamental constitutional right or interest guaranteed to a defendant, that failure will be viewed with distrust in the judicial assessment of the truthfulness of the state's declarations made in the search warrant application, to the extent that those declarations are based on the citizen informant's statements. St. v. Worrall, 1999 MT 55, 293 M 439, 976 P2d 968, 56 St. Rep. 225 (1999).

Modification of Franks Procedure for Challenging Veracity of Information in Application for Search Warrant: In deciding that a criminal defendant may challenge the truthfulness of factual statements in an application for a search warrant, the Supreme Court adopted the procedure set out in Franks v. Del., 438 US 154, 57 L Ed 2d 667, 98 S Ct 2674 (1978). The Franks procedure requires not only that the defendant show that the application contained false statements, but also that the defendant make a substantial showing that the false statements were made knowingly, intentionally, or with a reckless disregard for the truth, in the form of an offer of proof containing affidavits, sworn statements, or other reliable witness statements tending to prove that the false statements were deliberately made. Adopting the rationale set out by Justice Trieweiler in concurring with St. v. Feland, 267 M 112, 882 P2d 500, 51 St. Rep. 994 (1994), the court modified its use of the Franks procedure, holding that a better procedure would be to require the defendant to make a substantial preliminary showing that false information was included in the application for a warrant or in the affidavit in support of the application. If that

showing is made, a hearing must be held wherein the defendant must prove by a preponderance of the evidence that the information is untrue. If proved untrue, that information must be excised from the application and a determination then made as to whether there is sufficient probable cause without the excised information. If there is not, the search warrant must be voided and the fruits of the search excluded. Thus, a defendant need not prove that the person providing false information did so knowingly, intentionally, or with a reckless disregard for the truth before the false statements may be excised from the application. If false information exists, it must be excised from the application regardless of whether the information was included mistakenly, unintentionally, or negligently because misstatements and inaccuracies, whether intentional or unintentional, might otherwise produce the same constitutionally impermissible result, of a search based on something other than probable cause. St. v. Worrall, 1999 MT 55, 293 M 439, 976 P2d 968, 56 St. Rep. 225 (1999), modifying St. v. Sykes, 194 M 14, 663 P2d 691 (1983), St. v. Mosley, 260 M 109, 860 P2d 69 (1993), and St. v. Feland, 267 M 112, 882 P2d 500, 51 St. Rep. 994 (1994), and followed in St. v. Minez, 2004 MT 115, 321 M 148, 89 P3d 966 (2004). On remand, after excising the officer's distrustful statements from the search warrant application, the District Court concluded that probable cause existed based on the facts from the application that were consistent with the boy's testimony and that the warrant to search Worrall's property was properly issued, so Worrall's motion to suppress the evidence of the search was dismissed. Worrall appealed. The Supreme Court noted that probable cause must be determined exclusively from the four corners of the application and must be based on a determination of whether, given all the circumstances set forth in the application, there is a fair probability that contraband or evidence of a crime will be found in a certain place. Worrall did not challenge the truthfulness of any of the unexcised facts, and the boy's statements were presumed reliable in light of his sincerity, the fact that he had not previously been in trouble, and the fact that he voluntarily went to the Sheriff's office to report his observations. St. v. Worrall, 2001 MT 57, 304 M 341, 22 P3d 182 (2001), followed in St. v. Clifford, 2005 MT 219, 328 M 300, 121 P3d 489 (2005).

Unproved Statements of Child Informant as Sole Basis for Issuance of Warrant: A child observed marijuana plants growing on Worrall's property and reported it to police. The child's observation was never corroborated by the police. Worrall averred that allowing a search of his property based on the uncorroborated claim of an unproved 11-year-old child, after only a 15-minute interview, was unreasonable and that the District Court erred in finding probable cause for the search warrant because unverified statements of an unproved informant, much less a child informant, could not serve as the sole basis for the issuance of the warrant. Citing St. v. Adams, 284 M 25, 943 P2d 955, 54 St. Rep. 717 (1997), the Supreme Court noted that corroboration of an informant's testimony through other sources is necessary only when the information is hearsay or the informant is anonymous. In this case, the child was not anonymous and the information was based on personal observation rather than hearsay, so corroboration was unnecessary. The court observed that information provided to police that is motivated by good citizenship is a reliable basis for determining probable cause and that nothing in the record indicated that the child's report should be viewed more critically than a similar report from an adult. Thus, the unproved statement of the child informant may serve as the sole basis for issuance of a search warrant. St. v. Worrall, 1999 MT 55, 293 M 439, 976 P2d 968, 56 St. Rep. 225 (1999). On remand, after excising the officer's distrustful statements from the search warrant application, the District Court concluded that probable cause existed based on the facts from the application that were consistent with the boy's testimony and that the warrant to search Worrall's property was properly issued, so Worrall's motion to suppress the evidence of the search was dismissed. Worrall appealed. The Supreme Court noted that probable cause must be determined exclusively from the four corners of the application and must be based on a determination of whether, given all the circumstances set forth in the application, there is a fair probability that contraband or evidence of a crime will be found in a certain place. Worrall did not challenge the truthfulness of any of the unexcised facts, and the boy's statements were presumed reliable in light of his sincerity, the fact that he had not previously been in trouble, and the fact that he voluntarily went to the Sheriff's office to report his observations. St. v. Worrall, 2001 MT 57, 304 M 341, 22 P3d 182 (2001).

Application for Search Warrant Signed by Deputy County Attorney of Another County — Search and Seizure Not Illegal if Any Irregularity Has Not Affected Substantial Rights of Accused — Exclusionary Rule Not Automatically Applied: The Deputy County Attorney of Lake County signed an application for a search warrant to be executed in Sanders County. The defendant moved to suppress all evidence seized as a result of the warrant. The District Court denied the motion. On appeal, the Supreme Court did not address the question of the authority of a

Deputy County Attorney from one county to apply for a search warrant to be executed in another county. Because the warrant was sufficient under the constitution, the fact that the application for the warrant was signed by the Deputy County Attorney of another county did not affect the defendant's substantial rights under the constitution, the search and seizure was not illegal, and the evidence should not have been suppressed. The exclusionary rule should not be automatically applied when there is a technical violation of a statutory requirement. St. v. West, 1998 MT 282, 291 M 435, 968 P2d 289, 55 St. Rep. 1155 (1998).

How Lawful Authority to Enter and Search Private Home Under Writ of Execution Obtained — Execution Warrant: When an officer has been unable to secure property that would satisfy an underlying judgment and there is reason to believe that personal property subject to execution may be located within the debtor's residence, an "execution warrant" should be obtained pursuant to the following procedures in order to avoid violation of the debtor's constitutional rights. An execution warrant should be issued only by a judge "upon reasonable cause supported by affidavit setting out that a writ of execution has been issued and returned unsatisfied in whole or in part and that the affiant has reason to believe that there is property subject to execution in the possession of the debtor kept and maintained within the debtor's residence, not otherwise available for execution, describing the property sought and the place and purpose of the execution". If the judge is satisfied that there is a reasonable cause to believe the statements set out in the affidavit, the judge may then issue an execution warrant authorizing the officer to enter the premises and levy upon property subject to execution. An execution warrant obtained under these procedures will protect the judgment debtor's right to be free from unreasonable search and seizure under both the U.S. and Montana Constitutions. Dorwart v. Caraway, 1998 MT 191, 290 M 196, 966 P2d 1121, 55 St. Rep. 777 (1998), following Nebr. v. Hinchey, 374 NW 2d 14 (Nebr. 1985).

Facts Provided by Nonconfidential Informant Self-Authenticating — Omissions and Misstatements Raised by Defendant Held Immaterial for Purposes of Determining Necessity for Franks Hearing — Issues Not Raised on Appeal Held Nonreviewable: Dotts was arrested for assault and disorderly conduct and, in the course of an interview with a detective, offered information on a marijuana-growing operation that was being run by Adams, in exchange for leniency on the charges. Dotts subsequently disclosed, without any commitments from the police, that Adams ran the marijuana-growing operation at a certain location, which Dotts himself helped establish, and that Adams and his son drove certain vehicles described by Dotts. The house and the vehicles were subsequently confirmed by detectives, a search warrant was obtained, a marijuana-growing operation was discovered, and Adams was arrested. Adams sought to suppress the evidence, arguing that a detective's statement in the warrant application that "Mr. Dotts asked for nothing ... and I have offered him nothing ..." in the way of leniency was untrue and that certain facts contained statements that were made by Dotts and that turned out to be incorrect. The Supreme Court distinguished St. v. Valley, 252 M 489, 830 P2d 1255 (1992), and St. v. Kaluza, 272 M 404, 901 P2d 107 (1995), explaining that, unlike those cases, the case before it involved a nonconfidential informant whose identification was known to the police. Declining to follow a procedure urged by defendant Adams that would establish a policy of "zero tolerance" for intentional misstatements or omissions in applications for search warrants because the argument was raised for the first time on appeal, the Supreme Court followed the procedure outlined in Franks v. Del., 438 US 154 (1978), and applied in Montana in St. v. Sykes, 194 M 14, 663 P2d 691 (1983), which requires a defendant to make a substantial showing that false statements were knowingly or intentionally made, requires the reviewing court to disregard any such statements, and then requires the court to determine if the remaining facts demonstrate probable cause. Following St. v. Garberding, 245 M 356, 801 P2d 583 (1990), and other cases, the Supreme Court found that the misstatements and omissions in the warrant application raised by Adams did not, in light of Dotts' admission against interest that he helped set up the marijuana-growing operation, cast doubt on the credibility of the other information given by Dotts. For these reasons, the Supreme Court held that the misstatements and omissions were immaterial in determining Dotts' credibility and that, even if Dotts had been a confidential informant, the information that he gave was sufficiently corroborated to establish probable cause. Adams also raised the issue that the search warrant was overbroad, but relying upon St. v. Henderson, 265 M 454, 877 P2d 1013 (1994), the Supreme Court held that because the issue had been raised by Adams for the first time on appeal, the Supreme Court would not consider the issue. St. v. Adams, 284 M 25, 943 P2d 955, 54 St. Rep. 717 (1997), followed in St. v. Olmsted, 1998 MT 301, 292 M 66, 968 P2d 1154, 55 St. Rep. 1235 (1998), and St. v. Worrall, 1999 MT 55, 293 M 439, 976 P2d 968, 56 St. Rep. 225 (1999).

Warrant Issued for DNA Material Despite Fact Assailant Masked: Pearson was sexually assaulted by a masked man wielding a knife. When asked if there were any acquaintances that might have committed the crime, she indicated that it might have been Johnston, who fit the physical description and had tried to date her several times. In checking his background, law enforcement officials found that he had been charged with several burglaries in which nearly identical methods were used and, as part of one plea bargain, had pleaded guilty to eight rapes or attempted rapes. On that basis, the court issued a search warrant to obtain samples of Johnston's blood, saliva, hair, and urine. The Supreme Court held that past criminal conduct was one of many factors to be considered under the "totality of the circumstances" test and that probable cause existed to issue the warrant. St. v. Johnston, 271 M 385, 897 P2d 1073, 52 St. Rep. 490 (1995), distinguishing St. v. Isom, 196 M 330, 641 P2d 417 (1982).

Insufficient Preliminary Showing of False Statements in Warrant: The defendant, Feland, argued that the affiant's statements in a search warrant contained deliberately or recklessly false statements. The Supreme Court held that Feland had not met the initial burden of a substantial preliminary showing of false statements in the warrant because she relied only on general unsupported denials of statements in the warrant. The Supreme Court also held that Feland's general denial did not address the requirement that she show that the statements in the warrant were made with a deliberate or reckless disregard for the truth. St. v. Feland, 267 M 112, 882 P2d 500, 51 St. Rep. 994 (1994), following St. v. Sykes, 194 M 14, 663 P2d 691 (1983), and St. v. Mosley, 260 M 109, 860 P2d 69 (1993). Feland, Sykes, and Mosley were modified in St. v. Worrall, 1999 MT 55, 293 M 439, 976 P2d 968, 56 St. Rep. 225 (1999), inasmuch as a defendant need no longer prove that the person providing false information did so knowingly, intentionally, or with a reckless disregard for the truth before the false statements may be excised from the application or affidavit.

Legal Qualifications of Justice of the Peace: According to applicable statutes and the rules of the Commission on Courts of Limited Jurisdiction, before a person is legally qualified to serve as a substitute Justice of the Peace, the following requirements must be met: (1) within 30 days of taking office, the elected or appointed Justice of the Peace must create a list of persons who are qualified to act in the sitting judge's absence when no other Justice or City Court Judge is available; (2) the sitting Justice of the Peace must request and obtain from the Commission a waiver of training for the substitute judge and show that the substitute judge is of good moral character and has good community support, a sense of community standards, and a basic knowledge of court procedure; and (3) the substitute judge must be sworn in by the County Commissioners. A search warrant issued by a substitute judge in a case in which these qualifications were not met was held to be void ab initio because the statutory procedures to make him a judge and to vest him with the power to perform judicial functions had not been followed. Evidence seized pursuant to the warrant was suppressed. Potter v. District Court, 266 M 384, 880 P2d 1319, 51 St. Rep. 853 (1994).

Sitting Judge to Be Called Prior to Calling of Substitute Judge: In addition to the legal qualifications of a substitute judge, a sitting Justice of the Peace must first attempt to call in another Justice of the Peace, if there is one readily available, or a City Court Judge before resorting to calling in a qualified substitute judge from the list of substitute judges. A search warrant issued by a substitute judge in a case in which this procedure was not followed was held to be void ab initio because the statutory procedures to make him a judge and to vest him with the power to perform judicial functions had not been followed. Evidence seized pursuant to the warrant was suppressed. Potter v. District Court, 266 M 384, 880 P2d 1319, 51 St. Rep. 853 (1994).

Issuing Magistrate Involved in Police Investigation — Subsequent Search Warrant Improper: Following a burglary and upon receiving a report of an empty safe being found in the water, the Sheriff, a deputy, and the Justice of the Peace traveled to the site, discussing the evidence and the investigation. Two days later, after additional evidence was gathered, the Justice of the Peace issued a search warrant to search Wilson's truck. Upon conviction, Wilson challenged the impartiality of the Justice of the Peace to issue a warrant. Once the magistrate became an active participant in the police investigation, his impartiality ceased and he could no longer make a neutral and detached evaluation of the evidence to determine whether probable cause existed and thus could no longer protect Wilson's right to be free from a search not based on probable cause. Because the warrant was invalid, the subsequent search was illegal and evidence from the search was suppressed. St. v. Wilson, 266 M 146, 879 P2d 683, 51 St. Rep. 697 (1994).

Hearsay to Be Considered in Establishing Probable Cause: Hulbert argued that the search warrant affidavit contained hearsay statements and was therefore inadequate to establish probable

cause. The Supreme Court held that reliable hearsay may be considered in establishing probable cause when the reliability is demonstrated through corroborative evidence or surrounding facts. St. v. Hulbert, 265 M 317, 877 P2d 25, 51 St. Rep. 526 (1994).

Officer's Sworn Statement Sufficient to Establish Informant's Reliability: Hulbert argued that the officer's statement in the search warrant affidavit was inadequate with respect to the reliability of the informant. The Supreme Court held that it has never required an affidavit to particularly describe each incident in which an informant proved reliable and that a statement that the informant had been reliable in the past was sufficient to establish reliability. St. v. Hulbert, 265 M 317, 877 P2d 25, 51 St. Rep. 526 (1994).

Search Warrant Executed Within Ten Days of Issuance Not Stale: Neely argued that the warrant authorizing the search of her home was stale because it described a party at which drugs were present and the warrant was executed 2 days after the party. The Supreme Court held that the warrant described the premises at which drugs were present not the event where they were used and that a search warrant executed within 10 days of issuance as required by statute could not be stale. St. v. Neely, 261 M 369, 862 P2d 1109, 50 St. Rep. 1363 (1993).

Lack of Officer's Expertise Analyzing Power Usage Records — Procedure to Challenge Statements in Warrant Application: Mosley argued that a search warrant to search his property had been improperly issued because the officer applying for the warrant had not included any information concerning his expertise in analyzing power usage records. The Supreme Court held that the warrant did not meet the test requiring the application to contain power usage expertise information as required by St. v. Wilson, 254 M 317, 837 P2d 1346, 49 St. Rep. 844 (1992). However, the warrant was not improperly issued because the defendant had failed to show that the omission was knowingly or intentionally made. The court adopted the procedure set forth in Franks v. Del., 438 US 154, 57 L Ed 2d 667, 98 S Ct 2674 (1978), for challenging the truthfulness of statements made in an application for a search warrant. St. v. Mosley, 260 M 109, 860 P2d 69, 50 St. Rep. 675 (1993). The Franks procedure was modified, inasmuch as a defendant need no longer prove that the person providing false information did so knowingly, intentionally, or with a reckless disregard for the truth before the false statements may be excised from the application or affidavit, in St. v. Worrall, 1999 MT 55, 293 M 439, 976 P2d 968, 56 St. Rep. 225 (1999).

Nude Photographs Within Scope of Tax Evasion Search Warrant: Agents of the Department of Revenue obtained a search warrant for the search of the home of John and Jane Doe for the purpose of obtaining evidence of failure to report income derived from insurance and firearms sales. In executing the warrant, agents found an envelope that they opened. They discovered nude photos of John and Jane Doe, some of which led to an investigation for child abuse of the parties' children. The Does brought an action for invasion of privacy, claiming that the search of the envelope was outside the scope of the search warrant. The Supreme Court held that under the rationale of U.S. v. Ross, 456 US 798 (1982), and Stanley v. Ga., 394 US 557 (1969), the state's motion to dismiss the complaint was properly granted. The envelope could have contained photographic evidence of illegal dealing in firearms, of which the Does were suspected. The search of the envelope was therefore within the scope of the warrant. Doe v. St., 256 M 348, 846 P2d 1018, 50 St. Rep. 105 (1993).

Franks Hearing Not Warranted Absent Showing of Misstatements or Omissions in Search Warrant: Defendant moved to suppress all items seized under an allegedly insufficient search warrant or alternatively for an evidentiary hearing pursuant to Franks v. Del., 438 US 154, 57 L Ed 2d 667, 98 S Ct 2674 (1978), to establish claims of omission and misstatements of material fact contained in the search warrant application. The motion to suppress was denied. In a supplemental order, the District Court found that the application contained no deliberate falsehoods or material omissions that would require excising that information from the application for determination of probable cause pursuant to Franks. Upon review, the Supreme Court affirmed, holding that defendant's arguments of alleged omissions and misstatements, including the fact that the primary informant was a convicted felon and was paid for his tip, did not justify a Franks hearing. St. v. Garberding, 245 M 356, 801 P2d 583, 47 St. Rep. 2157 (1990), followed in St. v. Adams, 284 M 25, 943 P2d 955, 54 St. Rep. 717 (1997).

Anonymous Telephone Calls Sufficient to Issue Search Warrant: The authorities had received a series of anonymous calls and one anonymous Crimestoppers tip indicating that the defendant was involved in drug dealing. The warrant, without identifying the source, also stated that two individuals seen in the defendant's company had been charged with drug-related crimes, resulting in the arrest of one and a dismissal with respect to the other. The Supreme Court stated that in examining the "totality of circumstances", the facts were sufficient for the warrant's issuance. St. v. Rydberg, 239 M 70, 778 P2d 902, 46 St. Rep. 1519 (1989). See also St. v. Rinehart, 262 M 204,

864 P2d 1219, 50 St. Rep. 1517 (1993), and St. v. Oleson, 1998 MT 130, 289 M 139, 959 P2d 503, 55 St. Rep. 517 (1998).

Information Provided by Investigating Officer as Reliable Basis for Warrant: Observations of fellow officers engaged in a common investigation are plainly a reliable basis for a warrant applied for by one of their number. It is sufficient if the affidavit recites at the outset, or if it is clear from reading the affidavit as a whole, that it is based in part upon information obtained from other law enforcement officers. Therefore, the hearsay nature of the link between information provided by an undersheriff to a detective did not invalidate the finding of probable cause. St. v. Seaman, 236 M 466, 771 P2d 950, 46 St. Rep. 512 (1989), following U.S. v. Ventresca, 380 US 102, 13 L Ed 2d 684, 85 S Ct 741 (1965), and U.S. v. Kirk, 781 F2d 1498 (11th Cir. 1986), and followed in St. v. Rinehart, 262 M 204, 864 P2d 1219, 50 St. Rep. 1517 (1993).

Reliability of Informants in Probable Cause Determination: An application for a warrant: (1) recounted informants' past production of reliable information; (2) stated that one informant had extensive knowledge of local drug trade; (3) contained explicit descriptions of defendant's drug dealings with informants; and (4) indicated one informant's knowledge of defendant's address. These facts demonstrated the veracity, reliability, and basis of knowledge of informants sufficient to show probable cause for the warrant. St. v. Seaman, 236 M 466, 771 P2d 950, 46 St. Rep. 512 (1989). See also Muir v. Bilderback, 2015 MT 180, 379 Mont. 459, 353 P.3d 473.

Same Officer Applying for and Serving Warrant — "Sanford" Inapplicable: Defendant claimed the undersheriff rather than a detective should have sworn to the information in a warrant application, and therefore evidence should be suppressed under State ex rel. Sanford v. District Court, 170 M 196, 551 P2d 1005 (1976). However, Sanford did not apply when the same officer applied for, was named in, and served the warrant. The mandate that a warrant be directed to a particular officer accords with the requirement that the warrant be served by one of the officers mentioned in its direction. St. v. Seaman, 236 M 466, 771 P2d 950, 46 St. Rep. 512 (1989).

Inaccuracies in Application Not to Defeat Warrant When Probable Cause Established: Defendant contended that inaccuracies in an affidavit filed in support of a request for a search warrant rendered reliance on it void as a matter of law. Although the Supreme Court does not condone the presence of inaccuracies in search warrant applications, in this case, after excising the inaccurate portions of the statements, the affidavit still established sufficient probable cause to issue the warrant. St. v. Hembd, 235 M 361, 767 P2d 864, 46 St. Rep. 55 (1989). See also Franks v. Del., 438 US 154, 57 L Ed 2d 667, 98 S Ct 2674 (1977).

Warrant Proper for Seizure of Beer and Wine Served Without Valid License: Investigators complied with constitutional and statutory requirements for search and seizure when they: (1) knew a crime was being committed and were able to state of their own knowledge that defendant was serving beer without a valid license; (2) established reasonable cause; (3) were able to describe the place to be searched and articles to be seized; (4) showed the warrant to defendant while executing the search; and (5) provided defendant with a copy of the warrant and supporting paperwork. St. v. Barnes, 232 M 405, 758 P2d 264, 45 St. Rep. 1150 (1988).

Application and Search Warrant in Combination Describing Thing to Be Seized — Same Officer Applying for and Serving Warrant: A search warrant, standing alone, would be invalid for its failure to particularly describe the thing to be seized, which thing was described only in the application for the search warrant. The application and the warrant when read in combination adequately described the thing to be seized. If the warrant had been directed to an officer other than the officer who made and signed the application, it would have been invalid; however, in this case the same officer signed the application, served the warrant, and seized the contraband. The District Court properly denied defendant's motion to suppress even though the warrant was constitutionally defective. St. v. Peterson, 227 M 503, 741 P2d 392, 44 St. Rep. 1268 (1987).

Informant's Tip — Gates Test Replaces Aguilar-Spinelli Test: Crain was convicted of a drug offense after issuance of a search warrant to search his motel room led to the discovery and seizure of drugs, paraphernalia, and drug records. Crain appealed, contending that the application of the Gates "totality of the circumstances" test should not be applied to determine the sufficiency of the evidence to issue a warrant and that neither the Gates nor Aguilar-Spinelli test was met. The Supreme Court held that there was sufficient information in the application for a magistrate to determine that there was a probability that drugs and records would be found in Crain's room. Additionally, the Gates "totality of the circumstances" test for determining the sufficiency of the evidence to issue a search warrant completely replaces the more stringent two-pronged Aguilar-Spinelli test. St. v. Crain, 223 M 167, 725 P2d 209, 43 St. Rep. 1628 (1986), followed in St. v. Walston, 236 M 218, 768 P2d 1387, 46 St. Rep. 309 (1989). See also St. v. Deskins, 245 M 158,

799 P2d 1070, 47 St. Rep. 1951 (1990), St. v. Rinehart, 262 M 204, 864 P2d 1219, 50 St. Rep. 1517 (1993), and St. v. Oleson, 1998 MT 130, 289 M 139, 959 P2d 503, 55 St. Rep. 517 (1998).

Substantial Preliminary Showing: The defendant satisfied the test adopted by the Supreme Court in St. v. Sykes, 194 M 14, 663 P2d 691, 40 St. Rep. 690 (1983), for challenging the validity of an affidavit used by law enforcement officers to obtain a search warrant. The defendant made a substantial preliminary showing that the state's affidavit was based on deliberate falsehood or reckless disregard for the truth. Thus, the trial judge did not err in considering evidence on this issue at the probable cause hearing. St. v. Wilson, 218 M 359, 708 P2d 270, 42 St. Rep. 1647 (1985).

Totality of Circumstances: There was probable cause to issue a search warrant when the police officer's affidavit in support of the warrant indicated the following: (1) a citizen-informant reported that after some property had been stolen from her, she was approached by an individual who told her he had been involved in the theft and that he had traded some of her property for drugs at a trailer (the location for which the search warrant was later issued); (2) the citizen-informant told police that she had retrieved some of her stolen property at the trailer; (3) the police officer had known the citizen-informant for a number of years and believed her to be reliable; (4) the citizen-informant had been told by another person that he had traded a rifle for drugs at the trailer; (5) a neighbor of the trailer's residents reported to police that he believed that drugs were being sold from the trailer; and (6) another neighbor had made similar complaints to the police, including a complaint of a high rate of traffic in the area of the trailer. St. v. Jensen, 217 M 272, 704 P2d 45, 42 St. Rep. 1191 (1985).

Staleness — Hare and Tortoise — Disappearance at Different Rates of Speed: Thirty-seven days elapsed between the date on which the offense could have occurred and the time of the search. The defendant argued that the search warrant was stale. The issue of staleness cannot be resolved by a mechanical reference to the number of days between the facts relied upon in the affidavit and the time the warrant is issued. The observation of a half-smoked marijuana cigarette in an ashtray at a cocktail party may well be stale the day after the cleaning lady has been in; the observation of the burial of a corpse in a cellar may well not be stale three decades later. The hare and the tortoise do not disappear at the same rate of speed. St. v. Pierre, 208 M 430, 678 P2d 650, 41 St. Rep. 445 (1984).

Plain View Doctrine — Seizure of "Suspicious Objects": In executing a search warrant for drugs and a fugitive, law officers seized drug records. Defendant's motion to suppress the drug records was based in part on the claim that the records did not fall within the plain view doctrine because the law officers read the records. A law officer testified at the suppression hearing that the papers were strewn about the room and thus were inadvertently observed and were determined to be related to the items specified in the warrant and to have obvious evidentiary value without being touched, picked up, or rifled through in any way. He further testified that drug records are frequently found during searches for narcotics. In view of these circumstances and because a suspicion that the objects viewed are evidence or instrumentalities of a crime is sufficient to satisfy the requirement that the incriminating nature of the articles be apparent, the Supreme Court ruled that it was proper to admit the records. St. v. O'Neill, 208 M 386, 679 P2d 760, 41 St. Rep. 420 (1984), followed in St. v. Hembd, 235 M 361, 767 P2d 864, 46 St. Rep. 55 (1989). St. v. Hembd was overruled in part in St. v. Loh, 275 M 460, 913 P2d 592, 53 St. Rep. 226 (1996).

Disclosure of Informant's Identity — Validity of Affidavit in Support of Search Warrant: A defendant in a drug offense case moved to quash a search warrant and to produce the name of the informant whose statements were used in the affidavit in support of the search warrant. Defendant alleged that either the informant had made false statements or the informant had made an illegal entry into defendant's home. In a proceeding for a Writ of Supervisory Control, the Supreme Court set forth the procedure to be used to challenge the validity of an affidavit on the basis of deliberate falsehood or of reckless disregard for the truth. First, the defendant must make a substantial preliminary showing that his rights have been violated. Second, if defendant makes the requisite preliminary showing, then the affidavit must be examined to determine if sufficient information remains after excising the challenged material to support a finding of probable cause. Only if the remaining content is insufficient is defendant entitled to an evidentiary hearing. Finally, at the hearing defendant must establish by a preponderance of the evidence that the affidavit was based on an illegal entry, false information, or insufficient probable cause. If defendant is successful, that evidence will be suppressed. Defendant is not entitled to disclosure of the informant's identity until he has made a substantial preliminary showing that the entry was illegal or the information was false. St. v. Sykes, 194 M 14, 663 P2d 691, 40 St. Rep. 690 (1983).

Tribal Courts Not to Issue "Federal" Search Warrant: Because of involvement of federal agents in a search on an Indian reservation, the search was a federal search governed by Rule 41(a), Federal Rules of Criminal Procedure, and hence a search warrant must be issued by a federal court or state court of record. A tribal court is neither a federal court nor a state court as enumerated in 3-1-102; thus the warrants were invalid and subsequent evidence seized pursuant to the warrants is inadmissible. U.S. v. Messerly, 530 F. Supp. 751, 39 St. Rep. 183 (D.C. Mont. 1982).

Electronic Surveillance Based on Illegal Police Activity as Grounds for Appeal — Insufficient Evidence: Where the defendant was arrested as the result of an electronically recorded conversation with another offender who had previously consented to carrying a transmitting device for police officers, the allegations of the defendant that the recruitment of the other offender by police officers and the subsequent taping of the defendant's conversation were the result of previous illegal wiretaps placed on the telephone of the other offender could not serve as grounds for reversal of the defendant's conviction since there was no direct evidence in the record to support the defendant's conjecture. Any issue built upon conjecture is weightless for purposes of appeal. St. v. Coleman, 189 M 492, 616 P2d 1090, 37 St. Rep. 1661 (1980). Coleman and cases following Coleman are overruled, to the extent that those cases are inconsistent with the conclusion that society is willing to recognize as reasonable the expectation that private cell phone conversations are not being surreptitiously monitored and recorded by government agents, in St. v. Allen, 2010 MT 214, 357 Mont. 495, 241 P.3d 1045.

Electronic Surveillance of Suspect — Application of Exclusionary Rule When Evidence Not Offered: Where police officers obtained an order for the electronic surveillance of the defendant by the placement of a transmitter on an informant, there is no necessity for the court to review the legal sufficiency of the application for the order or the order itself if the tape recording obtained under the order was not used in evidence. In this case, the District Court found that the direct testimony of the informant was sufficient direct evidence upon which to convict the defendant. St. v. Coleman, 189 M 492, 616 P2d 1090, 37 St. Rep. 1661 (1980). Coleman and cases following Coleman are overruled, to the extent that those cases are inconsistent with the conclusion that society is willing to recognize as reasonable the expectation that private cell phone conversations are not being surreptitiously monitored and recorded by government agents, in St. v. Allen, 2010 MT 214, 357 Mont. 495, 241 P.3d 1045.

Electronic Surveillance of a Suspect — Place to Be Searched: An informant was fitted with an electronic device authorized by court order to monitor the conversations in a drug buy from a named individual, but the order did not contain a specific location to be searched under the provisions of 46-5-201 (now repealed). The Supreme Court held that the geographic location of an electronic surveillance of a particular person is tied to the whereabouts of the suspect. The phrase in 45-5-201 (now repealed) describing what may be searched ("the thing, place, or person") is disjunctive, thus the person whose conversation is to be overheard when named in the surveillance order is sufficiently precise to meet constitutional requirements. St. v. Coleman, 189 M 492, 616 P2d 1090, 37 St. Rep. 1661 (1980). Coleman and cases following Coleman are overruled, to the extent that those cases are inconsistent with the conclusion that society is willing to recognize as reasonable the expectation that private cell phone conversations are not being surreptitiously monitored and recorded by government agents, in St. v. Allen, 2010 MT 214, 357 Mont. 495, 241 P.3d 1045.

Equity of Retroactive Application — Hurdle Not Made: Armstrong sought to suppress evidence obtained in two searches. To suppress the evidence, the court would have to retroactively apply State ex rel. Sanford v. District Court, 170 M 196, 551 P2d 1005 (1976), which invalidated search warrants directed "to any Peace Officer of this State". There is a three-part test to determine whether a decision should be applied retroactively. The third part of the three-part test to determine whether to apply a rule retroactively requires the court to consider the equity of retroactive application. Armstrong fails to make the third hurdle. The Sanford rule is intended to support and improve the integrity of the factfinding process. Retroactive application in this case would exclude relevant and reliable evidence. In addition, both the court issuing the search warrants and the police are entitled to rely on the rule in effect at the time the warrants were issued. The court declined to apply the Sanford rule retroactively. St. v. Armstrong, 189 M 407, 616 P2d 341, 37 St. Rep. 1563 (1980).

Specificity of Search Warrant — Required Information — Limits of Coverage: For the search of a vehicle, all that is needed to meet the requirements of specificity is that the officer with reasonable effort can ascertain the automobile intended to be searched and its owner, if possible. The affidavit for the search warrant here listed five of seven criteria needed for identification of

a motor vehicle (i.e., owner, make, model, year, color, motor number, and license number), and that was sufficiently specific. Under the search warrant "any other contraband" not specifically described could be seized as long as a reasonable relationship was demonstrated between the authorized search and seizure of the items not specifically described therein. St. v. McKenzie, 186 M 481, 608 P2d 428 (1980).

Seizure of "Mere Evidence" Not Described in Warrant: Given a lawful search, some items may be seized in connection with the search that are not described in the warrant. The seizure of two license plates bearing the defendant's nickname and a letter addressed to the defendant at the place illegal drugs were found was permissible because the items tended to show the defendant's dominion and control over the premises and were therefore reasonably related to the search authorized by the warrant. St. v. Meader, 184 M 32, 601 P2d 386 (1979).

Search Warrant Issued on Basis of Inconclusive Photographs and Illegally Obtained Sample of Marijuana — Not Based on Sufficient Competent Facts: A search warrant premised on two factors, photographs taken of defendant's yard by a Sheriff's detective and a sample of marijuana illegally obtained by an inquisitive neighbor, was not based on sufficient competent facts. Since it was virtually impossible by careful scrutiny of the photographs alone to either locate or identify any substance which would give credibility to the existence of marijuana, the search warrant was, in fact, based solely on an illegally obtained sample. St. v. Helfrich, 183 M 484, 600 P2d 816 (1979), overruled in St. v. Long, 216 M 65, 700 P2d 153, 42 St. Rep. 643 (1985).

Specificity of Warrant: All that was needed to meet the requirements of specificity was that an officer with a reasonable effort could ascertain the auto intended to be searched and its owner, if possible. St. v. McKenzie, 171 M 278, 557 P2d 1023 (1976).

Invalid Search Warrant — False Arrest: The action of a police officer proceeding on the basis of his reasonable, good faith understanding of the law cannot be tortious, and when the Sheriff has made an arrest pursuant to evidence discovered under authority of a search warrant that was valid on its face, the arrested person cannot recover for false arrest or imprisonment, even though the search warrant is later declared to be invalid by the court. Strung v. Anderson, 529 P2d 1380, 32 St. Rep. 144 (1975) (not reported in Montana Reports).

WARRANTLESS SEARCHES

No Reasonable Expectation of Privacy in Drugs Disclaimed by Defendant — Evidence Properly Allowed — Inevitable Discovery Exception Not Applied: A police officer stopped the defendant's car after recognizing him as a person who had a suspended driver's license. After confirming the license was suspended, the police arrested the defendant and during a pat down discovered a prescription bottle of a controlled substance that was issued to another person. The defendant subsequently informed the police officer that he did not know where the bottle came from or why it was in his pants cuff. The defendant was then cited for driving with a suspended license and for criminal possession of dangerous drugs. At trial, the District Court denied the defendant's motion to suppress the drugs seized at the time of the arrest on the grounds that the search was incident to the arrest pursuant to 46-5-102 and, alternatively, the drugs would have inevitably been discovered during a standard inventory search at the detention center. On appeal, the Supreme Court affirmed the District Court's ruling, reasoning that the defendant disclaimed knowledge of the drugs and therefore he did not have a reasonable expectation of personal privacy in the prescription bottle. However, the Supreme Court declined to decide the case under the inevitable discovery rule. St. v. McKeever, 2015 MT 177, 379 Mont. 444, 351 P.3d 676.

Warrantless Search for Drugs Upheld — Defendant Freely Consented: The police received a tip that the defendant had drugs in her possession. Officers approached the defendant at a train station and asked if they could search her luggage. The defendant allowed the search and officers found prescription pills in unmarked containers. The interaction lasted approximately 10 to 15 minutes and the defendant was allowed to leave. The defendant was eventually charged with criminal possession of dangerous drugs. On appeal, the defendant argued that the tip failed to establish particularized suspicion and the consent to search was involuntary. Distinguishing St. v. Pratt, 286 Mont. 156, 951 P.2d 37 (1997), as applicable to DUI-type offenses, the Supreme Court held that the officers had particularized suspicion and that the defendant freely consented to the search. St. v. Dupree, 2015 MT 103, 378 Mont. 499, 346 P.3d 1114.

Authority to Consent to Search Implied From Circumstances — Motion to Suppress Properly Denied: A woman who shared a residence with two men in a rural area requested a civil standby from the Missoula County Sheriff's Department while she removed certain belongings from the property. From halfway up the driveway to the property, which was marked with "no trespassing" signs, officers saw marijuana plants through the open door as the woman entered the residence.

Officers obtained a search warrant for the property, and the defendant was charged with cultivation of marijuana in violation of 45-9-110. The defendant moved to suppress the evidence obtained from the civil standby and the search warrant, which the District Court denied. On appeal, the Supreme Court affirmed, holding that although the District Court did not issue a specific finding that the woman had access or control over the property for the limited purpose of retrieving her belongings, such a finding was implicit in the District Court's conclusion that the deputies lawfully saw the marijuana plants in plain view. St. v. Urziceanu, 2015 MT 58, 378 Mont. 313, 344 P.3d 399, following St. v. Gilmore, 2004 MT 363, 324 Mont. 488, 104 P.3d 1051 (2004).

Insufficient Particularized Suspicion for Investigative Stop of Parked Car — Motion to Suppress Improperly Denied: An officer noticed and approached a parked van that was not running and had two occupants. Although the officer did not activate his emergency lights, he approached the vehicle and, after seeing the youthfulness of the individual in the driver's seat, demanded identification from the two individuals and instructed the individuals to wait in the vehicle while he checked on the status of licenses and warrants. The defendant, who was the passenger, was arrested based on an outstanding warrant and ultimately charged with criminal drug possession. Because there was no particularized suspicion to stop or seize either individual, the District Court erred in denying the defendant's motion to suppress evidence. St. v. Strom, 2014 MT 234, 376 Mont. 277, 333 P.3d 218.

Probation Search of Purse Based on Reasonable Suspicion — Motion to Suppress Correctly Denied: As a condition of her probation, the defendant was required to inform her probation officer of her prescriptions. During a home visit, the officer searched her purse because of her suspicious behavior. Her purse contained illegal pills, and the state filed a petition to revoke her probation. The defendant filed a motion to suppress the evidence from the purse search, contending that the officer lacked reasonable grounds to search it. The District Court denied the motion to suppress and on appeal, the Supreme Court affirmed the denial. While a probation officer may not go through a probationer's belongings unless there is reasonable suspicion of a violation, in this case, the defendant's nervous behavior and excuses about her pills constituted reasonable grounds. St. v. Fischer, 2014 MT 112, 374 Mont. 533, 323 P.3d 891.

Lost Officers Lawfully Present — Motion to Suppress Properly Denied: After two law enforcement officers who were attempting to serve an arrest warrant became lost, they stopped at the defendant's residence in an attempt to determine the home's location and observed marijuana through the defendant's open front door. The defendant was charged with criminal production or manufacture of dangerous drugs and moved to suppress, arguing that because the officers had no reason to enter his property, they were not lawfully in a place where they could see the marijuana in plain view. The District Court denied the motion. On appeal, the Supreme Court affirmed, concluding that the District Court acted within its factfinding province to believe the officers' story about being lost and properly denied the motion to suppress. St. v. Phillips, 2013 MT 317, 372 Mont. 317, 312 P.3d 445.

Community Caretaker Doctrine Inapplicable — Denial of Motion to Suppress Affirmed Based On Particularized Suspicion: An officer saw the defendant execute a hard left turn in an area where the officer knew there were no cross streets and then drive on the sidewalk and onto the grass before coming to an abrupt stop and possibly hitting a fire hydrant. While speaking to the defendant, the officer noticed the smell of alcohol and other indicators of intoxication. The defendant failed a field sobriety test and subsequently pleaded guilty to driving under the influence after the Municipal Court denied his motion to suppress. The District Court affirmed on the basis of the community caretaker doctrine. The Supreme Court upheld the denial of the motion to suppress because the officer had particularized suspicion that the defendant had been involved in a property damage accident, but it clarified that the community caretaker doctrine applies to situations in which a citizen is in need of help or is in peril. St. v. Marcial, 2013 MT 242, 371 Mont. 348, 308 P.3d 69, distinguishing St. v. Lovegren, 2002 MT 153, 310 Mont. 358, 51 P.3d 471.

Defendant Entitled to Benefit of Change in Law Applied Retroactively: When a defendant's case is pending on direct review or otherwise not final, the defendant is entitled to the benefit of a new rule for the conduct of criminal prosecutions. In this case, the defendant was entitled to argue that his rights under Art. II, secs. 10 and 11, Mont. Const., were violated by warrantless electronic recording of telephone conversations without his consent. St. v. Stewart, 2012 MT 317, 367 Mont. 503, 291 P.3d 1187.

Defendant's Rights Violated by Warrantless Pretext Recordings of Defendant's Cell Phone Conversations: When the defendant was in his own vehicle when phone conversations were

recorded, he hung up when he stopped at a gas station where privacy would be more precarious, the only other person in the vehicle was his wife whom he trusted, and the calls originated from his home landline with no indication that anyone else was present, defendant had a subjective expectation of privacy. Because the state failed to address whether society was willing to accept an expectation of privacy in this situation as reasonable or whether the recording of the conversations was justified by a compelling state interest, the recordings constituted searches. Further, because the state failed to provide a recognized exception to the warrant requirement, the searches were unreasonable under Art. II, secs. 10 and 11, Mont. Const. St. v. Stewart, 2012 MT 317, 367 Mont. 503, 291 P.3d 1187.

Sufficient Particularized Suspicion for Investigative Stop — Improper Expansion of Investigative Stop: Law enforcement officers noticed the defendant inside a bar holding a beer. He appeared to be younger than 21 years old. The Supreme Court found that these facts established sufficient particularized suspicion for the officers to approach the defendant for an investigative stop. Under 46-5-401, the officers were authorized to request the defendant's name, his present address, and an explanation of his actions. However, the officers instead requested the defendant's age and identification. The defendant indicated he was 22 and declined to provide identification. Because officers failed to articulate any reason for continuing the defendant's questioning, the Supreme Court found that when the officers subsequently took the defendant outside, they exceeded the scope of the investigation. St. v. Driscoll, 2013 MT 63, 369 Mont. 270, 303 P.3d 788.

Requirement to Exit Vehicle Justified Based on Traffic Stop and Informant Information: An informant gave a tip to law enforcement concerning the transportation and sale of marijuana, including a description of the vehicle transporting it. Law enforcement put the vehicle under surveillance. After stopping it for speeding, a law enforcement officer detected a heavy scent of air freshener, coming from the vehicle. When the officer asked the driver to exit the vehicle and accompany him to the rear of the vehicle, the officer smelled marijuana on the driver and a subsequent search revealed marijuana in the vehicle. At trial, the driver contended that the car was stopped for speeding and that the officer's requirement that he exit the vehicle based solely on the smell of air freshener was an unlawful expansion of the traffic stop. The Supreme Court affirmed the District Court's denial of the driver's motion to suppress evidence because the stop was based not only on the vehicle's excessive speed but also on the informant's corroborated information that the vehicle was involved in drug trafficking. Hence, the requirement that the driver exit the vehicle fell within the scope of the stop. St. v. Roy, 2013 MT 51, 369 Mont. 173, 296 P.3d 1169.

License Plate Obscured by Snow and Trailer Hitch Sufficient Cause for Investigatory Stop: The defendant's temporary vehicle license plate was partially obscured by snow and a trailer hitch. Upon approaching the vehicle, officers noticed that the defendant had red, bloodshot eyes, was excitedly smoking, and upon questioning, admitted to drinking. The defendant was later convicted of DUI. On appeal, the Supreme Court held that an obstruction of a license plate in violation of 61-3-301 was enough to give rise to particularized suspicion for an investigatory stop. Furthermore, although the officers could see the full license plate upon approaching the vehicle, they were authorized to speak to the driver and request documentation such as a driver's license and registration. St. v. Haldane, 2013 MT 32, 368 Mont. 396, 300 P.3d 657.

Abrupt Stop on Desolate Back Road on Cold Winter's Night — Adequate Basis for Initial Welfare Check — Stop Valid Under Community Caretaker Doctrine: A police officer was driving down a desolate back road in the middle of a cold January night when a vehicle ahead of him abruptly pulled over. The officer pulled up behind it to see if the occupants were lost or needed assistance. The police officer testified at trial that as he approached the vehicle, he considered prior burglaries that had occurred in the area. Upon contact with the driver, the officer smelled alcohol, and he cited the driver for a misdemeanor DUI. The defendant moved to suppress evidence from the stop, claiming that the stop was not permitted under the community caretaker doctrine because the officer did not stop her with the sole intention of performing a welfare check. The District Court denied the motion to suppress, finding that the state had presented objective facts that the officer suspected the occupants might be in need of assistance because they were driving down a desolate back road in the middle of the night and had abruptly pulled over. On appeal, the Supreme Court affirmed and further noted that the community caretaker doctrine does not require an officer to have the sole subjective purpose of conducting a welfare check as long as the officer has adequate grounds for conducting the welfare check initially. St. v. Spaulding, 2011 MT 204, 361 Mont. 445, 259 P.3d 793. See also St. v. Graham, 2007 MT 358, 340 Mont. 366, 175 P.3d 885, and St. v. Lovegren, 2002 MT 153, 310 Mont. 358, 51 P.3d 471.

Totality of Circumstances Warranting Investigative Stop — Motion to Suppress Properly Denied: Cooper contended that an officer lacked a particularized suspicion to justify an investigative stop of Cooper's vehicle and that evidence seized during the stop should be suppressed. The Supreme Court disagreed. Cooper asserted that the officer failed to inform her of all the reasons for stopping the vehicle; however, an investigating officer need not identify a particular statutory violation or cite a defendant for a moving violation in order to establish a particularized suspicion. In this case, the officer had objective data and a resulting suspicion of criminal activity upon which to justify stopping Cooper's vehicle. Cooper pulled into oncoming traffic, nearly causing a collision, after leaving the parking lot of a bar that was hosting an event known to serve alcohol. Cooper then proceeded to drive incredibly slowly and traveled over the fog line, and Cooper's license plate was obscured by ice and snow. Under the totality of the circumstances, the officer had a sufficient particularized suspicion to make the stop, and Cooper's suppression motion was properly denied. St. v. Cooper, 2010 MT 11, 355 Mont. 80, 224 P.3d 636. See also St. v. Roy, 2013 MT 51, 369 Mont. 173, 296 P.3d 1169.

Warrantless Entry Justified Under Exigent Circumstances Exception — Evidence Admissible Under Plain View Doctrine: Officer Cameron investigated a report that Kenfield was on the way to a remote small town to purchase alcohol for minors. The officer arrived at Kenfield's residence and heard loud music and smelled marijuana. Cameron was out of radio range. No one answered when Cameron knocked at the door and announced himself, but Cameron heard running feet. Concerned with the minors' well-being, Cameron entered the residence and saw drug paraphernalia and residue on the kitchen sink. Cameron then called dispatch from the residence and requested backup, and officers subsequently seized drugs and other contraband. Kenfield was arrested for drug production or manufacture, distribution of drugs to minors, and sexual abuse of children. Kenfield moved to suppress the fruits of the warrantless search, but the motion was denied, and Kenfield appealed, but the Supreme Court affirmed. The odor of marijuana, coupled with the facts that the occupants attempted to avoid contact with Cameron and that Kenfield was believed to have been on the way to purchasing alcohol for minors, was sufficient for Cameron to form a reasonable belief that Kenfield had committed or was committing an offense. Additionally, the remoteness of the area, the time of the incident, the failure of Cameron's radio communication, Cameron's concern for the minors, the lack of response to the knock and announce, and the possibility that relevant evidence would be destroyed constituted exigent circumstances warranting immediate entry into the residence. Therefore, warrantless entry into Kenfield's home was justified, as was the seizure of drug evidence in plain view. St. v. Kenfield, 2009 MT 242, 351 M 409, 213 P3d 461 (2009), following St. v. Wakeford, 1998 MT 16, 287 M 220, 953 P2d 1065 (1998), and distinguishing St. v. McBride, 1999 MT 127, 294 M 461, 982 P2d 453 (1999).

Search of Residence on Permission of Minor Child Violative of Parent's Right to Privacy — Evidence Properly Suppressed — Exception: Police were dispatched to a residence in response to a report of a sexual assault on a young woman, who was discovered to be a minor. Following questioning in the living room, the girl led the police to her bedroom, where an alleged assault by her father had occurred. Because police believed that the minor had lawfully granted permission to search the residence, they seized items from the bedroom, including the sheets, comforter, and blanket from the bed and the victim's pajamas. They also had the victim change clothes so they could take possession of the underwear that the victim was wearing at the time of the alleged assault. The girl later signed a form granting permission to search the residence. The father's DNA was found on the bedding and he was charged with felony sexual assault. The father argued that the search and seizure were unconstitutional because they were conducted without his consent or a search warrant. The state contended that in a case such as this where the child granting entrance to the home was the possible victim of a sexual assault, a warrant was unnecessary. The District Court, citing St. v. Schwarz, 2006 MT 120, 332 M 243, 136 P3d 989 (2006), held that because the minor did not have actual authority to consent to a search, police were obligated to obtain consent from the parent or a search warrant prior to seizing items from the bedroom. Because neither consent nor warrant was obtained, the court suppressed all evidence seized from the house. The state appealed. The Supreme Court cited St. v. Goetz, 2008 MT 296, 345 M 421, 191 P3d 489 (2008), for the factors used to determine whether a state action constitutes an unreasonable or unlawful search or seizure: (1) whether the person challenging the state's action has an actual subjective expectation of privacy; (2) whether society is willing to recognize that subjective expectation as objectively reasonable; and (3) the nature of the state's intrusion. The court also noted that warrantless searches conducted inside a home are per se unreasonable, subject only to a few specifically established and well-delineated exceptions, none

of which were present here. The court affirmed the holding in Schwarz, holding that the child did not have authority to consent to the search of her parent's home. The focus was on the violation of the privacy rights of the parent in control of the home, not the general privacy rights of the child, except where, as with the underwear the victim was wearing during the alleged assault, society would recognize as reasonable a person's privacy interest in the intimate apparel that she was wearing at the time. Therefore, the evidence seized from the residence must be suppressed because it was the product of an illegal search and seizure, with the exception of the daughter's underwear, because the father did not have an actual subjective expectation of privacy in the underwear that his daughter was wearing at the time the alleged assault occurred that society would find objectively reasonable. The District Court did not err in granting the motion to suppress all the evidence, with the exception of the underwear. The case was remanded for further proceedings. St. v. Ellis, 2009 MT 192, 351 M 95, 210 P3d 144 (2009).

Failure to Demonstrate Exigent Circumstances Justifying Warrantless Entry Into Residence for DUI Evidence — Reversed: Saale was involved in a one-car rollover after leaving a bar. Witnesses who helped Saale from the vehicle observed that Saale appeared to be highly intoxicated but not seriously injured. Saale's husband then arrived and took Saale home. Officers went to the home, but the husband refused to allow anyone into the home and refused to bring Saale outside. Officers had been advised by the County Attorney's office that they could enter the home without a warrant because of exigent circumstances of Saale's possible intoxication and trying to elude officers and because Saale might be severely injured from the accident. Therefore, officers handcuffed the husband and removed him from the area, entered the home, and removed Saale back to the scene of the accident, where Saale sat in the patrol car for 45 minutes. Saale subsequently failed a portable breath test and was arrested for DUI second offense. Saale moved to suppress evidence from the warrantless search. The District Court held that the exigent circumstances warrant exception gave officers the right to enter the home and to take Saale back to the accident scene, to question Saale about the accident and potential injuries, and to protect against the destruction of Saale's blood alcohol level as evidence of DUI, so the dismissal motion was denied. Saale appealed, and the Supreme Court reversed. Entry into the home without consent was reasonable only if the exigent circumstances were legitimate, but in this case officers had neither a lawful nor practical exigency justifying warrantless invasion of the home to obtain evidence. The argument for preservation of DUI evidence was negated by the fact that no physical evidence had been taken from Saale at the time of entry, so there was no evidence to destroy, and by the fact that Saale sat in the patrol car for 45 minutes before a breath test was even taken. The argument that possible injury constituted an exigent circumstance was belied by the fact that witnesses informed the officers that Saale did not appear to be injured and by the fact that if injuries had been obvious to officers when Saale was removed from the home, Saale would have been taken to the hospital rather than to the accident scene to sit idly and unattended in the patrol car while officers investigated the accident. Absent proof of exigent circumstances, warrantless entry into Saale's home was unreasonable and constituted reversible error. St. v. Saale, 2009 MT 95, 350 M 64, 204 P3d 1220 (2009), following St. v. Peplow, 2001 MT 253, 307 M 172, 36 P3d 922 (2001), and distinguishing St. v. Deshner, 158 M 188, 489 P2d 1290 (1971), and St. v. Wakeford, 1998 MT 16, 287 M 220, 953 P2d 1065 (1998).

Failure to Give Miranda Warning Before Consensual Search of Vehicle Held to Be of No Legal Consequence: Clark was stopped by highway patrol officer Gleich after Gleich received a report from his brother, a Deputy Sheriff, that the two persons in the car had just been involved in a domestic disturbance and that neither of them possessed a valid driver's license. After the stop, Clark consented to a search of the vehicle. The Supreme Court affirmed the District Court's decision that because Miranda warnings are, under the U.S. Constitution, to precede custodial interrogations and not searches, the lack of a Miranda warning before a consensual search of Clark's vehicle was of no legal consequence. The Supreme Court noted that the U.S. Supreme Court held in U.S. v. Patane, 542 US 630 (2004), that there is no requirement that a Miranda warning be given before a request is made for consent to a search. St. v. Clark, 2008 MT 419, 347 M 354, 198 P3d 809 (2008).

Admissibility of Evidence From Independent Source Following Illegal Warrantless Search: Deputies conducted an illegal warrantless search that resulted in defendant receiving a minor in possession charge. Immediately after the illegal entry, defendant began defiantly chugging alcohol in the deputies' presence. Nevertheless, defendant contended that evidence of the alcohol possession should have been suppressed because the search was illegal. The District Court denied the suppression motion, and on appeal the Supreme Court affirmed. Evidence is admissible notwithstanding a search violation when the evidence is obtained from an independent source. By

continuing to consume alcohol after the warrantless entry, defendant provided deputies with an independent source for evidence that was excluded from the fruit of the poisonous tree doctrine, and the evidence was properly admitted. In re B.A.M., 2008 MT 311, 346 M 49, 192 P3d 1161 (2008). See also St. v. Ottwell, 239 M 150, 779 P2d 500 (1989), St. v. Courville, 2002 MT 330, 313 M 218, 61 P3d 749 (2002), and St. v. Rookhuizen, 2007 MT 312, 340 M 148, 172 P3d 1257 (2007).

Sufficient Probabilities Supporting Particularized Suspicion to Justify Investigative Stop — Motion to Suppress Properly Denied: McMaster was stopped for investigation after an officer observed apparent traffic violations and erratic driving. The officer was called to make the stop following a police officer's observations of McMaster's possible drug trafficking activities at the Conrad Town Pump. McMaster moved to suppress the fruits of the search on grounds that the officer lacked particularized suspicion to make the investigative stop. The motion was denied, and on appeal the Supreme Court affirmed. The determination whether particularized suspicion supports an investigative stop does not deal with hard certainties, but rather with probabilities. In this case, McMaster was known by officers to be involved in drug deals, and his furtive conduct at the Town Pump led officers to believe that a possible drug deal was in progress. McMaster was identified as the probable driver of the vehicle through a personalized license plate and by physical description. This evidence, coupled with McMaster's apparent traffic violations and erratic driving, constituted sufficient particularized suspicion that McMaster was involved in criminal activity to justify the investigative stop. St. v. McMaster, 2008 MT 294, 345 M 408, 191 P3d 443 (2008). See also St. v. Gopher, 193 M 189, 631 P2d 293 (1981).

Exigent Circumstances in Safety Sweep — Confession Related to Evidence Lawfully Seized Not Subject to Suppression: Officers arrested a suspect at Whisler's motel room, then entered the room in a safety sweep, where drugs were observed in plain view. Whisler was arrested and while at the detention center admitted possessing methamphetamine. Whisler contended that because the drugs were unlawfully seized at the motel room, the methamphetamine evidence should be suppressed as fruits of an unlawful search. However, exigent circumstances existed to warrant the safety sweep of the motel room, so the search was not unlawful, and because Whisler's admission did not stem from an unlawful search, the motion to suppress the methamphetamine evidence was properly denied. St. v. Whisler, 2008 MT 276, 345 M 292, 190 P3d 1098 (2008).

Exigent Circumstances Sufficient to Justify Warrantless Search to Avoid Possible Destruction of Drug Evidence: Law enforcement officers were tipped off that defendant was transporting one-half pound of methamphetamine into the state and tracked defendant to another person's apartment in Corvallis. Officers began surveillance of the apartment and observed two individuals who appeared to be watching the officers. Within a minute, two persons left the apartment, and the officers concluded that their presence was known to persons in the apartment. Shortly thereafter, the officers received a call from an officer in Butte informing them that defendant had called an informant in Butte and told the informant that defendant knew he was being watched and asked the informant to come to Corvallis to help get rid of the drugs. The officers then discussed the possibility that defendant could destroy the drugs before a valid search warrant could be issued in 4 to 7 hours and decided to call for backup and enter the apartment. Upon entering, the officers found defendant and a woman present. Defendant had no drugs on his person, but had $1,500 in his wallet and appeared to be under the influence of methamphetamine. When the warrant eventually arrived, officers found 3 1/2 grams of methamphetamine packaged for sale. Defendant was charged with felony conspiracy to commit criminal distribution of dangerous drugs, felony criminal possession with intent to distribute, felony criminal endangerment, and misdemeanor criminal possession of drug paraphernalia. Defendant pleaded not guilty to all charges and moved to suppress the fruits of the warrantless search. The motion was denied, and defendant was convicted on one confessed count of intent to distribute. On appeal, defendant contended that the warrantless search was unlawful, but the Supreme Court affirmed. The facts that the officers had already witnessed one suspect flee the scene, knew that defendant was aware of the officers' presence, and knew that a third party had been contacted to help defendant get rid of the drugs, combined with the knowledge that procurement of a search warrant would take 4 to 7 hours, established the presence of exigent circumstances sufficient to justify warrantless entry into the apartment to avoid destruction of the alleged one-half pound of methamphetamine. St. v. Ruggirello, 2008 MT 8, 341 M 88, 176 P3d 252 (2008), applying the exigent circumstances test set out in St. v. Stone, 2004 MT 151, 321 M 489, 92 P3d 1178 (2004).

Reasonable Cause for Warrantless Probationary Search — Motion to Suppress Properly Denied: Smith's live-in girlfriend was arrested on a probation violation for failing to report her change in residence and subsequently tested positive for drugs, which provided reasonable cause for her probation officer to conduct a warrantless search of her new residence—Smith's trailer.

The search revealed weapons, drug paraphernalia, items used to manufacture and distribute drugs, and some of the girlfriend's personal items. The officer then decided to search a bus parked near the trailer, and while waiting for a warrant, Smith arrived. Based on the items found in the trailer and an officer's knowledge that Smith's driver's license was suspended, Smith was arrested and found to be in possession of a large amount of cash, drugs, and paraphernalia. More drugs and chemical precursors of methamphetamine were subsequently found in Smith's vehicle and in the bus. Smith moved to suppress all evidence obtained in the searches on grounds that the initial search was unlawful because it was not justified as a probation search or by any other exception to the warrant requirements, but the motion was denied. On appeal, the Supreme Court affirmed. Because the initial search was a probationary search of the residence of the woman living with Smith and was justified by reasonable cause and because Smith did not challenge the legality of the searches of his person and vehicles, the District Court did not err in determining that the searches were lawful and in denying Smith's motion to suppress the evidence. St. v. Smith, 2008 MT 7, 341 M 82, 176 P3d 258 (2008). See also St. v. Finley, 2011 MT 218, 362 Mont. 35, 260 P.3d 175, which held that the District Court properly denied the defendant's motion to suppress evidence discovered when the defendant's wife's probation officer searched an open and unlocked safe in the couple's bedroom pursuant to a valid probationary search.

No Particularized Suspicion for Stop to Investigate Couple Engaged in Romantic but Not Criminal Behavior — Community Caretaker Doctrine Inapplicable Absent Indication of Citizen in Peril: While on routine patrol, an officer observed a vehicle parked on a pullout adjacent to a public road. The officer thought perhaps the driver was experiencing vehicle problems and drove by to investigate. However, the occupants were not having vehicle problems but were kissing, and the female passenger was observed attempting to "mount" the male driver. Concerned that the occupants were engaged in inappropriate sexual behavior, the officer circled back, parked behind the vehicle and activated the emergency lights, and approached the vehicle with the intent to discourage the couple from engaging in their behavior and to move them along. The officer discovered a cold, sweaty beer can outside the driver's door and also discovered the couple in various states of undress. Upon questioning the couple about what they were doing, the officer noticed that they both appeared intoxicated. The driver, Graham, was tested and subsequently arrested for DUI. Graham moved to suppress the evidence of the DUI on grounds that the officer did not have authority to make an investigative stop or, if that authority did exist, that the officer exceeded the scope of an investigative stop. The District Court agreed that the officer did not have a sufficient particularized suspicion to make an investigative stop, but nevertheless allowed the DUI evidence on grounds that the community caretaker doctrine provided a legal justification for the stop. On appeal, the Supreme Court first noted that if particularized suspicion was absent and no other exception to the warrant requirement applied, the search and seizure were unconstitutional. In this case, once the officer activated the emergency lights, Graham would not have felt free to walk away, so a seizure occurred. The Supreme Court agreed that the totality of the circumstances did not give rise to a particularized suspicion that a crime was occurring or was about to occur. Graham committed no traffic offense, and the couple's conduct was not criminal and did not indicate that a crime was about to occur. Any particularized suspicion occurred only after Graham was seized. The officer did not approach the vehicle because of a belief that a crime was being committed, but rather to discourage the couple from engaging in their behavior and to move them along, so the requisite particularized suspicion of a crime was absent. The Supreme Court also held that the community caretaker doctrine did not apply because under the criteria developed in St. v. Lovegren, 2002 MT 153, 310 M 358, 51 P3d 471 (2002), the first step in determining whether the doctrine applies is whether there are objective, specific, and articulable facts from which an experienced officer would suspect that a citizen is in need of help or is in peril. No such facts existed in this case, and the court declined to extend the doctrine to allow law enforcement officers equipped with nothing more than personal dissatisfaction of a person's otherwise lawful conduct to detain that person without any intention of providing community care or assistance. Dismissal of Graham's motion to suppress the evidence was reversed, and the case was remanded. St. v. Graham, 2007 MT 358, 340 M 366, 175 P3d 885 (2007), distinguishing St. v. Nelson, 2004 MT 13, 319 M 250, 84 P3d 25 (2004), St. v. Seaman, 2005 MT 307, 329 M 429, 124 P3d 1137 (2005), and St. v. Litschauer, 2005 MT 331, 330 M 22, 126 P3d 456 (2005).

Investigation of Disorderly Conduct — No Expectation of Privacy in Backyard — Fruits of Warrantless Search Properly Admitted: Officers investigated a disorderly conduct complaint at Dunn's residence and found Dunn and six others partying in Dunn's backyard with loud music blaring. Dispatch indicated an outstanding warrant for Dunn, he was searched, officers found drugs and paraphernalia on Dunn's person, and Dunn was arrested. Dunn moved to suppress

the evidence on grounds that the search was an unlawful invasion of privacy. The District Court denied the motion, and on appeal, the Supreme Court affirmed. Pursuant to Whitefish v. Large, 2003 MT 322, 318 M 310, 80 P3d 427 (2003), two factors are considered when determining whether a search was unlawful: (1) whether the person had an actual expectation of privacy that society is willing to recognize as objectively reasonable; and (2) the nature of the state's intrusion. Given the unique circumstances of this case, Dunn did not have a reasonable expectation of privacy. The ongoing disorderly conduct invited officers to investigate the complaint. Blasting loud music at 4 a.m. was not conduct that society would be willing to recognize as objectively reasonable. The unobtrusive investigation by officers accessing the backyard by an open and unobstructed path that would be used by any casual visitor was reasonable. Dunn's motion to suppress was properly denied. St. v. Dunn, 2007 MT 296, 340 M 31, 172 P3d 110 (2007).

Admissibility of Arson Evidence in Plain View Seized Under Exigent Circumstances — Warrant Required for Search for Other Evidence: A Deputy Sheriff responded to a fire call at Lewis's house and entered the building as part of fire suppression efforts. While inside, the Deputy Sheriff noticed evidence of possible arson. The Deputy Sheriff went back to his vehicle for a camera, reentered the building, photographed the evidence, and removed it, placing it in his vehicle. After the fire department arrived and suppressed the fire, the Deputy Sheriff reentered the building a third and fourth time to look for additional arson evidence. At trial, Lewis contended that all the evidence should be suppressed as fruits of unlawful warrantless searches. The trial court allowed introduction of evidence from the first entry because exigent circumstances existed to justify the Deputy Sheriff's entry, but the court denied admission of evidence gathered during the second and subsequent entries because exigent circumstances did not exist, holding that the Deputy Sheriff should have acquired a warrant for further investigative searches. The Supreme Court agreed that exigent circumstances surrounding the fire justified the first entry, but also held that the second entry was a continuation of the first and that evidence in plain view during the first entry could be lawfully seized and was admissible. However, a separate entry to search for or gather evidence pursuant to a criminal investigation requires a separate justification, such as a warrant, consent, or an exigency, and none of those justifications applied to the third and subsequent entries, so the motion to suppress evidence gathered during those searches was properly granted. St. v. Lewis, 2007 MT 295, 340 M 10, 171 P3d 731 (2007).

Clarification of Plain View Warrant Exception — Applicable to Seizures, Not Searches: The plain view doctrine allows peace officers to seize evidence in plain view without a warrant under certain circumstances. If an officer discovers evidence in plain view while lawfully present on an individual's property and the incriminating nature of the evidence is immediately apparent, the evidence may be seized and used against a defendant at trial. However, unlike exigent circumstances, valid consent, and lawful arrest, the doctrine does not allow the officer to proceed or intrude to the location of the evidence without a warrant. Rather, the applicability of the doctrine depends on the officer's lawful presence and right of access to the evidence and should not be construed as a stand-in for a search warrant. As an exception to the warrant requirement, the plain view doctrine applies to seizures, not searches. St. v. Lewis, 2007 MT 295, 340 M 10, 171 P3d 731 (2007). See also Horton v. Calif., 496 US 128 (1990).

Totality of Circumstance Indicating Voluntary Consent to Search Defendant's Home — Motion to Suppress Properly Denied: Defendant moved to suppress evidence found during an inspection of her day-care center by a Department of Justice agent who was working with local police to investigate a child's death at the center, claiming that the evidence was obtained by the agent's intentional misrepresentation of his purpose during the inspection and that defendant did not voluntarily consent to a search of the premises despite having signed a consent to search form. Although warrantless searches and seizures are per se unreasonable, one exception arises when a citizen has knowingly and voluntarily consented to a search. The prosecution carries the burden of establishing that consent was freely and voluntarily given and uncontaminated by any express or implied duress. In this case, the agent clearly identified himself and his purpose, telling defendant that he wanted to accompany the inspector but could not do so unless defendant signed the consent form. Absent evidence that defendant's consent was secured by subterfuge or express or implied misrepresentation, the District Court did not err in concluding that consent was voluntary or in denying defendant's motion to suppress the fruits of the search. St. v. Bieber, 2007 MT 262, 339 M 309, 170 P3d 444 (2007).

Suspect Interrogated in Home Without Miranda Warning — Motion to Suppress Improperly Denied: Following a lead of methamphetamine use at Munson's home, detectives went to the home and, without giving Munson a Miranda warning, questioned Munson for 1 3/4 hours before Munson confessed to possessing methamphetamine paraphernalia. Munson was arrested

for criminal possession of dangerous drugs and paraphernalia, and at trial, Munson moved to suppress the evidence and statements made to the officers, but the motion was denied. On appeal, the Supreme Court reversed. The officers created a custodial atmosphere, and Munson's freedom of action was significantly restricted. Under the totality of the circumstances, a reasonable person in Munson's position would not have felt free to terminate the interview and leave or to ask the officers to leave, so for purposes of Miranda, Munson was in custody and subjected to an interrogation. Therefore, failure of the officers to give Munson a Miranda warning rendered Munson's statements inadmissible. Because Munson's consent to a search was not given freely and without duress or coercion, all evidence seized under the guise of consent was also inadmissible. St. v. Munson, 2007 MT 222, 339 M 68, 169 P3d 364 (2007), following St. v. Osteen, 216 M 258, 700 P2d 188 (1985), and St. v. Rushton, 264 M 248, 870 P2d 1355 (1994).

Legal Detention Following Traffic Stop — Voluntary Consent to Search Vehicle — Motion to Suppress Properly Denied: Case was stopped for a traffic violation, and drugs were found in Case's car after Case allegedly consented to a search of the vehicle. Following conviction, Case appealed on grounds that evidence of the search should have been suppressed because the officer exceeded the scope of the initial stop by detaining Case and continuing to question him after issuing traffic citations. The Supreme Court concluded that under the circumstances, Case remained under police control during questioning and could not have reasonably concluded that he was free to leave. Because Case was not involved in a voluntary exchange, Case was in fact "seized" when he gave permission to search the vehicle. The court then examined whether particularized suspicion existed to continue the investigatory stop past the issuance of traffic citations and whether Case's consent to the search was voluntary. In this case, Case was legally detained because additional information, including Case's questionable behavior, his multiple connections with drugs, and confusion whether Case was in fact another person named Case who had skipped town, gave rise to further suspicions that served to properly enlarge the scope of the investigation. The only circumstance that Case claimed affected the voluntariness of his consent to search the vehicle was that the detention was illegal. Having concluded that the detention was legal, the court further concluded that Case's consent was voluntary and that the motion to suppress the fruits of the search was properly denied. St. v. Case, 2007 MT 161, 338 M 87, 162 P3d 849 (2007). See also St. v. Roberts, 1999 MT 59, 293 M 476, 977 P2d 974 (1999), and St. v. Hurlbert, 2009 MT 221, 351 M 316, 211 P3d 869 (2009).

Truant Smelling of Alcohol — Particularized Suspicion for Arrest — Motion to Suppress Properly Denied: A 14-year-old boy's mother called his school, reported that he had not returned home the previous night, and requested that he be picked up. The school resource officer notified police and asked that the boy be brought to school if found. An officer later found the boy on the street smelling of alcohol and took the boy to the police station where it was discovered that several town businesses had been burglarized during the night, including a bowling alley where money and liquor had been stolen. Money and liquor were found on the youth, and his shoes were taken as evidence to see if they matched prints found at the bowling alley. The youth moved that all evidence be suppressed, but the motion was denied. On appeal, the Supreme Court affirmed. Based on the fact that the officer smelled alcohol on the youth, the officer's particularized suspicion that the youth had been drinking developed into probable cause to believe that the youth committed the offense of consuming or possessing alcohol. Because the officer had probable cause to make an immediate arrest, including the fact that the boy had been reported missing from home and was truant from school, it was constitutionally permissible to take the boy into custody pursuant to 41-5-321 and reasonable to conduct a search pursuant to that arrest for the youth's safety. In re Z.M., 2007 MT 122, 337 M 278, 160 P3d 490 (2007).

Warrantless Search of Duffle Bag in Area of Drug Lab Based on Exigent Circumstances: While detoxifying property where a drug lab was found, officers discovered a locked duffle bag sitting on or near contaminated bedding and heard sounds of sloshing liquid and clanging glass or metal within the bag. The officers were concerned with a possible chemical reaction and explosion, so they removed the bag from the premises, laid it on a tarp, and notified the safety officer of the suspect liquids. The safety officer believed that obtaining a search warrant to open the bag would take at least 45 minutes, which posed a potential threat to the safety of the officers and the property and persons in the immediate area, so the bag was opened immediately without a warrant, and drug lab materials were found and removed. Defendant asserted that the search was unlawful on grounds that the officers had no right to even pick up the bag without a warrant because if they suspected that it contained methamphetamine lab materials, then they should have known that disturbing the bag could unleash hazardous fumes and explosive chemicals. The state contended that exigent circumstances existed because the officers were necessarily

required to immediately determine if dangerous chemicals were present. The Supreme Court noted that exigent circumstances for conducting a warrantless search exist when it is not practical to secure a warrant. Citing U.S. v. Lloyd, 396 F3d 948 (8th Cir. 2005), the court held that the "dangers created by methamphetamine labs can justify an immediate search because of exigent circumstances due to the volatile nature of such labs". In this case, the existence of exigent circumstances allowed the immediate warrantless search of the duffle bag. St. v. Gomez, 2007 MT 111, 337 M 219, 158 P3d 442 (2007).

Search by Private Citizen to Further Own Ends — Exclusionary Rule Inapplicable: When defendants' son was removed from the family home following an argument, the son went to stay at the home of a former babysitter and family friend. The son told the friend that his parents were involved with drugs. The friend went to the police, who stated that nothing could be done without further evidence. The son and friend then entered the family home, recovered drugs from the mother's bedroom, and gave the drugs to the police. Officers then obtained a warrant, searched the home, and arrested the parents. The parents sought to have the evidence suppressed under the exclusionary rule. The motion to suppress was denied, and the parents appealed. The Supreme Court noted that the exclusionary rule does not serve to deter private individuals from engaging in searches that would be illegal if conducted by police. To determine whether a private citizen is acting as a government agent in conducting a search, two critical factors are examined under the test in U.S. v. Miller, 688 F2d 652 (9th Cir. 1982): (1) whether the government knew of and acquiesced in the intrusive conduct; and (2) whether the party performing the search intended to assist law enforcement efforts or to further the party's own ends. Here, police did not know that the friend would conduct the search, and the search was made because of the friend's concern for the welfare and safety of the child. Thus, the search was private, and the evidence was not subject to the exclusionary rule and was properly admitted. St. v. Malkuch, 2007 MT 60, 336 M 219, 154 P3d 558 (2007). See also St. v. Berosik, 2009 MT 260, 352 M 16, 214 P3d 776 (2009).

Search of Person for Weapons Incident to Lawful Arrest and Prior to Transport Not Unconstitutional — When Showing of Exigent Circumstances Required: While officers were executing a warrant at a Missoula residence, Cooney arrived and requested entry to retrieve his son who was a guest at the residence. Officers requested Cooney's identification before allowing entry and ran a routine check on Cooney for outstanding warrants. The officers discovered an outstanding warrant for Cooney on a traffic offense and placed Cooney under arrest. A pat-down search revealed that Cooney possessed a pipe and a small bag of marijuana. The officers requested a patrol officer to transport Cooney to Municipal Court. Upon transferring custody of Cooney to the patrol officer, the arresting officers indicated that their initial search had not been thorough, so the patrol officer conducted another pat-down search of Cooney before transport to ensure that Cooney had no hidden weapons. The patrol officer felt an object in Cooney's pocket that might have been a weapon, removed the object, and discovered that it was another pipe with methamphetamine residue, so Cooney was also charged with felony possession of methamphetamine. Cooney moved to suppress the methamphetamine pipe on grounds that the patrol officer exceeded the scope of search incident to Cooney's arrest and that the pipe was the fruit of an unconstitutional search and seizure, but the motion was denied. On appeal, the Supreme Court affirmed. Although warrantless searches are per se unreasonable under Montana law, one exception to the warrant requirement is a search conducted pursuant to a lawful arrest. The law does not require a showing of exigent circumstances when an officer conducts a warrantless search incident to arrest in order to protect the officer from attack, to prevent the person from escaping, or to discover and seize the fruits of the crime, but a showing of exigent circumstances is required if the search is conducted to discover and seize any persons, instruments, articles, or things that may have been used in the commission of or that may constitute evidence of the offense. In this case, the state justified the search as protecting the officer from attack and was therefore required to demonstrate that the search was commensurate with the purpose of preventing Cooney from using any weapon hidden on his person to attack the officer. In this case, the search was commensurate because the patrol officer presented substantial evidence of a reasonable belief that the object in Cooney's pocket might have been a weapon, and the patrol officer was not required to trust his personal safety to a perfunctory search performed by other officers who indicated that the initial search was insufficient to ensure the safe transport of a prisoner. St. v. Cooney, 2006 MT 318, 335 M 55, 149 P3d 554 (2006), followed in St. v. Whisler, 2008 MT 276, 345 M 292, 190 P3d 1098 (2008).

Counsel's Failure to Challenge Parole Search Not Ineffective Assistance of Counsel: Meza was stopped for a traffic violation and because of surrounding circumstances, later upheld by the trial

court, the officer conducted a canine sniff search around Meza's truck that indicated the presence of drugs. Meza refused to allow the officer to search inside the truck and was allowed to leave the scene on foot. The officer was informed by dispatch that Meza was on parole and contacted the parole officer who agreed to a parole search of the vehicle. After being convicted, Meza argued that his attorney erred in not challenging the parole search. The Supreme Court ruled that Meza had received effective counsel because his attorney had challenged Meza's being stopped and the canine search on other grounds and that given the strong precedent for upholding parole searches, Meza's attorney was justified in not challenging that search. St. v. Meza, 2006 MT 210, 333 M 305, 143 P3d 422 (2006).

Voluntariness of Consent to Search — Totality of Circumstances: In determining whether consent to search was made voluntarily and was uncontaminated by coercion or duress, the Supreme Court considers the totality of the circumstances. In this case, Copelton was sitting in a car driven by Garcia, and when asked by officers if they could search the vehicle, Garcia shrugged his shoulders and gestured with his hands in an affirmative manner. The search revealed drugs, and Copelton was arrested for felony possession with intent to distribute. On appeal, Copelton asserted that his motion to suppress the fruits of the search should have been granted because Garcia did not knowingly and voluntarily consent to the warrantless search. A native of Mexico, Garcia had limited education with no instruction regarding the American legal system and a limited understanding of English. Copelton also noted that the officers did not inform Garcia of the right to refuse consent to the search and questioned whether a mere shrug of the shoulders was enough to indicate consent. Nevertheless, the Supreme Court affirmed. Garcia testified that he had prior experiences with law enforcement officers, including prior vehicle searches, that he clearly understood what the officer was asking when the officer requested to search the vehicle, and that he consented to the search because he had nothing to hide. Thus, Garcia's limited foreign education and limited ability to speak and understand English did not impede his ability to knowingly and voluntarily consent to the search. Further, lack of knowledge of the right to refuse consent is not determinative that consent was not voluntary in and of itself, and nonverbal consent can be effective when conduct indicates unequivocal consent. Under the totality of the circumstances, Copelton's motion to suppress was properly denied. St. v. Copelton, 2006 MT 182, 333 M 91, 140 P3d 1074 (2006), following St. v. Snell, 2004 MT 269, 323 M 157, 99 P3d 191 (2004).

Admissibility of Liquor Bottle in Plain View During Officer's Attempt to Secure Vehicle When Suspect in Custody for DUI: After receiving a report of a suspected drunk driver, the investigating officer stopped Delao and placed him in custody in the patrol car. Upon securing the vehicle, the officer saw a clear bottle partially covered beneath the center armrest, which the officer recognized as a liquor bottle. The bottle contained vodka, which the officer confiscated and which was entered as evidence in Delao's DUI case. Delao moved to suppress the evidence as the fruit of an unlawful search, but the motion was denied. Following conviction, Delao appealed, but the Supreme Court affirmed. The officer's attempt to secure the vehicle fell within the ambit of the slight duty of care owed to Delao under St. v. Sawyer, 174 M 512, 571 P2d 1131 (1977), and neither the observation nor seizure of the bottle involved any privacy violation because the bottle was in plain view. The officer was lawfully present in the vehicle, and the incriminating nature of the bottle was immediately apparent. St. v. Delao, 2006 MT 179, 333 M 68, 140 P3d 1065 (2006), followed in St. v. Kelm, 2013 MT 115, 370 Mont. 61, 300 P.3d 687.

Probable Cause for Warrantless Seizure of Vehicle — Odor of Marijuana Coupled With Defendant's Admission That Marijuana Had Been Smoked in Vehicle: Following a single-vehicle accident, the investigating officer discovered that Pierce had over $8,000 in outstanding warrants. Pierce was arrested and placed in the patrol car and then requested that the officer retrieve a telephone book from Pierce's vehicle. When the officer entered the vehicle, he noticed the strong odor of burnt marijuana. Pierce subsequently admitted that someone had smoked marijuana in the vehicle. The officer impounded the vehicle, sealing it with evidence tape. Following an alert by a canine officer 2 days later, the officer obtained a search warrant, discovered drugs and paraphernalia, and arrested Pierce on drug charges. Pierce contended that the state lacked probable cause to impound the vehicle and search it and moved to suppress the evidence. The Supreme Court disagreed. The officer used the marijuana odor in conjunction with Pierce's admission that someone had unlawfully smoked marijuana in the vehicle to establish probable cause to seize the truck, and the affidavit for a warrant to search the vehicle contained sufficient information to support a reasonable belief that the offense of possession of dangerous drugs had been committed and that evidence or contraband might be found in the vehicle. Pierce's motion to suppress the evidence was properly denied. St. v. Pierce, 2005 MT 182, 328 M 33, 116

P3d 817 (2005), following St. v. Broell, 249 M 117, 814 P2d 44 (1991), and distinguishing St. v. Schoendaller, 176 M 376, 578 P2d 730 (1978), and St. v. Olson, 180 M 151, 589 P2d 663 (1979).

No Reasonable Expectation of Privacy in Garbage Placed for Collection — Warrantless Search of Garbage Affirmed: Following an investigation of Pelvit and based on information that Pelvit was operating a methamphetamine lab, agents conducted a warrantless search of garbage cans in a public alley behind Pelvit's house and discovered discarded materials consistent with the manufacture of the drug. The items formed the basis for a search warrant of Pelvit's residence, pickup, and boat, where additional evidence was found. The state instituted forfeiture proceedings against the pickup, boat, and boat trailer. Pelvit moved to exclude the evidence, arguing that the warrant was not valid because it was based on an unlawful search of the garbage cans. The District Court held that Pelvit had no reasonable expectation of privacy in the garbage and denied the motion to suppress. On appeal, the Supreme Court affirmed. The court held that Pelvit did not have a reasonable expectation of privacy in his trash because he voluntarily relinquished his interest and control over his garbage when he abandoned the property with no express intent to exclude others. In abandoning the trash, Pelvit also abandoned any expectation of privacy in the property, and absent an expectation of privacy, there was neither a search nor a seizure in violation of a constitutionally protected interest. However, the Supreme Court did place certain constraints on the searching of garbage placed for collection, as set out in Litchfield v. St., 824 NE 2d 356 (Ind. 2005): (1) for such a seizure to be reasonable, the garbage must be quickly retrieved by officers in substantially the same manner as the trash collector would take it; and (2) in order to prevent wholesale or random searches, officers must have an articulable individualized suspicion that a crime is being committed in order to justify the garbage seizure. The circumstances in this case met the Litchfield constraints. The state met its burden of proving that Pelvit abandoned the trash, the seizure was conducted in a reasonable and unobtrusive manner, and police had a particularized suspicion that Pelvit was involved in criminal activity to justify the warrantless search. Denial of Pelvit's motion to suppress was not error. St. v. A Blue 1993 Chevrolet Pickup, 2005 MT 180, 328 M 10, 116 P3d 800 (2005), followed in St. v. Shelton, 2008 MT 282, 345 M 330, 191 P3d 420 (2008).

Smell of Alcohol and Driver's Admission of Minority Age — Sufficient Probable Cause for Search of Vehicle: When Shaw was stopped for speeding, she told the officer that she was 18 years old, could not produce proof of insurance, and had a suspended driver's license. During the conversation, the officer smelled alcohol on Shaw and in the vehicle. Shaw consented to a search of the car, and the officer discovered an open container of alcohol and drug paraphernalia. Following conviction, Shaw appealed on grounds that the officer threatened to impound the car and illegally obtained the evidence underlying the charges. The Supreme Court affirmed. The smell of alcohol, coupled with Shaw's admission that she was a minor, provided sufficient probable cause for a search of the vehicle, and Shaw knowingly and voluntarily consented to the search. Despite conflicting evidence, the trial court assessed the credibility and demeanor of the witnesses, and the Supreme Court declined to impose its own resolution of the conflicts on appeal. St. v. Shaw, 2005 MT 141, 327 M 281, 114 P3d 198 (2005), overruled, to the extent that a finding of probable cause is required in conjunction with the consent exception to the search warrant requirement, in St. v. Copelton, 2006 MT 182, 333 M 91, 140 P3d 1074 (2006).

No Expectation of Privacy for Trespasser — Entry Lawful and Warrantless Search Reasonable: Gilmore kept some belongings in a locked bedroom in Kathie Gilmore's house, and Kathie had no key to the room. Based on a tip from a confidential informant that marijuana plants had been observed in the window of the residence, officers requested and were given permission by Kathie to search the house without a warrant. Although she gave conflicting statements, Kathie stated that some of Gilmore's belongings were in the locked bedroom but he paid no rent, that Gilmore had previously assaulted her and that she was afraid of him, that she did not want him living in the house and had asked him to leave, and that she had no key to the room and advised the officers to kick down the door. Upon entering, the officers observed Gilmore asleep on the couch and drug paraphernalia in plain view. The officers then obtained a warrant and seized drugs and paraphernalia. Gilmore moved to suppress the evidence on grounds that the search was unlawful because Kathie did not have authority to authorize entry into the locked bedroom and that Gilmore had an expectation of privacy in the bedroom. The District Court found that in this case, the officers were acting under the appropriate authority of Kathie to consent to the search and denied the motion to suppress. The Supreme Court held that as a trespasser, Gilmore had no expectation of privacy in the bedroom. The District Court was affirmed. St. v. Gilmore, 2004 MT 363, 324 M 488, 104 P3d 1051 (2004). See also St. v. McLees, 2000 MT 6, 298 M 15, 994 P2d 683 (2000).

Investigatory Stop Based on Suspicion of Impersonation of Police Officer: Police stopped Bar-Jonah in the early hours of the morning near a school wearing a police-style jacket and stocking cap. The officer had prior knowledge of Bar-Jonah's history of crimes against children. Bar-Jonah asserted that he was simply walking a few blocks from his home, minding his own business, that the officer lacked a particularized suspicion of criminal activity to warrant the investigatory stop in violation of Bar-Jonah's right against unreasonable search and seizure, and that any evidence should thus be suppressed. The District Court denied the motion to suppress, and the Supreme Court affirmed. Relying on Fla. v. Bostick, 501 US 429 (1991), the District Court found that the initial stop was not an investigatory stop but merely a police-citizen encounter, but the Supreme Court held that the stop was not a mere police-citizen encounter because Bar-Jonah had no reason to believe that he could leave. Nevertheless, the officer reasonably suspected that Bar-Jonah had impersonated or was about to impersonate a police officer, and coupled with the officer's knowledge of Bar-Jonah's criminal history, the officer had a particularized suspicion of criminal activity warranting the investigative stop. Once Bar-Jonah was lawfully detained, a search of Bar-Jonah's person was justified based on Bar-Jonah's statement that he was carrying a stun gun. St. v. Bar-Jonah, 2004 MT 344, 324 M 278, 102 P3d 1229 (2004).

Particularized Suspicion for Investigative Stop of Suspect Vehicle in Area of Crime Under Totality of Circumstances: Following a theft at a grocery store, officers observed a blue Camaro circling the area. Given that almost an hour had elapsed since the reported theft and that the Camaro had the same county license plates as the robbers' suspected truck, officers conducted an investigative stop of the Camaro. Based on inconsistent stories presented by the Camaro's occupants and the fact that a theft had recently occurred in the area, officers requested to search Fellers' Camaro. Fellers signed a written consent to search, and officers discovered drugs and paraphernalia in Fellers' possession. Fellers appealed his conviction on grounds that the officers lacked a particularized suspicion to make the investigative stop. Pursuant to St. v. Bauer, 2001 MT 248, 307 M 105, 36 P3d 892 (2001), for an investigative stop to be reasonable, an officer must have objective data from which to make certain inferences and a resulting suspicion that the person stopped is or has been engaged in wrongdoing. The officer need not actually personally observe illegal activity in order to have a particularized suspicion to justify an investigatory stop, but support for a particularized suspicion must be viewed in light of the totality of the circumstances. Here, the officer had sufficient objective data from which to infer that the occupants of the Camaro were engaged in wrongdoing and a resulting suspicion of illegal activity. Under the totality of the circumstances, the investigative stop was justified, and Fellers' conviction was affirmed. St. v. Fellers, 2004 MT 321, 324 M 62, 101 P3d 764 (2004).

Consent Justification for Warrantless Entry Into House — Motion to Suppress Properly Denied: Officers in pursuit of DeWitt following an aggravated burglary knew that DeWitt was staying with Bill Robinson. After arriving at Robinson's house, Robinson said that he has just arrived and did not know if DeWitt was there but granted the officers permission to search the house. The officers found DeWitt sitting in the dimly lit basement drinking a beer. DeWitt argued that the search was unlawful and that evidence obtained from the search should be suppressed because Robinson did not have the right to consent to a search of the part of the house that DeWitt was renting. The Supreme Court disagreed. The officers' entry into the house was consensual, and warrantless entry was justified, so denial of the motion to suppress was proper. St. v. DeWitt, 2004 MT 317, 324 M 39, 101 P3d 277 (2004).

Evidence of Motorcycle in Plain View Admissible: Officers in pursuit of DeWitt following an aggravated burglary found DeWitt's truck in another person's driveway, noticed a light on in the garage, and knocked on the door, which opened on impact. As soon as the door opened, officers noticed the smoke and odor of a two-stroke engine recently being started and surmised that DeWitt had been at the home and left on a motorcycle shortly before their arrival. DeWitt contended that the search of the garage was unlawful and that evidence obtained from the search should be suppressed. The Supreme Court disagreed. Evidence regarding the motorcycle was in plain view and fell within the plain view exception to the right against unreasonable search and seizure. St. v. DeWitt, 2004 MT 317, 324 M 39, 101 P3d 277 (2004).

Objective Manifestation to Support Investigation Following Traffic Stop — Time of Stop Extended: Following a traffic stop and observation of Nelson's behavior, officers conducted a DUI investigation, performed field sobriety tests and arrested Nelson for DUI, and then searched Nelson's car and discovered drugs and paraphernalia. Nelson contended that the fruits of the search should be suppressed because the officers did not give the stop advisory required in former 46-5-402 (repealed 2003) or a Miranda advisory and because the DUI investigation at the scene exceeded the scope of the investigative stop. The motion to suppress was denied, and on appeal,

the Supreme Court affirmed. The stop advisory issue was not contested, and the Supreme Court declined to address it. Nelson was not entitled to a Miranda warning because the Miranda protections are afforded during a custodial interrogation but do not apply to an investigative stop. In addition, as in St. v. Henderson, 1998 MT 233, 291 M 77, 966 P2d 137 (1998), the initial investigatory stop took on the quality of an escalating situation in which additional information gave rise to further suspicions and enlarged the scope of the investigation to that of a possible DUI. The officers had a particularized suspicion to conduct the DUI investigation, properly extending the time of the stop. Although the Supreme Court has not established specific time parameters to which an officer must adhere when conducting an investigative stop, the 24 minutes taken to conduct the investigative stop in this case was reasonable and not excessive. St. v. Nelson, 2004 MT 310, 323 M 510, 101 P3d 261 (2004).

Particularized Suspicion Sufficient Justification for Request for Consent to Search Vehicle — No Illegal Detention — Motion to Suppress Properly Denied: Snell was stopped for speeding and was also cited for failure to carry proof of insurance. While writing out the citation in the patrol car, the officer asked Snell if he could search the vehicle, and Snell consented. The officer discovered drugs, and Snell was charged with possession and intent to distribute marijuana. Snell moved to suppress the evidence. Snell conceded that he had voluntarily consented to the search, and the state conceded that the officer did not have probable cause. The motion to suppress was denied, and Snell appealed. The Supreme Court considered both the consent and illegal detention issues. First, the court reasoned that the officer had particularized suspicion to stop the vehicle and that Montana law does not require additional justification for requesting consent, so Snell's voluntary consent was sufficient to justify the warrantless search of the vehicle (see St. v. Parker, 1998 MT 6, 287 M 151, 953 P2d 692 (1998)). Second, the court concluded that because the officer did not coerce or restrain Snell, order him to stay, or prevent Snell from exiting the patrol car, a reasonable person would have felt free to leave the patrol car upon completion of the traffic stop, so the poststop interaction between Snell and the officer was a voluntary exchange rather than an illegal detention or unlawful seizure (see St. v. Merrill, 2004 MT 169, 322 M 47, 93 P3d 1227 (2004), and St. v. Hill, 2004 MT 184, 322 M 165, 94 P3d 752 (2004)). Snell's motion to suppress was properly denied. St. v. Snell, 2004 MT 269, 323 M 157, 99 P3d 191 (2004).

Transient Party Guest's Reasonable Expectation of Privacy in Host's Bathroom During Warrantless Search — Community Caretaker Doctrine Inapplicable: When officers executed a warrantless search of Tash's apartment based on a complaint of a loud party, Smith, an 18-year-old transient party guest, was in the bathroom vomiting. An officer opened the closed bathroom door, smelled what was believed to be an intoxicating substance, concluded that Smith was intoxicated, and charged Smith with being a minor in (former?) possession of alcohol. Smith moved to suppress the evidence on grounds that the search was illegal and that the officer violated Smith's expectation of privacy in Tash's bathroom. The state contended that Smith lacked the requisite standing to challenge the officers' initial entry into the apartment because Smith was a guest and had no reasonable expectation of privacy in the common rooms of the apartment. Applying the factors in St. v. Bowman, 2004 MT 119, 321 M 176, 89 P3d 986 (2004), the Supreme Court agreed with the state. The state also argued that an officer's intrusion into the closed bathroom was justified under the community caretaker doctrine. On this point, the Supreme Court reversed. The community caretaker doctrine stands for the proposition that officers have a duty to investigate uncertain situations in order to ensure public safety, but the facts in this case did not warrant the officer's intrusion absent objective, specific, articulable facts supporting a conclusion that Smith was in need of officer assistance. Smith had a legitimate expectation of privacy in Tash's bathroom and was entitled to constitutional privacy protections. St. v. Smith, 2004 MT 234, 322 M 466, 97 P3d 567 (2004), followed, with regard to a guest's lack of standing to challenge a search of common areas of another person's apartment, in St. v. Redlich, 2004 MT 235, 322 M 476, 97 P3d 1090 (2004), and St. v. Shelton, 2008 MT 282, 345 M 330, 191 P3d 420 (2008).

Search Incident to Conversation After Traffic Stop Concluded Considered Voluntary — Motion to Suppress Properly Denied: Officers stopped Merrill for investigation following an improper lane change. A license plate check showed that Merrill was not the vehicle owner. However, the vehicle was owned by a person suspected by one of the officers to be involved with dangerous drugs. The officer told Merrill that he was just giving her a verbal warning and that she was free to go. Stepping away from the vehicle, the officer noticed that Merrill seemed unusually nervous. Suspicious about the report regarding the vehicle owner, the officer again approached the vehicle and asked Merrill if he could talk to her. Merrill answered affirmatively. The officer then asked if he could search the vehicle. Merrill again answered affirmatively. Merrill stepped out of the car,

and the officer asked if he could search her person, including her pockets. Merrill again answered affirmatively, and the officer discovered drugs in her pocket. Merrill contended that she had been unlawfully detained subsequent to an investigatory stop and that the evidence should be suppressed. The trial court concluded that the search was voluntary and denied the suppression motion. On appeal, the Supreme Court affirmed. Once the officer completed the investigation of the improper lane change, the investigatory stop was concluded and Merrill was free to leave. What followed was neither a subsequent investigatory stop nor an extension of the first stop, but rather a voluntary exchange, and nothing prevents an officer from engaging a citizen in a voluntary conversation. A purely voluntary conversation intrudes on no constitutionally protected interest, so Merrill was accorded no constitutional protection related to the search and seizure, and denial of the motion to suppress was appropriate. St. v. Merrill, 2004 MT 169, 322 M 47, 93 P3d 1227 (2004), followed in St. v. Hill, 2004 MT 184, 322 M 165, 94 P3d 752 (2004).

Threat of Cruelty to Animals Sufficient Exigent Circumstance to Justify Warrantless Entry of Probationer's Home — Entry Authorized by Probation Officer: Stone ran an animal zoo at his home. A neighborhood boy who assisted in feeding animals and cleaning cages notified authorities that some animals had died and that numerous others appeared to be without food or water. When officers arrived on Stone's posted property, they confirmed that numerous animals were dead and others had no food or water. Stone was not home, but the boy informed the officers that there were other animals in the house. The officers also learned that Stone was on probation and notified Stone's probation officer, who authorized entry into the house so that the animals inside could be cared for. Stone was convicted of animal cruelty and appealed on grounds that he had an expectation of privacy and that, although probable cause existed, the entry was unlawful because of the absence of exigent circumstances, so the evidence should have been suppressed. In a case of first impression, the Supreme Court concluded that the unrefuted imminent threat to the lives and well-being of the animals and the prevention of needless suffering and death of the animals were adequate exigent circumstances to justify warrantless entry into the house so as not to frustrate legitimate law enforcement efforts in preventing animal cruelty. Having reasonable cause to suspect that Stone was violating probation by committing cruelty to animals inside the house, the warrantless entry was also considered a justifiable probation search, and denial of the motion to suppress was proper. St. v. Stone, 2004 MT 151, 321 M 489, 92 P3d 1178 (2004). See also Tuck v. U.S., 477 A2d 1115 (1984), St. v. Bauer, 379 NW 2d 895 (1985), Pine v. St., 889 SW 2d 625 (1994), and People v. Thornton, 676 NE 2d 1024 (1997).

Sufficient Particularized Suspicion for DUI Stop Based on Anonymous Tip and Officer's Observations: An officer received an anonymous tip that Brander was driving while intoxicated. The tipster named Brander, described the vehicle, including a license number and model, and gave Brander's direction of travel and suspected destination. The officer encountered a vehicle that mostly matched the description and followed, observing that the vehicle was moving slowly, meandering in its lane, crossing the fog line, partially crossing into the left lane without signaling, and then moving back into the right lane. The officer initiated a stop and noticed a number of cases of beer in the back of the truck that were both opened and unopened. Brander failed field sobriety tests and was arrested. Brander contended that the officer did not have reasonable grounds for making the stop based on the anonymous tip and moved to suppress the DUI evidence. The suppression motion was denied, and on appeal, the Supreme Court affirmed. Brander's argument failed because the stop was not based solely on the tip with no independent observation of suspicious activity. In fact, the officer was not even initially sure if the vehicle that he was stopping was the one described in the tip, but based on the officer's training and experience, the erratic driving supported a particularized suspicion that the driver was under the influence sufficient to warrant the stop and the administration of field sobriety tests. St. v. Brander, 2004 MT 150, 321 M 484, 92 P3d 1173 (2004), followed in St. v. Schulke, 2005 MT 77, 326 M 390, 109 P3d 744 (2005). See also Hulse v. St., 1998 MT 108, 289 M 1, 961 P2d 75 (1998). Hulse was followed in St. v. Meza, 2006 MT 210, 333 M 305, 143 P3d 422 (2006).

Lack of Exigent Circumstances Justifying Warrantless Search of Fanny Pack — Motion to Suppress Evidence Properly Granted: After Lanegan was arrested for obstructing a peace officer and handcuffed, the officer proceeded to conduct a warrantless search of Lanegan's fanny pack and discovered drugs and drug paraphernalia. Lanegan was then charged with drug crimes. Lanegan moved to suppress the evidence, and the motion was granted. The state appealed, but the Supreme Court affirmed. A search incident to arrest may be conducted under the conditions in 46-5-102, but in this case, none of the conditions were present. The search would not have protected the officer or prevented Lanegan's escape because Lanegan was already handcuffed, nor would the search have resulted in discovery of anything that could have been used in or

fruits of the crime of obstructing a peace officer. Warrantless searches are per se unreasonable, but one exception is when there are exigent circumstances that would cause a reasonable person to believe that prompt action is necessary to prevent physical harm, destruction of relevant evidence, escape, or some other consequence improperly frustrating legitimate law enforcement efforts. However, the search in this case did not rise to the level of exigent circumstances to allow a warrantless search, and the motion to suppress was properly granted. St. v. Lanegan, 2004 MT 134, 321 M 349, 91 P3d 578 (2004).

Sufficient Objective Police Data to Warrant Investigative Stop of Burglary Suspect — Motion to Suppress Evidence Properly Denied: Following a tip from a former parole officer and a background check, Eixenberger became a potential suspect in a string of burglaries in Kalispell area casinos. Eixenberger had received two citations while driving a red Thunderbird in the area and became a primary suspect when the car was seen about 200 yards from a casino about 9 minutes before the casino was burglarized. The car was subsequently spotted several times, with either Eixenberger or a friend driving, during early morning hours when the burglaries occurred. One early morning, a casino was burglarized. Police checked Eixenberger's friend's residence and found neither Eixenberger nor the car and then stopped Eixenberger in the car a short distance from and within minutes of another casino burglary. Police found rocks and tools consistent with the burglaries. Eixenberger moved to suppress the evidence on grounds that the police lacked a particularized suspicion to make the investigative stop, but the motion was denied. On appeal, the Supreme Court affirmed. Under the totality of circumstances in this case, the police had sufficient objective data to support a suspicion that Eixenberger was or had engaged in wrongdoing, so the investigative stop was appropriate. St. v. Eixenberger, 2004 MT 127, 321 M 298, 90 P3d 453 (2004), distinguishing St. v. Lafferty, 1998 MT 247, 291 M 157, 967 P2d 363 (1998).

No Expectation of Privacy in Animal Cape Taken to Taxidermist: Bowman took an elk cape to a taxidermist for mounting, but the cape was seized without a warrant when wildlife officials received a tip that Bowman had taken the elk out of season. Bowman contended that the evidence should be suppressed because the search was unlawful. On appeal, the Supreme Court noted that a determination of whether a search is lawful depends in part on whether a person has an actual expectation of privacy that society is willing to recognize as reasonable and that one factor in determining a legitimate expectation of privacy is the extent to which the person took measures to shield the property from public view. Here, any expectation of privacy that Bowman had in the cape was relinquished when, without taking any measures to preserve a claim of privacy, the cape was taken to a public business and placed in possession of a third party, even if the transfer was only temporary. St. v. Bowman, 2004 MT 119, 321 M 176, 89 P3d 986 (2004).

Warrants Based on Anonymous Tip Sufficiently Corroborated by Inculpatory Information — Motion to Suppress Evidence Properly Denied: Wildlife officials received an anonymous tip that Bowman had taken an elk out of season and seized evidence at a taxidermy shop and at Bowman's home pursuant to two warrants. Bowman moved to suppress the evidence, contending that the warrant applications did not state probable cause. The motion was denied, and on appeal, the Supreme Court affirmed. After receiving the anonymous tip, the wildlife officials obtained independent data that revealed inculpatory information corroborating the criminal conduct disclosed by the tip, which provided a substantial basis to determine that probable cause existed to issue the warrants. Bowman's motion to suppress was properly denied. St. v. Bowman, 2004 MT 119, 321 M 176, 89 P3d 986 (2004).

Reliability of Citizen's Tip — Totality of Circumstances Justifying Investigative Stop: A citizen called in a suspected DUI, giving a detailed description of Hall and his vehicle. The report by the named informant was bolstered by a store clerk who personally observed Hall's behavior. An officer spotted Hall's vehicle minutes after receiving the report, matched it to the detailed description, and corroborated the report after observing Hall's actions. Hall contended that the officer nevertheless had insufficient information to support a particularized suspicion of DUI and that the subsequent investigative stop was illegal. The Supreme Court applied the factors in St. v. Pratt, 286 M 156, 951 P2d 37 (1997), to evaluate the totality of the circumstances. The court noted that an officer in the field must be able to rely on reports and dispatches from other officers without having to conduct a cross-examination as to the basis of the report, but when an officer has acted on dispatched information, it is appropriate to include information known to the dispatching or reporting officer. Here, the initial tip and the corroboration gave a high indicia of reliability that, when coupled with the officer's observations, satisfied the Pratt factors for a justified investigative stop made pursuant to a tip. St. v. Hall, 2004 MT 106, 321 M 78, 88 P3d

1273 (2004). See also St. v. Roy, 2013 MT 51, 369 Mont. 173, 296 P.3d 1169, and St. v. Gill, 2012 MT 36, 364 Mont. 182, 272 P.3d 60.

Reasonable Cause for Investigative Stop and Pat-Down Search — Motion to Suppress Evidence Properly Denied: An officer discovered a youth behind a car about 11 p.m., apparently working on the vehicle's license plate. The officer suspected that the youth was removing the plate, but when asked, the youth claimed to be installing it. The officer recognized the youth from prior law enforcement contacts and knew that the youth did not live at the residence or own a car. Based on these circumstances, the officer conducted a pat-down search and discovered a marijuana pipe. At about that time, the youth's girlfriend came out of the residence and told the officer that she had requested that the youth put the license plate on the vehicle. The youth later moved to suppress the drug paraphernalia on grounds that the officer did not have a particularized suspicion to make the investigative stop, exceeded the scope of the investigative stop, and did not have probable cause to conduct a frisk. The Supreme Court affirmed denial of the motion to suppress. Applying the two-part test from St. v. Gopher, 193 M 189, 631 P2d 293 (1981), the court held that the officer had sufficient objective data to form a particularized suspicion that the youth was engaged in wrongdoing to justify the investigative stop. Then, once the officer recognized the youth, suspicions were heightened, so the pat-down search remained within the context of the initial stop, and the officer did not exceed the scope of the stop. Finally, because of the officer's prior dealings with the youth and knowing that the youth did not live at the residence or own a car, the officer had reasonable cause: (1) to believe that the youth was committing an offense and might be armed; (2) for concern for the officer's safety; and (3) to conduct a frisk. The officer did not have to accept the youth's seemingly innocent explanation of why he was working behind the car late at night. In re D.R.B., 2004 MT 90, 320 M 516, 88 P3d 808 (2004). See also St. v. Collard, 286 M 185, 951 P2d 56 (1997), and St. v. Dawson, 1999 MT 171, 295 M 212, 983 P2d 916 (1999).

Voluntary Encounter Versus Investigative Stop: Officers received a report from a citizen that a vehicle had been observed being driven erratically on the interstate and that the driver had pulled over at a convenience store and staggered into the building. When officers arrived, they found an unoccupied vehicle that matched the informant's description and observed Wagner inside on the telephone. The officers initiated contact with Wagner, noticing immediately that he appeared intoxicated, and requested that Wagner speak with them outside. Wagner acceded, voluntarily admitted that he had been drinking, failed field sobriety tests, and was arrested for DUI. Wagner subsequently asserted that the officers lacked a particularized suspicion to make the investigative stop because the informant's report was not sufficiently corroborated and moved to dismiss. The motion was denied, and Wagner appealed. The Supreme Court noted that if the telephone encounter constituted an investigative stop, it would be necessary to determine whether the officers obtained the requisite particularized suspicion, but if the encounter did not constitute a stop, it must be determined whether officers obtained the requisite particularized suspicion after initiating contact but prior to conducting a stop. Here, the court cited U.S. v. Mendenhall, 446 US 544 (1980), and held that Wagner was not "seized" because in view of all the circumstances surrounding the incident, Wagner would not have believed that he was not free to leave. Following the initial approach, the officers then obtained the evidence of Wagner's intoxication through consensual means, providing the requisite particularized suspicion to conduct the ensuing investigative stop. St. v. Wagner, 2003 MT 120, 315 M 498, 68 P3d 840 (2003). See also St. v. Jenkins, 192 M 539, 629 P2d 761 (1981), St. v. Roberts, 1999 MT 59, 293 M 476, 977 P2d 974 (1999), and St. v. Clayton, 2002 MT 67, 309 M 215, 45 P3d 30 (2002).

Exigent Circumstances and Probable Cause Justifying Warrantless Entry Into Private Home — Motion to Suppress Evidence of Warrantless Search Properly Denied: In response to an urgent domestic violence 9-1-1 call from Saxton, officers arrived at Saxton's mobile home, but because they received no response to their calls and knocking, the officers entered the home to protect the lives of possible victims inside. Once inside, the officers discovered a marijuana growing operation and subsequently arrested Saxton on drug charges. Saxton moved to suppress the evidence on grounds that the warrantless entry was unlawful, but the motion was denied, and Saxton appealed. The Supreme Court recognized the general rule that warrantless searches conducted inside a person's home are per se unreasonable, with few exceptions. Pursuant to St. v. Wakeford, 1998 MT 16, 287 M 220, 953 P2d 1065 (1998), one exception occurs when an officer concludes that there are exigent circumstances and probable cause to conduct the search, and in this case, exigent circumstances and probable cause justified entry into the home. It was reasonable for the responding officers to conclude that it was necessary to enter the home to discover and protect Saxton or other potentially incapacitated victims. Because entry was justified, the District Court

did not err in denying Saxton's motion to suppress evidence obtained as a result of the search. St. v. Saxton, 2003 MT 105, 315 M 315, 68 P3d 721 (2003).

Voluntariness of Statements Made to Officers Responding to Emergency Call — Admissibility of Statements Not Made During Custodial Interrogation: Officers responded to an emergency 9-1-1 domestic violence call at Saxton's home and discovered a marijuana growing operation in the home. Saxton contended that statements made to the officers should be suppressed because the statements were not voluntary and because no Miranda warning was given. The trial court disagreed, and the Supreme Court affirmed. Although the state may not use confessions or admissions obtained through custodial interrogations without proper Miranda warnings, in this case, the officer's conversation with Saxton was not considered a custodial interrogation within the context of Miranda because Saxton was not restrained in any way and was told repeatedly that she was free to leave and because Saxton's statements regarding ownership of the marijuana were offered voluntarily. St. v. Saxton, 2003 MT 105, 315 M 315, 68 P3d 721 (2003).

Elements of Thornton Reasonable Person Test Met — Arrest Unlawful: An officer received a report that the driver of a vehicle similar to Van Dort's had failed to pay for gasoline before leaving a service station. The officer pulled over Van Dort's vehicle and ran a warrant check on Van Dort and his passenger, discovering that the passenger had an outstanding warrant. By mistake, the officer arrested Van Dort but then released him and arrested the passenger. The officer called for backup for assistance in securing the vehicle so that a search could be conducted for contraband. While conducting a pat-down search of the passenger, drugs and paraphernalia were discovered. The passenger was placed in one patrol car, and Van Dort, still in handcuffs, was placed in a second patrol car. Van Dort was told that he was not under arrest, but the vehicle occupants were nevertheless transported to the Sheriff's office, and Van Dort was placed in an interview room. An officer told Van Dort that he was free to go, but that the officer wanted to ask Van Dort a few questions. Van Dort was then read his Miranda rights and questioned for 2 hours, at which time he admitted using methamphetamine earlier in the day. Van Dort was then charged with drug possession and subsequently moved to suppress the confession and evidence on grounds that his detention amounted to an unlawful arrest, but the motion was denied, and Van Dort appealed. The Supreme Court applied the test in St. v. Thornton, 218 M 317, 708 P2d 273 (1985), to determine whether an arrest occurred. The test involves three elements: (1) authority to arrest; (2) assertion of that authority to effect an arrest; and (3) restraint of the person arrested. The District Court found that because the officer informed Van Dort that he was not under arrest, the second element of the test was not satisfied. The Supreme Court found this reasoning too restrictive, focusing solely on the officer's words to the exclusion of the officer's conduct and the circumstances of Van Dort's detention. In U.S. v. Bravo, 295 F3d 1002 (9th Cir. 2002), it was held that an officer cannot negate a custodial situation simply by telling a suspect that the suspect is not under arrest because such an affirmation is only one factor within the totality of the circumstances to be considered in the analysis of an arrest. Further, under Thornton, an arrest has been accorded a broad definition that applies if a reasonable person, innocent of any crime, would have felt free to walk away under the circumstances. In this case, a reasonable person would have believed that the person was under arrest, despite the officer's statement to the contrary. All the Thornton factors being met, Van Dort was in fact placed under arrest. The court then considered whether the arrest was lawful based on probable cause and concluded that the facts and circumstances were insufficient for the officer to believe that Van Dort was committing or had committed an offense. The officer may have suspected that Van Dort had used drugs and used that suspicion to take Van Dort in for purposes of eliciting a confession, but at the time of the arrest, there was no evidence to support a reasonable belief of Van Dort's drug use sufficient to establish probable cause, so Van Dort's arrest was unlawful. St. v. Van Dort, 2003 MT 104, 315 M 303, 68 P3d 728 (2003), followed in St. v. Ellington, 2006 MT 219, 333 M 411, 143 P3d 119 (2006).

Reasonable Expectation of Privacy in Lost Wallet — Evidence Obtained From Search of Lost Wallet Subject to Suppression: Hamilton's lost wallet was turned into the Bozeman police, who opened it to determine ownership. In doing so, the police discovered prescription drugs. Hamilton confessed that the drugs were not prescribed for her, and she was arrested and convicted. On appeal, Hamilton asserted that she retained an expectation of privacy in the lost wallet and that the fruits of the search of the wallet should be suppressed. The Supreme Court agreed. In determining whether an unlawful search of the wallet occurred, the court applied St. v. Scheetz, 286 M 41, 950 P2d 722 (1997), looking at whether Hamilton had an actual expectation of privacy that society was willing to recognize as objectively reasonable and at the nature of the state's intrusion. When a person intentionally abandons property, the expectation of privacy is

abandoned as well. However, when property is not intentionally or voluntarily abandoned, the expectation of privacy remains substantially intact. Thus, Hamilton's expectation of privacy was diminished only to the extent necessary for the police to determine ownership. The police search exceeded what was necessary to determine ownership of the wallet and was not justified by any exception to the warrant requirements. Therefore, the warrantless search was illegal, and the evidence obtained as a result of the search should have been suppressed. Hamilton's conviction was reversed. St. v. Hamilton, 2003 MT 71, 314 M 507, 67 P3d 871 (2003), distinguished in St. v. Demontiney, 2014 MT 66, 374 Mont. 211, 324 P.3d 344.

Unusual but Legal Driving and Unsupported Tip Insufficient Grounds for Particularized Suspicion to Make Investigative Stop: An officer received a tip concerning suspicious activity in a high crime area of Billings. The officer observed Fisher's car in the area and followed the car. The officer observed that the vehicle had a temporary sticker, which could not be read, but no license plate. The vehicle made several turns and ended up on the street where the officer originally saw it. The officer then stopped the vehicle, and Fisher was subsequently arrested for possession of drugs and drug paraphernalia. Fisher moved to suppress the evidence on grounds that the officer had no particularized suspicion to make the stop. The motion was denied and Fisher was convicted and appealed. The state initially claimed that the officer had a particularized suspicion that Fisher was in violation of vehicle registration laws, but the state waived that argument when the officer did not testify to that effect. Further, none of the information in the anonymous tip was connected to Fisher; rather, the officer stated that he wanted to obtain the identity of the vehicle occupants for later investigation of the tip. However, under St. v. Anderson, 258 M 510, 853 P2d 1245 (1993), an investigative stop is not justified in order to corroborate a tip. Lastly, Fisher maintained an appropriate speed, violated no traffic laws, and made no unusual turns, and Fisher's driving was not headlong flight or evasive. The simple fact that Fisher drove back to the original street where the officer saw the vehicle, absent more objective data, was insufficient for the officer to form a particularized suspicion that Fisher was engaged in criminal activity based on operation of the vehicle. Thus, the stop violated Fisher's right to be free from unreasonable search and seizure and the Supreme Court reversed. St. v. Fisher, 2002 MT 335, 313 M 274, 60 P3d 1004 (2002), distinguishing St. v. Henderson, 1998 MT 233, 291 M 77, 966 P2d 137 (1998), and Ill. v. Wardlow, 528 US 119 (2000), and distinguished in St. v. Flemings, 2008 MT 229, 344 M 360, 188 P3d 1020 (2008).

Use of Force in Resisting Arrest Committed After Investigative Stop — Exclusionary Rule Inapplicable: Courville was stopped by an officer who had reports of underage drinking in the area. When the officer tried to arrest Courville, Courville assaulted the officer. Courville moved to suppress the evidence under the exclusionary rule because the officer did not have a particularized suspicion to make the stop in the first place. The motion was denied, and Courville appealed, but the Supreme Court affirmed. An officer must have a particularized suspicion to conduct an investigatory stop, and if no particularized suspicion exists, the exclusionary rule precludes introduction of evidence gathered from the illegal stop. However, the rule does not apply in every case. If the evidence is so attenuated or dissipated from the government's constitutional violation that the evidence loses its primary constitutional taint, then the evidence is admissible. To allow a person whose right to be free from unreasonable searches and seizures was allegedly violated to respond with unlimited violence would create intolerable results. Here, the evidence of Courville's criminal conduct committed against the officer was so attenuated from the claimed improper investigatory stop that it lost its primary constitutional taint, if any existed. Thus, the exclusionary rule did not apply, and the motion to suppress was properly denied. St. v. Courville, 2002 MT 330, 313 M 218, 61 P3d 749 (2002), following St. v. Ottwell, 240 M 376, 784 P2d 402 (1989).

One Taillight Brighter Than Other — Not Grounds for Investigative Stop: An investigative stop of a motor vehicle was not justified by the fact that one taillight burned brighter than the other when both lights, including the running lights, brake lights, and turn signals, worked. A variance in the illuminating qualities of taillights on a vehicle is not a violation of Montana law if each emits a red light plainly visible from a distance of 1,000 feet to the rear. The Supreme Court held that all evidence gathered as a result of the stop must be suppressed. St. v. Kaufman, 2002 MT 294, 313 M 1, 59 P3d 1166 (2002).

Involuntary Written Consent to Search — Suppression of Illegally Seized Evidence Under Exclusionary Rule: Olson was arrested when officers entered her home pursuant to a warrant for Olson's failure to appear at a Justice's Court hearing. While the arrest was taking place in the kitchen, an officer looked into the living room and observed drug paraphernalia. Officers then searched other rooms of the house and found drugs and paraphernalia in each room. An

officer requested that Olson sign a form consenting to a further search of the residence, and Olson agreed. A further search revealed more drugs and paraphernalia. Olson later made a taped statement in jail. The District Court denied Olson's motion to suppress on grounds that the written consent was voluntary. The Supreme Court disagreed and reversed. Although the knowing and voluntary consent by a citizen to a search is a recognized exception to warrant requirements, consent is not voluntary when it is given only after law enforcement officers have already conducted an illegal search because the consent flows directly from the unlawful intrusion. Further, the taped statement should have also been suppressed under the exclusionary rule, because the incriminating statement was gathered as a result of the unlawful search. St. v. Olson, 2002 MT 211, 311 M 270, 55 P3d 935 (2002).

Warrantless Search of Home Subsequent to Lawful Arrest Unjustified Under Plain View Doctrine and Protective Sweep: Olson was arrested when officers entered her home pursuant to a warrant for Olson's failure to appear at a Justice's Court hearing. While the arrest was taking place in the kitchen, an officer looked into the living room and observed drug paraphernalia. Officers then searched other rooms of the house and found drugs and paraphernalia in each room. Olson moved to suppress the evidence and subsequent statement on grounds that the warrantless search was unreasonable. The District Court denied the motion pursuant to the plain view doctrine and concluded that the search was justified as a precautionary sweep. The Supreme Court reversed. Under Chimel v. Calif., 395 US 752 (1969), there is no comparable justification for routinely searching any room other than that in which the arrest occurs. Further, under Md. v. Buie, 494 US 325 (1990), a protective sweep is justified when there are articulable facts that, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene. In this case, the arresting officers were informed that there was no one else in the house at the time of the arrest and had no indication to believe otherwise. Neither the plain view doctrine nor a protective sweep justified a further search of the residence without a warrant. St. v. Olson, 2002 MT 211, 311 M 270, 55 P3d 935 (2002).

Absence of Exigent Circumstances — Warrantless Search Unjustified: Logan was one of two passengers in a vehicle that was stopped for failure to have the rear license plate illuminated. The officer recognized the driver, who had a history of carrying weapons and of violence toward police officers, and called for backup. The officer then approached the vehicle but did not smell or observe any illegal drugs or drug paraphernalia or observe any behavior that led the officer to believe that anyone in the vehicle was under the influence of drugs. After obtaining identification from the driver and passengers, the officer ran a check for outstanding warrants on all the parties and learned that all three persons had past drug arrests and that an extreme officer caution alert was in effect for the driver. The officer then called for another officer who had a drug-sniffing dog. The dog alerted to the passenger-side door of the car, and the officer removed a purse from the back seat containing drug paraphernalia and a paper bindle. The dog entered the vehicle and indicated additional drugs. Logan was subsequently arrested for possession of dangerous drugs but moved to suppress the evidence on grounds that the officer did not have a particularized suspicion of the presence of drugs to support a canine sniff search of the vehicle. The Supreme Court agreed. In St. v. Elison, 2000 MT 288, 302 M 228, 14 P3d 456 (2000), the Supreme Court held that there is no automobile exception to constitutional search warrant requirements and that the mobility of a vehicle, without more, is not sufficient to justify a warrantless search. In addition to particularized suspicion, a warrantless search of a vehicle requires probable cause and a generally applicable exception to the warrant requirement, such as plain view search, a search incident to arrest, or exigent circumstances, which was the only applicable exception at issue here. The District Court held that the exigent circumstance in this case was that allowing Logan to reenter the vehicle to retrieve the purse would have provided the opportunity to destroy the evidence. However, the officer testified that there was nothing that prevented obtaining a search warrant, and that testimony itself belied the fact that exigent circumstances existed. Because the state failed to meet the heavy burden of proving exigent circumstances, the District Court erred in denying Logan's motion to suppress, so the case was reversed. St. v. Logan, 2002 MT 206, 311 M 239, 53 P3d 1285 (2002).

Writs of Execution Used to Enter, Search, and Seize — Damages for Violation of Constitutional Rights — Immunity of Peace Officers: Two brothers sued the Sheriff and two deputies for violating their Montana constitutional rights to privacy, due process, and freedom from unreasonable searches and seizures. Neither writs of execution issued to enforce default judgments against one brother nor the postjudgment statutes under which they were issued expressly directed or authorized local peace officers to enter the other brother's house and search for and seize property

of the brother against whom the writs were issued and who lived in the house. Therefore, 2-9-103 did not give the peace officers immunity from suit on the basis that they acted "under the authority of law". However, to the extent that any claim for damages for violation of due process is based on failure to provide the brother against whom the writs were issued with notice of property that is exempt from execution and a timely hearing, the claim results from the execution statutes' constitutional inadequacy, and recovery for those procedural inadequacies is barred by the provision in 2-9-103 for immunity for an action under authority of a law subsequently found unconstitutional. The District Court's dismissal, based on statutory immunity, of the brothers' other claims was reversed. Dorwart v. Caraway, 2002 MT 240, 312 M 1, 58 P3d 128 (2002).

Elements of Community Caretaker Doctrine — Particularized Suspicion Not Required in Case of Safety Stop: About 3:05 a.m., an officer on routine patrol stopped to investigate a vehicle parked beside a highway with its lights out but with its motor running. Lovegren was in the driver's seat and appeared to be asleep, but he did not respond when the officer knocked on the window. When the officer opened the door, Lovegren awoke and stated, "I was drinking." The officer noticed that Lovegren's eyes were bloodshot and smelled alcohol. The officer had Lovegren perform field sobriety tests, which Lovegren failed, and arrested Lovegren for DUI. Lovegren moved to suppress all evidence, claiming that the search was illegal because the officer had no particularized suspicion of any wrongdoing. The District Court denied the motion on grounds that a particularized suspicion was not necessary because the officer had a duty to investigate for Lovegren's own safety. Lovegren appealed, but the Supreme Court affirmed pursuant to the community caretaker doctrine. The court applied the following test to determine whether an officer's actions fall under the doctrine: (1) as long as there are objective, specific, and articulable facts from which an experienced officer would suspect that a citizen is in need of help or is in peril, the officer has a right to stop and investigate; (2) if the citizen is in need of aid, the officer may take appropriate action to render assistance or mitigate the peril; and (3) once the officer is assured that the citizen is not in peril and is not in need of assistance or that the peril has been mitigated, any actions beyond that constitute a seizure implicating constitutional protections afforded by the right of privacy and the right against illegal search and seizure. In this case, when the officer opened the door to check on Lovegren's well-being and Lovegren awoke and voluntarily stated that he had been drinking, the officer then noticed other signs of intoxication that constituted a particularized suspicion to make a further investigative stop that eventually developed into probable cause for an arrest. It would have been a dereliction of the officer's duty if, after knocking on the window and receiving no response, the officer had walked away and continued on patrol. Thus, the escalation of events leading to Lovegren's arrest was proper, and denial of the motion to suppress the evidence of the investigation was not erroneous. St. v. Lovegren, 2002 MT 153, 310 M 358, 51 P3d 471 (2002), following Grinde v. St., 249 M 77, 813 P2d 473 (1991), and Hulse v. St., 1998 MT 108, 289 M 1, 961 P2d 75 (1998), and followed in St. v. Reiner, 2003 MT 243, 317 M 304, 77 P3d 210 (2003), St. v. Nelson, 2004 MT 13, 319 M 250, 84 P3d 25 (2004), St. v. Litschauer, 2005 MT 331, 330 M 22, 126 P3d 456 (2005), St. v. Wheeler, 2006 MT 38, 331 M 179, 134 P3d 38 (2006), and St. v. Vaughn, 2007 MT 164, 338 M 97, 164 P3d 873 (2007). The Lovegren community caretaker doctrine was also applied in St. v. Seaman, 2005 MT 307, 329 M 429, 124 P3d 1137 (2005). See also Henry v. U.S., 361 US 98 (1959), Terry v. Ohio, 392 US 1 (1968), and Cady v. Dombrowski, 413 US 433 (1973).

Defendant Present in Apartment Where Methamphetamine Lab Found — Totality of Circumstances Justifying Warrantless Arrest: Officers raided Savage's apartment, identified by an anonymous tip as a suspected methamphetamine laboratory. Nalder was also present, and although officers had no previous suspicions regarding Nalder, they arrested her after hearing a toilet running and observing her standing in the kitchen, which was adjacent to the bathroom, near what appeared to be a jar filled with a substance in the first stage of the methamphetamine-producing process. During an interview, Nalder admitted to flushing substances used to make methamphetamine down the toilet when she heard the officers announce themselves. Nalder was charged with tampering with physical evidence, but Nalder moved to suppress the statements and the charge on grounds that probable cause did not exist for her warrantless arrest. The motion was denied, and Nalder was convicted and appealed, contending error in denial of the motion to suppress based on certain findings that were allegedly incorrect. The Supreme Court affirmed. The trial court's finding that the officers announced their presence twice before entering the apartment, contrary to Nalder's claim that she did not hear any knocking, was supported by the evidence and not clearly erroneous because failure to hear did not constitute evidence contradicting the officers' testimony that they announced themselves. The trial court's finding that the officers broke down the door was not supported by substantial evidence and was thus

erroneous, but the error was not prejudicial in light of the totality of the circumstances. Nalder correctly asserted that her mere presence at the scene did not justify arrest and that there must be some connection with criminal activity before her warrantless arrest was justified. However, considered in light of the totality of the circumstances and the trained officers' knowledge, there was sufficient probable cause for Nalder's arrest. The officers received extensive training in what to reasonably expect while raiding a methamphetamine laboratory, and evaluated in accordance with the officers' perceptions, they could reasonably believe that Nalder was committing, and had just committed, a crime. St. v. Nalder, 2001 MT 270, 307 M 280, 37 P3d 661 (2001).

Invalid Warrantless Search of Defendant's Hands Absent Exigent Circumstances: Officers responding to a break-in found blood on doorknobs, light switches, broken glass, and other objects in the house and garage. Matching the description of the suspect, Hardaway was picked up near the scene and found to have blood on his hands. Hardaway was arrested for burglary, and during postarrest processing, blood was swabbed from his hands without permission or a warrant. The blood sample matched the blood evidence found at the scene. Hardaway moved to suppress blood swab evidence obtained from his hands after arrest, but the motion was denied. The District Court reasoned that the swabbing either was not a search, pursuant to St. v. Holzapfel, 230 M 105, 748 P2d 953 (1988), or was justified as a search incident to arrest, pursuant to St. v. Ulrich, 187 M 347, 609 P2d 1218 (1980). Hardaway appealed on grounds that the swabbing was clearly a search that was required to be justified by both probable cause and exigent circumstances and that no exigent circumstances existed because he was in custody at the time and a warrant could have been obtained. The Supreme Court agreed and reversed. The court adopted the analysis of what constitutes a search set out in Cupp v. Murphy, 412 US 291 (1973), holding that Hardaway had a reasonable expectation of privacy as to his person and personal security (overruling Holzapfel) and that the swabbing constituted a search subject to federal and Montana constitutional protections. Although his hands and the blood on them were exposed to the public for viewing, it was not the viewing that constituted a search, but rather the swabbing. Further, even though the swabbing could be considered a search incident to arrest pursuant to federal law and the bright-line rule in U.S. v. Robinson, 414 US 218 (1973), that requires no further justification than a lawful arrest for the search exception to apply, the Supreme Court opted to grant greater individual privacy rights protection to Hardaway based on the Montana Constitution, consistent with the prior holding in St. v. Sawyer, 174 M 512, 571 P2d 1131 (1977). The court noted its consistent holdings that a warrantless search incident to an arrest must be commensurate with its underlying purpose of preventing an arrestee from using any weapons, escaping, or destroying incriminating evanescent evidence in the arrestee's possession, considered inherently anticipated exigent circumstances under 46-5-102(1) through (3); however, to the extent that a warrantless search incident to a lawful arrest is conducted pursuant to 46-5-102(4), which deals with discovering and seizing any persons, instruments, articles, or things that may have been used in the commission of or that may constitute evidence of the offense, specific and articulable exigent circumstances are also required to justify and render the search lawful (distinguishing and partially overruling Ulrich). Here, there were simply no exigent circumstances requiring a warrantless search. Hardaway was at the station house, under the full control of the police, with no present means of destroying the blood evidence. Hardaway could have consented to the swab or waited in discomfort until a warrant was obtained, but either way the evidence was going nowhere. Therefore, the swabbing of Hardaway's hands was not a valid search incident to arrest. St. v. Hardaway, 2001 MT 252, 307 M 139, 36 P3d 900 (2001), distinguished in St. v. Madplume, 2007 MT 11, 335 M 290, 150 P3d 956 (2007).

Arrest and Detention for Nonjailable Offense Unreasonable Absent Circumstances to Justify Immediate Arrest: A Havre police officer responded to a 2:47 a.m. complaint that two people were "messing around with cars" and were running toward the post office, but no physical description was provided. While searching the post office area, the officer noticed a person walking down the street. Upon seeing the police car, the person began running. Bauer was eventually found and arrested for minor in possession (MIP), second offense. During booking, Bauer was also found to be in possession of drugs, but moved to suppress on grounds that his arrest and detention for a nonjailable offense was an unlawful violation of the right to privacy, the right to be free from unreasonable search and seizure, and the right to be free from cruel and unusual punishment. The District Court concluded that the arrest was lawful because once the officer had probable cause to arrest, the right to detain was inherent. The Supreme Court disagreed, reversed, and suppressed the fruits of the search. When determining the reasonableness of a warrantless search, the state's interest must be balanced against the level of intrusion into an individual's privacy resulting from the search, and this analysis applies equally to the seizure of a person. Although 46-6-311

gives officers the discretion to either arrest or issue a notice to appear, to be constitutional, the officer's exercise of that discretion must be reasonable, and in addition to probable cause, there must also be circumstances that require immediate arrest. It is unreasonable for an officer to effect an arrest and detention for a nonjailable offense when there are no circumstances to justify an immediate arrest, and a person stopped for such an offense should not be subjected to the indignity of an arrest and police station detention when a simple, nonintrusive notice to appear will serve the interests of law enforcement. Here, the officer knew that imprisonment was not a potential punishment for Bauer's second offense MIP, and there were no circumstances that required Bauer's immediate arrest, so Bauer should have been issued a notice to appear in lieu of arrest. St. v. Bauer, 2001 MT 248, 307 M 105, 36 P3d 892 (2001).

Few People in Area of Early Morning Complaint, Coupled With Flight by Suspect, Sufficient to Warrant Investigative Stop: A Havre police officer responded to a 2:47 a.m. complaint that two people were "messing around with cars" and were running toward the post office, but no physical description was provided. While searching the post office area, the officer noticed a person walking down the street. Upon seeing the police car, the person began running. Bauer was eventually found and arrested for minor in possession, second offense. During booking, Bauer was also found to be in possession of drugs but moved to suppress on grounds that the officer had no particularized suspicion to make the investigative stop. The District Court found that the stop was warranted, and the Supreme Court agreed, based on these facts: (1) it was early in the morning and there were few people walking on the streets; (2) Bauer was in close proximity to the location of the complaint; (3) there was no physical description of the two individuals available in the complaint; (4) the patrol vehicle was clearly marked with reflective striping and top lights and could be plainly seen under the street lights; and (5) Bauer ran and attempted to hide upon seeing the patrol vehicle. St. v. Bauer, 2001 MT 248, 307 M 105, 36 P3d 892 (2001).

Driver Stopped at Flashing Red Light Over Twenty-Five Seconds Sufficient to Warrant Investigative Stop: About 1 a.m. on a Sunday morning, an officer observed a vehicle stopped at a flashing red light. The officer performed a U-turn and pulled in behind the vehicle. Although there was no other traffic, the vehicle remained stopped for at least 10 more seconds, then the officer honked his horn in an effort to get the vehicle to proceed. The vehicle remained stopped for an additional 10 to 15 seconds and then proceeded through the intersection. By that point, the officer was concerned that the driver was impaired by alcohol, so an investigative stop was made. Cook was tested and arrested for DUI and convicted. Cook moved for suppression of the evidence on grounds that the only information that the officer had upon which to base the stop was that Cook stopped at the light for what the officer believed to be an unusual length of time and that, pursuant to St. v. Reynolds, 272 M 46, 899 P2d 540 (1995), the information was not sufficient to create a particularized suspicion that a criminal offense was being committed to justify an investigative stop. On the other hand, the officer testified that an officer is more likely to encounter an impaired driver during weekend time, such as when Cook was observed, and that a driver's observably slow response to traffic signals is one of a number of visual indicators that a driver may be impaired. The Supreme Court applied the test for particularized suspicion in St. v. Anderson, 275 M 344, 912 P2d 801 (1996), and affirmed. The court distinguished Reynolds, noting that Cook was stopped more than twice as long as Reynolds and that nothing in Reynolds indicated that the officer in that case relied on training and experience to interpret the pause at the intersection as indicative of impaired driving. Based on the totality of the circumstances, the officer had sufficient objective data from which to make inferences regarding Cook's possible impairment that created a particularized suspicion that Cook was committing an offense and to conduct the investigative stop. Missoula v. Cook, 2001 MT 237, 307 M 39, 36 P3d 414 (2001).

Erratic Driving at Night in Proximity to Bars — Totality of Circumstances Justifying Traffic Stop: Shortly after midnight, an officer observed Loiselle's vehicle drifting across the right traffic lane, crossing the white fog line, making several turns without signaling, and weaving. The officer pulled Loiselle over for an investigative stop, which resulted in a DUI charge. At trial, Loiselle moved to suppress evidence obtained during the stop, but the motion was denied, and Loiselle appealed. To make an investigatory stop, an officer must have a particularized and objective basis for suspecting criminal activity, and whether particularized suspicion exists is a question of fact determined by considering the totality of the circumstances. In this case, the totality of the circumstances justified the stop. Loiselle did not merely touch the fog line, but actually drove over it and proceeded on the shoulder of the road for at least 3 seconds. The behavior was preceded by erratic driving that caught the officer's attention and that occurred late at night in the proximity of several nearby bars. Irrespective of Loiselle's failure to use turn signals, to a 5-year veteran of the Sheriff's office, there was sufficient objective data from which the officer could suspect that

the occupant of the vehicle had engaged in wrongdoing and commence an investigatory stop. St. v. Loiselle, 2001 MT 174, 306 M 166, 30 P3d 1097 (2001).

Reasonable Cause for Search of Probationer — Motion to Suppress Evidence of Search Properly Denied: As a condition of a suspended sentence for conviction of felony sale of drugs, Roper consented to warrantless searches of his person, vehicle, or residence. Roper was subsequently granted a conditional discharge from state supervision of his probation because he was serving a concurrent probation as a result of a federal criminal conviction. However, despite the conditional discharge, the state reserved the right to warrantless searches and drug checks during the term of the state probationary sentence, and Roper was relieved only of the requirement to report to the state probation officer monthly. After a few months, the state probation officer became concerned that Roper was both using and selling drugs when two clients reported Roper's continued involvement with drugs. An informant told investigators that Roper stored drugs in a black leather pouch. Based on the gathered information and the close proximity of Roper's workplace to a school, the probation officer believed that reasonable cause existed to search Roper and, with other police officers, went to Roper's workplace and observed him outside involved in what appeared to be a drug transaction. They searched Roper but found no drugs in his possession. The officers went into the workplace and conducted a urinalysis on Roper, which tested positive. While there, the officers noticed a black leather pouch next to Roper's work gloves, seized it, and discovered methamphetamine. Roper was arrested, and the officers went to his house where additional drug evidence was discovered and seized. Roper moved to suppress all the evidence found at both his workplace and residence, contending that the probation officer did not have the right to perform any type of warrantless search and that the evidence seized at the residence was the result of the illegal search of the workplace. The motion was denied, and the Supreme Court affirmed. The probation officer's authority to conduct warrantless searches was extended by the waiver of privacy to which Roper agreed as a condition of probation. The officers were lawfully at Roper's workplace because they had authority to request a urinalysis and to search Roper's person, and the seizure of the black pouch was proper based on the plain view doctrine and information that the pouch was where Roper kept drugs. Further, because the evidence at the workplace was lawfully gathered, the District Court did not err when it denied the motion to suppress evidence gathered during the subsequent search of Roper's home. St. v. Roper, 2001 MT 96, 305 M 212, 26 P3d 741 (2001).

Exigency Requirements for Warrantless Search of Vehicle Clarified — Automobile Exception to Search Warrant Requirement Inapplicable: In order to justify the warrantless search of an automobile, the state must show exigent circumstances under which it was not practical to obtain a warrant. Taking the opportunity to clarify the source of the exigency requirement, the Supreme Court noted that Montana's unique constitutional language affords citizens a greater right to privacy and broader protection than the federal constitution in cases involving searches of private property, and as a result, the category of warrantless searches that may be conducted under the Montana Constitution is narrower than the category of warrantless searches that may be conducted under the federal constitution. The Montana Constitution provides greater protection from warrantless search of automobiles, and such searches are restricted to the purpose of safeguarding articles within plain view of the officer. In this case, Elison had items stowed out of view behind the seat of his car, creating an actual and reasonable expectation of privacy, and the state needed a compelling interest beyond the mere existence of probable cause to search the car without a warrant. The warrantless search of an automobile also requires the existence of a generally applicable exception to the warrant requirement, such as a plain view search, a search incident to arrest, or exigent circumstances. Here, the District Court found exigent circumstances, including the mobility of the vehicle, the possibility that a confederate could move the vehicle, and the fact that it would have been difficult to obtain a warrant at the time that the stop was made at 12:05 a.m. The Supreme Court disagreed and held that the state failed to carry the heavy burden of proving exigent circumstances. Mere mobility of a vehicle, without more, is insufficient to justify a warrantless search. The possibility that a confederate could move the vehicle did not apply because Elison was alone and without means to contact a confederate. The validity of a warrantless search also does not turn solely on the time of day that the search is conducted. Although Montana magistrates may prefer not to be disturbed late at night, Montana's constitutional protections apply at all times and do not simply fade away with the setting sun. Absent exigency, the search of Elison's vehicle was unlawful, and Elison's motion to suppress the fruits of the warrantless search was improperly denied. The case was reversed. St. v. Elison, 2000 MT 288, 302 M 228, 14 P3d 456, 57 St. Rep. 1206 (2000).

Entry of Intensive Supervision Program Officer Into Probationer's Home Without Consent Unlawful — Information Gathered Via Search Admissible as Independent Source or Inevitable Discovery Exceptions to Fruit of Poisonous Tree Doctrine: As a condition of suspended sentencing, Therriault was placed in the intensive supervision program (ISP). Near the end of the program, Therriault's supervising officer, McCarty, arrived at Therriault's residence for a routine check. Although Therriault was not there, McCarty entered the residence and found, in plain view, what he thought might be a note for him from Therriault, but which turned out to be a high school registration form for a female student. McCarty then went to Therriault's sister's home next door. Therriault's sister informed McCarty that she had seen a girl at Therriault's home during the prior 2 weeks and inquired about the lawful age of consent. McCarty then reentered Therriault's home and reviewed the form, discovering that the applicant was 14 years old. McCarty left a note for Therriault to contact him and left the residence but returned later that night to discover a 14-year-old girl in Therriault's basement. Upon petition to revoke his probation, Therriault alleged that the discovery directly resulted from an illegal search and seizure and moved to suppress all evidence under the fruit of the poisonous tree doctrine. The District Court denied the motion, revoked Therriault's suspended sentence, and sentenced him to prison for the remainder of the term. Therriault appealed. The state contended that as a participant in ISP, Therriault enjoyed little or no expectation of privacy and that McCarty's conduct did not constitute a search. The Supreme Court disagreed, finding that ISP is merely a rigid condition imposed on certain probationers and that it is the sentencing tribunal, not the ISP officer, that establishes the conditions for any search of the probationer's person or property and that any ISP rules, terms or conditions, or means of supervision that conflict with a court-ordered condition of probation will be superseded by the court's conditions. The state misconstrued Therriault's expectation of privacy under ISP because the court's probationary condition stated that Therriault would submit his residence "to search at any time by lawful authorities upon reasonable request of his Probation Officer", so Therriault could expect that an intrusion into the privacy of his home would not occur unless McCarty had reasonable cause and first posed a reasonable request. Accordingly, McCarty's conduct constituted an illegal search and evidence obtained through the unlawful conduct would not generally be admissible under the fruit of the poisonous tree doctrine. However, under St. v. New, 276 M 529, 917 P2d 919 (1996), such derivative evidence is admissible if it is: (1) attenuated from the constitutional violation so as to remove its primary taint; (2) obtained from an independent source; or (3) determined to be evidence that would have been inevitably discovered apart from the constitutional violation. In this case, the second exception applied. McCarty received independent incriminating evidence from Therriault's sister; thus, it was not the tainted evidence of the girl's name or age or the fact that she was transferring to a different school that led to her discovery, but rather the independent information that a girl of questionable age had been residing with Therriault. This irrefutable evidence, ascertained through a source sufficiently independent of McCarty's unlawful conduct, warranted exclusion from the fruit of the poisonous tree doctrine. The District Court's revocation of Therriault's suspended sentence was affirmed. St. v. Therriault, 2000 MT 286, 302 M 189, 14 P3d 444, 57 St. Rep. 1185 (2000).

Random Recovery and Examination of Items Not Allowed Pursuant to Stop and Frisk — Premise of Plain Feel Doctrine: Heath was charged with possession of drugs and paraphernalia discovered during a warrantless pat-down search for weapons conducted during a stop and frisk. Heath moved for suppression of the evidence on grounds that a small leather coin purse and a 2-inch glass pipe could not reasonably have been mistaken for weapons, but the motion was denied. The state contended that the pat down was permissible and that the drug evidence found during the search was lawfully seized under the plain feel doctrine. Pursuant to St. v. Stubbs, 270 M 364, 892 P2d 547, 52 St. Rep. 232 (1995), the state must satisfy two criteria for a stop and frisk to be valid at its inception: (1) the officer must have objective data from which an experienced officer can make certain inferences; and (2) the officer must have a resulting suspicion that the occupant of a vehicle was engaged in wrongdoing or was a witness to criminal activity. The frisk is to search for potential weapons, and the officer must suspect an object to be a weapon, or if the officer detects other contraband during the pat down for weapons, its incriminating character must be immediately apparent. The District Court determined that the small leather coin purse could not be mistaken for a weapon, but nevertheless concluded that it could have contained a weapon. However, that conclusion exceeded the permissible scope of a pat-down search, and the Supreme Court found no justification in removing the coin purse on the blanket assumption that it could contain a weapon. The court also found no basis for concluding that the glass pipe's incriminating nature was immediately apparent, and thus there was no basis for invoking

the plain feel doctrine. An officer cannot randomly recover items from a suspect's clothing and proceed to examine them pursuant to a stop and frisk and then, after the fact, argue that the objects might have contained a weapon or were immediately apparent as contraband. Here, the warrantless search was per se unreasonable, and the state failed to prove that the search came within the reasonable scope of a stop and frisk. The Supreme Court reversed the District Court's denial of Heath's motion to suppress and remanded for further proceedings. St. v. Heath, 2000 MT 94, 299 M 230, 999 P2d 324, 57 St. Rep. 387 (2000), distinguishing St. v. LaMere, 226 M 323, 735 P2d 511 (1987).

Officer's Knowledge of Vehicle Owner's Revoked License Sufficient Basis for Suspicion of Criminal Activity to Warrant Stopping Vehicle: Deputy Keintz observed a vehicle displaying a distinctive personalized license plate being driven by a female south of Missoula. The officer recognized the license plate, recalled the prior arrest and license suspension of the vehicle owner, and initiated a traffic stop. Halvorson was the owner and driver of the vehicle and was ticketed for driving with a suspended license. On appeal, Halvorson contended that the officer did not have sufficient information to form a particularized suspicion that the occupant of the vehicle was or had been engaged in criminal activity to justify stopping the vehicle. Applying the criteria in St. v. Gopher, 193 M 189, 631 P2d 293 (1981), the Supreme Court followed St. v. Pike, 551 NW 2d 919 (Minn. 1996), in holding that an officer's knowledge that the owner of a vehicle has a revoked driver's license is enough to form the basis of a reasonable suspicion of criminal activity when the officer observes the vehicle being driven, as long as the officer remains unaware of any facts that would render unreasonable an assumption that the owner is driving the vehicle. St. v. Halvorson, 2000 MT 56, 299 M 1, 997 P2d 751, 57 St. Rep. 270 (2000), followed in Billings v. Costa, 2006 MT 181, 333 M 84, 140 P3d 1070 (2006). Costa was followed in St. v. Neil, 2009 MT 128, 350 M 268, 207 P3d 296 (2009).

Warrantless Strip Search of Prison Visitor Permissible if Supported by Reasonable Suspicion: Deserly traveled to the state prison to visit her husband who was an inmate, but upon attempting to enter, her underwire bra set off the metal detector. She was informed that she could consent to a strip search and that if she refused, she would be denied contact visitation but would be allowed noncontact visitation. Deserly was a former jailer and knew what a strip search entailed, but nevertheless consented to the search. Later, Deserly sued the Department of Corrections, seeking unspecified damages for emotional distress allegedly caused when the prison officers required her to submit to the strip search, complaining that her privacy was invaded and that she was humiliated and visually raped as a result of the search. The District Court found that the search was justified and that no privacy invasion occurred and summarily dismissed the case. Deserly conceded on appeal that because the state has an interest in the security of its penal institutions, searches of inmate visitors are justifiable only on satisfying a reasonable suspicion standard, but maintained that the legitimate penalogical need to conduct the search could have been satisfied by more narrow means than a strip search. The Supreme Court acknowledged that one of the clearest forms of degradation in Western society is to strip a person of the person's clothes and that a strip search, regardless of how professionally and courteously conducted, is an embarrassing and humiliating experience. Further, a prison visitor retains the constitutional right to be free from unreasonable searches and seizures. However, a prisoner does not have a due process right to unfettered visitation, nor does a citizen have a right to unfettered visitation of a prisoner that rises to a constitutional dimension. Moreover, in seeking entry into a controlled prison environment, a visitor simultaneously acknowledges a lesser expectation of privacy because of the insistence on access. Because prisons are dangerous places for employees, visitors, and inmates, the basic constitutional issue becomes one of balancing the legitimate governmental interest in and need for searching inmate and prison visitors against the intrusions into personal rights and residual privacy interests that such searches entail. Although prison visitors can be subjected to some searches, such as pat-downs or metal detector sweeps, merely as a condition of visitation, more intrusive searches, such as strip searches, are permissible as exceptions to the constitutional warrant requirements only if the search is supported by reasonable suspicion. Thus, the ultimate question was not simply whether there was some alternative means of conducting the search, but whether prison officials acted reasonably and used the least intrusive means under the circumstances. In Deserly's case, the strip search was supported by reasonable suspicion and was conducted in a manner that took into account Deserly's privacy interest and yet fulfilled the Department's penalogical need to ensure that Deserly was not carrying metal contraband in some article of her clothing. Deserly v. Dept. of Corrections, 2000 MT 42, 298 M 328, 995 P2d 972, 57 St. Rep. 199 (2000), following St. v. Bassett, 1999 MT 109, 294 M 327, 982

P2d 410, 56 St. Rep. 447 (1999), and distinguishing Hunter v. Auger, 672 F2d 668 (8th Cir. 1982), and Thorne v. Jones, 765 F2d 1270 (5th Cir. 1985).

Invalid Third-Party Consent to Warrantless Search of Private Residence — Consenting Party to Have Actual Authority to Consent to Search: A warrantless search conducted inside a home is per se unreasonable, subject to only a few exceptions, one of which is when the search is conducted pursuant to consent that is freely and voluntarily given. The state may justify a warrantless search by showing that permission was obtained from defendant or from a third party who possessed common authority over or other sufficient relationship to the premises or effect sought to be inspected, but the state has the burden of showing that consent was voluntary. However, for third-party consent to be valid, the consenting party must have actual authority to consent, as opposed to apparent authority. In the present case, McLees lived with his father, Scott, in an apartment owned by his grandfather, Earl, and investigating officers obtained Earl's voluntary consent before searching the residence. The District Court held that Earl had common authority to consent to the search and denied McLees' motion to suppress incriminating evidence found in the search. The Supreme Court disagreed. Under U.S. v. Matlock, 415 US 164, 39 L Ed 2d 249, 94 S Ct 988 (1974), common authority may not be implied from the mere property interest of a third party in the property to be searched. Rather, the authority that justifies third-party consent rests on the mutual use of the property by persons having joint access or control for most purposes. Here, the record was insufficient to show that Earl had common authority over McLees' apartment. Earl never went to the apartment unless Scott was there. Earl did not have free access to and was not a cohabitant of the apartment and did not share in its use. The fact that Earl owned the property was not dispositive when McLees had a reasonable expectation of privacy by living there. Earl therefore did not have a sufficient relationship with the apartment that would give him actual authority to consent to a warrantless search. While declining to address whether the seized evidence was admissible under the independent source rule or the inevitable discovery rule, the Supreme Court held that it was inadmissible under the third-party consent rule and reversed for further proceedings. St. v. McLees, 2000 MT 6, 298 M 15, 994 P2d 683, 57 St. Rep. 25 (2000), following St. v. Sorenson, 180 M 269, 590 P2d 136 (1979), St. v. Lopez, 896 P2d 889 (Hawaii 1995), and St. v. Hubbel, 286 M 200, 951 P2d 971, 54 St. Rep. 1373 (1997), distinguishing Ill. v. Rodriguez, 497 US 177, 111 L Ed 2d 148, 110 S Ct 2793 (1990), and followed, with regard to third-party authority to consent to search, in St. v. Gilmore, 2004 MT 363, 324 M 488, 104 P3d 1051 (2004), and St. v. Lacey, 2009 MT 62, 349 M 371, 204 P3d 1192 (2009).

No Evidence of Criminal Activity, Exigent Circumstances, or Emergency — Warrantless Entry Into Home in Search of Runaway Unjustified: While searching for a runaway teenager, police went to McBride's house, where the runaway was reportedly staying. Upon arrival, there was no sign of ongoing criminal activity. The officer was denied entry upon request, but entered anyway. McBride was arrested on an outstanding warrant, and evidence was seized. McBride moved to suppress the evidence, but the motion was denied. Although the facts and circumstances imparted to the officer were from a reliable source, they were insufficient to justify in a reasonable person a belief that McBride had committed any offense. Further, no exigent or emergency circumstances existed to support a compelling need for official action without first securing a warrant; therefore, warrantless entry into McBride's home was wrong. The Supreme Court reversed the order of the trial court denying the motion to suppress the evidence and remanded. St. v. McBride, 1999 MT 127, 294 M 461, 982 P2d 453, 56 St. Rep. 512 (1999), following St. v. Dow, 256 M 126, 844 P2d 780, 49 St. Rep. 1168 (1992), and St. v. Wakeford, 1998 MT 16, 287 M 220, 953 P2d 1065, 55 St. Rep. 56 (1998).

Lawful Entry Into Home by Firefighter — Reasonable Expectation of Privacy Retained — Plain View Exception Inapplicable: A firefighter legally in Bassett's home performing mopup after a fire discovered apparent marijuana growing in a closet. The plants, visible because the closet door had burned away, were subsequently seized by a Deputy Sheriff without a warrant. When told that the plants had been discovered, Bassett waived Miranda rights and admitted growing marijuana but later moved to suppress the statement because it was the direct product of an unconstitutional search. The District Court admitted evidence from the search under the plain view exception and denied suppression of Bassett's confession. The court further held that Bassett no longer held a reasonable expectation of privacy in his closet because he did nothing to restrict entry into the home and because society would not view entry into a burned residence that was largely destroyed and open to the elements as an invasion of privacy. To determine the threshold question of whether the search was an unlawful intrusion into Bassett's privacy, the Supreme Court applied the criteria in St. v. Hubbel, 286 M 200, 951 P2d 971, 54 St. Rep. 1373 (1997): (1) whether Bassett had an actual expectation of privacy; (2) whether society would

recognize that expectation as objectively reasonable; and (3) the nature of the state's intrusion. Citing Mich. v. Tyler, 436 US 499, 56 L Ed 2d 486, 98 S Ct 1942 (1978), the court noted that a person retains a reasonable privacy interest in that person's home even when it has been damaged by fire. The court also followed U.S. v. Hoffman, 607 F2d 280 (9th Cir. 1979), for the proposition that the privacy expectation remains even when firefighters discover contraband. Although a firefighter is obviously justified and in fact expected by Montanans to enter a home to extinguish a fire, this does not mean that Montanans reasonably expect that the private sanctity of their homes will then be open to other government officials to search for evidence of unrelated criminal activity simply because the firefighter was already legitimately on the premises. The firefighter and the Deputy Sheriff each had separate reasons for entering the home. Therefore, two entirely separate justifications for each entry were required. There was no exigent circumstance, such as an immediate emergency, that justified the Deputy Sheriff's warrantless entry, nor did the plain view exception apply because the officer was not legally in the home when the evidence was seen. Further, Bassett did not need to take any affirmative steps to demonstrate that he retained his privacy interest. The warrantless search was unjustified, and Bassett's incriminating statement was the direct product of an illegal search and thus inadmissible by virtue of the exclusionary rule. St. v. Bassett, 1999 MT 109, 294 M 327, 982 P2d 410, 56 St. Rep. 447 (1999), distinguishing St. v. Bell, 737 P2d 254 (Wash. 1987), and St. v. Loh, 275 M 460, 913 P2d 592, 53 St. Rep. 226 (1996).

Person's Belief in Inability to Leave Constituting Seizure: Roberts was reported to be driving under the influence and was followed home by an officer who pulled into Roberts' driveway behind Roberts' car, effectively blocking Roberts' exit. Even though Roberts voluntarily pulled into the driveway and could have simply ignored the officer's presence and walked into his house, in this instance, the officer's actions nevertheless constituted an investigatory stop. Citing U.S. v. Mendenhall, 446 US 544, 64 L Ed 2d 497, 100 S Ct 1870 (1980), and U.S. v. Kerr, 817 F2d 1384 (9th Cir. 1987), the Supreme Court held that a person has been "seized" within the context of the constitution only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that the person was not free to leave. When the officer blocked Roberts' means and direction of travel, the officer precipitated an investigative stop amounting to a seizure of Roberts. St. v. Roberts, 1999 MT 59, 293 M 476, 977 P2d 974, 56 St. Rep. 245 (1999), following St. v. Pratt, 286 M 156, 951 P2d 37, 54 St. Rep. 1349 (1997), and distinguishing St. v. Lee, 282 M 391, 938 P2d 637 (1997). See also St. v. Emerson, 2015 MT 254, 380 Mont. 487, 355 P.3d 763.

Discovery of Shotgun Case During Routine Walk-Through of Probationer's Residence Constituting Reasonable Grounds for Further Warrantless Search: Probationer Stucker allowed a voluntary tour of his residence by probation officers, who discovered two weapons cases in plain view in the master bedroom. One case contained a bow, which Stucker was allowed to possess under the terms of his probation; the other contained a semiautomatic shotgun, which constituted contraband under the probation conditions. The discovery of the shotgun case in plain view constituted reasonable grounds for the officers to conduct a warrantless search of the residence to determine if additional weapons were present. The District Court did not err in denying Stucker's motion to suppress the fruits of the search. St. v. Stucker, 1999 MT 14, 293 M 123, 973 P2d 835, 56 St. Rep. 65 (1999).

Freedom From Unreasonable Search and Seizure in Hotel or Motel Room — Exigent Circumstances Exception to Warrant Requirement: The same protection against unreasonable search and seizure that applies to private residences extends to guests in hotel and motel rooms. One exception to the warrant requirement is when exigent circumstances and probable cause are present. The exigent circumstances doctrine provides that a warrantless entry by law enforcement officials may be legal when there is a compelling need for official action and no time to secure a warrant. Exigent circumstances are circumstances that would cause a reasonable person to believe that entry or other relevant prompt action was necessary to prevent physical harm to the officers or other persons, the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts. The state can meet its heavy burden of showing the existence of exigent circumstances only by demonstrating specific and articulable facts to justify that the circumstances, as they appeared at the time of entry, would lead a reasonable officer to believe that someone in the house or hotel or motel room required immediate assistance. Exigent circumstances existed in the present case when: (1) the police responded to a dispatch that Wakeford was possibly suicidal and might harm himself; (2) after checking with the desk clerk, the officers heard two voices, male and female, arguing as the officers approached Wakeford's room, leading the officers to believe that they

were about to confront a potential domestic abuse situation; (3) the officers spoke to Wakeford at the door and were unable to see inside the room or whether Wakeford was holding anything in his hands; (4) Wakeford was sweating and breathing heavily, and his eyes were dilated; and (5) the officers could reasonably believe that their immediate entry into the room was necessary to ensure the safety of the occupants and themselves. Under these circumstances, probable cause existed that Wakeford may have committed domestic abuse, justifying a warrantless search of the room. Evidence seized pursuant to the search was admissible. St. v. Wakeford, 1998 MT 16, 287 M 220, 953 P2d 1065, 55 St. Rep. 56 (1998), followed, with regard to applicability of the exigent circumstances exception, in St. v. Gomez, 2007 MT 111, 337 M 219, 158 P3d 442 (2007). See also U.S. v. Gardner, 627 F2d 906 (9th Cir. 1980), St. v. Dow, 256 M 126, 844 P2d 780 (1992), and U.S. v. Gooch, 6 F3d 673 (9th Cir. 1993).

Standing of Vehicle Passenger to Challenge Legality of Warrantless Search of Vehicle — Consent to Vehicle Search Extended to Closed Items in Vehicle: Parker was a passenger in a vehicle that was searched after the driver consented to a warrantless search. Parker's fanny pack was opened as part of the search, and suspected drug paraphernalia was found. Parker moved to suppress the evidence. The District Court determined that Parker lacked standing to challenge the search. Applying St. v. Bullock, 272 M 361, 901 P2d 61 (1995), the Supreme Court disagreed, noting that when the charge against the defendant includes an allegation of a possessory interest in the property that is seized, the defendant has standing to object to the prosecutorial use of that evidence, based on either the unlawful search of the location where it was found or its unlawful seizure. However, the District Court did not err in denying the motion to suppress evidence seized during the search of the vehicle in this case because the officer could have reasonably believed that the driver's consent to search the vehicle extended to closed items in the vehicle. St. v. Parker, 1998 MT 6, 287 M 151, 953 P2d 692, 55 St. Rep. 16 (1998), following Fla. v. Jimeno, 500 US 248, 114 L Ed 2d 297, 111 S Ct 1801 (1991), and St. v. Rushton, 264 M 248, 870 P2d 1355 (1994), and followed in St. v. Wetzel, 2005 MT 154, 327 M 413, 114 P3d 269 (2005).

Constitutionality of Warrantless Police Search of Private Land Up to and Including Threshold of Residence — Concept of Curtilage Inapplicable: Hubbel sought to suppress evidence gathered by police from the common parking area, sidewalk, and porch of Hubbel's residence on grounds that the officers were not on the property legally when they first observed evidence, rendering the search and seizure unlawful. Rather than analyzing the facts in the context of curtilage, the Supreme Court applied St. v. Bullock, 272 M 361, 901 P2d 61 (1995), in deciding the extent to which Hubbel had a legitimate expectation of privacy on his private property. The police parked in a general parking area used by other visitors, and after observing blood evidence in the driveway, they walked along the sidewalk to the front porch and discovered bullet holes in the front door, as well as other evidence in plain view. The officers did not ignore any posted warnings, hop fences, open gates, or slip through bushes intended to screen the home from view. In fact, the officers did nothing other than what any casual visitor to the Hubbel home would do. Because the intrusion in this case was minimal, the entry onto Hubbel's property leading up to and including the threshold of the residence did not require a warrant. The concept of curtilage did not apply because there was no evidence that the area surrounding the home was put to any special use that would indicate that the surrounding area was intimately connected with the home itself or that Hubbel reasonably expected that the surrounding area should be treated the same as the home itself. St. v. Hubbel, 286 M 200, 951 P2d 971, 54 St. Rep. 1373 (1997).

Retroactive Consent to Warrantless Search Disallowed: Hubbel voluntarily gave retroactive consent to a search of her property 5 months after police searched and seized evidence inside the Hubbel home. However, the requirement of advance justification, by virtue of a warrant or a carefully carved exception, is fundamental and inherent to all search and seizure cases. Applying the rationale in Terry v. Ohio, 392 US 1, 20 L Ed 2d 889, 88 S Ct 1868 (1968), the Supreme Court noted that exigent circumstances for conducting a warrantless search consist of circumstances that involve factors that exist when it is not practicable to secure a warrant, such as a mobile vehicle, the possible destruction of evidence, safety of police officers, or other emergency situations, and must be apparent at the inception of the search. Requiring prior consent is the only view that makes sense in light of the purposes behind the suppression rule, which serves to deter lawless police conduct by excluding illegally obtained evidence. Thus, retroactive consent may not be used to validate a search, and the evidence seized as a result of the unlawful search in this case was inadmissible. St. v. Hubbel, 286 M 200, 951 P2d 971, 54 St. Rep. 1373 (1997).

Particularized Suspicion That Suspect Involved in Burglary Sufficient to Justify Investigatory Stop: Based on the objective data and totality of the circumstances, the District Court did not err in concluding that an investigating officer had a particularized suspicion to stop Collard. The

officer's experience and training led him to believe that Collard may have been connected to a robbery, based on the following facts: (1) the officer knew that the crime had been committed by a male who was acting alone; (2) Collard was first observed only a few blocks from the crime scene; (3) Collard's vehicle was the only vehicle moving about just after the crime was committed; (4) Collard was the only person in the vehicle; (5) Collard was driving in a hurried manner away from the crime scene; and (6) Collard surprised the officer by pulling over unexpectedly. St. v. Collard, 286 M 185, 951 P2d 56, 54 St. Rep. 1366 (1997).

Plain Feel Doctrine Adopted — Incidental to Investigatory Stop: Collard contended that ski goggles that were felt in his pant leg during a pat search conducted pursuant to an investigatory stop were wrongfully seized because the goggles were not in plain view and their identity was not readily apparent, and therefore the goggles were improperly introduced into evidence. Applying Minn. v. Dickerson, 508 US 366, 124 L Ed 2d 334, 113 S Ct 2130 (1993), the Supreme Court adopted the "plain feel" corollary to the "plain view" doctrine. The plain feel doctrine states that if a police officer lawfully pats down a suspect's outer clothing and feels an object of a contour or mass that makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons. If the object is contraband, its warrantless seizure is justified by the same practical considerations that inhere in the plain view context. In the present case, the ski goggles had a shape that could be immediately identifiable when touched, and the officer did not need to manipulate the object or touch it more than a few seconds to know what it was. The robbery suspect had reportedly worn ski goggles, and the officer's seizure of Collard's goggles was thus justified. St. v. Collard, 286 M 185, 951 P2d 56, 54 St. Rep. 1366 (1997).

Illegal Search of Person but Lawful Search of Vehicle — Vehicle Search Upheld as Probation Search and Not "Fruit of Poisonous Tree": Deputy Turner watched New make several turns in his vehicle without signaling and, after determining by his vehicle license plate that New was on probation, stopped the vehicle and searched New. Upon discovering drugs in New's pocket, Turner impounded the vehicle. Detective Jacobs questioned New, and New gave Jacobs approval to search the vehicle. Then Jacobs talked to Forsyth, New's probation officer, who conducted the search of New's vehicle with Jacobs. Turner's search of New's pockets was subsequently held illegal but the District Court refused to quash evidence taken from the vehicle as a result of Forsyth's search. The Supreme Court affirmed, holding that the search of the vehicle was not the "fruit of the poisonous tree", the illegal personal search of New, but was justified upon the independent grounds that Forsyth had previously determined that he wanted to search New's vehicle because of pending charges of violations of the conditions of New's probation. St. v. New, 276 M 529, 917 P2d 919, 53 St. Rep. 510 (1996).

Drugs Discovered in Response to House Fire — "Plain View" Seizure Upheld — "Plain View" Doctrine Clarified: Police officer Denham responded to a house fire and to the belief of bystanders that there were two people inside the home by kicking in the door of the home and crawling under thick smoke to a bedroom, where he discovered marijuana in spaghetti jars. When Loh came home from work, she was informed of the fire, was informed of her rights, and admitted that the marijuana was hers. The District Court denied Loh's motion to suppress the evidence of the marijuana plants. The Supreme Court affirmed and clarified the rules for the application of the "plain view" doctrine in Montana. The Supreme Court noted that many Montana cases have followed Coolidge v. N.H., 403 US 443 (1971), in determining that evidence in plain view be inadvertently discovered and that the seizure of evidence in plain view requires exigent circumstances (as opposed to requiring exigent circumstances for only the entry itself into the home). The Supreme Court noted that these requirements of Coolidge were not continued in the more recent case of Horton v. Calif., 496 US 128 (1990), and that the rationale of Horton was followed by the Ninth Circuit Court in G&G Jewelry, Inc. v. Oakland, 989 F2d 1093 (9th Cir. 1993). For these reasons, the Supreme Court overruled prior "plain view" cases to the extent that those cases were inconsistent with Horton and G&G Jewelry. Citing cases from other jurisdictions involving searches conducted in the course of responses to fire alarms, the Supreme Court then held that the seizure of the marijuana plants was lawful because the officers were lawfully in the house because of fire, the nature of the content of the jars was immediately apparent, and the officers had lawful access to the jars. St. v. Loh, 275 M 460, 914 P2d 592, 53 St. Rep. 226 (1996), followed in St. v. Doyle, 1998 MT 195, 290 M 287, 963 P2d 1255, 55 St. Rep. 819 (1998), and St. v. Weaselboy, 1999 MT 274, 296 M 503, 989 P2d 836, 56 St. Rep. 1115 (1999), and distinguished in St. v. Bassett, 1999 MT 109, 294 M 327, 982 P2d 410, 56 St. Rep. 447 (1999).

"Open Fields" Doctrine Expanded — Privacy Expectation Includes Fenced or Posted Property Beyond Curtilage — Warrantless Search Unlawful: Following a tip that defendants had illegally

killed and transported game, officers found a cabin owned by one defendant and located in a wooded area at the end of a private road some 330 feet off of a Forest Service road. A fence and metal gate separated the cabin from the road, and "No Trespassing" signs were visibly posted on trees on both sides of the gate. Upon arrival, officials found the gate open and, without permission or a warrant, drove down the private road to the cabin, where they subsequently observed an elk carcass, which could not be seen from the public road, hanging near the defendant's cabin. After officers confiscated the elk, defendants pleaded guilty but preserved and appealed the District Court's denial of their motion to suppress evidence obtained after officers entered the property without permission or a warrant. In ruling that the District Court erred in granting defendants' motion to suppress, the Supreme Court refused to apply the U.S. Supreme Court's decision in Oliver v. U.S., 466 US 170 (1984), which held that the protection of the fourth amendment does not include open fields but extends only to the curtilage area immediately surrounding a home, to this section. The Supreme Court ruled that a person may have an expectation of privacy in an area of land beyond the curtilage that society recognizes as reasonable and where the expectation of privacy is evidenced by fencing, "no trespassing" signs, or some other means that unmistakably indicates that entry by law enforcement officers requires permission or a warrant. The court refused to apply the requirement to observations of private land from public property, but specifically overruled inconsistencies in its prior decisions in Charvat, Dess, Bennett, and Sorensen, which were decided prior to Oliver under the old two-part test in Katz v. U.S., 389 US 347 (1967). St. v. Bullock, 272 M 361, 901 P2d 61, 52 St. Rep. 717 (1995), followed in St. v. Romain, 1999 MT 161, 295 M 152, 983 P2d 322, 56 St. Rep. 638 (1999), and St. v. Shults, 2006 MT 100, 332 M 130, 136 P3d 507 (2006).

Particularized Suspicion Not Supported by Totality of Circumstances — Investigatory Stop Unjustified: An investigatory stop must be justified by some objective manifestation that the person stopped is or is about to be engaged in criminal activity, and the totality of the circumstances must give the police a particularized and objective basis for suspecting the person of criminal activity. The issue of whether a particularized suspicion exists in order to justify an investigative stop is factually driven. When the totality of the circumstances does not support a particularized suspicion, the investigatory stop is unjustified. Citing numerous applicable Montana cases, the Supreme Court, in this instance, noted the fact that Reynolds had moved through an intersection "bordering on traveling too fast" for conditions, but not necessarily breaking the law critically or technically and exhibiting no patterns consistent with a person driving under the influence of alcohol or erratically. The possible traffic violation could not be combined with any other objective data to support a particularized suspicion that Reynolds was engaged in wrongdoing. Therefore, the subsequent investigatory stop was unwarranted. Reynolds' motion to dismiss DUI charges based on the unlawful stop was granted. St. v. Reynolds, 272 M 46, 899 P2d 540, 52 St. Rep. 600 (1995), followed in In re Bauer v. St., 275 M 119, 910 P2d 886, 53 St. Rep. 65 (1996), and St. v. Roberts, 1999 MT 59, 293 M 476, 977 P2d 974, 56 St. Rep. 245 (1999), and distinguished in Seyferth v. St., 277 M 377, 922 P2d 494, 53 St. Rep. 698 (1996), and Missoula v. Cook, 2001 MT 237, 307 M 39, 36 P3d 414 (2001).

Plain View Doctrine Justifying Seizure of Contraband During Stop and Frisk Search for Weapons: After Stubbs was stopped on a reasonable suspicion of criminal activity, including speeding, reckless or careless driving, and eluding a peace officer, the officer noticed numerous weapons in the vehicle, providing a reasonable justification for searching Stubbs on the scene. During a pat-down search of Stubbs' clothing, the officer thought that a lump in Stubbs' pocket might be a deadly weapon. After removing the item to make sure that it was not a weapon, the item was in plain view and the incriminating character of the object, a brass pipe, was apparent. Absent any indication that the search was used as a pretext to discover illicit drugs or paraphernalia, the discovery of the pipe was inadvertent and seizure of the contraband was justified. St. v. Stubbs, 270 M 364, 892 P2d 547, 52 St. Rep. 232 (1995), overruled in part in St. v. Loh, 275 M 460, 914 P2d 592, 53 St. Rep. 226 (1996).

"Plain View" Search Upheld for Drugs Found When Defendant Allowed to Retrieve Clothes and Identification: Smith was arrested on an outstanding warrant by deputies at the door of a motel room. He was allowed to reenter the room to retrieve his shoes and identification. Upon entering the room, the deputies observed Williams and some money on a bed. When a deputy looked in a desk drawer for a pen, he observed cocaine packaged for sale. The District Court applied the "plain view" exception to the requirement for a search warrant and denied defendants' motions to suppress. The Supreme Court affirmed, relying on Wash. v. Chrisman, 455 US 1 (1982). The Supreme Court noted that the unrebutted testimony of the deputy was that he opened only one drawer in response to Williams's request for a pen and inadvertently

discovered the cocaine. The Supreme Court further held that St. v. Carlson, 198 M 113, 644 P2d 498 (1982), had no application to the case before the court because Carlson was limited to misdemeanor traffic offenses. St. v. Williams, 268 M 428, 887 P2d 1171, 51 St. Rep. 556 (1994), overruled in part in St. v. Loh, 275 M 460, 914 P2d 592, 53 St. Rep. 226 (1996).

Warrantless Search of Home — Voluntary Consent — Totality of Circumstances Test: Warrantless searches and seizures conducted inside a home are per se unreasonable, subject only to a few carefully drawn exceptions, including instances in which a citizen has knowledgeably and voluntarily consented to a search. In order for consent to be voluntary, it must be uncontaminated by any duress or coercion, express or implied, as determined by the totality of the circumstances. In this case, defendant was told that he was not required to consent to the search, but that factor was not controlling. Other circumstances mitigating against voluntariness included: (1) the fact that defendant had made a highly incriminating admission that was extracted improperly without Miranda warnings after entry to the home was gained without a warrant; (2) coercion arising from the fact that defendant was promised that if consent was given for the search, he would not be arrested or incarcerated, which constituted an implication that if cooperation was not given, incarceration would result; and (3) a statement by the investigating officer that if consent was not given, officers would remain in the house for a number of hours until a search warrant was obtained. Based on the totality of the circumstances, defendant's consent was coerced rather than given freely and voluntarily and evidence obtained during the subsequent search was inadmissible. St. v. Rushton, 264 M 248, 870 P2d 1355, 51 St. Rep. 262 (1994), following Schneckloth v. Bustamonte, 412 US 218, 36 L Ed 2d 854, 93 S Ct 2041 (1973), followed in St. v. Doyle, 1998 MT 195, 290 M 287, 963 P2d 1255, 55 St. Rep. 819 (1998), St. v. Wetzel, 2005 MT 154, 327 M 413, 114 P3d 269 (2005), and St. v. Shults, 2006 MT 100, 332 M 130, 136 P3d 507 (2006).

Uncorroborated Tip Not Basis for Particularized Suspicion for Traffic Stop: After the Lincoln County Sheriff's office received a tip that Anderson would be traveling from Idaho to Montana with a large amount of marijuana, officers stopped Anderson's truck and conducted a pat-down search of Anderson's passenger. After finding a marijuana pipe, the passenger was arrested, the vehicle was impounded, a warrant was obtained, and additional marijuana was discovered in the truck. Anderson was convicted of possession with intent to sell. The Supreme Court reversed, citing St. v. Gopher, 193 M 189, 631 P2d 293 (1981), and holding that the officers who stopped the truck had no particularized suspicion that Anderson was engaged in illegal activity. The tip received by the Sheriff's office could not serve as the basis for the stop because an uncorroborated and unreliable tip is not the objective data contemplated by the Gopher case. Because the initial stop was unlawful, the Supreme Court ordered that all of the evidence seized be suppressed. St. v. Anderson, 258 M 510, 853 P2d 1245, 50 St. Rep. 637 (1993).

Assistance for Search: Defendant signed a consent form for the search of his home. The consent form authorized the deputy to search. The Supreme Court, citing St. v. Yoss, 146 M 508, 409 P2d 452 (1965), held that the consent neither expressly nor by implication prohibited the deputy from obtaining the assistance of burglary victims in the search. St. v. Rodgers, 257 M 413, 849 P2d 1028, 50 St. Rep. 335 (1993).

Exigent Circumstances Surrounding Hot Pursuit Following Felony Crimes — Narrow Warrantless Search Justified: The victim of an armed robbery and rape reported the crimes immediately after they occurred, and police followed tracks in fresh snow to the motel room where Dow was staying. Dow was arrested after an officer entered the room without a warrant, noticed a pair of wet jeans hanging in the open closet, and matched defendant's boots with the tracks. Dow sought suppression of the evidence, claiming the warrantless felony arrest was presumptively unreasonable and prohibited. Exception to the warrant requirement is made when exigent circumstances and probable cause are present. Dow did not argue lack of probable cause. Under Warden v. Hayden, 387 US 294, 18 L Ed 2d 782, 87 S Ct 1642 (1967), hot pursuit is recognized as a particular type of exigent circumstance, but the Montana Supreme Court has, until now, considered the theory inapplicable. In this case, however, the court distinguished St. v. Sorenson, 180 M 269, 590 P2d 136 (1979), and St. v. District Court, 176 M 257, 577 P2d 849 (1978), in holding that the hot pursuit, even though nearly 2 hours after the commission of the crime, was applicable considering that the crimes were serious and the scope of the warrantless search was narrow. St. v. Dow, 256 M 126, 844 P2d 780, 49 St. Rep. 1168 (1992). See also U.S. v. Santana, 427 US 38, 49 L Ed 2d 300, 96 S Ct 2406 (1976), and Welsh v. Wis., 466 US 740, 80 L Ed 2d 732, 104 S Ct 2091 (1984).

Automobile Exception to Search Warrant Requirement — Probable Cause and Exigent Circumstances: A warrantless search of an automobile requires: (1) the existence of probable cause to search; and (2) the presence of exigent circumstances that make it impracticable to

obtain a warrant under the circumstances. Defendant's daughter-in-law notified police that defendant was transporting a shipment of marijuana in the spare tire of his pickup truck and would arrive that evening. The information was consistent with reports from other informants regarding defendant's drug-related activity and, when coupled with defendant's appearance at the designated time in the described vehicle, established probable cause to stop the vehicle. The fact that there was neither enough time to obtain a warrant nor enough officers available to safely conduct the stakeout constituted appropriate exigent circumstances to conduct the search. The stop and search being legal, defendant's arguments regarding lack of consent and denial of a motion to suppress were immaterial. St. v. Allen, 256 M 47, 844 P2d 105, 49 St. Rep. 1130 (1992), followed in St. v. McCarthy, 258 M 51, 852 P2d 111, 50 St. Rep. 420 (1993), and St. v. Elison, 2000 MT 288, 302 M 228, 14 P3d 456, 57 St. Rep. 1206 (2000). See also Carroll v. U.S., 267 US 132, 69 L Ed 543, 45 S Ct 280 (1924), and Calif. v. Acevedo, 500 US 565, 114 L Ed 2d 619, 111 S Ct 1982 (1991).

Nonapplicability of Exclusionary Rule Extended to Private Felonious Conduct: The state sought to convict the defendant on drug charges, relying in part on the testimony of two individuals who had burglarized the defendant's home. The Supreme Court ruled that it was extending nonapplicability of the exclusionary rule to the felonious conduct of private individuals unless those individuals are acting as agents of the state. St. v. Christensen, 244 M 312, 797 P2d 893, 47 St. Rep. 1449 (1990).

Delay Between Time of Arrest and Seizure: The defendant was stopped because a witness had informed the police that she believed that he had been shooting at bighorn sheep out of season. The officers arrested the defendant for traffic offenses and inspected a rifle located in plain view in the defendant's vehicle. However, the rifle was not seized until over an hour later. The Supreme Court held that the delay was of no effect because the officers had probable cause to seize the rifle at the time of the arrest and that the delay did not overcome the original justification for the seizure. St. v. Lynn, 243 M 430, 795 P2d 429, 47 St. Rep. 1288 (1990).

Frisk Incident to Investigatory Stop: Following the holding in Terry v. Ohio, 392 US 1, 20 L Ed 2d 889, 88 S Ct 1868 (1968), a peace officer may frisk an individual for weapons incident to making an investigatory stop. St. v. Kills On Top, 243 M 56, 793 P2d 1273, 47 St. Rep. 984 (1990), followed in St. v. Stubbs, 270 M 364, 892 P2d 547, 52 St. Rep. 232 (1995).

Vehicular Stop Based on Information From Flyer or Bulletin: A law enforcement officer may make a vehicular stop if the officer has a reasonable suspicion, grounded in specific and articulable facts, that a person was involved in or is wanted in connection with a completed felony. This suspicion may be based on information obtained from a flyer or bulletin if the bulletin was issued on the basis of articulable facts supporting a reasonable suspicion. St. v. Kills On Top, 243 M 56, 793 P2d 1273, 47 St. Rep. 984 (1990), followed in St. v. Grimes, 1999 MT 145, 295 M 22, 982 P2d 1037, 56 St. Rep. 571 (1999). See also U.S. v. Hensley, 469 US 221, 83 L Ed 2d 604, 105 S Ct 675 (1985).

Exclusionary Rule — Suppression of Evidence of Assault: Defendant, who escaped from a girls' correctional facility, was convicted of felony assault (now assault with a weapon) for threatening a state employee who entered her motel room without a search warrant in violation of the fourth amendment and this section. The exclusionary rule does not bar admission of evidence of a person's criminal conduct that occurred in response to a fourth amendment violation, and therefore evidence of defendant's assaultive conduct is admissible. Such evidence does not constitute the "fruit of the poisonous tree". The purpose of the exclusionary rule—to protect a person from unreasonable searches or seizures through suppression of evidence—is not accomplished by its application in this situation. To allow a person whose fourth amendment rights were violated to respond with unlimited violence toward the violator and then to grant the person immunity through the exclusionary rule would create intolerable results. St. v. Ottwell, 239 M 150, 779 P2d 500, 46 St. Rep. 1580 (1989), followed in St. v. Courville, 2002 MT 330, 313 M 218, 61 P3d 749 (2002). The Ottwell and Courville analyses were applied to the inapplicability of the exclusionary rule to actions of bail agents in St. v. Rookhuizen, 2007 MT 312, 340 M 148, 172 P3d 1257 (2007).

Application of Inadvertent Discovery Rule: The cautious actions of law enforcement officials in seeking to protect the validity of a search warrant should not invalidate the inadvertent seizure of evidence or contraband when the officers conducting the search adhere to the intent contained in the warrant. St. v. Hembd, 235 M 361, 767 P2d 864, 46 St. Rep. 55 (1989), following U.S. v. $10,000 in U.S. Currency, 780 F2d 213 (2nd Cir. 1986).

Warrantless Search by Probation Officer Lawful if Based on Reasonable Suspicion of Probation Violation: Defendant's deferred sentence was revoked after a warrantless search initiated by

her probation officer pursuant to the terms of her probation revealed that defendant possessed dangerous drugs in violation of the terms of her probation. Search by a probation officer of his probationer's car, premises, or other belongings is lawful if it is based on the probation officer's reasonable suspicion of a probation violation. St. v. Small, 235 M 309, 767 P2d 316, 46 St. Rep. 9 (1989), followed in St. v. New, 276 M 529, 917 P2d 919, 53 St. Rep. 510 (1996), and St. v. Olmsted, 1998 MT 301, 292 M 66, 968 P2d 1154, 55 St. Rep. 1235 (1998).

Warrantless Police Search of Probationers' Car and Residence Allowed — Reasonable Grounds Standard — Fogarty Overruled: A police officer's warrantless search of the probationers' car and residence based on the officer's observations and with permission of the probation officer, in compliance with probationary conditions, did not violate the fourth amendment. St. v. Fogarty, 187 M 393, 610 P2d 140 (1980), is specifically overruled and the "reasonable grounds" standard of Griffin v. Wis., 483 US 868, 97 L Ed 2d 709, 107 S Ct 3164 (1987), is adopted. Police cooperation with probation officers is to be encouraged as an important aid to effective administration of the probation system. To impose a warrant requirement for residential searches, on the basis of rights enjoyed by persons not on probation, would artificially raise a probationer's privacy interest to a level inconsistent with conditional liberty status. St. v. Burke, 235 M 165, 766 P2d 254, 45 St. Rep. 2278 (1988), followed in St. v. Hawkins, 239 M 404, 781 P2d 259, 46 St. Rep. 1786 (1989), St. v. Boston, 269 M 300, 889 P2d 814, 51 St. Rep. 1142 (1994), St. v. Burchett, 277 M 192, 921 P2d 854, 53 St. Rep. 590 (1996), St. v. Meza, 2006 MT 210, 333 M 305, 143 P3d 422 (2006), and St. v. Moody, 2006 MT 305, 334 M 517, 148 P3d 662 (2006), and clarified, regarding the fact that probation officers, other than the one assigned to a probationer, are not precluded from authorizing a probationary search, in St. v. Olmsted, 1998 MT 301, 292 M 66, 968 P2d 1154, 55 St. Rep. 1235 (1998). See also St. v. Charlie, 2010 MT 195, 357 Mont. 355, 239 P.3d 934, and St. v. Fischer, 2014 MT 112, 374 Mont. 533, 323 P.3d 891.

Reasonableness of Warrantless Search — Specific Consent Required: In order to overcome the presumption against waiver of the constitutional right prohibiting warrantless searches and seizures, the state must show that defendant gave unequivocal, specific consent to entry, uncontaminated by duress or coercion. St. v. Dawson, 233 M 345, 761 P2d 352, 45 St. Rep. 1542 (1988), citing St. v. Brough, 171 M 182, 556 P2d 1239 (1976).

Defendant's Lack of Interest in Automobile — No Standing to Contest Search or Seizure: Defendant convicted of theft contended that the trial court erred in admitting evidence obtained from police placement of fluorescent detection powder on the exterior of his brother's automobile. The Supreme Court found that defendant lacked standing to contest the validity of the search and seizure because he could claim neither property nor possessory interest in the vehicle. St. v. Gonzales, 231 M 242, 751 P2d 1063, 45 St. Rep. 579 (1988), followed in St. v. Powers, 233 M 54, 758 P2d 761, 45 St. Rep. 1286 (1988).

Shining of Ultraviolet Light Not Considered Search: Agents dusted money used in a drug deal with invisible detection powder that showed up only under an ultraviolet light. After defendant's arrest, his hands and wallet were inspected under ultraviolet light for traces of the dust and the positive results admitted into evidence. The Supreme Court adopted the rationale in Commonwealth v. DeWitt, 314 A2d 27 (Pa. Super. 1973), in holding that the shining of the ultraviolet light did not constitute a search so as to implicate privacy rights under either the U.S. or Montana Constitution. The court found persuasive the fact that defendant was validly arrested, that the wallet was properly seized, and that the light only afforded an opportunity to learn if defendant may have touched the drug money. St. v. Holzapfel, 230 M 105, 748 P2d 953, 45 St. Rep. 53 (1988).

Valid Search of Wallet After Arrest: The District Court properly allowed into evidence the results of a postarrest, nonconsensual, warrantless search of defendant's wallet. The Supreme Court adopted the reasoning in U.S. v. Passaro, 624 F2d 938 (9th Cir. 1980), that a wallet is an element of clothing "which is, for a reasonable time following a legal arrest, taken out of the realm of protection from police interest". The search also satisfied the privacy guaranties of the Montana Constitution because the arrest reduced the arrestee's expectation of privacy. St. v. Holzapfel, 230 M 105, 748 P2d 953, 45 St. Rep. 53 (1988).

Delayed Seizure of Articles in Plain View: A seizure that is proper under the "plain view" exception may be delayed, so long as the delay is reasonable. St. v. Romero, 224 M 431, 730 P2d 1157, 43 St. Rep. 2309 (1986).

Warrantless Arrest — No Warrant Necessary Prior to Search: After an arrest properly made under 46-6-106 (renumbered 46-6-312), a person may be searched without a search warrant prior to placement in a police holding cell. Billings v. Skurdal, 224 M 84, 730 P2d 371, 43 St. Rep. 2036 (1986).

Weapon Seized in Home Without Warrant — Statement by Defendant Without Miranda Warnings — Evidence Suppressed: Defendant charged with aggravated assault moved to suppress evidence. The trial court granted defendant's motion on grounds that defendant felt compelled to give officers access to his home without warrant, and thus seizure of weapon in plain view was not justified; statements by defendant in response to officers' questions were not admissible since defendant was considered to be in custody at the time and did not receive Miranda warnings. The Supreme Court upheld the trial court's order suppressing the evidence, noting factors that required the officers to obtain a search warrant. St. v. Osteen, 216 M 258, 700 P2d 188, 42 St. Rep. 789 (1985), followed in St. v. Rushton, 264 M 248, 870 P2d 1355, 51 St. Rep. 262 (1994).

Warrantless Search of Dwelling — Defendant's Expectation of Privacy: The defendant escaped from prison and hid in his girlfriend's nearby home. Police officers, who had a valid arrest warrant for the defendant, discovered him when they conducted a warrantless search of the dwelling. On appeal, the Supreme Court ruled that the defendant had a legitimate expectation of privacy in his girlfriend's home and has standing to challenge the constitutionality of the search based on an arrest warrant rather than a search warrant. Admission of the evidence obtained from the search was not harmless error even though the defendant had testified to the circumstances surrounding his escape. St. v. Kao, 215 M 286, 698 P2d 403, 42 St. Rep. 363 (1985).

Warrantless Search — Third-Party Right of Privacy: Police officers may not constitutionally enter the home of a third person in search of an escaped felon for whom they have a valid arrest warrant unless exigent circumstances exist and probable cause leads them to believe the suspect will be found on the premises. The duty of police officers to search for and arrest those who commit crimes must be balanced with the right of innocent citizens to be secure in the privacy of their homes against unreasonable police invasion. St. v. Kao, 215 M 277, 697 P2d 903, 42 St. Rep. 356 (1985).

Field Sobriety Test Not a Search: Purdie was stopped as part of routine traffic control as he passed a vehicular accident. The police officer who stopped him smelled alcohol. When Purdie left the accident scene driving erratically, the police officer stopped him again and asked him to get out of the car and perform some field sobriety tests. He showed a lack of coordination during the tests. Purdie argued that the test results were the fruits of an illegal warrantless search. The Supreme Court disagreed. Field sobriety tests are not searches protected by the constitution. St. v. Purdie, 209 M 352, 680 P2d 576, 41 St. Rep. 754 (1984).

Federal Constitutional Requirement of Search Warrant Prior to Entry Into Home to Conduct Search or Make Arrest: A search warrant cannot be obtained under 46-5-203 (renumbered 46-5-224) for the purpose of searching for and seizing a person unless that person has been kidnapped. Although 46-6-104(3) and 46-6-401(3) (renumbered 46-6-210) would have permitted entry into respondent's home to arrest a fugitive without a search warrant, entry into a home to conduct a search or make an arrest has been held by the U.S. Supreme Court in Steagald v. U.S., 451 US 204 (1981), to be unreasonable under the fourth amendment unless done pursuant to a warrant. Therefore, compliance with 46-6-104(3) or 46-6-401(3) (renumbered 46-6-210) would not be sufficient to satisfy the requirements of the fourth amendment. St. v. O'Neill, 208 M 386, 679 P2d 760, 41 St. Rep. 420 (1984).

Consent Search — No Inventory or Report to Magistrate Required: The Dumas Hotel in Butte was robbed. The police were notified, and an investigation was begun. Police officers observed LaMere's residence for 3 days, observing no activity. They contacted the landlord, who invited an officer to enter the apartment. The apartment appeared abandoned. Later that day the landlord signed a consent to search. During the search, police found what appeared to be a map of the Dumas Hotel and a piece of pantyhose that was apparently part of a mask. LaMere contended that the entry to the apartment was illegal because no exigent circumstances existed which excused the lack of a warrant. He also contended that the requirement of filing an inventory and delivering a copy to the person from whose premises property was taken was not complied with. The Supreme Court held that because LaMere had abandoned the apartment he had disclaimed any right to object to the place being searched. On abandonment the landlord was in possession and had authority to consent to the search. There is no statutory requirement that items seized under a consent search be inventoried and reported to a magistrate. St. v. Madera, 206 M 140, 670 P2d 552, 40 St. Rep. 1558 (1983).

Warrantless Administrative Search Under Federal Law and "Plain View" Seizure Upheld: Where the defendant moved to suppress evidence of his possession and intent to sell hashish, arguing that the warrantless search under federal law by an agriculture inspector of a package addressed to him and seizure of the package violated his constitutional rights, the District Court did not err in denying the defendant's motion to suppress. The search was conducted under the

Federal Plant Pest Act, 7 U.S.C. sections 147a -167, and the Hawaiian and territorial quarantine rules, 7 C.F.R. section 318. Under the administrative search principles articulated in Camera v. Municipal Court, 387 US 523 (1967), and See v. City of Seattle, 387 US 541 (1967), a government official is entitled to conduct administrative searches without a warrant when, as in this case, the evidence could otherwise be speedily removed. Under Camera and U.S. v. Davis, 482 F2d 893 (9th Cir. 1973), probable cause need not be shown for this type of search. The package and its contents were then lawfully seized under the "plain view" rule announced in Coolidge v. New Hampshire, 403 US 443 (1971), and modified in Texas v. Brown, 460 US 730, 75 L Ed 2d 502, 103 S Ct 1535 (1983). The defendant's fourth amendment rights were therefore not violated. St. v. Kelly, 205 M 417, 668 P2d 1032, 40 St. Rep. 1400 (1983).

Marijuana in Plain View of Officer Investigating Traffic Complaint: Where the defendant was suspected of speeding and the arresting officer went to caution the defendant against speeding, but on approaching the defendant's vehicle parked in a driveway saw a bag of marijuana on the car seat and arrested the defendant, the District Court did not err in allowing the marijuana into evidence in a prosecution for possession and sale of a dangerous drug. The record provides ample support for the officer's claim that he was investigating a traffic complaint. Moreover, the officer did not violate any reasonable expectation of privacy as the vehicle was parked partially on a public right-of-way. The chance that the marijuana would be moved or destroyed made the officer's warrantless arrest and seizure reasonable. St. v. Godsey, 202 M 100, 656 P2d 811, 39 St. Rep. 2354 (1982), overruled in part in St. v. Loh, 275 M 460, 914 P2d 592, 53 St. Rep. 226 (1996).

No Expectation of Privacy in Forest Service Campground: Defendant sought to suppress evidence seized from a Forest Service campground. The primary test for determining standing to challenge the legality of a search and seizure is "a legitimate expectation of privacy", although factors such as disclaimer of ownership, whether one is on the premises searched legitimately, and the permanence of such presence are also factors. In this case, the defendant did not have an expectation of privacy and therefore had no standing to challenge the legality of the search. St. v. Dess, 201 M 456, 655 P2d 149, 39 St. Rep. 2231 (1982), distinguished and overruled in part in St. v. Bullock, 272 M 361, 901 P2d 61, 52 St. Rep. 717 (1995).

"Gopher" Criteria Met — Investigatory Stop of Automobile: The criteria set forth in St. v. Gopher, 193 M 189, 631 P2d 293, 38 St. Rep. 1078 (1981), for an investigatory stop were satisfied when the deputy was sufficiently qualified although his length of employment, experience, and training were not great and when the facts he possessed made his suspicions particularized to a specific activity in a specific vehicle. St. v. Morsette, 201 M 233, 654 P2d 503, 39 St. Rep. 2078 (1982), followed in St. v. Collard, 286 M 185, 951 P2d 56, 54 St. Rep. 1366 (1997), and St. v. Olmsted, 1998 MT 301, 292 M 66, 968 P2d 1154, 55 St. Rep. 1235 (1998).

Consent — Defendant's Knowledge of Right to Refuse: Following Schneckloth v. Bustamonte, 412 US 218, 93 S Ct 2041, 36 L Ed 2d 854 (1973), the Montana Supreme Court rejected defendant's claim that his consent to the search of his truck was not voluntary because he had not been informed of his right to refuse. The court ruled that the Montana Constitution did not require application of a stricter standard than the totality of circumstances test used in Schneckloth. St. v. Stemple, 198 M 409, 646 P2d 539, 39 St. Rep. 1085 (1982).

Visual Observation From Place Where Officer Has No Right to Be — Invalid Search: Defendant was involved in a minor traffic accident that was not his fault. He failed to produce his driver's license. The investigating officer later learned that the license was revoked. The officer made out "Notice to Appear and Complaint" forms for operating a vehicle while driver's license was revoked and obstructing an officer, both misdemeanors. The officer gave the citations to the City Clerk for mailing to the defendant, but this was never done. A week later, the officer, thinking the citations had been mailed, requested and received an arrest warrant. Two officers went to defendant's house, awakened him, and informed him he was under arrest. Defendant requested he be allowed to get dressed. The officers told defendant they would have to accompany him and observed marijuana and bongs. They obtained a search warrant, returned and searched the house, and found small quantities of drugs and a stolen pistol. Defendant moved to suppress the evidence as obtained through an illegal search. The State contended that full custodial arrest was reasonable, was not connected to any pretextual arrangement that the police suspected defendant as a drug user, and that the search warrant based on the "plain view" observation of the officers in the home was valid. The District Court declined to determine whether the arrest was a pretext but decided there was no necessity for a full custodial arrest and suppressed the evidence. The court held that under the totality of the circumstances, the defendant had not consented to the officers' entry. The validity of the officers' entry into the home is the fulcrum upon which this case turns. The Supreme Court held that the distinctive factor which turns an observation into

a search, in the constitutional sense, is whether the person making the observation has a right to be in the place where the observation is made. Evidence discovered in plain view from a place where officers are entitled to stand and where their claim to stand is not created as a pretext, solely to make legitimate otherwise impermissible intrusions, is not the subject of a "search". The court held that consent to enter the house was coerced and therefore the observations were a search and evidence seized was properly suppressed. St. v. Carlson, 198 M 113, 644 P2d 498, 39 St. Rep. 802 (1982).

Seizure of Evidence After Arrest on a "Particularized Suspicion": Evidence that was in plain view in defendant's car as he was arrested after a "particularized suspicion" meeting the test adopted in St. v. Gopher, 193 M 189, 631 P2d 293 (1981), was a valid seizure because the arrest was a lawful arrest. St. v. Schatz, 194 M 59, 634 P2d 1193, 38 St. Rep. 1687 (1981).

Stop and Frisk Procedure Applicable to Automobiles: Where, upon investigating a possible burglary, the investigating officer stopped a suspicious looking automobile and noticed what appeared to be stolen property in the back seat of the car, which was driven off at a high rate of speed in the middle of the investigation, the District Court did not err in denying the defendant's motion to suppress the stolen property recovered from the automobile. The dictum in St. v. Rader, 177 M 252, 581 P2d 437 (1978), that stop and frisk principles do not apply to automobiles must be abandoned in light of the principle most recently announced in U.S. v. Cortez, 449 US 411, 66 L Ed 2d 621, 101 S Ct 690 (1981), that an assessment of whether a crime has been committed must be based upon all relevant circumstances and the evidence evaluated in light of the knowledge of a trained law enforcement officer. When a trained police officer has a particularized suspicion that the occupant of a vehicle is or has been engaged in criminal activity or is a witness thereto, a limited and reasonable investigatory stop and search is justified. St. v. Gopher, 193 M 189, 631 P2d 293, 38 St. Rep. 1078 (1981), followed in St. v. Lee, 232 M 105, 754 P2d 512, 45 St. Rep. 903 (1988), St. v. Stubbs, 270 M 364, 892 P2d 547, 52 St. Rep. 232 (1995), St. v. Olmsted, 1998 MT 301, 292 M 66, 968 P2d 1154, 55 St. Rep. 1235 (1998), St. v. Halvorson, 2000 MT 56, 299 M 1, 997 P2d 751, 57 St. Rep. 270 (2000), and St. v. Herbenson, 2001 MT 75, 305 M 68, 22 P3d 1128 (2001).

Citizen Search Unlawful Warrantless Search: In appeal by the State from a motion suppressing all evidence resulting from an unreasonable search and seizure, the Supreme Court affirmed. A warrantless search is per se unreasonable unless it falls within one of the defined exceptions. Before the warrantless search, neither private citizen searcher could have obtained a valid search warrant because they were not possessed, through their own knowledge or through demonstrably reliable informants, of facts sufficient to establish probable cause, an essential ground for the issuance of a warrant. Since the warrantless search here was per se unreasonable, it was unconstitutional under our federal and state Constitutions and therefore unlawful. St. v. Hyem, 193 M 51, 630 P2d 202, 38 St. Rep. 891 (1981), overruled in St. v. Long, 216 M 65, 700 P2d 153, 42 St. Rep. 643 (1985).

Identification Testimony — Transport of Accused Prior to Arrest: Identification testimony derived from the transportation of defendant for the purpose of exhibiting him to a witness was not suppressible as a violation of the fourth amendment to the United States Constitution. The record supports the District Court's conclusion that Jenkins agreed to accompany the officers and had not been "arrested" prior to his formal arrest upon identification by a witness. St. v. Jenkins, 192 M 539, 629 P2d 761, 38 St. Rep. 922 (1981).

Consent to Search — Voluntariness — Totality of the Circumstances Test: Defendant voluntarily went to the Billings Police Department in connection with a homicide investigation. It later came out that defendant had serious mental and drug abuse problems. Defendant was interrogated by two police officers. He was kept incommunicado in a small room for several hours, the officers used the "mean cop-nice cop" interrogation technique, and the officers lied to defendant about how much was known of his involvement in the crime (guilt assumption technique). The officers told defendant his problems might be mental or medical rather than criminal. Defendant then gave written consent to search his house and van. The police then brought in a psychiatrist who administered sodium amytal to defendant. The next day defendant was convinced by the psychiatrist to confess. The District Court suppressed evidence found during the search, ruling that the consent was involuntarily given. The question of voluntariness largely depends upon the facts of each case, no single fact being dispositive. The determination of voluntariness, rather, depends upon the "totality of the circumstances". The issue of voluntariness is a factual one addressed to the discretion of the trial court and will not be disturbed if supported by substantial credible evidence. The totality of the circumstances in the present case includes not only the police techniques employed, which were particularly coercive, but also the testimony presented by experts that defendant was a paranoid schizophrenic with severe drug problems. There can be

no doubt that substantial evidence exists to support the suppression finding. St. v. Allies, 190 M 475, 621 P2d 1080, 37 St. Rep. 2089 (1980).

Properly Taken Blood Test: Applying the standard in St. v. Mangels, 166 M 190, 531 P2d 1313 (1975), that "incapacity be determined on the basis of the best evidence which is reasonably available to the officer", the Supreme Court found that defendant was in a condition rendering him incapable of refusing to consent to the taking of a blood sample. Thus, it was unnecessary for him to be placed under arrest prior to the blood sample taking. This result was held to be consistent with the implied consent statute and the fourth amendment protection against unlawful searches. The latter issue was addressed in St. v. Deshner, 158 M 188, 489 P2d 1290 (1971). St. v. Campbell, 189 M 107, 615 P2d 190 (1980).

Neutron Activation Test for Gunpowder Residues: The defendant was arrested at the police station without a warrant, and the police administered a neutron activation test to determine if there were gunpowder residues on the defendant's hands. The defendant sought to suppress the results of the test on the grounds that his right to be secure against unreasonable searches and seizures was violated. The Supreme Court held that a search incident to a lawful arrest is an exception to the warrant requirement of the fourth amendment. The administration of a neutron activation test following the defendant's arrest was within the permissible scope of a search incident to a lawful arrest. Once the search incident to arrest is found to be reasonable the state has no further burden to show that the evidence is destructible. St. v. Ulrich, 187 M 347, 609 P2d 1218 (1980).

Timeliness of Warrantless Arrest: Defendant charged with mitigated deliberate homicide argued that too much time had elapsed between commission of the crime and the arrest to support a warrantless arrest. The court disagreed because knowledge of the commission of a crime in an officer's presence may be gained by him through a mechanical apparatus, and an offense is deemed committed in the presence of the officer so as to justify arrest without a warrant when he hears the disturbance and proceeds at once to the scene. What the officer overheard on the telephone reasonably led him to believe that the defendant was committing an offense. The warrantless arrest pursuant to that belief minutes later was proper regardless of whether or not the existing circumstances required immediate arrest. St. v. Hamilton, 185 M 522, 605 P2d 1121 (1980).

Warrantless Entry — "Plain View" Doctrine: A warrantless entry into an unlocked trailer was proper and justified since the officers were responding to a possible burglary and the informant stated that the occupants were not home and that the door was always locked during their absence. Since the officers' search was limited to places where the suspected burglar might be hiding, the incidental discovery of contraband during the course of the search was lawful under the "plain view" doctrine. State ex rel. Zander v. District Court, 180 M 548, 591 P2d 656 (1979).

Warrantless Search Unjustified — Exception Doctrines Not Blended: The circumstances did not suspend the warrant requirement or justify the search of defendant's residence during which marijuana was seized allegedly under the "plain view" doctrine. The "hot pursuit" doctrine, emergency situation, and third-party consent to search concepts were all absent in this case, and the Supreme Court refused to blend these well-delineated exceptions into one that will fit the facts of this case. St. v. Sorenson, 180 M 269, 590 P2d 136 (1979).

"Open Fields" Doctrine: Marijuana plants discovered in an old corral on unrestricted property were in an area not constitutionally protected from unreasonable search and seizure because of Montana's recognition of the "open fields" doctrine. St. v. Charvat, 175 M 267, 573 P2d 660 (1978), distinguished and overruled in part in St. v. Bullock, 272 M 361, 901 P2d 61, 52 St. Rep. 717 (1995). Bullock was followed in St. v. Romain, 1999 MT 161, 295 M 152, 983 P2d 322, 56 St. Rep. 638 (1999).

No Search Without an Intention to Find: Officers entered defendant's room through an open door intending only to speak to him. What they noticed in plain view or what was directed to their attention by defendant as to fruits of a robbery was admissible. Given no intention to find, there can be no search. St. v. Emerson, 169 M 285, 546 P2d 509 (1976).

Arrest as Unreasonable Seizure: When the driver of a motor vehicle was placed under arrest for speeding when he could not post an appearance bond, the arrest was reasonable because the driver had an out-of-state driver's license; he was unemployed; he had only a general delivery address; and he was driving a car registered in a county other than that of his residence. State ex rel. Kotwicki v. District Court, 166 M 335, 532 P2d 694 (1975).

Voluntary Consent to Search: Defendant's consent to the search of his car was voluntary where defendant had previously been arrested and knew his rights, had told officers that the car was full of marijuana, and knew that a search warrant would be issued, even though consent

was obtained after he had spent the night in jail and was still in custody. State ex rel. Kotwicki v. District Court, 166 M 335, 532 P2d 694 (1975).

Individual — Agent of State: Court properly suppressed evidence of marijuana, seized by defendant's employer from defendant's coat and taken to police, since a private individual acting in cooperation with the police is deemed to be acting as an agent of the state. St. v. Coburn, 165 M 488, 530 P2d 442 (1974), overruled in St. v. Long, 216 M 65, 700 P2d 153, 42 St. Rep. 643 (1985).

Probable Cause for Arrest — Incident Search: Officers, who observed defendant's place of employment through binoculars and observed other drug users come and go and observed defendant taking a baggie out of his car and passing it around, had probable cause to arrest defendant and make a search of his person without a warrant. St. v. Stewart, 165 M 156, 526 P2d 1380 (1974).

"Plain View" Doctrine — Search of Parolee's Apartment: Police officers who arrested a parolee upon a valid warrant for violation of his parole had probable cause to search his apartment after seeing two televisions and a tape player in plain view at the time they made the arrest. St. v. Peters, 165 M 142, 526 P2d 353 (1974).

Probable Cause for Arrest Required Before Warrantless Search: Although reasonable search without warrant is permitted incident to a lawful arrest, such search cannot be used to establish the probable cause to justify the arrest. St. v. Fetters, 165 M 117, 526 P2d 122 (1974).

PROBABLE CAUSE REQUIREMENTS

Probation Search of Purse Based on Reasonable Suspicion — Motion to Suppress Correctly Denied: As a condition of her probation, the defendant was required to inform her probation officer of her prescriptions. During a home visit, the officer searched her purse because of her suspicious behavior. Her purse contained illegal pills, and the state filed a petition to revoke her probation. The defendant filed a motion to suppress the evidence from the purse search, contending that the officer lacked reasonable grounds to search it. The District Court denied the motion to suppress and on appeal, the Supreme Court affirmed the denial. While a probation officer may not go through a probationer's belongings unless there is reasonable suspicion of a violation, in this case, the defendant's nervous behavior and excuses about her pills constituted reasonable grounds. St. v. Fischer, 2014 MT 112, 374 Mont. 533, 323 P.3d 891.

Probable Cause for Warrant and Search of Binder and Notebooks — Motion to Suppress Properly Denied: After the defendant was linked to a robbery, and while the defendant was also a person of interest in an unrelated homicide investigation, law enforcement officers secured a warrant to search his residence to locate evidence of the robbery, including coins and postage stamps. Law enforcement officers executing the warrant seized items related to the robbery and discovered a binder and several notebooks that were relevant to the homicide investigation; they did not immediately seize the binder and notebooks but sought a second warrant based on what they viewed during the original search. The defendant moved to suppress the binder and notebooks. The District Court denied his motion. On appeal, the defendant argued that the warrant's statement that people sometimes keep diaries, ledgers, and other documents of criminal activity did not establish sufficient probable cause to search the binder and notebooks. The Supreme Court affirmed, concluding that although law enforcement officers may have lacked probable cause to search the writings contained in the binder and notebooks, they possessed probable cause to locate pawn receipts and coins within the binder and notebooks. Therefore, officers could reasonably look through those items, and the contents of the binder and notebooks relevant to the homicide investigation became subject to plain view. Based on the writings contained in the binder and notebooks, law enforcement officers had sufficient probable cause to seize the binder and notebooks through the second warrant. St. v. Covington, 2012 MT 31, 364 Mont. 118, 272 P.3d 43.

Particularized Suspicion to Conduct Investigative Stop: A friend observed that the defendant smelled of alcohol and called 9-1-1 to report that the defendant was very upset and had had a lot to drink. The defendant's husband also called 9-1-1 and followed the defendant, who was stopped and cited for DUI. The reports by the friend and the husband and the observations by the arresting police officer met the particularized suspicion requirements. City of Missoula v. Moore, 2011 MT 61, 360 Mont. 22, 251 P.3d 679.

No Reason to View With Distrust Failure of Officer to Record Events Creating Particularized Suspicion for Traffic Stop: An officer observed Deines drive through two red lights without stopping, but the officer failed to record either act. Deines was subsequently stopped for a traffic violation and was then arrested for DUI as a result of the traffic stop. Following conviction, Deines appealed on grounds that because the officer failed to record the events that created a

particularized suspicion for the traffic stop, the officer's testimony should be viewed with distrust in the judicial assessment of particularized suspicion. The Supreme Court noted a line of cases that "view with distrust" the failure of law enforcement officers to preserve a record of particular evidentiary matters, but the court declined to extend those cases to the circumstances of this case. The prior cases were related primarily to officers gathering evidence in the controlled environment of a police station, and the court recognized that circumstances in the field may preclude the creation of a tangible record. Additionally, the court noted the passage of HB 534 (Ch. 214, L. 2009), which requires the electronic recording of custodial interrogations in most felony cases and essentially renders the "view with distrust" line of cases moot, so future application of the view with distrust precedent is doubtful. Therefore, there is no reason to view with distrust the failure of a police officer to record events creating particularized suspicion for a traffic stop. St. v. Deines, 2009 MT 179, 351 M 1, 208 P3d 857 (2009).

Inevitable Discovery of Laptop Computer Evidence — Motion to Suppress Properly Denied: Lacey shared a residence with Dozier, although the property was owned by Dozier. Dozier discovered incriminating evidence on Lacey's laptop computer, which was in the common area of the residence and which Dozier was allowed to access. Officers came to the residence and Dozier allowed them to seize the computer. Lacey later asserted that the officers lacked probable cause to seize Lacey's personal property without Lacey's consent. Because Lacey had a possessory interest in the property, Dozier did not have the right or authority to consent to seizure of the computer. However, because the computer was searched pursuant to a federal search warrant rather than on Dozier's consent, Dozier's consent was immaterial. Rather, even if probable cause did not exist for seizure of the laptop, the evidence later discovered pursuant to the federal warrant was admissible under the inevitable discovery exception to the fruit of the poisonous tree doctrine, and Lacey's motion to suppress was properly denied. St. v. Lacey, 2009 MT 62, 349 M 371, 204 P3d 1192 (2009). See also St. v. Notti, 2003 MT 296, 318 M 146, 79 P3d 289 (2003), and St. v. Dasen, 2007 MT 87, 337 M 74, 155 P3d 1282 (2007).

Scope of Stop Lawfully Expanded by Consent to Search: Clark was stopped by a highway patrol officer based upon a Deputy Sheriff's report that a passenger in Clark's vehicle and Clark had been in a domestic dispute. After the officer and the deputy ascertained that the female in Clark's vehicle was not harmed and not being harmed, they requested to search the vehicle, to which Clark consented, and controlled substances for which Clark did not have a prescription were found in the back seat. The Supreme Court held that the District Court properly refused to suppress the controlled substances over Clark's objection that the search of his vehicle was unnecessary to determine the safety of his female companion. The court pointed out, citing St. v. Snell, 2004 MT 269, 323 M 157, 99 P3d 191 (2004), that Montana law doesn't require additional justification for requesting consent to search a vehicle. St. v. Clark, 2008 MT 419, 347 M 354, 198 P3d 809 (2008).

Sufficient Probable Cause for Issuance of Search Warrant for Investigation of Hunting Activities: Cotterell asserted that there was insufficient probable cause to issue a search warrant for investigation of alleged illegal hunting activities. The Supreme Court reviewed the facts in the warrant application and concluded that the facts and circumstances described in the application were sufficient to indicate a fair probability that evidence of a crime existed on Cotterell's property, including Cotterell's possession of two-way communication devices for use in hunting big game animals and Cotterell's unlawful use of an amphibious off-highway vehicle to retrieve a deer from his neighbor's property. St. v. Cotterell, 2008 MT 409, 347 M 231, 198 P3d 254 (2008).

Particularized Suspicion to Support Canine Sniff of Vehicle and Probable Cause for Warrant to Search Vehicle: Following arrest on outstanding warrants, a dog alerted on Stombaugh's vehicle, a warrant was obtained, and a drug search was conducted. Stombaugh contended that fruits of the search should have been suppressed because officers lacked particularized suspicion to conduct the canine sniff and lacked probable cause to obtain a warrant to search the vehicle. The Supreme Court disagreed and affirmed. Based on the facts that Stombaugh's family reported to police regarding Stombaugh's drug use and notified officers that Stombaugh would be visiting the family's home, Stombaugh's admission of pending drug charges in Washington and police confirmation of the pending felony drug charges, Stombaugh's urgency in seeking removal of the vehicle out of the county and an unusual desire to pay more than the vehicle was worth to do so, and discovery of a white pill on the vehicle dashboard and Stombaugh's evasiveness about the pill, the District Court did not err in holding that officers had particularized suspicion to conduct the canine sniff of the vehicle. In addition to the factors considered for particularized suspicion (except the white pill), the warrant application also described the alert of the drug dog on the vehicle, Stombaugh's admission that the vehicle contained drug paraphernalia, and the officers'

experience and qualifications with regard to drug crime investigation. Under the totality of the circumstances, the District Court correctly concluded that probable cause existed for issuance of the search warrant. St. v. Stombaugh, 2007 MT 105, 337 M 147, 157 P3d 1137 (2007).

Defendant's Drug Precursor Purchases and Officer's Experience — Sufficient Probable Cause for Search Warrant for Drug Lab Under Totality of Circumstances: Dutton moved to suppress the evidence from a search on grounds of staleness and lack of sufficient information to support the warrant. The Supreme Court dismissed the staleness argument after determining that a crimestopper's tip from 9 months before the warrant was issued was timely when coupled with information received 5 months earlier and considerable information that was only days or weeks old at the time of the warrant application. Additionally, when viewing the totality of the circumstances in a practical, common-sense manner, there was sufficient probable cause for the warrant based on an experienced officer's observations of Dutton's activity of purchasing numerous drug precursors used in methamphetamine production as inconsistent with the average consumer. Dutton's motion to suppress was properly denied. St. v. Dutton, 2007 MT 56, 336 M 192, 153 P3d 642 (2007).

Seized Property Abandoned by Owner in Lawful Possession of State for Purposes Other Than Forfeiture — Subsequent Petition for Forfeiture Not Precluded: After Branam's vehicle was stopped by an officer following a report of an assault, Branam fled. The officer had the vehicle towed to a storage yard. An employee of the storage yard noticed cash and a weapon in the vehicle. A search of the vehicle yielded cash, a weapon, and drug paraphernalia, and a canine alerted to the smell of drugs on the cash but not on the vehicle. Branam was not charged with a drug-related offense, but numerous confidential informants stated that the vehicle had been used in drug transactions. The state petitioned for forfeiture of the property. Branam moved to dismiss the petition on grounds that the state did not have probable cause to seize the property. The District Court agreed and summarily dismissed the petition, and the state appealed. The Supreme Court reversed. Property is subject to forfeiture to the state if it is or has been used in connection with the manufacture, distribution, or sale of dangerous drugs, and property may be seized for the purpose of declaring it forfeit to the state if an officer has probable cause to believe that a conveyance has been or is intended to be used to unlawfully transport, keep, deposit, or conceal a controlled substance. Probable cause is required at the time of seizure if the state seizes property without a warrant solely for purposes of forfeiture. However, if property is lawfully seized for purposes other than forfeiture, nothing in 44-12-103 precludes a later petition for forfeiture when an investigation develops probable cause to believe that the property is subject to forfeiture. Search and seizure without a warrant may not be held illegal if a defendant has disclaimed any right or interest in the place or object searched or the evidence or contraband seized or if a right of the defendant has not been infringed by the search and seizure. Here, Branam's act of fleeing and leaving the vehicle and its contents on the street constituted abandonment sufficient to justify having the vehicle towed, and the warrantless discovery of the cash and weapon by the towing company employee did not infringe on Branam's right of privacy. Probable cause to seize property exists when an officer's knowledge is sufficient to warrant a reasonable person to believe that an offense has been committed, and when a vehicle is stopped and the occupants of the vehicle immediately flee, suspicions of an offense connected to the vehicle arise. Thus, when the officer took possession of the vehicle, sufficient probable cause existed to cause seizure of the property and allow further investigation. Additionally, nothing required that Branam be charged with a criminal offense to allow forfeiture of the property. St. v. Branam, 2006 MT 300, 334 M 457, 148 P3d 635 (2006).

Canine Sniff Search of Defendant's Truck Warranted by Circumstances: Meza argued that the canine sniff search of his truck was illegal because the officer had stopped him for turning without using a turn signal and therefore had no probable cause to use the dog to search around his truck. The Supreme Court held that the stop for the traffic infraction was justified, that before the stop, the officer had observed Meza parked in front of a house known for drug activity talking to an inhabitant of the house, and that upon being stopped, Meza immediately got out of the truck and appeared nervous. Therefore, the totality of the circumstances justified using the dog to search Meza's truck. St. v. Meza, 2006 MT 210, 333 M 305, 143 P3d 422 (2006).

Reasonable Cause for Search of Probationer's Vehicle for Methamphetamine Lab Under Totality of Circumstances: Two probation officers arrived at Feltman's residence to conduct a search and found dangerous drugs and paraphernalia. While there, Fritz arrived at the residence asking for Feltman. Fritz was told to leave and complied, but returned later. After determining Fritz's identity, the officers discovered that there was an outstanding warrant for Fritz for a probation violation. In an effort to avoid incarceration, Feltman told the officers that there

was a drug lab in Fritz's truck. After Fritz was arrested, the officers searched his truck and discovered chemicals for manufacturing methamphetamine. Fritz contended that the search was unreasonable because the truck was not registered in his name and because Feltman's statement was not corroborated. The Supreme Court disagreed, concluding that under the totality of the circumstances, reasonable cause existed for the search of the truck. Officers knew that: (1) Fritz was a probationer who failed to report to his probation officer as required; (2) Fritz was associating with Feltman at a residence where drugs and paraphernalia were found; (3) Feltman provided explicit information about a laboratory in the truck, which she backed up with a reasonable explanation; (4) methamphetamine cooks frequently conceal portable laboratories by using vehicles registered in someone else's name; and (5) the truck was under Fritz's control because he was observed driving it two separate times. St. v. Fritz, 2006 MT 202, 333 M 215, 142 P3d 806 (2006).

Totality of Circumstances, Including Odor of Marijuana, Sufficient Probable Cause to Support Search Warrant: The Department of Public Health and Human Services received a call alleging that Morse was selling drugs in the presence of her juvenile daughter, and the local drug task force received two additional calls alleging that Morse was distributing drugs from her apartment. When police visited Morse's apartment, there were four other people there, all of whom had prior drug-related arrests, including Morse. The officers smelled marijuana and observed an empty electric digital scale in the living room. Morse refused a search of the apartment, so officers obtained a search warrant. In executing the warrant, the officers found drugs and paraphernalia. At trial, Morse moved to suppress the evidence based on lack of probable cause for the warrant. The motion was denied, and on appeal, the Supreme Court reviewed the totality of the circumstances and affirmed. The smell of marijuana did not in itself establish probable cause, nor did the telephone calls. However, when considered with Morse's drug history, the criminal backgrounds of the other four people, and the presence of the scale, the search warrant application established probable cause, and the motion to suppress was properly denied. St. v. Morse, 2006 MT 54, 331 M 300, 132 P3d 528 (2006).

Motion to Suppress DUI Blood Test Evidence Obtained by Investigative Subpoena Properly Denied: Following a motorcycle accident, Fregien admitted to a responding firefighter that he had consumed some beer, and the firefighter and a highway patrol officer noticed the odor of alcohol on Fregien's breath. The firefighter's affidavit supported an investigative subpoena for Fregien's blood test results obtained at the hospital. Fregien contended that the evidence did not rise to the level of probable cause and that the blood test results should have been suppressed, but the suppression motion was denied. On appeal, the Supreme Court affirmed. Under St. v. Nelson, 283 M 231, 941 P2d 441 (1997), the facts warranted an honest belief in the mind of a reasonable and prudent person that Fregien had committed the offense of DUI, thereby establishing probable cause for the investigative subpoena for Fregien's blood test results, and the motion to suppress was properly denied. St. v. Fregien, 2006 MT 18, 331 M 18, 127 P3d 1048 (2006).

Officer's Testimony and Videotape Sufficient Evidence of Reasonable Grounds for DUI Stop: Clark's driver's license was suspended after he refused to take a breath test when arrested for DUI. In petitioning for reinstatement of the license, Clark contended that the arresting officer lacked a particularized suspicion to make a stop and failed to articulate a reason for the stop at the hearing on the license suspension. The Supreme Court applied the reasonable grounds test in St. v. Brander, 2004 MT 150, 321 M 484, 92 P3d 1173 (2004), and held that the trial court properly concluded, on the basis of the officer's testimony that Clark hit a curb and swerved across lanes, coupled with a videotape of the stop, that the officer had reasonable grounds to investigate Clark for DUI. The trial court properly analyzed the factors in 61-8-403, and the analysis was not clearly erroneous. Denial of the petition to reinstate Clark's license was affirmed. Clark v. State ex rel. Driver Improvement Bureau, 2005 MT 65, 326 M 278, 109 P3d 244 (2005), followed in St. v. Rodriguez, 2011 MT 36, 359 Mont. 281, 248 P.3d 850 (2011).

No Reasonable Grounds to Believe Defendant DUI — Sole Testimony of Defendant Sufficient to Prove No DUI Occurred: Eustance drove to the airport to pick up his daughter and grandson who were arriving on a flight. Because of hip pain, it was more comfortable to wait in his car. Eustance parked in the lot of a nearby car rental agency and fell asleep. Eustance was later awakened by a Deputy Sheriff who requested that Eustance perform field sobriety tests and a breath test, but Eustance refused to perform both tests, so his license was seized and suspended. At a hearing on a petition for reinstatement of his license, Eustance was the only witness. He testified that he had been operating his vehicle in a safe and legal manner prior to arrest, that his ability to drive was not impaired, and that he did not believe there was reasonable suspicion or probable cause to justify his arrest. The District Court agreed and granted the petition reinstating the license. On

appeal, the state cited Hunter v. St., 264 M 84, 869 P2d 787 (1994), contending that Eustance had not met the burden of establishing that suspension of the license was improper because without the deputy's testimony, Eustance's own testimony was self-serving and insufficient to meet the burden. The Supreme Court disagreed. The testimony of one witness is sufficient to prove any fact. Nowhere in Hunter was it held that a petitioner in a license reinstatement hearing cannot meet the burden of proof without testimony from the arresting officer or that a petitioner's testimony, without more, is insufficient to meet the burden of proof. Thus, the District Court was entitled to accept Eustance's uncontradicted testimony as true. Absent evidence supporting the state's position, Eustance met the burden of proof and his license was properly reinstated. Eustance v. St., 2005 MT 34, 326 M 77, 107 P3d 478 (2005).

Personal Possession of Pipe Insufficient Probable Cause to Search Vehicle — Evidence in Plain View in Vehicle Sufficient Probable Cause for Subsequent Search of Residence: When Griffin was lawfully arrested for driving without a license, the arresting officer found a pipe in Griffin's pocket that, in the officer's opinion, contained drug residue. The officer then obtained a search warrant for Griffin's truck. When approaching the truck, the officer observed items in plain view in the open truck bed that could be used to manufacture methamphetamine. Pursuant to another search warrant based on the evidence in the truck bed, officers searched Griffin's residence and found a drug lab that was booby-trapped with explosives. Griffin moved to suppress all the evidence because the first search warrant was issued without probable cause. The motion was denied, but on appeal, the Supreme Court agreed that the only evidence supporting the vehicle search warrant—the existence of a pipe on Griffin's person and the fact that Griffin recently exited the truck—provided insufficient probable cause for a warrant to search the truck. Just because a person has a pipe in a pocket that contains untested white residue does not mean that the person's vehicle will contain evidence of a drug offense. However, in this case, the majority of evidence seized from the truck was in plain view in the truck bed. Griffin had no expectation of privacy regarding items in plain view, nor was a warrant required to seize the items in the truck bed. Therefore, any error in issuing the search warrant for the truck was harmless and not prejudicial. Additionally, the lawfully seized evidence in the truck bed was sufficient to support a finding of probable cause for issuance of another warrant to search Griffin's residence. Denial of Griffin's motion to suppress was affirmed. St. v. Griffin, 2004 MT 331, 324 M 143, 102 P3d 1206 (2004).

Information Provided by Citizen Informant — Sufficient Warrant Application: Beaupre contended that the fruits of a search should be suppressed because the warrant application was based on uncorroborated information provided by a confidential informant unknown to the officer who applied for the warrant and that the application was based on impermissible hearsay. The motion to suppress was denied, and on appeal, the Supreme Court affirmed. The informant was part of a cleaning crew hired by Beaupre to clean up damage after a fire at Beaupre's residence. During the cleanup, the informant observed drug paraphernalia and suspected drug lab materials, photographed the items, and gave the photographs to police. The informant remained confidential, but was not anonymous, and was acting as a concerned citizen. Questions regarding the informant's involvement and motivation were answered by the application and thus provided probable cause without further corroboration. The informant's information was not considered hearsay because the observations of fellow officers were a reliable basis for a warrant applied for by another officer. St. v. Beaupre, 2004 MT 300, 323 M 413, 102 P3d 504 (2004). See also St. v. Seaman, 236 M 466, 771 P2d 950 (1989), St. v. Reesman, 2000 MT 243, 301 M 408, 10 P3d 83 (2000), St. v. Deshaw, 2012 MT 284, 367 Mont. 218, 291 P.3d 561, and Muir v. Bilderback, 2015 MT 180, 379 Mont. 459, 353 P.3d 473.

Admission of Unrelated Criminal Activity by Informant — Independent Corroboration Unnecessary: An informant who was known to police told the authorities that Meyer was in possession of illegal explosives after witnessing the explosives being delivered to Meyer. The informant admitted several instances of criminal activity, including use and possession of methamphetamine and being present when the explosives were delivered. Meyer sought to suppress evidence of the explosives because the informant's statements were not corroborated, the informant was not charged with transporting illegal explosives, and the drug charges were unrelated to the explosives investigation. The motion to suppress was denied, and on appeal, the Supreme Court affirmed. Independent corroboration is not required for a reliable informant whose identity is known to law enforcement and whose information is not based on hearsay, and an informant who gives an unequivocal admission against interest is considered reliable without further corroboration. Because corroboration was not necessary, the court declined to address whether admissions unrelated to the underlying offense may be classified as an admission against

interest. St. v. Meyer, 2004 MT 272, 323 M 173, 99 P3d 185 (2004), following St. v. Reesman, 2000 MT 243, 301 M 408, 10 P3d 83 (2000).

Not Necessary to Allege Every Element of Offense to Support Finding of Probable Cause for Search Warrant: A search warrant application alleged that Meyer violated 45-8-335 by illegally possessing explosives. Meyer contended that the application was insufficient because it did not allege a violation of every element of 45-8-335, so probable cause did not exist. The Supreme Court disagreed. Probable cause to believe that an offense has been committed is a separate question from whether probable cause exists to search a suspect's residence, and evidence sufficient to support probable cause for a warrant is significantly less than that required to support a conviction. In this case, the warrant application stated facts supporting probable cause to believe that contraband connected with the offense of illegal possession of explosives would be found at Meyer's residence, described with particularity the place to be searched and what was to be seized, was based on observations of a reliable informant, and alleged a specific timeframe related by the informant as to when the continuing possession occurred. Under the totality of the circumstances, the application was sufficient when viewed on its four corners to support a finding of probable cause. St. v. Meyer, 2004 MT 272, 323 M 173, 99 P3d 185 (2004).

Suspect's Conduct and Officer's Knowledge of Suspect's Criminal History Sufficient Probable Cause for Warrant to Search Vehicle for Drugs: When officers arrested Frasure on an outstanding warrant, Frasure acted jittery and nervous, spoke with choppy, accelerated speech, and was sweating. Based on their training, the officers knew Frasure's actions were consistent with a person under the influence of methamphetamine. The officers also knew from previous contact that Frasure was a methamphetamine addict who had previously been arrested for methamphetamine offenses. A pat-down search incident to the arrest revealed a marijuana pipe in Frasure's pocket. Frasure denied consent to search the vehicle that he was in when arrested, but the vehicle was impounded and a warrant was obtained to search the vehicle. The search revealed drugs and paraphernalia, and Frasure moved to suppress the evidence on grounds that there was insufficient probable cause for the search warrant. The motion was denied, and on appeal, the Supreme Court affirmed. The officers' knowledge and Frasure's conduct constituted sufficient evidence to support the officers' belief that Frasure had committed an offense, so sufficient probable cause existed to support the vehicle search, and denial of Frasure's motion to suppress was not erroneous. St. v. Frasure, 2004 MT 242, 323 M 1, 97 P3d 1101 (2004).

Probable Cause for Search Warrant for Vehicle Based on Warrantless Canine Search of Exterior of Vehicle, Outstanding Drug Warrant, and Officer's Experience: Officers went to Hart's home to execute an outstanding warrant for felony sale of dangerous drugs and noticed Hart driving away in his van in the opposite direction. The officers initiated a traffic stop and noticed furtive movements from Hart as he moved quickly toward the floorboard, indicating that he was attempting to retrieve a weapon or hide something in the van. Hart refused a request to search the van, but the officers had a particularized suspicion that Hart was in possession of drugs. The officers conducted a canine search of the exterior of the van, and the dog alerted to the presence of drugs. The officers then acquired a warrant to search the van and discovered methamphetamine and marijuana. On appeal, Hart contended that there was insufficient probable cause for a search warrant. The Supreme Court disagreed. Evaluated in light of an officer's knowledge and all relevant circumstances, probable cause to search exists if the facts and circumstances within the officer's personal knowledge are sufficient to warrant a reasonable person to believe that a suspect has committed an offense. In this case, there was sufficient probable cause based on the fact that the officers were attempting to execute an outstanding drug warrant, the officer's experience in using drug-detecting canines, the dog's positive alert, and Hart's furtive movements at the time of the stop. St. v. Hart, 2004 MT 51, 320 M 154, 85 P3d 1275 (2004).

Sufficient Corroboration of Tip in Application for Warrant to Demonstrate Probable Cause — Suppression Motion Improperly Granted: Based on a tip, Palmer was arrested for drugs following a search of his bus. The District Court subsequently granted Palmer's motion to suppress after concluding that: (1) the informant lacked reliability; (2) timeframes surrounding the information were unclear; (3) the informant's tip was not sufficiently corroborated; (4) associations between Palmer and drug activity were tenuous; and (5) evidence found in Palmer's trash could not be directly linked to Palmer. The state appealed the suppression, and the Supreme Court reversed. Applying St. v. Reesman, 2000 MT 243, 301 M 408, 10 P3d 83 (2000), the court found it unnecessary to determine whether the informant should be treated as a confidential informant, requiring corroboration, or as an informant who made an unequivocal admission against interest in the course of providing the tip because the search warrant application itself sufficiently corroborated the tip and demonstrated probable cause. The fact that corroborative evidence in the form of

video surveillance revealed no actual criminal activity did not necessarily lead to the conclusion that probable cause did not exist. St. v. Palmer, 2003 MT 129, 316 M 46, 68 P3d 809 (2003).

Confession a Result of Exploitation of Unlawful Arrest — Miranda Warning Insufficient to Negate Cumulative Effect of Circumstances Leading to Confession: Officers had insufficient probable cause to arrest Van Dort, resulting in an unlawful arrest, and the Supreme Court then considered whether Van Dort's subsequent confession was legitimate. The state maintained that because Van Dort was given Miranda warnings, the confession should be admissible. Van Dort averred that the Miranda warnings alone were insufficient to sever the causal connection between the confession and the arrest. The court noted that as set out in St. v. Beach, 217 M 132, 705 P2d 94 (1985), which adopted the federal rule set out in Brown v. Ill., 422 US 590 (1975), the general principle is that a confession obtained as a result of an unlawful arrest is inadmissible; however, there must be a causal connection between the arrest and the confession. In determining whether a causal connection exists, the court considers: (1) the presence or absence of timely Miranda warnings; (2) whether there was an intervening independent act by the defendant or some third party; (3) the temporal proximity of the arrest and confession; and (4) the degree of the alleged constitutional violation. Miranda warnings will not, in all cases, attenuate the corruptive effect of a prior constitutional violation or remove the taint of a prior constitutional violation. In this case, the Miranda warnings did not sever the chain of causality between Van Dort's unlawful arrest and the confession and were insufficient to negate the cumulative effect of all the relevant circumstances leading to Van Dort's confession. The court distinguished Beach, holding that despite the issuance of Miranda warnings, Van Dort's confession was the result of the exploitation of the unlawful arrest and inadmissible as fruit of the poisonous tree, and the Supreme Court reversed the District Court's denial of Van Dort's motion to suppress. St. v. Van Dort, 2003 MT 104, 315 M 303, 68 P3d 728 (2003).

Justifiable Stop for Daytime Check of Temporary Window Sticker Warranted — Further Police Intrusion Not Warranted Once Limited Purpose of Stop Accomplished: Following weeks of surveillance instigated by a confidential tip intimating drug activities, the Billings police observed no suspicious drug-related activities conducted by defendants, but after receiving a tip that defendants would be driving from Billings to Bozeman to sell marijuana, officers stopped defendants' vehicle because there were no license plates displayed, although a temporary sticker could be seen but not read in the tinted rear window. When the officers approached the vehicle, they noticed that the temporary sticker properly displayed in the window was current. Nevertheless, in a short time, additional officers arrived with a drug-sniffing dog. The dog indicated the presence of drugs, the vehicle was searched, marijuana was found, and defendants were arrested. Defendants contended that the evidence should be suppressed because there was no particularized suspicion to make the stop. The Supreme Court agreed that the investigative stop was warranted because the officers' inability to read the expiration date on the temporary sticker provided an objective basis to infer that the sticker was not valid. However, a quick check of the properly displayed sticker in bright daylight confirmed the sticker's validity. Defendants had committed no traffic offense or violated any other criminal law of which the officers were aware. An investigative stop is a temporary detention that may not last longer than necessary to effectuate the purpose of the stop. Once the limited purpose of the investigative stop was accomplished, no further police intrusion was warranted, and the investigative stop related to drug possession was not justified. The District Court committed reversible error in refusing to suppress the evidence of the subsequent vehicle search. St. v. Martinez, 2003 MT 65, 314 M 434, 67 P3d 207 (2003), following St. v. Henderson, 1998 MT 233, 291 M 77, 966 P2d 137 (1998). See also St. v. Clark, 2008 MT 419, 347 M 354, 198 P3d 809 (2008).

Sufficient Probable Cause for Search of Vehicle for Suspected Drug Lab: Officers received a tip from Olson's estranged husband that a methamphetamine lab was being operated in Olson's garage. The officers placed the garage under surveillance and saw equipment being loaded into Olson's car that same day. The officers stopped the car for an investigative stop, and an officer informed Olson that he knew that lab equipment was in the trunk. Olson initially denied it, but when the officer expressed concern for Olson and her son, she made incriminating statements and confessed that the lab was in the car. The officers then obtained a search warrant and searched the vehicle and Olson's garage. Olson contended that the warrant application was not supported by probable cause. The Supreme Court applied the standards in Ill. v. Gates, 462 US 213 (1983), and St. v. Reesman, 2000 MT 243, 301 M 408, 10 P3d 83 (2000), and concluded that Olson's husband was acting as a good citizen and was a reliable informant. The officers had sufficient probable cause to believe that a drug lab was relocated from Olson's garage to the vehicle to

support the issuance of the search warrant. St. v. Olson, 2003 MT 61, 314 M 402, 66 P3d 297 (2003).

De Novo Review of Excised Search Warrant Application by Supreme Court — Standard of Review: Supreme Court review of an application for a search warrant grants great deference to the issuing magistrate's determination that probable cause existed for issuing the warrant. However, when information has been excised from an application after the fact, that deference will not be paid to the magistrate's probable cause determination and the court will review the excised application de novo to determine whether probable cause supported the issuance of the search warrant. The Supreme Court's standard of review has often been articulated as whether the magistrate had a substantial basis to issue the search warrant, while the court's conclusions tended to be focused on whether sufficient probable cause existed. For purposes of review, the phrase "substantial basis for probable cause" has the same meaning as the phrase "sufficient probable cause". St. v. St. Marks, 2002 MT 285, 312 M 468, 59 P3d 1113 (2002). See also St. v. Kuneff, 1998 MT 287, 291 M 474, 970 P2d 556 (1998).

Sufficient Independent Corroboration of Statements of Confidential Informant: A confidential informant told police that St. Marks was engaged in illegal drug distribution with another man. The informant gave details concerning St. Marks' distinctive license plate, where he parked his car in public places, and the fact that he was staying in a particular room in a local motel. Corroboration of these innocent facts alone failed to prove the necessary indicia of suspicious human conduct to substantiate the informant's statements. However, further independent police investigation revealed that St. Marks had been staying at the motel for over 2 months, paid the bill in cash every 2 weeks, and had a home address in the same town as the motel. In the officers' judgment, it was unusual for a person to stay in a motel for long periods when the person has a local address, but it was common for drug dealers to stay in places other than their home to avoid bringing attention to themselves or placing their residence at risk, and distributors of dangerous drugs often have significant amounts of cash on hand. The Supreme Court decided that credence should be given to the officers' judgment because their experience and training provided a reasonable basis for the conclusions regarding St. Marks' behavior. Also, the other man mentioned by the informant was subsequently arrested after being found with a significant quantity of drugs. Thus, after evaluating the totality of the circumstances within the four corners of the search warrant application and excluding certain information that was conceded as being stale, the Supreme Court concluded that the unredacted information supplied in the application, including the subsequent corroboration and investigation by law enforcement, provided sufficient probable cause to support the belief that an offense had been committed and that evidence, contraband, or persons connected with the offense could be found. St. Marks' motion to suppress was properly denied. St. v. St. Marks, 2002 MT 285, 312 M 468, 59 P3d 1113 (2002).

Lack of Physical Description Not Precluding Particularized Suspicion Warranting Investigatory Stop — Defendant in Proximity to Suspects at Crime Scene: A convenience store clerk called police to report a possible theft and gave physical descriptions of two suspects. When a police officer arrived at the scene, he observed three people nearby, two of whom matched the physical description. Niles did not match the description, but was standing with those who did. The officer cornered one of the persons described by the clerk, after which Niles and the other person began walking away. When ordered to stop, the two tried to flee but were apprehended and arrested. Niles was charged with obstructing a peace officer and with possession of alcohol by a minor. During criminal proceedings, Niles moved to suppress evidence based on the contention that the officer lacked a particularized suspicion to detain. The motion was denied. On appeal, the Supreme Court affirmed. Although Niles was not physically described in the police report, he nevertheless was clearly associated with the two described suspects near the area of the crime, and although Niles did not initially run away from the officer, he did walk away in the presence of a suspect and in a manner that, under the totality of the circumstances, the officer could form a particularized suspicion that Niles was engaged in or had been engaged in criminal wrongdoing. St. v. Niles, 2002 MT 282, 312 M 453, 59 P3d 1129 (2002), distinguishing St. v. Broken Rope, 278 M 427, 925 P2d 1157 (1996), and St. v. Bauer, 2001 MT 248, 307 M 105, 36 P3d 892 (2001).

Informants' Statements Based on First-Hand Evidence — Sufficient Probable Cause for Search Warrant: The Gramses' teenage daughter held a slumber party at the family home. During the party, the daughter procured marijuana from a filing cabinet in her father's bedroom, telling her friends that her father approved of her smoking marijuana and did not care if she went into the bedroom to procure some. The children allegedly smoked marijuana at the party, and the daughter was later implicated in a marijuana distribution scheme at her middle school. During the school investigation, one of the girls who was at the slumber party recalled the incident, and

based on the information, a warrant was obtained to search the Gramses' residence. Marijuana and paraphernalia were seized. The Gramses moved to suppress the evidence, contending that probable cause did not support the search warrant. The motion was denied, and the Gramses appealed, but the Supreme Court affirmed. The court applied the test in St. v. Reesman, 2000 MT 243, 301 M 408, 10 P3d 83 (2000), for determining whether an informant's information is sufficient to establish probable cause. The informants here were not anonymous, so the question became whether the informants' testimony was hearsay or based on personal observation of the criminal activity. The statements were based on first-hand evidence, so the last element of the Reesman test was whether the informants were reliable. In this case, the informants admitted that they smoked marijuana, which was an unequivocal admission against their interests, so the information was considered reliable and the police were not required to independently corroborate the informants' information. The admissions provided sufficient probable cause to obtain the search warrant, and the motion to suppress was properly denied. St. v. Grams, 2002 MT 188, 311 M 102, 53 P3d 897 (2002).

Shining of Police Spotlight Into Vehicle Not Considered Seizure: After Clayton left a Bozeman bar, he noticed that he was being followed by a police car, so he pulled to the right side of the road and stopped. As the police car pulled in behind Clayton's vehicle, the officer shined a spotlight into Clayton's vehicle to see how many people were in it. Before the police car came to a stop, Clayton got out of his vehicle, looked at the police car, and began to run. The officer immediately recognized Clayton from a prior involvement and knew that Clayton's driver's license had been revoked, so the officer gave chase, eventually catching Clayton and placing him under arrest for obstructing an officer. Clayton was subsequently also charged with fourth offense felony DUI and driving with a suspended license. Clayton argued that he was seized when the officer pulled in behind his vehicle and shined the spotlight into it, because the officer did not have a particularized suspicion to effect a stop, and contended that he felt restrained and reasonably believed that he was not free to leave. The District Court concluded that the police acted reasonably and that when Clayton turned and faced the officer and gave away his identity, the police had particularized suspicion. The question for the Supreme Court was whether the police had effected a stop prior to that time and whether a seizure occurred. The state relied on Calif. v. Hodari D., 499 US 621 (1991), for the proposition that a seizure requires either a physical restraint or a submission to an assertion of authority, arguing that even if a stop did occur, the police had particularized suspicion to effect the stop and that the police action was reasonable in nature and scope. The Supreme Court rejected Hodari D., holding that it does not comport with Montana constitutional requirements, and instead affirmed the test in St. v. Roberts, 1999 MT 59, 293 M 476, 977 P2d 974 (1999), that no seizure occurs unless, in view of all the circumstances surrounding the incident, a reasonable person would have felt that the person was not free to leave. In this case, the fact of the police slowing down and coming to a stop behind Clayton's vehicle, and shining a spotlight into the vehicle, did not amount to such a show of authority to meet the Roberts test. The police did not use a siren or emergency lights, the encounter took place on a public street, and the police did not exit the police car and approach Clayton. Thus, no stop occurred prior to Clayton exiting his vehicle, and the District Court was affirmed. St. v. Clayton, 2002 MT 67, 309 M 215, 45 P3d 30 (2002).

Sufficient Probable Cause for Search Warrant Based on Tip From Confidential Informant — Corroboration Required — Defendant's Burden to Show False Information in Warrant Application: A confidential informant told police that Gray was conducting a marijuana growing operation in his home. Based on the allegations, officers surveyed the exterior of the home and discovered a newly installed chimney and vents consistent with such an operation. Known drug offenders were observed frequenting the residence. An investigative subpoena of Gray's utility records showed an increase in power consumption consistent with a growing operation. Based on this information, officers obtained a search warrant and discovered 77 marijuana plants and associated growing paraphernalia. Gray moved unsuccessfully to suppress the evidence on grounds of insufficient probable cause to support the warrant, arguing that the warrant application contained unreliable hearsay, insufficient detail, and unsupported conclusory statements. The Supreme Court affirmed. In St. v. Reesman, 2000 MT 243, 301 M 408, 10 P3d 83 (2000), the court reiterated that corroboration of an informant's tip through other sources is necessary when the information is hearsay or the informant is anonymous. In this case, even though the informant was not anonymous, the informant lacked personal knowledge of the operation, so the information was hearsay and required corroboration. Nevertheless, the information could still be considered with other factors in determining probable cause under the totality of the circumstances test. The officers made several attempts to corroborate the information, including verification of

the physical description of Gray and the residence, although that innocuous information alone provided no indicia of suspicious human conduct to substantiate the allegations, as required in St. v. Griggs, 2001 MT 211, 306 M 366, 34 P3d 101 (2001). However, the officers' other observations did provide sufficient corroboration to support probable cause, despite Gray's attempt to offer seemingly innocent explanations for the suspicious conduct. When a defendant challenges the veracity of information in a warrant application, the defendant must make a substantial preliminary showing that the application or affidavit in support of the application contained false information. If that showing is made, a hearing must be held and the defendant must prove by a preponderance of the evidence that the information is untrue, and if proved untrue, that information must be excised from the application and a determination made as to whether sufficient probable cause exists without the excised information (see St. v. Worrall, 1999 MT 55, 293 M 439, 976 P2d 968 (1999)). Here, Gray did challenge the veracity of some, but not all, of the information, but the Supreme Court declined to disturb the trial court's findings regarding the reasonableness and prudence of the investigation or its judgment regarding the credibility of the witnesses. The court found that at some point, credence must be lent to the judgment of law enforcement whose training and experience invoke common sense conclusions about human behavior, and as long as officers provide reasonable justifications for their conclusions, the court will not disturb a finding of probable cause for issuance of a search warrant. The information here was sufficiently corroborated, and in light of the totality of the circumstances, the conclusion that probable cause existed was affirmed. St. v. Gray, 2001 MT 250, 307 M 124, 38 P3d 775 (2001). See also St. v. Rinehart, 262 M 204, 864 P2d 1219 (1993).

Sufficiency of Law Enforcement Officer's Independent Corroboration of Anonymous Tip — Failure to Corroborate Probability of Criminal Activity — Evidence of Search Properly Suppressed: Bozeman police received an anonymous tip that Griggs was conducting a mushroom-growing operation in his home. The informant also included a physical description of Griggs, his address, a description of his vehicle, the fact that Griggs had recently improved the wood trim on his residence, and the facts that he was a member of the armed forces, was a sharpshooter, and possessed several weapons. Detectives were able to corroborate all the personal information and incorporated it into a search warrant application, but did not corroborate that alleged criminal activity was occurring. Nevertheless, a warrant was issued by a District Court Judge and executed the following day, resulting in the seizure of contraband and Griggs's arrest. Griggs moved to suppress, arguing that the warrant was issued without sufficient probable cause, and a different District Court Judge granted the motion on grounds that because there was no independent police investigation that corroborated the caller's statements about the drug activity, sufficient probable cause for the warrant did not exist. The state appealed, contending that the further law enforcement investigation required under the standards in Ill. v. Gates, 462 US 213 (1983), and St. v. Reesman, 2000 MT 243, 301 M 408, 10 P3d 83 (2000), do not necessarily require corroboration of any criminal activity at all and need not extend to any incriminating information regarding alleged criminal activity supplied by an informant. The Supreme Court disagreed. A defendant may challenge whether independent corroboration or investigation was sufficient within the context of a court's totality of the circumstances analysis. Upon review, an appellate court must look solely to the information given to the impartial magistrate and to the four corners of the entire warrant application, rather than examining the application sentence by sentence. An anonymous informant's information regarding criminal activity always requires law enforcement corroboration in order to supply a sufficient substantial basis for a probable cause determination, although information supplied by a "concerned citizen" whose identity is known, who personally observes the alleged criminal activity, and who openly risks liability by accusing another person of criminal activity may not need further law enforcement corroboration. What is critical in the corroboration of an informant's information, when corroboration is in fact required, is that innocent noncriminal activity or evidence subjected to further investigation by officers ripens into suspicious behavior in light of the tip concerning criminal activity. A warrant application must state facts sufficient to support probable cause to believe that a criminal offense has been committed, as well as facts supporting probable cause to believe that evidence, contraband, or persons connected with the offense may be found. The necessary indicia of suspicion that results from police corroboration of otherwise innocent information must reveal a pattern of human behavior associated with the alleged criminal activity or activity necessary to carry out the activity that, when viewed as a whole, is consistent with the criminal activity. It is possible that in order to reveal this indicia of suspicious conduct, officers may investigate and corroborate otherwise innocent, noncriminal activity with further observations of otherwise innocent, noncriminal activity, but in Griggs's case, none of the subsequent investigations

served to supply the magistrate with any indicia of conduct even remotely associated with the criminal activity alleged by the informant. Thus, probable cause did not exist, and the fruits of the search were properly suppressed. St. v. Griggs, 2001 MT 211, 306 M 366, 34 P3d 101 (2001), distinguishing St. v. Deskins, 245 M 158, 799 P2d 1070 (1990), and St. v. Hook, 255 M 2, 839 P2d 1274 (1992), and followed in Hauge v. District Court, 2001 MT 255, 307 M 195, 36 P3d 947 (2001). Griggs was distinguished in St. v. Zito, 2006 MT 211, 333 M 312, 143 P3d 108 (2006), in which corroborating facts relating to defendant were pertinent to harvesting of marijuana and criminal activity was confirmed by an experienced narcotics detective. See also U.S. v. Mendonsa, 989 F2d 366 (9th Cir. 1993).

Missing Vehicle Headlight Constituting Objective and Particularized Suspicion of Wrongdoing to Justify Investigative Stop: Officers conducting surveillance of a house where drug activities were suspected noticed that a vehicle leaving the area was missing a headlight. The officers believed that the driver, Farabee, may have just completed a drug transaction at the house and pulled over the vehicle, based on the fact that the vehicle appeared to be in violation of 61-9-104, which requires two working headlights. Upon receiving permission and searching the vehicle, the officers discovered marijuana and paraphernalia. On appeal, Farabee argued that the officer who stopped him did not have a particularized suspicion that Farabee was committing an offense because the stop occurred at 1:30 p.m., in broad daylight, and Farabee's headlights were turned off, so the officers could only speculate that the headlight was inoperable. The Supreme Court disagreed, holding that the officers' suspicions were particularized. From the objective and particularized data that the vehicle appeared to be missing a headlight, the officers made the reasonable inference that the headlight was inoperable. Particularized suspicion does not require certainty on the part of an officer; thus, the District Court's conclusion that Farabee was engaged in wrongdoing that justified an investigative stop was not clearly erroneous. St. v. Farabee, 2000 MT 265, 302 M 29, 22 P3d 175, 57 St. Rep. 1106 (2000), distinguishing Grinde v. St., 249 M 77, 813 P2d 473 (1991), and St. v. Reynolds, 272 M 46, 899 P2d 540 (1995).

Traffic Stop of Illegally Operated Vehicle Not Considered Pretext for Search of Vehicle for Narcotics: Officers conducting surveillance of a house where drug activities were suspected noticed that a vehicle leaving the area was missing a headlight. The officers believed that the driver, Farabee, may have just completed a drug transaction at the house and pulled over the vehicle, based on the fact that the vehicle appeared to be in violation of 61-9-104, which requires two working headlights. Upon receiving permission and searching the vehicle, the officers discovered marijuana and paraphernalia. On appeal, Farabee argued that the evidence should be suppressed because the officers used the equipment violation as a pretext to stop him and investigate their hunch, in violation of section 10 of this article and this section. The Supreme Court disagreed, applying the rationale in Whren v. U.S., 517 US 806 (1996), that an officer's motive for a traffic stop does not render an objectively reasonable stop invalid. The constitutional reasonableness of a traffic stop does not depend on the subjective motivations of the individual officers involved. In this case, based on the objective and particularized data that the vehicle appeared to be missing a headlight, the officers made the reasonable inference that the headlight was inoperable, so the totality of the circumstances justified the investigative stop. Farabee's motion to suppress was properly denied. St. v. Farabee, 2000 MT 265, 302 M 29, 22 P3d 175, 57 St. Rep. 1106 (2000), distinguishing St. v. Lahr, 172 M 32, 560 P2d 527 (1977).

Clarification of Corroboration Necessary to Verify Information Provided by Anonymous or Confidential Informant — Confidential Informant's Information Corroborated by Anonymous Tip Considered Insubstantial Basis for Determination of Probable Cause: A confidential informant provided police with firsthand information on alleged drug-related activities at a trailer home in Big Sky occupied by a person named Hoge, but there was no mention that Reesman lived at the trailer or was involved in any way. There was no indication that the informant had provided reliable information in the past. Police also received information from an anonymous citizen, who had reportedly provided reliable information in the past, regarding similar activity at the trailer home. However, there was no indication that the citizen's information came from personal observation or in what context prior reliable information had been received. Police took no further steps to corroborate the information supplied by either informant. Nevertheless, a warrant was issued for the entire trailer home and executed 2 days later. Police found Reesman and three other persons there and, upon searching Reesman's bedroom without his valid consent, discovered more than 100 doses of LSD. Reesman was charged with criminal possession of dangerous drugs with intent to sell, but he pleaded not guilty and moved to suppress the evidence on grounds that the warrant lacked probable cause and was overbroad. The District Court determined that corroboration of the confidential informant's firsthand, detailed information

by an anonymous tip weighed heavily in favor of the informant's reliability and provided a substantial basis for a finding of probable cause; therefore, the court refused to suppress the evidence. On appeal, the Supreme Court applied the totality of circumstances test set out in Ill. v. Gates, 462 US 213 (1983), to determine the sufficiency of the warrant application based on information supplied by anonymous or confidential informants, examining extensive case law. In obtaining a search warrant based on a tip from an anonymous informant or one based on hearsay, independent corroboration of the information is necessary. If an informant is not anonymous, but the information is not based on personal observation of the described criminal activity, independent corroboration is also required. In the case of a confidential informant with information based on personal observation, that person must have provided reliable and accurate information in the past in order for the information to serve as a basis for determining probable cause without further corroboration. If an informant makes an unequivocal admission against interest, further corroboration is unnecessary for warrant purposes. If an informant is motivated by good citizenship and the information demonstrates a sufficient degree of the nature of the circumstances under which the information became known, the informant's disclosures are considered a reliable basis for determining probable cause. A citizen informant is generally presumed reliable, and that reliability is shown by the very nature of the circumstances under which the incriminating evidence became known. Under the circumstances in Reesman's case, the confidential informant's information, which required further corroboration, could not serve as a source of independent corroboration or investigation that transformed the other informant's information into a basis for establishing probable cause. Thus, without further independent corroboration or investigation, the confidential informant's information in the search warrant application failed to supply the magistrate with the substantial basis for probable cause. The District Court erred in denying Reesman's motion to suppress the evidence, and the Supreme Court reversed. St. v. Reesman, 2000 MT 243, 301 M 408, 10 P3d 83, 57 St. Rep. 1017 (2000), distinguishing St. v. Rydberg, 239 M 70, 778 P2d 902 (1989), St. v. Deskins, 245 M 158, 799 P2d 1070 (1990), and St. v. Oleson, 1998 MT 130, 289 M 139, 959 P2d 503 (1998), and followed in St. v. Palmer, 2003 MT 129, 316 M 46, 68 P3d 809 (2003). See also St. v. Walston, 236 M 218, 768 P2d 1387 (1989), St. v. Martinez, 2003 MT 65, 314 M 434, 67 P3d 207 (2003), and St. v. Zito, 2006 MT 211, 333 M 312, 143 P3d 108 (2006).

Search of Probationer's Residence or Vehicle — Reasonable Grounds and Probable Cause Distinguished: One condition of Kriesel's probation was a provision that Kriesel be subject to search and seizure of his residence, person, or vehicle upon the request of his probation officer at any time with or without a warrant and with or without probable cause. Kriesel was arrested for violating probation and released to await revocation proceedings but failed to report to his probation officer, so a bench warrant was issued for his arrest. Following a vehicle stop based on an informant's description of his car, Kriesel was arrested on the outstanding warrant and methamphetamine and drug paraphernalia were found in the car. Kriesel tested positive for marijuana and amphetamine. On appeal, Kriesel moved to suppress the evidence found in the search, alleging that the informant supplied information that was not sufficiently corroborated and that there was thus insufficient particularized suspicion to stop his vehicle, as required under 46-5-401. However, in this case, the stop was initiated to detain Kriesel under the authority of a valid outstanding warrant, satisfying the probable cause requirement of 46-6-201, and as a result, the particularized suspicion requirement was satisfied. Further, under St. v. Olmsted, 1998 MT 301, 292 M 66, 968 P2d 1154 (1998), a search of a probationer's residence or vehicle does not require probable cause, but rather reasonable grounds as determined by the totality of the circumstances. The reasonable grounds standard requires substantially less than the probable cause standard because of a probationer's diminished expectation of privacy and the superior position of the probation officer to determine what level of supervision is necessary to provide rehabilitation and community safety. The District Court found that given Kriesel's status as a probationer, the search of his vehicle was properly executed. Given the evidence that there was probable cause for the stop and reasonable grounds for the search, the court's findings were not clearly erroneous, were correctly applied as a matter of law, and thus were affirmed. St. v. Kriesel, 2000 MT 144, 300 M 44, 2 P3d 831, 57 St. Rep. 564 (2000).

Public Duty Doctrine as Applied to Law Enforcement Personnel — Exception in Cases of Special Relationship: Trina admitted that she had been drinking when stopped in her vehicle by Officer Driscoll, who nevertheless believed that sufficient probable cause did not exist to arrest the woman. Instead, thinking Trina might be impaired, the officer suggested a ride home or that Trina walk the 2-mile distance and warned Trina about returning to the vehicle. Trina decided instead to walk to a phone and call for a ride and was killed in traffic. Trina's husband

brought suit for civil damages under 42 U.S.C. 1983, claiming that the officer breached the duty to protect, in violation of Trina's due process rights. The District Court summarily dismissed the claim, holding that because no probable cause existed for Trina's arrest, the officer had no duty to protect Trina from harm and that without a duty, the action failed. The public duty doctrine provides that a police officer's duty to protect and preserve the peace is owed to the public at large rather than to a particular person, unless a special relationship exists, thus giving rise to a special duty that is more particular than that owed to the public. A special relationship is established: (1) by a statute intended to protect a specific class of persons, of which the plaintiff is a member, from a particular type of harm; (2) when a government agent undertakes specific action to protect a person or property; (3) by governmental actions that reasonably induce detrimental reliance by a member of the public; and (4) under certain circumstances when the agency has actual custody of the plaintiff or of a third person who harms the plaintiff. Relying on Stewart v. Standard Publishing Co., 102 M 43, 55 P2d 694 (1936), the Supreme Court agreed that although the officer may not have initially owed Trina a duty to protect, that duty was assumed as a matter of law when the officer prevented the woman from driving her car and ensured that she did not attempt to drive. The question of whether the duty to protect was breached is a question of fact for the jury, so summary dismissal was improper. Nelson v. Driscoll, 1999 MT 193, 295 M 363, 983 P2d 972, 56 St. Rep. 744 (1999), clarifying and distinguishing Phillips v. Billings, 233 M 249, 758 P2d 772 (1988), and followed in Massee v. Thompson, 2004 MT 121, 321 M 210, 90 P3d 394 (2004). Nelson was followed, as to elements of exception to the public duty doctrine (nonlaw enforcement case), in Orr v. St., 2004 MT 354, 324 M 391, 106 P3d 100 (2004), and in Prosser v. Kennedy Enterprises, Inc., 2008 MT 87, 342 M 209, 179 P3d 1178 (2008). See also Krieg v. Massey, 239 M 469, 781 P2d 277, 46 St. Rep. 1839 (1989), Busta v. Columbus Hosp. Corp., 276 M 342, 916 P2d 122 (1996), and Eves v. Anaconda-Deer Lodge County, 2005 MT 157, 327 M 437, 114 P3d 1037 (2005).

Requisite Objective Data and Resulting Suspicion for Lawful Stop and Frisk in Motel Room: Officers were lawfully searching Roehr's motel room when Dawson knocked on the door. An officer opened the door, and Dawson entered, asking for Roehr. The officer told Dawson that he was going to conduct a pat-down search for weapons and asked Dawson if he possessed any weapons, drugs, or needles. Dawson said that he had no weapons. The officer repeated the question. Dawson motioned toward his coat pocket and said that he had some "smoke" in there. The "smoke" turned out to be methamphetamine and drug paraphernalia. Dawson sought to suppress the evidence, contending that the search was illegal because the officer had no articulable, reasonable suspicion that Dawson had engaged in criminal activity. On appeal, the Supreme Court noted that Roehr was a known criminal and that his room had been under surveillance for suspected drug activity. The officer had probable cause to believe that Roehr was conducting transactions involving dangerous drugs and stolen property in the room. When Dawson appeared, asking for Roehr, the officer had a particularized suspicion, based on the totality of the circumstances, to believe that Dawson had committed or was about to commit an offense. Thus, sufficient cause existed to detain Dawson. Further, in the officer's experience, people involved in drug offenses frequently carry weapons. The officer had no prior dealings with Dawson to help him determine whether Dawson was armed and did not know whether Dawson presented a danger to the officers conducting the search of the room, so reasonable cause existed to suspect that Dawson was armed and dangerous. Therefore, the officer possessed the requisite objective data and resulting suspicion to lawfully stop and frisk Dawson, and denial of the motion to suppress the fruits of the search was not error. St. v. Dawson, 1999 MT 171, 295 M 212, 983 P2d 916, 56 St. Rep. 668 (1999), distinguishing St. v. Anderson, 1999 MT 60, 293 M 490, 977 P2d 983, 56 St. Rep. 252 (1999).

Staleness — Continuing Nature of Criminal Activity:

When criminal activity is continuing in nature, information that would be stale when considered individually carries greater weight in a probable cause determination when combined with more recent information. If information reveals "that the possession and distribution of dangerous drugs by a person is a protracted and continuing activity", the passage of time between prior conduct and the probable cause determination becomes less significant. Here, the informant's tips about Anderson's drug-related activities between 7 and 10 months prior to the search and seizure, drug-related arrests 5 years and again 7 months earlier, and discovery during the search of methamphetamine in the trailer where Anderson was staying demonstrated a pattern of continuous conduct and was not stale for purposes of determining probable cause. Thus, probable cause existed to believe that Anderson was committing an offense, but it was insufficient, standing alone, to justify a warrantless search. The case was reversed because the

state failed to meet its burden of establishing that exigent circumstances existed to justify the warrantless search and, given the fact that although it may have been reasonable to detain Anderson under the circumstances, the search was conducted at midday, during regular business hours, and on a weekday, yet the officers did not approach one of the available judicial officers to obtain a warrant or to amend the existing warrant to properly authorize a search. St. v. Anderson, 1999 MT 60, 293 M 490, 977 P2d 983, 56 St. Rep. 252 (1999), following St. v. Wakeford, 1998 MT 16, 287 M 220, 953 P2d 1065, 55 St. Rep. 56 (1998), and followed in St. v. Bar-Jonah, 2004 MT 344, 324 M 278, 102 P3d 1229 (2004).

Informant indicated that he had observed a marijuana growing operation on several occasions over the previous 5 months. The investigating officer stated that in his experience, such an operation was highly likely to stay in one location for a long time. The Supreme Court held that if a criminal activity is continuing in nature, a greater amount of time may elapse between the observation of the activity and the application for a search warrant without negating probable cause. St. v. Walston, 236 M 218, 768 P2d 1387, 46 St. Rep. 309 (1989), followed in St. v. Crowder, 248 M 169, 810 P2d 299, 48 St. Rep. 376 (1991), St. v. Rinehart, 262 M 204, 864 P2d 1219, 50 St. Rep. 1517 (1993), St. v. Hulbert, 265 M 317, 877 P2d 25, 51 St. Rep. 526 (1994), and St. v. Siegal, 281 M 250, 934 P2d 176, 54 St. Rep. 158 (1997).

Unproved Statements of Child Informant as Sole Basis for Issuance of Warrant: A child observed marijuana plants growing on Worrall's property and reported it to police. The child's observation was never corroborated by the police. Worrall averred that allowing a search of his property based on the uncorroborated claim of an unproved 11-year-old child, after only a 15-minute interview, was unreasonable and that the District Court erred in finding probable cause for the search warrant because unverified statements of an unproved informant, much less a child informant, could not serve as the sole basis for the issuance of the warrant. Citing St. v. Adams, 284 M 25, 943 P2d 955, 54 St. Rep. 717 (1997), the Supreme Court noted that corroboration of an informant's testimony through other sources is necessary only when the information is hearsay or the informant is anonymous. In this case, the child was not anonymous and the information was based on personal observation rather than hearsay, so corroboration was unnecessary. The court observed that information provided to police that is motivated by good citizenship is a reliable basis for determining probable cause and that nothing in the record indicated that the child's report should be viewed more critically than a similar report from an adult. Thus, the unproved statement of the child informant may serve as the sole basis for issuance of a search warrant. St. v. Worrall, 1999 MT 55, 293 M 439, 976 P2d 968, 56 St. Rep. 225 (1999).

Passenger Not Unlawfully Detained During Lawful Stop of Driver — Motion to Suppress Evidence Found in Search of Passenger Properly Denied: Roberts was a passenger in a vehicle that was lawfully stopped. When he tried to exit the vehicle, Roberts was told to remain inside. After volunteering his name, the officer ran a warrant check and found that Roberts was wanted on an outstanding warrant. Roberts was arrested and searched, and a quantity of controlled substances was found on his person. Roberts moved to suppress the evidence of the search on the grounds that he was unlawfully detained when he was directed to remain in the vehicle, but the motion was denied. The Supreme Court applied U.S. v. Vaughan, 718 F2d 332 (9th Cir. 1983), in holding that it is not a constitutional violation to detain a passenger when a vehicle has been lawfully stopped because a warrant is outstanding for the driver. Even though officers had no reason to believe that the passenger had engaged in any criminal activity, they were permitted to detain the passenger while a search was conducted of his companions. Based on Roberts' own version of the events, the detention, arrest, and search of his person were justified and lawful, and the motion to suppress was therefore properly denied. St. v. Roberts, 284 M 54, 943 P2d 1249, 54 St. Rep. 745 (1997).

Citizen Information Lacking Objective Data — No Particularized Suspicion of Wrongdoing to Warrant Investigative Traffic Stop: An anonymous citizen informant telephoned to notify police that a purple Chevrolet Camaro with a tan convertible top, driven by David Lee, was heading north toward Glasgow on the Fort Peck highway. The informant stated the belief that Lee was speeding and driving under the influence of alcohol. Officer Collins located the described vehicle on the indicated route and checked the vehicle's speed with radar. Lee was driving 52 miles an hour in a 55-mile-an-hour zone. Collins made a U-turn and speeded up behind the Camaro, at which point Lee slowed down to 35 miles an hour. Collins stopped the Camaro, determined that the driver was the person described in the dispatch report, and arrested Lee for driving under the influence. Relying on St. v. Gopher, 193 M 189, 631 P2d 293 (1981), the Supreme Court noted that while an anonymous citizen tip can establish a basis for a particularized suspicion

of wrongdoing when corroborated by independent observation of wrongdoing or illegality by an officer, in the absence of other objective data, an anonymous tip alone does not support a particularized suspicion. Lee was not speeding and did not show obvious signs of driving under the influence. Merely slowing down after observing a police car make a U-turn and speed up to come within a few car lengths behind one's vehicle is not illegal and provides no evidence of wrongdoing. Because the investigative stop was not justified, the Supreme Court reversed Lee's conviction and dismissed the case. St. v. Lee, 282 M 391, 938 P2d 637, 54 St. Rep. 401 (1997).

Illegal Search of Person but Lawful Search of Vehicle — Vehicle Search Upheld as Probation Search and Not "Fruit of Poisonous Tree": Deputy Turner watched New make several turns in his vehicle without signaling and, after determining by his vehicle license plate that New was on probation, stopped the vehicle and searched New. Upon discovering drugs in New's pocket, Turner impounded the vehicle. Detective Jacobs questioned New, and New gave Jacobs approval to search the vehicle. Then Jacobs talked to Forsyth, New's probation officer, who conducted the search of New's vehicle with Jacobs. Turner's search of New's pockets was subsequently held illegal but the District Court refused to quash evidence taken from the vehicle as a result of Forsyth's search. The Supreme Court affirmed, holding that the search of the vehicle was not the "fruit of the poisonous tree", the illegal personal search of New, but was justified upon the independent grounds that Forsyth had previously determined that he wanted to search New's vehicle because of pending charges of violations of the conditions of New's probation. St. v. New, 276 M 529, 917 P2d 919, 53 St. Rep. 510 (1996).

Existence of Probable Cause for Search of Particular Location: Probable cause to believe that an offense has been committed by a suspect is a separate question from whether probable cause exists to search the suspect's residence; therefore, probable cause must exist for the search of the particular location for which the search warrant is obtained. The court issuing the search warrant is required to make a commonsense determination of whether, given the circumstances set forth in the warrant application, a fair probability exists that contraband or evidence related to a crime will be found in a particular place. Because a search warrant application did not establish the existence of that fair probability that evidence would be found in defendant's residence, even though a reliable informant provided information of defendant's suspected criminal activity, it was error to deny defendant's motion to suppress evidence obtained during the subsequent search of defendant's residence. St. v. Kaluza, 272 M 404, 901 P2d 107, 52 St. Rep. 795 (1995), following St. v. Crowder, 248 M 169, 810 P2d 299 (1991), distinguished in St. v. Oleson, 1998 MT 130, 289 M 139, 959 P2d 503, 55 St. Rep. 517 (1998). See also St. v. Rinehart, 262 M 204, 864 P2d 1219 (1993), St. v. Kaluza, 262 M 360, 865 P2d 263 (1993), and St. v. Siegal, 281 M 250, 934 P2d 176, 54 St. Rep. 158 (1997).

No Showing of Informants' Veracity and Reliability or Basis for Information — Search Warrant Improperly Issued: A search warrant application that failed to establish the veracity and reliability of the arrestee informants and that, in addition, failed to indicate the basis for any of the informants' knowledge regarding defendant's criminal activities in relation to the residence to be searched could not be said to corroborate or verify the information with regard to the residence and thus provided no value in establishing probable cause for the issuance of the search warrant. St. v. Kaluza, 272 M 404, 901 P2d 107, 52 St. Rep. 795 (1995), distinguished in St. v. Adams, 284 M 25, 943 P2d 955, 54 St. Rep. 717 (1997).

Pretextual Stop Test: In applying an objective reasonable officer test to determine whether a particular stop is pretextual, the court of appeals focuses on objective facts to determine whether a reasonable officer, under the circumstances, would have made the stop absent a desire to investigate an unrelated serious offense. In this inquiry, it is helpful to determine whether a stop conformed to regular police practices. Under Montana law, a reasonable highway patrol officer would not have stopped the defendant for illegally parking on a street in a business district. Thus, the stop was pretextual and the evidence should have been excluded. U.S. v. Hernandez, 55 F3d 443 (9th Cir. 1995).

Corroboration of Victim's Statements: Defendant contended that a search warrant was issued without probable cause because law enforcement did not corroborate or confirm the testimony of the sex crime victim upon which the warrant was based. Although under St. v. Kelly, 205 M 417, 668 P2d 1032 (1983), corroboration may be necessary in cases in which police receive their information through an informant, a crime victim is not equivalent to an informant, and the same principles of corroboration do not apply. In this case, the issuance of a search warrant "upon application affirming the victim's statements to the police" was an adequate demonstration of probable cause. St. v. Steffes, 269 M 214, 887 P2d 1196, 51 St. Rep. 1463 (1994).

General Overview of Probable Cause Requirements: An application for a search warrant must state facts sufficient to show probable cause for issuance of the warrant, following the "totality of the circumstances" test set out in Ill. v. Gates, 462 US 213, 76 L Ed 2d 527, 103 S Ct 2317 (1983). Probable cause must be determined solely from the information contained within the four corners of the search warrant application. A determination of probable cause does not require a prima facie showing of criminal activity. Rather, the issuing magistrate must determine only that there is a probability of criminal activity. An affidavit supporting a search warrant is to be interpreted by the magistrate and examined by a reviewing court in a common sense, realistic fashion, avoiding hypertechnical interpretations. If a magistrate issues a search warrant after subjecting the application to the Gates test, a reviewing court must presume that decision to be correct. An application that provides a substantial basis for the probability that criminal activity is occurring is sufficient to establish probable cause. St. v. Rinehart, 262 M 204, 864 P2d 1219, 50 St. Rep. 1517 (1993), following St. v. O'Neill, 208 M 386, 679 P2d 760 (1984), St. v. Sundberg, 235 M 115, 765 P2d 736 (1988), St. v. Walston, 236 M 218, 768 P2d 1387 (1989), St. v. Seaman, 236 M 466, 771 P2d 950 (1989), St. v. Rydberg, 239 M 70, 778 P2d 902 (1989), and St. v. Baldwin, 242 M 176, 789 P2d 1215 (1990), and followed in St. v. Kaluza, 262 M 360, 865 P2d 263, 50 St. Rep. 1596 (1993), in which it was held that probable cause to search a residence does not follow simply from the existence of probable cause to believe a suspect is guilty, St. v. Siegal, 281 M 250, 934 P2d 176, 54 St. Rep. 158 (1997), St. v. Oleson, 1998 MT 130, 289 M 139, 959 P2d 503, 55 St. Rep. 517 (1998), St. v. Anderson, 1999 MT 60, 293 M 490, 977 P2d 983, 56 St. Rep. 252 (1999), St. v. Gray, 2001 MT 250, 307 M 124, 38 P3d 775 (2001), and St. v. Barnaby, 2006 MT 203, 333 M 220, 142 P3d 809 (2006).

Totality of Circumstances — Search Sustained on Legally Obtained Evidence Supporting Search Warrant — Evidence Gathered by Ruse Irrelevant: Detectives were informed by a previously reliable confidential informant that Holstine conducted a marijuana growing operation in his house in the Big Sky area. The information provided by the informant about the location and description of Holstine's home was independently verified by detectives. Posing as a skier, one detective then gained entrance to Holstine's home, and smelled marijuana smoke inside the home. The same detective also smelled growing marijuana near an outside corner of Holstine's home and observed a boarded window near the place where the informant had said the growing operation was located inside Holstine's home. A search warrant was obtained based upon all of the information gathered by the detectives. Marijuana plants were confiscated from Holstine's home, and Holstine was convicted of felony possession of marijuana. The Supreme Court held that under the "totality of the circumstances" test adopted by St. v. Campbell, 254 M 425, 838 P2d 427 (1992), and St. v. Valley, 252 M 489, 830 P2d 1255 (1992), the information gained from the confidential informant, together with the testimony of the detective concerning the window and smell of marijuana from outside the residence, was sufficient information constituting probable cause to support the application for the search warrant. The information gained by the detectives by use of the skier ruse was of no value. St. v. Holstine, 260 M 310, 860 P2d 110, 50 St. Rep. 1063 (1993).

Conclusory Statements Regarding Electrical Usage and Informant's Personal Knowledge Insufficient to Show Probable Cause for Search Warrant: The District Court granted a search warrant based upon a Crimestoppers anonymous phone call claiming that Wilson ran a marijuana growing operation and upon a detective's statements concerning electrical usage at Wilson's residence. The District Court denied Wilson's motion to suppress the evidence gained in the search. The Supreme Court reversed, holding that because the Crimestoppers caller did not describe the interior of the house, the location of the growing operation, the operation itself, or how the caller knew of the operation other than having seen it himself, there was insufficient information for the information to be self-verifying. The only information about power usage was the detective's statements that it was "consistent with that of a grow operation". These were conclusory statements with insufficient detail. St. v. Wilson, 254 M 317, 837 P2d 1346, 49 St. Rep. 844 (1992). See also St. v. Kaluza, 272 M 404, 901 P2d 107, 52 St. Rep. 795 (1995).

Totality of Circumstances — Defense Evidence Insufficient to Overcome Presumption of Properly Issued Warrant: Hook was arrested after detectives found a marijuana growing operation in his cabin. Hook moved to suppress the evidence of the operation, claiming that there was insufficient probable cause for issuance of the search warrant used by the detectives, and the District Court granted the motion. The Supreme Court reversed, holding that the appropriate test, contained in Ill. v. Gates, 462 US 213 (1983), as adopted by St. v. Crowder, 248 M 169, 810 P2d 299 (1991), is whether the totality of the circumstances shows probable cause. The Supreme Court cited as showing probable cause: (1) the information given by the anonymous caller, some

of which was corroborated by the detectives; (2) a high electrical usage, which the investigating detective knew could be caused by a growing operation; and (3) a criminal history check that revealed that Hook had previously been arrested for possession of a controlled substance. Hook claimed that there were many legal reasons for the high electrical consumption but provided no reasons or rationale for the phenomenon, thus failing to overcome the presumption that the magistrate properly issued the search warrant. St. v. Hook, 255 M 2, 839 P2d 1274, 49 St. Rep. 841 (1992), distinguished in St. v. Kaluza, 272 M 404, 901 P2d 107, 52 St. Rep. 795 (1995), and St. v. Griggs, 2001 MT 211, 306 M 366, 34 P3d 101 (2001).

Stale Information, Lack of Informant Veracity, and Failure to Investigate as Insufficient Basis for Probable Cause — Motion to Suppress Proper: An application for a search warrant was based on five tips, including three that were stale, ranging in time and age from 11 months to over 7 years, and two that were anonymous and confidential Crimestoppers tips that did not allow for proper assessment of the credibility of the informant or his sources. None of the tips were subjected to prompt or adequate law enforcement investigation. The application did not contain sufficient facts and circumstances to meet the Gates test for probable cause, and a motion to suppress evidence seized as a result of the warrant should have been granted. St. v. Valley, 252 M 489, 830 P2d 1255, 49 St. Rep. 30 (1992), distinguished in St. v. Adams, 284 M 25, 943 P2d 955, 54 St. Rep. 717 (1997).

Probable Cause as Issue in Warrant Proceedings — Effect of Illegal Arrest on Evidence in Subsequent Prosecution: As set out in U.S. v. Harris, 403 US 573, 29 L Ed 2d 723, 91 S Ct 2075 (1971), the issue in warrant proceedings is not guilt beyond a reasonable doubt but probable cause for believing a crime has occurred. Even if the defendant's arrest has been unlawful, an illegal arrest has no impact on subsequent prosecution using evidence not tainted by illegality. St. v. Sor-Lokken, 246 M 70, 803 P2d 638, 47 St. Rep. 2264 (1990).

Consistency of Informants' Details Adding to Totality of Circumstances — Prior Criminal Activity as Enhancement of Informant's Tip: Defendant contended that a search warrant issued on three informants' tips, a prior drug-related conviction, and a deputy's recollection that he smelled marijuana at defendant's home on a previous unrelated visit failed to provide a basis to conclude that probable cause existed for issuance of the warrant. The state, relying on U.S. v. Harris, 403 US 573, 29 L Ed 2d 723, 91 S Ct 2075 (1971), maintained that prior criminal activity of a similar nature, even if unverified, enhances an informant's tip that a person is presently engaged in criminal conduct so that under the totality of circumstances test, the issuing Justice of the Peace was entitled to consider the information presented in the search warrant application as a whole, including past offenses, when assessing probable cause. The Supreme Court agreed, holding that the degree of consistent detail provided by the informants not only added to the totality of circumstances to establish probable cause but also substantiated their reliability. St. v. Garberding, 245 M 356, 801 P2d 583, 47 St. Rep. 2157 (1990).

Seizure of Clothing as Material Evidence of Crime: Defendant was lawfully taken into custody on charges of robbery, and the police followed their standard practice of taking detainees' clothing. It was not error for the police to take defendant's shoe and match it with a print found at the crime scene when there was probable cause to believe defendant's clothing would provide material evidence of the crime for which he was arrested. St. v. Jellison, 236 M 300, 769 P2d 711, 46 St. Rep. 376 (1989).

Elements of Intimidation Present in Threat to Third Party — Probable Cause for Search: Defendant intimidated victims by pointing a gun at them in his car. Defendant also indicated the presence of another weapon in the trunk of the car and indicated his intention to use it to harm a third party. Victims viewed a second gun in the trunk but were not directly threatened with it. The District Court suppressed evidence found in the trunk after finding a sufficient nexus did not exist for probable cause because defendant gave no indication he intended to use the gun in the trunk to intimidate victims and because the second gun was not alleged to be contraband. The Supreme Court reversed, holding that defendant produced a fear in the victims that he intended and had the ability to harm the third party, constituting intimidation, and that viewing of the gun in the trunk established sufficient probability to authorize a search of the trunk. St. v. Hembd, 235 M 361, 767 P2d 864, 46 St. Rep. 55 (1989).

Warrantless Police Search of Probationers' Car and Residence Allowed — Reasonable Grounds Standard — Fogarty Overruled: A police officer's warrantless search of the probationers' car and residence based on the officer's observations and with permission of the probation officer, in compliance with probationary conditions, did not violate the fourth amendment. St. v. Fogarty, 187 M 393, 610 P2d 140 (1980), is specifically overruled and the "reasonable grounds" standard of Griffin v. Wis., 483 US 868, 97 L Ed 2d 709, 107 S Ct 3164 (1987), is adopted. Police cooperation

with probation officers is to be encouraged as an important aid to effective administration of the probation system. To impose a warrant requirement for residential searches, on the basis of rights enjoyed by persons not on probation, would artificially raise a probationer's privacy interest to a level inconsistent with conditional liberty status. St. v. Burke, 235 M 165, 766 P2d 254, 45 St. Rep. 2278 (1988), followed in St. v. Burchett, 277 M 192, 921 P2d 854, 53 St. Rep. 590 (1996), St. v. Stucker, 1999 MT 14, 293 M 123, 973 P2d 835, 56 St. Rep. 65 (1999), and St. v. Moody, 2006 MT 305, 334 M 517, 148 P3d 662 (2006), and clarified, regarding the fact that probation officers, other than the one assigned to a probationer, are not precluded from authorizing a probationary search, in St. v. Olmsted, 1998 MT 301, 292 M 66, 968 P2d 1154, 55 St. Rep. 1235 (1998). See also St. v. Charlie, 2010 MT 195, 357 Mont. 355, 239 P.3d 934.

Existence of Exigent Circumstances — Warrantless Search: The Supreme Court applied the rule formulated in U.S. v. Kunkler, 679 F2d 187 (9th Cir. 1982), that holds that exigent circumstances exist to justify a warrantless entry, search, or seizure when police officers, acting on probable cause and in good faith, reasonably believe from the totality of circumstances that: (1) evidence of contraband will imminently be destroyed; or (2) the nature of the crime or character of the suspect poses a risk of danger to the arresting officers or third persons. St. v. Dawson, 233 M 345, 761 P2d 352, 45 St. Rep. 1542 (1988).

Probable Cause Not Negated by Passage of Time — Staleness as Dependent on Nature of Property Sought: Defendant in a homicide case contended that the applications for search warrants did not state facts sufficient to show probable cause, that the applications did not establish a nexus between the items sought, and that the information in the applications was stale. The Supreme Court, noting its decision in St. v. O'Neill, 208 M 386, 679 P2d 760, 41 St. Rep. 420 (1984), to draw all reasonable inferences to support the magistrate's determination, found substantial basis for concluding probable cause existed at the time the warrants were issued, including the fact that since staleness depends largely on the nature of the property sought, the passage of time alone (in this case 53 days after discovery of the body) may not negate probable cause. St. v. Pease, 222 M 455, 724 P2d 153, 43 St. Rep. 1417 (1986).

Evidence Not Suppressed as "Fruit of the Poisonous Tree": A Deputy Sheriff illegally seized a bag of marijuana from the passenger compartment of defendant's vehicle after his arrest on DUI charges. The court held that this illegal search did not taint the subsequent legal seizure of cocaine in the vehicle or the seizure of marijuana found under the chair occupied by defendant in the Sheriff's office. There was knowledge independent of the illegal search that supported probable cause, thus the "fruit of the poisonous tree" doctrine did not bar admission of the seized evidence. St. v. Pearson, 217 M 363, 704 P2d 1056, 42 St. Rep. 1253 (1985), followed in St. v. New, 276 M 529, 917 P2d 919, 53 St. Rep. 510 (1996).

Incarceration Unlawful — Subsequent Confession Voluntary: The defendant, while incarcerated illegally in Louisiana on a misdemeanor charge, confessed to a murder committed in Montana several years earlier. At his subsequent trial in Montana on a charge of deliberate homicide, the defendant moved to suppress evidence of his confession on several grounds, including that the State failed to establish the confession was voluntary. When, as in this case, a defendant shows his incarceration was initially illegal, the burden shifts to the State to show that his right against self-incrimination was not violated. The determination of voluntariness depends on the totality of the circumstances, with the burden of proof on the State to prove voluntariness by a preponderance of the evidence. In this case the defendant was issued numerous timely and complete Miranda advisements prior to making the incriminating statement. Also, he confessed in the presence of his attorney after opportunity to confer with him. The totality of the facts indicate the trial court did not err in finding the confession voluntary. St. v. Beach, 217 M 132, 705 P2d 94, 42 St. Rep. 1080 (1985), followed in St. v. Loh, 275 M 460, 914 P2d 592, 53 St. Rep. 226 (1996).

Probable Cause Contained Within Four Corners of Officer's Affidavit: The information contained in Sergeant Harada's affidavit satisfied the probable cause test set forth in Ill. v. Gates, 462 US 213, 76 L Ed 2d 527, 103 S Ct 2317 (1983). It included information concerning the time, date, and place where drugs could be found; the kind and intended use of drugs; and an accurate description of defendant's car and defendant's travel plans. It also stated that the informant had been present when defendant used drugs; that defendant personally told informant he was going to transport drugs to Great Falls on January 25, 1984; and that informant was believed to be reliable because of reliable information previously provided by him to the police. Finding probable cause, the Supreme Court reversed the District Court with an admonition to the Justice of the Peace who issued the search warrant to refrain from conducting conversations with the officer making application that elicit oral responses not recorded on the face of the affidavit and

possibly tainting the warrant issued. St. v. Hendrickson, 217 M 1, 701 P2d 1368, 42 St. Rep. 981 (1985).

Totality of Circumstances: Chubb observed a vehicle on a single-lane road that provided access to a house. Since it was uncommon to see a vehicle on the road, Chubb stopped it to talk to the driver. It was later learned that the house had been burglarized. The vehicle was identified as belonging to the defendant, and a receipt with the defendant's name on it was found at the burglarized house. An investigation revealed that the defendant's residence had several tarps spread on the ground covering unknown personal property and a temporary structure had recently been constructed, apparently used for storage of personal property. The defendant was seen outside a tavern in Idaho known as a place for fencing stolen property. Based on the foregoing information, a search warrant was issued. The defendant made a motion to suppress the fruits of the search, asserting that there had been insufficient probable cause to search the defendant's premises. In the instant case, the totality of the circumstances as expressed in the application for search warrant supported the decision of the magistrate that there was a fair probability that evidence of a crime would be found in a particular place. St. v. Pierre, 208 M 430, 678 P2d 650, 41 St. Rep. 445 (1984).

Totality of Circumstances Indicating Probable Cause: When the affidavit in support of an application for a search warrant indicated that: (1) defendant had allegedly been arrested in 1975 for possession of marijuana; (2) in 1977, 347 grams of marijuana had allegedly been found in defendant's laundry; (3) in 1978, an informant had advised law enforcement officers that defendant possessed a large quantity of cocaine and had distributed it to the informant; (4) in January and February of 1982, defendant had associated with Fitzgibbons, who became in May 1982 a fugitive on charges connected with distribution of cocaine; (5) in June 1982, law officers learned that defendant had distributed cocaine to several people at his residence; (6) 2 days before the search an informant advised a law officer that Fitzgibbons was coming to defendant's town; and (7) on the day of the search the same informant had seen Fitzgibbons at defendant's house twice and had smelled marijuana in the home, there was probable cause to issue a search warrant to search for Fitzgibbons or contraband. St. v. O'Neill, 208 M 386, 679 P2d 760, 41 St. Rep. 420 (1984), followed in St. v. Campbell, 254 M 425, 838 P2d 427, 49 St. Rep. 838 (1992).

Informant's Tip — Aquilar-Spinelli and Gates Tests: A search warrant was based upon a tip from an informant (who was reliable in three previous tips), and part of the tip resulted in the seizure of marijuana from a car specifically described in the tip. The car had apparently originated from the defendant's residence. There was sufficient probable cause to issue a search warrant for the search of the defendant's residence under the Aquilar-Spinelli test because there was sufficient "self-verifying" detail in the tip to inform the issuing magistrate of the circumstances underlying the informant's basis of knowledge. Also, the informant's specific information, corroborated by the details concerning the automobile, was sufficient evidence of the informant's veracity. Since the stringent requirements of the Aquilar-Spinelli test were met, probable cause also existed under the "totality of the circumstances" test set forth in Illinois v. Gates, 462 US 213, 76 L Ed 2d 527, 103 S Ct 2317, 51 U.S.L.W. 4709 (1983). St. v. Erler, 207 M 88, 672 P2d 624, 40 St. Rep. 1915 (1983).

Habeas Corpus — Federal Fourth Amendment Collateral Attack: A prisoner's petition for federal habeas corpus predicated on a claim of unconstitutional search and seizure must be barred where a prisoner fails to assert that the state courts had denied him a full and fair opportunity to litigate his fourth amendment claim, and furthermore the petition must be denied where the record of state proceedings clearly indicates that the petitioner was given a full and fair opportunity to litigate the claim in state court. Jenkins v. Warrington, 530 F. Supp. 121, 39 St. Rep. 174 (D.C. Mont. 1982).

Probable Cause — Matters Before Magistrate at Issuance of Warrant: The District Court erred in upholding a search when it considered as probable cause matters testified to by police but not contained in the information available to the magistrate issuing the warrant. The only information given the Justice of the Peace was the search warrant and the search warrant application, which did not on their face contain probable cause for the issuance of the search warrant. St. v. Isom, 196 M 330, 641 P2d 417, 39 St. Rep. 137 (1982), followed with regard to applicability of the four corners of the warrant application in St. v. Van Voast, 247 M 194, 805 P2d 1380, 48 St. Rep. 160 (1991).

"Reasonableness" of Search Prerequisite to Paternity Blood Test: The appellant in this case was charged with contempt of court for failure to submit to a blood test pursuant to 40-6-112. He alleged that the section violated his civil rights. The Supreme Court declined to consider the appellant's attack on an isolated section of the Uniform Parentage Act as adopted in Montana. The

act must be construed as a whole. The "reasonableness" requirement of the fourth amendment and of Art. II, sec. 11, Mont. Const., could be established by an affirmative showing by the movant that there existed a prima facie case against the putative father. After that, a blood test could be taken. The failure to follow the statutory procedures to establish reasonableness prior to the ordering of the "search" rendered the search a violation of the accused's rights under the fourth amendment and the Montana Constitution to be secure from "unreasonable" search. The contempt order was vacated and the case remanded for further proceedings. Rose v. District Court, 192 M 341, 628 P2d 662, 38 St. Rep. 830 (1981).

Electronic Surveillance of a Suspect — Reliability of Informant: Where the defendant was arrested as the result of an electronically recorded conversation with an informant who had previously consented to carrying a transmitting device for police officers after providing them with detailed information on the time and circumstances of a proposed sale of drugs, the affidavit upon which the order for the electronic surveillance was issued was legally sufficient in that it properly informed the District Court of the underlying circumstances upon which the informant concluded that the drugs were where they were said to be located and the underlying circumstances from which the officer making the affidavit could conclude the informant was reliable, in spite of the fact that the informant was a convicted felon. St. v. Case, 190 M 450, 621 P2d 1066, 37 St. Rep. 1661 (1980).

Standard for Issuance of Order Allowing Electronic Surveillance — Compelling State Interest: Where police officers obtained an order for electronic surveillance of the defendant, an affidavit supporting the request for the order which recited facts showing the defendant to be in possession of dangerous drugs satisfied the standard for issuance of electronic surveillance orders announced in St. v. Brackman, 178 M 105, 582 P2d 1216 (1978), in which the Supreme Court held that the state must show a compelling state interest to obtain this kind of order. The enforcement of criminal laws is essential to the preservation of an orderly society and is a compelling state interest sufficient to support the issuance of the order. St. v. Case, 190 M 450, 621 P2d 1066, 37 St. Rep. 1661 (1980).

Unlimited Search and Polygraph Provisions on Probation Unconstitutional: As conditions for imposition of a suspended sentence, defendant was required to submit to an unlimited search provision by any lawful authorities and to submit to a polygraph examination upon the request of any law enforcement officer. The Supreme Court when reviewing the revocation of defendant's suspended sentence held that the unlimited polygraph examination condition was overly broad and thus an invalid condition of probation and that the unlimited warrantless search provision is an unconstitutional condition of probation. The Supreme Court said that a sentencing court cannot inject prosecuting attorneys or law enforcement officials into the probation process by granting them direct rights to search the probationer, his home, or vehicle. A type of probable cause or some identifiable reason is required before a search clause may be exercised to search the probationer or his vehicle. The legal interests of innocent third persons living with a probationer are to be protected by requiring a search warrant before searching the probationer's home. Polygraph examinations as a condition of probation can be effectively contained within constitutional parameters by confining the right to demand a polygraph examination to the probation officer. St. v. Fogarty, 187 M 393, 610 P2d 140 (1980), overruled in St. v. Burke, 235 M 165, 766 P2d 254, 45 St. Rep. 2278 (1988).

Arrest and Search Warrants — Probability of Criminal Conduct: For the issuance of a proper warrant, only a probability of criminal conduct must be shown. A County Attorney and a Sheriff's deputy, both of whom had been on the scene of an abduction, gave sworn testimony, in effect, to the Justice of the Peace, and the County Attorney's signed affidavit became part of an arrest warrant and a search warrant. Although the combination of the sworn testimony and the affidavit established probable cause, there was also additional testimony that placed the defendant at the scene of the abduction where the victim's watch was found in a pool of blood before warrants were sought. St. v. McKenzie, 186 M 481, 608 P2d 428 (1980).

Probable Cause to Arrest — Factors in Addition to Mere Presence at the Scene: Defendant's mere presence at the scene of the homicide was not sufficient probable cause to justify his arrest. However, the police had overheard the events in the house over an open telephone line, and the defendant was present with the corpse at the scene when the police arrived within minutes after the events were overheard on the phone. The scratch on the defendant's face indicated recent involvement in a fight. These events sufficiently constituted probable cause to arrest the defendant. St. v. Hamilton, 185 M 522, 605 P2d 1121 (1980).

Odor Insufficient Probable Cause for Search Warrant: The odor of burning marijuana does not by itself establish probable cause to issue a search warrant. Smell alone is not sufficient to justify the invasion of the privacy of one's home. St. v. Olson, 180 M 151, 589 P2d 663 (1979).

Swearing or Affirmation Challenged: The Supreme Court rejected defendant's contention that search warrants were invalid for failure on the part of the County Attorney to swear or affirm and reduce the supporting testimony to writing, when there was, in effect, sworn testimony by the County Attorney and Deputy Sheriff in addition to an affidavit, the combination of which established probable cause. St. v. McKenzie, 177 M 280, 581 P2d 1205 (1978).

Sworn Testimony and Affidavit of Peace Officers: Sworn testimony by the County Attorney and Deputy Sheriff in addition to an affidavit by the County Attorney which was made a part of each warrant was a sufficient showing of probable cause to issue the warrants. St. v. McKenzie, 171 M 278, 557 P2d 1023 (1976).

Probable Cause — Search of Automobile Trunk: Where a police officer stopped defendant for speeding and saw several CB radios and a stereo tape player, along with tools which could have been used to remove them from other vehicles, in the passenger compartment of defendant's car, leading the officer to suspect that defendant might have stolen the articles, there was no probable cause for a search of trunk, and no search warrant authorizing such a search could properly have issued. St. v. Brough, 171 M 182, 556 P2d 1239 (1976).

Probable Cause — Informant's Oral Testimony: Where an affidavit for a search warrant is wholly sufficient to establish probable cause, based, however, on hearsay from an untested informant, the reliability of that informant may be checked by a magistrate, and informant's oral testimony to the magistrate is not considered as supplementing probable cause to support the affidavit for the search warrant but merely providing a direct test of the informant's reliability as to the hearsay contained in the affidavit. St. v. Thomson, 169 M 158, 545 P2d 1070 (1976).

Probable Cause — Time: An affidavit for a search warrant which omits reference to the time of the criminal event cannot establish probable cause and is therefore deficient. State ex rel. Townsend v. District Court, 168 M 357, 543 P2d 193 (1975).

Reduced to Writing Requirement: Contemporaneous oral declarations to a magistrate cannot be used to bolster an insufficient affidavit in the attempt to establish probable cause unless such declarations are sworn, signed, reduced to writing, and made a part of the affidavit for the issuance of the search warrant. State ex rel. Townsend v. District Court, 168 M 357, 543 P2d 193 (1975).

GENERAL

Officer's Actions in Recording and Interrogating Defendant — Reasonable Person Likely to Believe Self in Police Custody Despite Officer's Statements to Contrary — Contraband Obtained by Illegal Seizure: The defendant was a passenger in a vehicle at the time a police officer arrested the driver on a felony warrant. Later, at the police station, the defendant asked the police officer to retrieve her purse from the car and subsequently denied the officer's request to search the purse. Although the officer told the defendant that she was not in police custody, he placed her purse between them on a table, turned on a tape recorder, and conducted an interrogation of the defendant. Eventually, the defendant admitted there were illegal items in the purse, and the officer located a small amount of cocaine and some needles in it. After the defendant was charged with possession, her counsel filed a motion to suppress, which the District Court denied. Following her conviction, the defendant appealed and the Supreme Court reversed, holding that no reasonable person would have believed he or she was free to leave given the officer's actions. The Supreme Court concluded that the search of the defendant's purse was an illegal seizure and directed the District Court to suppress all of the evidence obtained from it on remand. St. v. Emerson, 2015 MT 254, 380 Mont. 487, 355 P.3d 763.

24/7 Sobriety and Drug Monitoring Program Testing Requirements — Not Unreasonable Search or Violation of Privacy: Requiring a defendant who is a repeat DUI arrestee to provide twice daily breath samples as a condition of release under the Montana 24/7 Sobriety and Drug Monitoring Program Act does not constitute an unreasonable search and does not infringe upon a significant privacy interest. The state's compelling interest in keeping the public safe by preventing repeat DUI arrestees from driving while drunk outweighs any privacy concerns. St. v. Spady, 2015 MT 218, 380 Mont. 179, 354 P.3d 590.

Particularized Suspicion From Weaving Car — Totality of Circumstances Justifying Stop: The investigating officer witnessed the defendant's car cross the fog line three times and drive onto the rumble strip twice. The officer was concerned that the driver was impaired, falling asleep, distracted, or experiencing a medical problem. After the defendant consented to a search of the

vehicle, the officer found drugs. The defendant eventually pleaded no contest to possession of dangerous drugs with intent to distribute, reserving his right to appeal. On appeal, the defendant argued that the officer lacked particularized suspicion. The Supreme Court disagreed, finding that considering all factors, the investigatory stop was warranted. St. v. Duong, 2015 MT 70, 378 Mont. 345, 343 P.3d 1218.

Effect of Defendant's Refusal on Ability of Law Enforcement to Administer Test Superseded by Subsequent Valid Warrant: The defendant argued that after he refused a blood or breath test, under the 2009 version of 61-8-402 law enforcement officers were prohibited from taking any action to obtain a blood sample for testing. The Supreme Court held that the District Court properly denied the defendant's motion to suppress the results of the blood alcohol test. After the defendant refused the tests, the officer obtained a valid warrant, and the statute did not prevent the officer from obtaining either the warrant or the subsequent blood test pursuant to that warrant. St. v. Minett, 2014 MT 225, 376 Mont. 260, 332 P.3d 235.

Volunteers Used to Conduct Search — No Constitutional Violation — Motion to Suppress Correctly Denied: Local law enforcement had received numerous complaints about the defendant's Malamute breeding operation. Sheriff's officials received a warrant to search the defendant's kennels and home that extended to "any and all agents" required for the search. Because the sheriff's office did not have the resources to conduct the search, it organized a group of volunteers to assist. Following the search, the defendant was charged with over 90 counts of felony animal cruelty. The defendant filed a motion to suppress the evidence retrieved during the search, arguing that the use of volunteers violated his rights under Article II, section 11, of the Montana Constitution. The judge denied the motion to suppress and on appeal, the Supreme Court similarly rejected this argument, noting that 46-5-226 allows civilians to aid in serving a warrant. St. v. Chilinski, 2014 MT 206, 376 Mont. 122, 330 P.3d 1169.

Admission of Warrantless Pretext Recordings Harmless Error: When the defendant portrayed the recordings as inculpatory on appeal and took the opposite position at trial, arguing the recordings were exculpatory or ambiguous, and used the recordings for his benefit as impeachment evidence at trial, the qualitative impact of the tainted recordings was harmless. St. v. Stewart, 2012 MT 317, 367 Mont. 503, 291 P.3d 1187.

Admissibility of Evidence Seized at Defendant's Out-of-State Residence: Dodson claimed that the District Court erred in denying a motion to suppress evidence seized during a search by federal officers at Dodson's out-of-state residence because that was not Dodson's actual residence at the time the search was conducted. The Supreme Court noted that: (1) the residence was listed as Dodson's release address on his federal supervised release form and the proper paperwork had not been submitted to federal authorities to change the address; (2) Dodson had a room at the residence where his belongings were stored; (3) when Dodson left Montana he provided the out-of-state residence as a forwarding address; and (4) officers observed Dodson at the residence when conducting surveillance. This constituted sufficient evidence that Dodson was residing at the out-of-state address when the search was conducted, and the suppression motion was properly denied. St. v. Dodson, 2009 MT 419, 354 M 28, 221 P3d 687 (2009).

No Negligence in Officers' Response to Robbery Call or in Brief Detention of Robbery Victim: Plaintiff worked at a convenience store when a person entered the store, held a knife to plaintiff's throat, and robbed the store. Plaintiff managed to dial 9-1-1, but could not speak with police. Officers determined where the call came from and surrounded the store. However, even though officers could see two people inside, it was not possible to determine who was involved in the robbery. Meanwhile, plaintiff was taken to a back room and raped. Officers arrested the perpetrator immediately after he left the store and then ordered any other persons inside to exit. Plaintiff then left the store and was subdued and handcuffed for about 30 seconds before officers determined that she was an employee and had been raped. Plaintiff subsequently sued the county, law enforcement agencies, and several individual officers for negligently responding to the situation, allowing plaintiff to be raped, and improperly arresting plaintiff when she left the store. The District Court granted summary judgment for defendants and plaintiff appealed, but the Supreme Court affirmed. Under the circumstances, the officers responded quickly and professionally and got plaintiff to a safe position and to medical care as immediately as possible. The officers did not have custody or control of either the plaintiff or the robber at the time the rape occurred and therefore were in no position to undertake specific actions to protect the plaintiff until she came out of the store and her identity and role in the events were established. Additionally, the brief detention of plaintiff was justified and provided no cause of action against defendants. Gonzales v. Bozeman, 2009 MT 277, 352 M 145, 217 P3d 487 (2009).

Officer's Voluntary Exchange With Person in Parked Vehicle in Public Place Not Considered Seizure: Wilkins was parked in a public industrial area late on a cold night in a running vehicle with the lights on. An officer noticed the car and, being concerned that the vehicle was in an area where recent burglaries had occurred and concerned for the welfare of the driver, stopped to investigate. While speaking with Wilkins, the officer smelled the odor of an alcoholic beverage and noticed that Wilkins' speech was slurred, and after further investigation Wilkins was arrested for DUI. Wilkins contended that the arrest was unlawful because the officer had no particularized suspicion and because the community caretaker doctrine was inapplicable. Without reaching either of Wilkins' arguments, the Supreme Court affirmed because the officer's contact with Wilkins did not amount to a seizure. The officer was alone and did not activate emergency lights or a spotlight, display a weapon, or use threatening tones during the conversation, but rather simply approached Wilkins to see why she was parked on a dark, remote street late at night in cold weather. A reasonable person in Wilkins' place would not have concluded that she was not free to leave following the voluntary contact. Wilkins was parked in a public place, and the officer did not need a particularized suspicion to justify the contact. St. v. Wilkins, 2009 MT 99, 350 M 96, 205 P3d 795 (2009).

Consent Negates Alleged Violations: An officer overheard another officer advise that he had found the dead body of a male with a gunshot wound to the head. Almost simultaneously, the officer observed a vehicle he believed to be speeding and activated his radar. The officer clocked the vehicle traveling 51 mph in a 35 mph zone and initiated a traffic stop. The vehicle eventually pulled over and stopped off the highway outside the fog line. The officer noticed the driver, Hixon, was not wearing shoes and he also detected a slight odor of alcohol. The officer returned to his car to verify the registration and write out a speeding citation. The officer returned to Hixon's vehicle to give him the ticket with the intention of leaving to assist the officer investigating the shooting, as they were the only law enforcement officers on duty at the time. As Hixon engaged the officer in a conversation about the ticket, the officer noticed the odor of alcohol again and became concerned about Hixon's level of intoxication. During their conversation, the officer ascertained that Hixon had recently left his house, which was in the area where the dead body had been discovered. The officer proceeded to perform the standard field sobriety tests on Hixon and determined he was intoxicated. At that point, he had him take a portable breath test, which resulted in a blood alcohol content of 0.262. The officer then advised Hixon he was under arrest and placed him in the back seat of his patrol car. The officer asked Hixon if he would like his shoes and Hixon replied no, he did not. The officer informed Hixon that he was calling a tow truck to remove the vehicle from the side of the road, pursuant to standard department policy. The officer requested Hixon's permission to search the vehicle, which was granted. As he was beginning his search, the officer received a call from the officer conducting the shooting investigation mentioning that there was a distinct shoe pattern in the ground around the body. During the conversation the officer continued his search of the truck and found Hixon's shoes in the back seat. He did not touch the shoes. He informed the officer investigating the shooting of his discovery and told him he had Hixon detained for DUI and also was having his truck towed because of the DUI policy. The officer then went back to his vehicle to reposition the handcuffs on Hixon for his comfort, at which time he also Mirandized him because Hixon was volunteering random information. The sheriff's department applied for a search warrant to search Hixon's vehicle, which had been hauled to the sheriff's impound lot. The search warrant application included a copy of the officer's report of the events surrounding his traffic stop, which described his consent search of Hixon's truck and his observation of a pair of tennis shoes behind the passenger seat. The report also included notations from the crime scene that footprints near the body were consistent with that brand of tennis shoes. The application for the search warrant was granted, and a search ensued. As a result of the search, Hixon's tennis shoes were seized from the vehicle, the shoeprints at the crime scene matched the shoes, and Hixon was charged with deliberate homicide. Hixon filed a motion to suppress the evidence obtained from the seizure and search of his truck on the grounds that the seizure was illegal. The motion was denied. Hixon was convicted and appealed. Hixon did not directly challenge the search on appeal but challenged the seizure of his vehicle. Hixon maintained on appeal that the evidence obtained as a result of the seizure of his pickup truck, including the tennis shoes that were matched to the scene of the crime, should have been suppressed in light of the illegal seizure of his truck. The Supreme Court held that it was unnecessary to resolve this question because it is undisputed that before the tow truck arrived, Hixon consented to the officer's request to take a look inside his vehicle, that the officer then observed the shoes, and that the officers subsequently obtained a search warrant for the vehicle, the validity of which was not in dispute, before seizing the tennis shoes. Accordingly,

it was reasonable to assume, as did the District Court, that the shoes would have been inevitably discovered in any event, notwithstanding the alleged constitutional violations. St. v. Hixon, 2008 MT 365, 346 M 427, 197 P3d 918 (2008).

Particularized Suspicion to Confirm Identity of Vehicle Owner Based on Information From License Plate Search on Probationer's Vehicle: A Deputy Sheriff noticed a woman sitting in a vehicle parked in front of the residence of a known drug dealer who was on probation for drug violations. When the woman acted suspiciously, the deputy ran the vehicle's license plate through dispatch. Dispatch confirmed that the vehicle belonged to Thomas, who was also on probation. After 5 minutes, the deputy drove past the vehicle again, and the woman acted furtively. The deputy tried unsuccessfully to contact Thomas's probation officer to inquire about Thomas's status and then approached the vehicle to question the woman. The woman confirmed that she was Thomas and that she was on probation. The deputy returned to his car and successfully reached Thomas's probation officer, who informed the deputy that Thomas was not to have contact with any other person on probation and had recently failed a urinalysis test. The probation officer requested that the deputy search Thomas's vehicle, and the deputy found a drug pipe that later tested positive for methamphetamine. Thomas was charged with felony drug possession but moved to suppress the evidence on grounds that the search was illegal because the deputy lacked particularized suspicion. The motion was denied, Thomas was convicted and appealed, and the Supreme Court affirmed. As an experienced officer, the deputy could reasonably infer that Thomas was engaged in some sort of criminal activity based on the fact that the deputy knew Thomas was on probation and that Thomas was observed parked in front of the residence of another probationer whom the deputy knew to be a drug dealer. This information, coupled with the deputy's knowledge of the drug history of the resident, comprised the totality of the circumstances and supported the determination that particularized suspicion existed for the deputy's initial investigatory stop of Thomas. Denial of the motion to suppress was affirmed. St. v. Thomas, 2008 MT 206, 344 M 150, 186 P3d 864 (2008), followed in St. v. Neil, 2009 MT 128, 350 M 268, 207 P3d 296 (2009).

Inevitable Discovery Doctrine Exception to Exclusionary Rule on Inadmissibility of Evidence Obtained as Result of Unlawful Search — Sua Sponte Application by Supreme Court: Dickinson asserted that certain evidence discovered during a warrantless search of his motel room should be suppressed under the exclusionary rule as fruit of the poisonous tree because the discovery was not made during a search incident to arrest and because the search was not a justified protective sweep. The state contended that the search was conducted on grounds of safety and exigent circumstances. Although neither party raised the argument, the Supreme Court decided sua sponte to address the issue under the inevitable discovery doctrine exception to the exclusionary rule, which holds that fruit of the poisonous tree evidence is admissible if it is inevitable that the evidence would have been discovered apart from a defendant's confession. In this case, the officers were legally in the motel room, and there was more than sufficient evidence in plain sight to justify issuance of a warrant. Once the warrant was executed, the remainder of the evidence would have inevitably been discovered and was thus admissible under the inevitable discovery doctrine. St. v. Dickinson, 2008 MT 159, 343 M 301, 184 P3d 305 (2008). See also St. v. Pearson, 217 M 363, 704 P2d 1056 (1985). The Dickinson inevitable discovery doctrine was also applied in St. v. Hilgendorf, 2009 MT 158, 350 M 412, 208 P3d 401 (2009). Hilgendorf was followed in St. v. Pearson, 2011 MT 55, 359 Mont. 427, 251 P.3d 152.

Admissibility of Evidence of Lawfully Seized Property — Summary Dismissal of Petition for Forfeiture Improper: After Branam's vehicle was stopped by an officer following a report of an assault, Branam fled. The officer had the vehicle towed to a storage yard. An employee of the storage yard noticed cash and a weapon in the vehicle. A search of the vehicle under warrant yielded cash, a weapon, and drug paraphernalia. The state petitioned for forfeiture of the property. Branam moved to dismiss the petition on grounds that because the state did not have probable cause to seize the property, the evidence was inadmissible. The District Court agreed and summarily dismissed the petition, and the state appealed. The Supreme Court held that the facts alleged in the petition were sufficient to satisfy the requirements of 44-12-103, so the petition was sufficient to withstand Branam's motion to dismiss. As a matter of law, the property was lawfully seized and probable cause existed to institute forfeiture proceedings, so Branam was not entitled to summary judgment dismissing the petition. However, the court declined to comment on the admissibility of the evidence because the question of whether the state could present sufficient admissible evidence at trial to establish that the property was subject to forfeiture under 44-12-102 was not before the court. The case was reversed and remanded for further proceedings. St. v. Branam, 2006 MT 300, 334 M 457, 148 P3d 635 (2006).

Statements Made Prior to Miranda Warning Not in Response to Interrogation Admissible: Zito argued that a statement made by him at the time of his arrest that his marijuana operation was a "medical grow" could not be used as a basis for subsequent questioning because he had not been read his rights prior to making the statement. The Supreme Court held that even if Zito was in custody at the time of the statement, he made the remark on his own and not in response to interrogation by the police and therefore it was not elicited in violation of his rights. St. v. Zito, 2006 MT 211, 333 M 312, 143 P3d 108 (2006).

Blood on Coat Considered Admissible Based Upon Defendant's Oral and Written Consent: Jones agreed to voluntarily come to the police station on two occasions to answer question relating to a homicide case. Although the police had a warrant for his arrest, it was never served. Both times Jones was read his Miranda rights. During one interview, he stated that he was "through talking" but then continued to answer questions. During one of the interviews, Jones was asked what he was wearing on the day of the murder and then was asked if the police could examine the coat that he had on that day. Jones agreed and was driven to his home and retrieved the coat for the officers. The coat was subsequently found to have the victim's blood on it. Jones argued that the coat was inadmissible because he did not sign the consent form given to him until after the police had possession of the coat. The officers testified that he had signed the release prior to turning over the coat. The Supreme Court held that regardless of when the release was signed, Jones had previously given oral consent for the police to look at the coat. The Supreme Court also ruled that the police had the right to not only look at the coat but to take possession of it based on the clear language contained in the consent form. St. v. Jones, 2006 MT 209, 333 M 294, 142 P3d 851 (2006).

Defendant's Statement That He Was "Through Talking" Not Invocation of Constitutional Rights: Jones agreed to voluntarily come to the police station on two occasions to answer question relating to a homicide case. Although the police had a warrant for his arrest, it was never served. Both times Jones was read his Miranda rights. During one interview, he stated that he was "through talking" but then continued to answer questions. After he was convicted, he argued that his statement was an unequivocal assertion of his right to counsel and to remain silent. The Supreme Court upheld the trial court's finding that Jones' subsequent statements were not coerced or involuntary. Any evidence gathered from the subsequent statements was not subject to suppression. St. v. Jones, 2006 MT 209, 333 M 294, 142 P3d 851 (2006).

Probation Officer's Actions Fail to Constitute Coercion With Respect to Statements Made by Defendant to Police: Jones argued that evidence gathered from statements that he made during interviews with the police regarding a homicide case should have been suppressed because he was illegally coerced into making the statements by his probation officer who told him that he needed to talk to the police and because the probation officer had issued an arrest warrant when Jones missed his scheduled meeting. The Supreme Court noted that the probation officer had not told Jones of the arrest warrant and that Jones voluntarily walked over to the police station from the meeting with the probation officer because Jones said that he had nothing to hide. The Supreme Court ruled that the probation officer's statement that Jones needed to talk to the police did not constitute an illegal act to compel Jones to answer questions and that evidence gained from Jones' subsequent statements was not subject to suppression. St. v. Jones, 2006 MT 209, 333 M 294, 142 P3d 851 (2006).

Brief Detainment of Postal Package for Drug Detection Purposes Not Considered Seizure — Addressee's Possessory Interest in Package Retained: A postal inspector suspected that a package addressed to Ochadleus contained drugs. The inspector took the package to the Billings DEA office, and a drug-sniffing dog alerted to the package. The inspector obtained a search warrant, and the package was found to contain marijuana. The inspector then obtained a warrant to search the intended destination of the package. The package was delivered by the inspector later that day, and shortly thereafter, state officers executed the search warrant and arrested Ochadleus for possession with intent to distribute. Ochadleus contended that the evidence should be suppressed on grounds that because the postal inspector did not have reasonable grounds to subject the package to a canine sniff, detaining the package was an unlawful seizure, but the suppression motion was denied. On appeal, the Supreme Court examined extensive federal case law regarding the detention of mail and noted that under U.S. v. Aldaz, 921 F2d 227 (9th Cir. 1990), postal authorities may seize and detain packages if they have a reasonable suspicion of criminal activity. In this case, the postal inspector had reasonable cause to detain the package when it exhibited characteristics consistent with the Postal Inspection Service's drug package profile, and the inspector's action of briefly detaining the package for a canine sniff did not constitute a seizure because it did not deprive Ochadleus of a possessory interest in the package.

St. v. Ochadleus, 2005 MT 88, 326 M 441, 110 P3d 448 (2005). See also U.S. v. Van Leeuwen, 397 US 249 (1970), U.S. v. Banks, 3 F3d 399 (11th Cir. 1993), and U.S. v. Hernandez, 313 F3d 1206 (9th Cir. 2002).

Reasonable Mistake in Arrest of Misidentified Person and Subsequent Seizure of Incriminating Evidence — Admissibility of Evidence: The landlady of a rental apartment asked police to come and talk to her about her tenant, whom she identified as Thomas Bateman, and gave the officers Bateman's physical description, approximate age, and a description of Bateman's suspicious activity. The officer radioed in for an outstanding warrant check on Thomas Bateman and discovered that Thomas Bateman had an outstanding warrant for misdemeanor possession of dangerous drugs. The warrant information matched the description provided by the landlady. When officers knocked on Bateman's door and asked if he was Thomas Bateman, Bateman replied affirmatively. The officers said they had a warrant for his arrest and attempted to handcuff Bateman, and Bateman dropped a bag of Gummy Bears and what appeared to be a marijuana pipe. Bateman then told the officers that there was another Thomas Bateman and that there had been police confusion regarding them in the past. Officers checked Bateman's identification, radioed to dispatch for further information, and determined that although their ages and physical descriptions were similar, the arrestee was indeed not the Thomas Bateman with the outstanding warrant. Because the officers saw Bateman drop the marijuana pipe and noticed the odor of smoke and other drug paraphernalia in the living room, they had probable cause at that point to arrest him. Also in the apartment was another man who did have an outstanding warrant. Officers then obtained a warrant to search the apartment and discovered a methamphetamine lab in the crawl space. Bateman moved to dismiss the charges because the evidence resulted from an illegal arrest. The motion was denied, and Bateman appealed. Citing Hill v. Calif., 401 US 797 (1971), the Supreme Court affirmed. The officers acted reasonably, albeit mistakenly, in arresting Bateman. Because the arrest was reasonable, the subsequent discovery of incriminating evidence was legal and admissible. St. v. Bateman, 2004 MT 281, 323 M 280, 99 P3d 656 (2004).

Search of Clothing and Duffel Bag Near Arrestee Supported by Exigent Circumstances: Pursuant to a lawful warrant, Galpin was arrested while sleeping on a couch in a small house in the early morning hours and was found to be in possession of two bags of methamphetamine. His coat and a duffel bag were 4 to 6 feet away, and officers searched the clothing and bag and discovered keys that were subsequently found to open two storage facilities where additional drug manufacturing equipment was stored. Galpin moved to suppress the evidence, but the motion was denied. On appeal, the Supreme Court affirmed. The search was permissible both as a means of protecting the agents from attack as well as discovering and seizing the fruits of the crime. Additionally, the previous day, in another location, officers had found other equipment for manufacturing methamphetamine owned by Galpin in a similar duffel bag and reasonably suspected that the bag in Galpin's possession contained equipment and potentially toxic and explosive chemicals used in methamphetamine manufacturing, so the precautionary search of the bag was justified. Thus, the search was supported by exigent circumstances, and the denial of the motion to suppress was not in error. St. v. Galpin, 2003 MT 324, 318 M 318, 80 P3d 1207 (2003).

Action for Damages Allowed Against Local Peace Officers Violating Person's Self-Executing State Constitutional Rights to Privacy, Due Process, and Freedom From Unreasonable Searches and Seizures: Plaintiffs filed a civil action against the Sheriff and two deputies for damages for violation of plaintiffs' Montana constitutional rights to privacy, due process, and freedom from unreasonable searches and seizures. The court held that those three rights are self-executing. The court also held that plaintiffs were entitled to damages. The court based the right to recover damages on: (1) federal cases allowing damage suits for violation of rights under the U.S. Constitution; (2) Restatement (Second) of Torts 874A (1979), which follows the principle in those federal cases by stating that when a constitutional provision protects a class of persons and does not provide a remedy for a violation of the provision, the court may, if appropriate, allow an action under an existing tort or a new cause of action similar to an existing tort; (3) 1-1-109 providing that the common law of England is the rule of decision in Montana courts to the extent that it is not repugnant to or inconsistent with the U.S. or Montana Constitution or Montana statutes, and cases from other states using the English common law as a basis for granting a remedy for a state official's violation of a person's state constitutional rights; (4) 27-1-202 allowing recovery of damages by a person who suffers detriment from the unlawful act or omission of another; and (5) the Montana Constitution, Art. II, sec. 16, right to a remedy for every injury. The court stated that there is a great distinction between wrongs, such as assault, conversion, and trespass, by a

private individual against another private individual and wrongs against a private individual by a person acting under authority of the state in violation of a person's constitutional rights and stated that common-law causes of action remedying the former are not adequate to remedy the latter. Dorwart v. Caraway, 2002 MT 240, 312 M 1, 58 P3d 128 (2002).

DECISIONS UNDER 1889 CONSTITUTION

SEARCH AND SEIZURE GENERALLY

When State and When Federal Constitution Applicable: The provisions of the federal and state Constitutions relative to unreasonable searches and seizures being but limitations upon the powers of the respective governments, either government is responsible only for the wrongful acts or omissions of its own officers. Where one charged with the violation of the liquor law complains of illegal acts done by federal enforcement officers under a federal search warrant over whom the state has no control, his rights are determinable by a reference to Art. III, sec. 7, 1889 Mont. Const., and not under the provisions of the fourth amendment to the United States Constitution. St. v. Gardner, 77 M 8, 249 P 574 (1926).

Timely Objection Required: Held, that one charged with a violation of the liquor laws who wishes evidence obtained through an illegal search and seizure suppressed must protect himself by timely action. Objection to such evidence on the ground that it had been secured through a violation of his constitutional rights, made for the first time at the trial, though defendant for practically a year knew that without such evidence the state could not make out even a prima facie case against him, was not timely. St. v. Gotta, 71 M 288, 229 P 405 (1924).

Application to Person and Possessions: The constitutional provision, both federal and state, against unreasonable searches and seizures applies to a person, his baggage, and his personal belongings and to the search of a person unlawfully arrested and the seizure of his belongings. State ex rel. Sadler v. District Court, 70 M 378, 225 P 1000 (1924).

Protection for All: The protection granted by Art. III, sec. 7, 1889 Mont. Const., against unreasonable searches and seizures reaches all alike, whether accused of crime or not, and the duty of enforcing it is obligatory upon all entrusted with the enforcement of the law. State ex rel. Thibodeau v. District Court, 70 M 202, 224 P 866 (1924); State ex rel. King v. District Court, 70 M 191, 224 P 862 (1924).

Search Warrants — Limitations: Because a search warrant is a process subject to much abuse, it has in this country generally been limited in its use by constitutional restrictions. State ex rel. Streit v. Justice Court, 45 M 375, 123 P 405 (1912).

Examination of Documents: The Legislature, by section 93-8301, R.C.M. 1947 (now repealed), providing that any court in which an action is pending may order either party to give to the other an inspection of any document in his possession containing evidence relating to the merits of the action or defense, has given a construction to Art. III, sec. 7, 1889 Mont. Const., defining the circumstances under which the inspection of the private papers and documents of one party in an action by another will not be deemed an unreasonable search. State ex rel. Boston & Mont. Consol. Copper & Silver Min. Co. v. District Court, 27 M 441, 71 P 602 (1903).

SUFFICIENCY OF SEARCH WARRANT

Sufficient Description of Premises to Be Searched: Search warrant which described the premises to be searched as "two cabins located near the Duck Creek 'Y', near West Yellowstone, Montana, near the office building at Koelzer's Duck Creek cabins" was of insufficient particularity where there were three cabins in the area of the office building and when police had good reason to believe that only one of the houses contained controlled substances. St. v. Ballew, 166 M 270, 516 P2d 1159 (1975), distinguished in St. v. Cope, 250 M 387, 819 P2d 1280, 48 St. Rep. 949 (1991).

Lack of Probable Cause — Search Warrant Void: When affidavit for search warrant did not establish probable cause, the search warrant was illegally issued and void, and the admission as evidence of the fruits of the search was prejudicial error. Application of Gray, 155 M 510, 473 P2d 532 (1970).

Sufficiency of Affidavit — Affidavit to Stand Alone: Additional information not contained in affidavit for search warrant could not be used to uphold its issuance, since the affidavit itself is required to provide exclusive support for issuance of search warrant. Application of Gray, 155 M 510, 473 P2d 532 (1970).

Description in Search Warrant of Items Seized: Evidence obtained in a search of defendant's home was properly used to convict the defendant of grand larceny, even though the items seized

were not specifically described in the search warrant pursuant to which the search and seizure was conducted. St. v. Gray, 152 M 145, 447 P2d 475 (1968).

Fishing Expedition: On application for Writ of Certiorari to annul order of District Court for perpetuation of testimony and requiring prospective defendant to produce all books and records pertaining to an alleged account over a period of over 24 years, the Supreme Court held that the procedure was a "fishing expedition", violated relator's constitutional right against unlawful search and seizure of his papers and personal effects, and the court's order therefor was in excess of jurisdiction. State ex rel. Pitcher v. District Court, 114 M 128, 133 P2d 350 (1943).

Documents to Be Shown Relevant: A compulsory production of private books and papers by means of a subpoena duces tecum constitutes a violation of Art. III, sec. 7, 1889 Mont. Const., unless the books and documents have first been shown to be material or relevant to the issues in a cause and the court is apprised of the nature of the action and the necessity for their production. In the instant case where petitioner made no request or showing, the order was held to be violative of this provision on application for Writ of Certiorari. State ex rel. Smith v. District Court, 112 M 506, 118 P2d 141 (1941).

Open Fields: The constitutional guaranty against unreasonable searches and seizures extends only to persons, their papers, homes, and effects, not to open fields. Where a search warrant had been issued in a prosecution for cattle stealing and hides of slaughtered cattle were found in an open field of defendant, motion to suppress the evidence secured on the ground that the premises on which they had been found were not described in the warrant was properly overruled. St. v. Arnold, 84 M 348, 275 P 757 (1929).

Erroneous Wording in Statute: Held, that Ch. 116, L. 1923 (since repealed), conferring jurisdiction upon Justices' Courts to issue search warrants in liquor cases, is not rendered invalid as in contravention of Art. III, sec. 7, 1889 Mont. Const., by the erroneous use of the word "partially" instead of "particularly" in providing that the complainant in his affidavit shall "partially" describe the premises to be searched. St. v. District Court, 71 M 570, 230 P 1089 (1924).

Oath or Affirmation: The fact the information was not verified by the County Attorney did not violate this section. St. v. Paine, 61 M 270, 202 P 203 (1921); St. v. Martin, 29 M 273, 74 P 725 (1903); St. v. Shafer, 26 M 11, 66 P 463 (1901); St. v. Clancy, 20 M 498, 52 P 267 (1898).

Support of Application for Warrant: Held, on application for Writ of Prohibition, that a complaint filed in the District Court, under the prohibition enforcement act (Ch. 143, L. 1917, since repealed), stating, in the form of a conclusion, that affiant "has probable cause to believe and does believe" that on a given day intoxicating liquors were being unlawfully possessed, kept, etc., on certain premises, was insufficient to give the District Court or Judge jurisdiction to issue a search warrant; that the warrant issued in pursuance thereof was violative of the inhibition contained in Art. III, sec. 7, 1889 Mont. Const., against unreasonable searches and seizures; and that the proceeding based thereon was void ab initio. State ex rel. Samlin v. District Court, 59 M 600, 198 P 362 (1921).

Issuance of Warrant: A warrant may issue on an information filed by the County Attorney by leave of court on a motion in writing not verified and the information verified on information and belief only. St. v. Shafer, 26 M 11, 66 P 463 (1901).

WARRANTLESS SEARCHES

Search of Suspected Runaway's Purse Unjustified — Evidence Excluded — "Plain View" Doctrine: Police officers who, acting upon suspicion that defendant was a runaway juvenile, had taken defendant to the Sheriff's office for the purpose of identifying her and contacting her parents were without sufficient justification for searching defendant's purse for identification when defendant had produced two items of identification and had informed officers that she had a birth certificate at her home which would substantiate the identification. Marijuana and hashish found in search of defendant's purse were excluded since there was no valid reason for the officer's search of defendant's purse and the "plain view" doctrine was not applicable. St. v. Hough, 163 M 47, 516 P2d 613 (1973).

Consent of Accused — Foreign Citizen: State did not sustain its burden of proof that defendant consented to search of his truck where defendant was a Canadian citizen born in England, was unknowledgeable of rights granted under United States law, and had not been informed of his right to refuse a warrantless search. St. v. Pound, 162 M 10, 508 P2d 118 (1973).

Search Incident to Arrest — Vehicle Search: Search of pickup truck was not incident to lawful arrest where initial arrest was effected and defendant placed in custody hours before the Sheriff who conducted the search arrived at the scene and the state showed no exigent circumstances to

justify the warrantless search, such as physical danger to the law enforcement officer or loss of evidence. St. v. Pound, 162 M 10, 508 P2d 118 (1973).

Search Incident to Arrest — Reasonableness: Search of defendant and seizure of illegal drugs were reasonable when his original detention for traffic offense was with probable cause, he was informed of his Miranda rights, he next voluntarily surrendered a portion of contraband, and he was then arrested and searched. Feaster v. Wilson, 161 M 520, 509 P2d 559 (1973).

Telephone Communications — Individual: It was a violation of the right of privacy guaranteed by Art. III, sec. 7, 1889 Mont. Const., for wife's sister to listen on an extension, unknown to husband, to telephone conversation between husband and wife, and sister's testimony as to threat made by husband during the conversation was inadmissible in prosecution of husband for wife's murder. St. v. Brecht, 157 M 264, 485 P2d 47 (1971).

Free and Intelligent Consent: A search and seizure may be made without a warrant if the individual freely and intelligently gives unequivocal and specific consent and when there is no evidence of express or implied duress. St. v. Williams, 153 M 262, 455 P2d 634 (1969).

Consent — Open Range: Constitutional rights of defendant convicted of grand larceny of cattle were not violated by evidence of worked-over brands given by witnesses privileged to travel on open range on which defendant had mere nonexclusive license to graze cattle and further evidence obtained while removing cattle in vicinity of defendant's home with defendant's consent. St. v. Johnson, 149 M 173, 424 P2d 728 (1967). See also St. v. Perkins, 153 M 361, 457 P2d 465 (1969) (calves in corral).

Waiver: When defendant admitted a Sheriff, a Deputy Sheriff, and two livestock inspectors onto his ranch on three separate occasions to inspect his calves and helped them to corral the animals, he waived his constitutional right against unreasonable search and seizure by consenting to the actions of the state authorities. St. v. Peters, 146 M 188, 405 P2d 642 (1965), distinguished in St. v. LaFlamme, 170 M 202, 551 P2d 1011 (1976).

State Protection — Federal Officers: Just as the provisions of the federal Constitution against unreasonable searches and seizures have no application to state officers, so those of the state Constitution cannot be invoked against independent action by federal officers or private persons. Where, after the constitutional rights of a person charged with illegal possession of morphine had been violated by federal officers in opening a package sent through the mails containing the drug, a Sheriff arrested the addressee and seized the package on information imparted to him by such officers as to its contents, but not in cooperation or collusion with them, his seizure in that mode did not render the package inadmissible in evidence as made in contravention of Art. III, sec. 7, 1889 Mont. Const., against unreasonable searches and seizures, and the court in suppressing it committed error. St. v. District Court, 82 M 515, 268 P 501 (1928).

Extent of Protection: The constitutional guaranty (Art. III, sec. 7), against unreasonable searches and seizures extends only to one's person, papers, home, and effects; hence defendant's contention that trespass by an officer upon his land so near to an outbuilding in which a still was being operated as to observe it in operation violated his constitutional right has no merit, the guaranty not covering his field (or the roadway). St. v. Ladue, 73 M 535, 237 P 495 (1925).

Violation in Presence of Officers: Where a Sheriff is in the possession of such knowledge from the employment of his own senses or from information actually imparted to him by other credible persons to cause him in good faith, acting within reasonable discretion, to believe that the liquor law was being violated in his presence, he may make seizure and arrest the offender, and in doing so without a warrant, he does not violate any constitutional rights of such person. State ex rel. Brown v. District Court, 72 M 213, 232 P 201 (1925).

Matching of Footprints: Evidence obtained by the taking of the shoes of defendant charged with murder, whether with or without his consent, and comparing them with footprints leading from the place of the crime is admissible, and its use does not deprive him of the constitutional guaranty prohibiting unreasonable searches and seizures. St. v. Fuller, 34 M 12, 85 P 369 (1906).

PROBABLE CAUSE REQUIREMENTS

Probable Cause — Rental of Room in House Where Criminal Activity Present: When defendant lived alone in, had exclusive use of, and paid rent for one room in house in which criminal activity appeared present, there was no probable cause for issuance of warrant for search of his room in absence of showing of any criminal activity by him personally, and search conducted pursuant to such warrant was a violation of Art. III, sec. 7, 1889 Mont. Const. State ex rel. Garris v. Wilson, 162 M 256, 511 P2d 15 (1973), distinguished in St. v. Paschke, 165 M 231, 527 P2d 569 (1974).

Probable Cause — Absence of Facts: Where affidavit for search warrant merely stated that affiant had knowledge and believed that designated articles taken in burglary were located on the

premises but contained no facts for judicial determination, probable cause was not established. Application of Gray, 155 M 510, 473 P2d 532 (1970).

Showing Required: To warrant the issuance of a search warrant under the liquor law, it must appear to the magistrate that probable cause for its issuance exists, and to that end the complaint or affidavit must set forth the facts which show probable cause. The showing, however, need not be sufficient to justify a conviction, the law being satisfied if by legal evidence, direct or circumstantial, it is made to appear that the law is being violated. St. v. Gardner, 74 M 377, 240 P 984 (1925).

Application to State Government: The guaranty against unreasonable searches and seizures embodied in Art. III, sec. 7, 1889 Mont. Const., applies to all invasions by the state government or any of its employees of the sanctity of the home of the citizen, his personal security, personal liberty, and private property where there is no probable cause to believe that his rights in this behalf have been forfeited by his own criminal conduct. State ex rel. Samlin v. District Court, 59 M 600, 198 P 362 (1921).

Probable Cause Construed: The proper construction of the words "probable cause", as used in this section, may be facts embodied in a complaint which charges the offense upon information and belief. St. v. Shafer, 26 M 11, 66 P 463 (1901); St. v. McCaffery, 16 M 33, 40 P 63 (1895).

Information — Prima Facie Probable Cause: The requirement of the Constitution that no warrant shall issue without probable cause, reduced to writing and supported by oath or affirmation, is, prima facie, satisfied and complied with when an information charging a public offense is filed by the County Attorney. An information is, prima facie, the statement of probable cause under oath, equal with an indictment presented upon the oath of grand jurors. St. v. Clancy, 20 M 498, 52 P 267 (1898).

Oath or Affirmation: The provision of Art. III, sec. 7, 1889 Mont. Const., that no warrant shall issue without probable cause, supported by oath, prevents arbitrary accusations by requiring affidavits of truthfulness to facts constituting probable cause, avoids false issues, and guarantees to the citizen that no warrant of seizure of his person can lawfully issue except upon such probable cause, supported by the oath of someone. But, being a formal matter, the support by oath or affirmation can be waived, and, if the verification can be waived, the illegality of a warrant issued upon an unverified information can also be waived. State ex rel. Nolan v. Brantly, 20 M 173, 50 P 410 (1897).

Law Review Articles

Is the Government in My Pocket? An Overview of Government Location Tracking of Cell Phones Under the Federal System and in Montana, Schwendt, 72 Mont. L. Rev. 261 (2011).

Gopher to Martinez: A Journey Across the Shifting Sands of Particularized Suspicion in Montana, Capp, 66 Mont. L. Rev. 205 (2005).

It's Good to Be the Game Warden: State v. Boyer and the Erosion of Privacy Protection for Montana Sportsmen, Stearns, 65 Mont. L. Rev. 187 (2004).

Kyllo v. United States: A Lukewarm Interpretation of the Fourth Amendment, Kobos, 64 Mont. L. Rev. 519 (2003).

The Evolution of Montana's Privacy—Enhanced Search and Seizure Analysis: A Return to First Principles, Harrison & Mickelson, 64 Mont. L. Rev. 245 (2003).

The Fourth Amendment and Drug-Detecting Dogs, Even, 48 Mont. L. Rev. 101 (1987).

Right of Privacy, Elison & NettikSimmons, 48 Mont. L. Rev. 1 (1987).

Intrusion, Exclusion, and Confusion, Reep, 41 Mont. L. Rev. 281 (1980).

Criminal Procedure: The Exclusionary Rule, Lovas, 40 Mont. L. Rev. 132 (1979).

Consent Searches in Montana: Basic Elements of the Test for Voluntariness, Parish, 38 Mont. L. Rev. 327 (1977).

Criminal Procedure—Montana Law and the Federal Impact, Elison, 38 Mont. L. Rev. 27 (1977).

State v. Brecht: Evolution or Offshoot of the Fourth Amendment Exclusionary Rule?, Johnson, 34 Mont. L. Rev. 187 (1973).

Search and Seizure: Seizure of Purely Evidentiary Items Held Constitutional, Cain, 29 Mont. L. Rev. 101 (1967).

Search and Seizure: Municipal Ordinances Permitting Searches Without Warrant by Health and Safety Inspectors Are Unconstitutional Under Fourth and Fourteenth Amendments, Murphy, 29 Mont. L. Rev. 81 (1967).

Search and Seizure: Search of Bodily Cavities, Poore, 28 Mont. L. Rev. 127 (1966).

The Constitutionality of Civil Inspections, Angel and Corontzos, 21 Mont. L. Rev. 195 (1960).

A Guide for More Efficient Law Enforcement, Kalbfleisch, 18 Mont. L. Rev. 198 (1956).

Arrests Without a Warrant in Montana, Mason, 11 Mont. L. Rev. 1 (1950).

Section 12. Right to bear arms.

Convention Notes

Identical to 1889 constitution.

Compiler's Comments

Former Constitutional Provision: This section is the same as Art. III, sec. 13, 1889 Mont. Const.

Case Notes

DECISIONS UNDER 1972 CONSTITUTION

No District Court Authority to Order Sale of Firearms During Sentencing: The defendant pleaded nolo contendere to robbery, assault with a weapon, and burglary. As part of the sentencing the District Court directed the County Sheriff to sell the defendant's firearms and apply the proceeds to the cost of incarceration at the county detention facility. On appeal, the Supreme Court reversed the condition that the firearms be sold and the proceeds applied against the defendant's incarceration costs. The court reasoned that the Legislature did not provide the District Court with the statutory authority to order the sale of firearms. St. v. Lee, 2015 MT 259, 381 Mont. 33, 358 P.3d 168.

Disposition of Felon's Firearms, Ammunition, Weapons, and Other Items Reversed in Part and Affirmed in Part: Following the defendant's conviction of three counts of attempted deliberate homicide, the District Court sentenced him to prison for 40 years with 20 years suspended. The suspended portion of the defendant's sentence contained numerous conditions, including that the defendant not own, possess, or be in control of any firearms or deadly weapons and that the defendant comply with local, state, and federal laws. Pursuant to 46-5-306 through 46-5-309, the County Attorney petitioned for an order disposing of the evidence used in the defendant's case. The District Court ordered that the defendant's firearms, dangerous weapons, ammunition, and other equipment be disposed of, at the state's election, at a public sale or auction or to a licensed firearms dealer, with the proceeds going to the defendant's father as his agent. On appeal, the Supreme Court concluded that the District Court erred in not releasing to the defendant's parents certain items that were not firearms, ammunition, or weapons. Distinguishing St. v. Nelson, 2008 MT 359, 346 Mont. 366, 195 P.3d 826, and St. v. Letasky, 2007 MT 51, 336 Mont. 178, 152 P.3d 1288, the Supreme Court affirmed the District Court's determination that the defendant was not entitled to possession of the firearms, ammunition, and weapons at issue because the Montana Constitution does not guarantee a felon the right to keep or bear arms, nor could the District Court violate 18 U.S.C. 922(g)(1) by returning the weapons to a convicted felon. Noting that the list of options for disposition contained in 46-5-308(1)(a) through (1)(f) is not exhaustive, the Supreme Court concluded that the District Court did not abuse its discretion in allowing the state to sell the defendant's firearms, ammunition, and weapons at public sale or auction, with the proceeds going to the defendant's father as his agent, instead of releasing the items to the defendant's parents who lacked the knowledge to sell the items. St. v. Fadness, 2012 MT 12, 363 Mont. 322, 268 P.3d 17, distinguished in St. v. Lee, 2015 MT 259, 381 Mont. 33, 358 P.3d 168.

Right to Possess Firearms — Not Specifically Prohibited by Judge but Prohibited by State Agency Administering Probation: As a condition of probation, defendant was placed by the judge under the jurisdiction of the Department of Corrections and ordered to comply with the terms and conditions established by the Department. The Department had an administrative rule making nonpossession of firearms a standard condition for probationers. Because the sentencing court did not, as required by 46-18-801, specifically enumerate and specifically include in the sentence order a prohibition against possessing a firearm, the Department of Corrections could not, and the rule did not, deprive defendant of the right to possess firearms. (However, see the 1995 amendment to subsection (1) of 46-18-801.) U. S. of America v. Brooks, 270 M 136, 890 P2d 759, 52 St. Rep. 113 (1995).

Right to Bear Arms — Not Violated by Conviction of Negligent Homicide by Shooting: Defendant who killed his ex-wife's boyfriend in her home with a .357 magnum revolver argued on appeal that he was acquitted of deliberate homicide and mitigated deliberate homicide because the jury believed his self-defense argument, and that therefore the conviction of negligent homicide could only be based on the improper belief that possessing a weapon, a right protected by the Montana Constitution, was itself negligent. The argument was incredible and based on faulty assumptions concerning the verdict and also on an unbelievably strained construction of the right to bear arms. The right to bear arms conveys no right or privilege to enter a residence without permission,

threaten its unarmed occupants, and discharge a weapon under unreasonable conditions. St. v. Stroud, 210 M 58, 683 P2d 459, 41 St. Rep. 919 (1984).

DECISIONS UNDER 1889 CONSTITUTION

Right to Kill Game in Defense of Person or Property: Under Art. III, sec. 3 and 13, 1889 Mont. Const., legal justification may always be interposed as a defense by a person charged with killing a wild animal contrary to law and the general law on the right to use force must be construed in pari materia with fish and game laws when found inoperative, otherwise the latter would be unconstitutional as denying an inalienable right. St. v. Rathbone, 110 M 225, 100 P2d 86 (1940).

Law Review Articles

The Impending Storm: The Supreme Court's Foray Into the Second Amendment Debate, Keleher, 69 Mont. L. Rev. 113 (2008).

Private Actors & Structural Balance: Militia & the Free Rider Problem in Private Provision of Law, Morkiss, 58 Mont. L. Rev. 115 (1997).

The Relevance of the Second Amendment to Gun Control Legislation, Dowd, 58 Mont. L. Rev. 79 (1997).

Constitutional Limits on Regulating Private Militia Groups, McAffee, 58 Mont. L. Rev. 45 (1997).

Ash on the Sills: The Significance of the Patriot Movement in America, Neiwert, 58 Mont. L. Rev. 19 (1997).

The Second Amendment and Other Federal Constitutional Rights of the Private Militia, Becker, 58 Mont. L. Rev. 7 (1997).

Section 13. Right of suffrage.

Convention Notes

Identical to 1889 constitution.

Compiler's Comments

Former Constitutional Provision: This section is the same as Art. III, sec. 5, 1889 Mont. Const.

Case Notes

DECISIONS UNDER 1972 CONSTITUTION

Districting and Apportionment Commission — No Violation of Plaintiffs' Right of Suffrage: Because the inescapable consequence of the redistricting process is that some districts will only be able to vote in two senate elections over a 10-year period and the remedy argued by the plaintiffs would merely shift the purported violation to another set of voters, the District Court did not err in concluding that plaintiffs' suffrage argument lacked merit. Willems v. State, 2014 MT 82, 374 Mont. 343, 325 P.3d 1204.

Process for Establishing County Building Code Jurisdictional Area Based on Franchise Limitation Unconstitutional: The 2001 Legislature enacted Senate Bill No. 242 (SB 242), which established a process for designating a county building code jurisdictional area and eliminating municipal jurisdictional areas by an election procedure limited to record owners of real property instead of the general constituency. When questioned regarding the constitutionality of the process, the Supreme Court noted that because voting rights cases involve a fundamental political right, strict scrutiny required the state to demonstrate a compelling governmental interest in restricting the voting franchise. The court concluded that: (1) the application and enforcement of building codes is an issue of public safety that affects all persons living in the area, not just record owners of real property; (2) governmental entities that oversee building codes are not special-purpose units whose functions and actions exclusively or disproportionately affect record owners of real property over other constituents in the area that do not own real property; and (3) elections to determine who may impose and enforce building codes in a given area are general interest elections rather than special interest elections. The state failed to show a compelling interest in limiting the voting franchise to only record owners of real property, and because the valid provisions of SB 242 were not severable from the invalid provisions, the court held that SB 242 was invalid in its entirety. (However, see Ch. 443, L. 2003, wherein the Legislature amended the voting procedure to address the franchise limitation.) Finke v. State ex rel. McGrath, 2003 MT 48, 314 M 314, 65 P3d 576 (2003). See also Kramer v. Union School District, 395 US 621 (1969).

DECISIONS UNDER 1889 CONSTITUTION

Denial of Right to Nominate: Under the rule that a statute which denies to an elector the right to nominate candidates for public office is void as violative of Art. III, sec. 5 and 26, 1889

Mont. Const., law providing for nonpartisan nomination to judicial office, by petition, was invalid because it was incapable of being made to operate uniformly throughout the state, in that it failed to provide any means by which a candidate for judicial office may be nominated in a newly created municipality or for a newly created judicial office or for judicial office in a district the boundaries of which have been changed since the last election or may be changed hereafter. State ex rel. Holliday v. O'Leary, 43 M 157, 115 P 204 (1911).

Number of Polling Places Inadequate: When an act of the Legislature provided for not less than two or more than five polling places in school districts of the first class and it appeared that the facilities were inadequate to accommodate those who wished to vote and it also appeared that those who were not able to vote did not attempt to do so until the latter part of the day, the law was not in conflict with Art. III, sec. 5, 1889 Mont. Const. State ex rel. Bray v. Long, 21 M 26, 52 P 645 (1898).

Section 14. Adult rights.

Convention Notes

New provision. Self explanatory.

Compiler's Comments

1986 Amendment by Referendum: Constitutional Amendment No. 15, proposed by Ch. 129, L. 1985, and approved at the general election held November 4, 1986, after "may establish" deleted "an age of not more than 19 as" and after "legal age for" inserted "purchasing". Amendment effective January 1, 1987. (See text of referendum in final volume of 1987 Laws of Montana.)

1978 Amendment by Referendum: Constitutional Amendment No. 4, proposed by Ch. 459, 1977, and approved at the general election held November 7, 1978, at end of section inserted exception clause allowing establishment of an age of not more than 19 as the legal age for consuming or possessing alcohol. Amendment effective January 1, 1979. (See text of referendum in final volume of 1979 Laws of Montana.)

Case Notes

Child Support — Majority Age: Upon attaining the age of 18 a person is an adult and is no longer a "child" within the purview of 40-6-211 of whom parents are entitled to custody or to whom parents are obligated for support, despite the fact that at the time of the decree the legal age was 21. Chrestenson v. Chrestenson, 180 M 96, 589 P2d 148 (1979).

Attorney General's Opinions

Age of Majority — Effect Upon Aftercare Authority: Article II, sec. 14, 1972 Mont. Const., does not prohibit the Aftercare Bureau of the Department of Institutions (now Community Corrections Bureau of the Department of Corrections) from exercising supervisory authority over persons aged 18 through 20 who have been released from youth correctional facilities after executing aftercare agreements (now parole agreements). 37 A.G. Op. 72 (1977).

Section 15. Rights of persons not adults.

Convention Notes

New provision giving children all of the rights that adults have unless a law meant to protect children prohibits their enjoyment of the right.

Case Notes

Youth Offender Jointly and Severally Liable for Restitution Award — Failure to Consider Youth's Ability to Pay — Plain Error Warranting New Restitution Hearing: At his plea hearing, the youth defendant admitted to having committed criminal mischief as part of a common scheme, in violation of 45-6-101 and 45-2-101. The youth admitted his participation in 2 nights of vandalism, causing $16,020.63 in damages, out of 11 total nights of vandalism, worth total damages of $78,702.09. At the restitution hearing, the Youth Court held the youth jointly and severally liable for the entire $78,702.09 without inquiring into the extent of the youth's assets or prospects for future earnings. On appeal, the Supreme Court held that it was plain error for the Youth Court to fail to consider the youth's ability to pay the restitution. The Supreme Court took up the issue sua sponte because the error implicated the youth's fundamental constitutional rights under Article II, sec. 15, Mont. Const., as a youth in the Youth Court system faces a different disposition and therefore is not similarly situated to an adult who commits the same offense. Additionally, the criminal mischief statute at 45-6-101(2) expressly requires the court to impose restitution only after fully considering the convicted person's ability to pay. The Supreme Court held that the Youth Court's failure to consider the youth's ability to pay raised questions of the fundamental fairness of the proceedings against him and remanded for a new restitution

hearing to consider the youth's ability to pay the full amount of restitution. In re K.E.G., 2013 MT 82, 369 Mont. 375, 298 P.3d 1151.

Youth Court Authority to Extend Probation Period at Probation Revocation Proceeding — No Violation of Equal Protection: At age 14, the appellant admitted to the charge of assault with a weapon and was placed on probation until his 18th birthday by the Youth Court. Two years later, the appellant admitted to possession of a handgun, in violation of his probation agreement. At the disposition hearing, the Youth Court revoked the appellant's probation, committed him to the Pine Hills Youth Correctional Facility until his 18th birthday, and extended his probation term until his 21st birthday to ensure he would be fully rehabilitated. The appellant appealed the Youth Court order on the grounds that the Youth Court had no authority to impose an additional probationary period beyond the period in the initial order. The appellant also asserted that he was denied equal protection of the law because he was similarly situated to an adult who committed assault with a weapon but was treated differently because the adult could not be subject to an additional probation period upon revocation. The Supreme Court upheld the order of the Youth Court because, under 41-5-1431, the court could have issued an order of commitment to the correctional facility and required the appellant to remain on probation until his 21st birthday at the original hearing. In addition, the Supreme Court determined that the appellant was not similarly situated to an adult who committed assault with a weapon because specific statutory provisions within the Youth Court Act ensure minors are treated differently from adults, including emphasizing rehabilitation, which was the Youth Court's justification for extending the appellant's probation. In re S.M.K.-S.H., 2012 MT 281, 367 Mont. 176, 290 P.3d 718.

Lack of Advisement of Right to Counsel and Right Against Self-Incrimination for Youth Taken Into Custody for Questioning Reversible Error — When Waiver of Rights Attaches: A youth was questioned at the Sheriff's office regarding a burglary and criminal mischief and was then taken home, where he agreed to relinquish articles of clothing that were not inconsistent with evidence found at the crime scene. The youth's parents were not notified of any of the Sheriff's actions, and no omnibus hearing was held. The youth's clothing was later introduced at trial over the youth's objection. Following conviction, the youth appealed, contending that the clothing was not legally obtained pursuant to a search warrant, that he was not advised of his rights, and that he did not give an informed waiver of his right to have his parents contacted prior to relinquishment of the clothing. The state maintained that the youth voluntarily consented to relinquish the clothing and thus waived his rights. The Supreme Court reversed. Under the Montana Youth Court Act, a youth taken into custody for questioning on a matter that could result in allegations that the youth is delinquent must be advised of the right to counsel and the right against self-incrimination, and the youth's parents must be immediately notified by the investigating officer. A youth who is 16 years of age or older may make an effective waiver of those rights. In determining whether waiver and consent by juveniles are voluntary, the Supreme Court applies the totality of circumstances test set out in Evans v. District Court, 2000 MT 38, 298 M 279, 995 P2d 455 (2000), which provides that a determination of voluntariness takes into account: (1) the defendant's age and level of education; (2) whether the defendant was advised of the defendant's rights; (3) the defendant's prior experience with the criminal justice system; (4) the defendant's background and experience; and (5) the defendant's demeanor, coherence, articulateness, and capacity to make full use of the defendant's faculties. Here, the District Court failed to take the Evans factors into account, and the requirements of 41-5-331 regarding parental notification were not fulfilled. Failure to follow statutory requirements and to consider the totality of the circumstances was reversible error. In re C.T.P., 2004 MT 63, 320 M 279, 87 P3d 399 (2004).

Plain Error in Allowing Youth's Extrajudicial Statements When Youth Not Advised of Right to Counsel and Right Against Self-Incrimination: A youth asserted for the first time on appeal that the Youth Court improperly admitted extrajudicial statements that the youth made regarding the youth's whereabouts when a burglary and criminal mischief were committed. Despite the state's contention that the arguments should not be considered because they were not raised at trial, the Supreme Court nevertheless considered the argument under the plain error doctrine because the youth was not notified while in custody of the fundamental right to counsel and the right to avoid self-incrimination, nor were the youth's parents notified as required. The youth's rights under the Montana Youth Court Act and the constitution were simply ignored in this case, so in order to avoid a question of the fundamental fairness of the trial by admission of constitutionally infirm extrajudicial statements, the Supreme Court reversed the trial court's decision to admit the statements. In re C.T.P., 2004 MT 63, 320 M 279, 87 P3d 399 (2004).

Failure to Appoint Counsel for Minor Parent During Formulation of and Prior to Court Approval of Treatment Plan Violative of Due Process Rights: H.C. was adjudicated a youth in need of care, and was simultaneously a minor parent in an abuse and neglect proceeding whose own child was adjudicated a youth in need of care. Although a guardian ad litem was appointed to represent H.C.'s child, counsel was never appointed for H.C. herself during the formulation of her treatment plan or prior to the District Court's approval of the plan. A natural parent's right to the care and custody of a child is a fundamental liberty interest that requires that the state provide a fundamentally fair procedure at all stages in proceedings for the termination of parental rights. Due process requires fundamental fairness, and fundamental fairness requires fair procedures. Further, under this section, a minor parent is entitled to the same due process protections and procedures as adult counterparts. In this case, in order to preserve the fundamental fairness of the proceedings and for the treatment plan to be considered appropriate, due process required that counsel be appointed for the minor mother during the formulation of her treatment plan and prior to the District Court's approval of the plan, and the failure of the District Court to do so was reversible error. In re A.F.-C., 2001 MT 283, 307 M 358, 37 P3d 724 (2001), distinguishing In re T.C. & R.C., 240 M 308, 784 P2d 392 (1989), inasmuch as appointment of counsel is not always inappropriate or otherwise precluded during the earlier stages of child protective proceedings that precede termination proceedings, if due process requires.

Settlement Agreement Involving Minor Child Open for Public Inspection — No Right of Privacy Recognized — Demands of Privacy Do Not Exceed Merits of Public Disclosure: Pengra and the state agreed to a settlement of Pengra's suit against the state on behalf of his daughter and himself involving the death of his wife. Pengra requested that the settlement document be sealed and thereby made unavailable for public inspection. In a challenge to the sealing of the settlement agreement, the Supreme Court held that: (1) minors have no greater right of privacy than adults in settlement agreements involving claims against the state; (2) Pengra had no subjective expectation of privacy in the settlement agreement; (3) by the Legislature's enactment of 2-9-303, society is not willing to recognize any privacy expectation of Pengra regarding the settlement agreement; (4) compelling policy reasons support the disclosure of the settlement; and (5) any right of privacy by Pengra in the settlement agreement did not outweigh the merits of public disclosure of that agreement. Pengra v. St., 2000 MT 291, 302 M 276, 14 P3d 499, 57 St. Rep. 1231 (2000).

Transfer of Youth Court Case to District Court Not Violative of Minor's Constitutional Rights: Spina argued that the statute allowing transfer of her Youth Court case to the District Court resulted in violation of her rights under this section, which guarantees to minors the same fundamental rights afforded to adults, and under Art. II, sec. 24, Mont. Const., which guarantees the right to a fair trial. The Supreme Court considered alleged violations of the right against self-incrimination, the right to effective assistance of counsel, the right to a fair trial, and the right to a presumption of innocence, finding that Spina's arguments were without merit. The transfer statute did not violate Spina's constitutional rights. St. v. Spina, 1999 MT 113, 294 M 367, 982 P2d 421, 56 St. Rep. 467 (1999).

Imposition of Both Juvenile and Adult Sentences — Level of Constitutional Scrutiny: Imposition of both juvenile and adult sentences under the Extended Jurisdiction Prosecution Act infringed upon the juvenile's physical liberty. Physical liberty is a fundamental right under the Montana Constitution. Therefore, the court must apply strict scrutiny analysis to the claim that the Act violates the Montana Constitution's equal protection and rights of minors clauses by subjecting the juvenile to a longer period of incarceration than an adult committing the same offense, and there must be a compelling state interest sufficient to justify the Act. In re S.L.M., 287 M 23, 951 P2d 1365, 54 St. Rep. 1480 (1997).

Scope of Minors' Rights — Test for Constitutional Scrutiny: This section, relating to minors' rights, clearly affords minors full recognition under the equal protection clause in section 4 of this article and all the fundamental rights of an adult under this article. If the Legislature wishes to create an exception to this guarantee, it must show a compelling state interest and that the exception is designed to enhance the rights of minors. In re S.L.M., 287 M 23, 951 P2d 1365, 54 St. Rep. 1480 (1997).

Unconstitutional to Impose Both a Juvenile and an Adult Sentence Upon Youth: The 1995 amendments to the purpose section of the Montana Youth Court Act made the Act espouse much more preventative, if not punitive, goals because the Act was amended to seek to prevent delinquency through imposition of enforceable and immediate consequences upon juveniles and to establish programs of detention and community protection. Obviously, it is no longer accurate to reason, as the Supreme Court did in In re C.H., 210 M 184, 683 P2d 931 (1984), that the

Act's infringements upon juveniles' physical liberty are legitimate means of enhancing their protections within the meaning of this section, providing that minors have all the fundamental rights of this article unless specifically precluded by laws that enhance the protection of minors. Moreover, it is no longer accurate to state, as the court did in In re C.S., 210 M 144, 687 P2d 57 (1984), that a Youth Court disposition is strictly for rehabilitation, not retribution. Indeed, the Extended Jurisdiction Prosecution Act (EJPA), by requiring the Youth Court to impose an adult sentence in addition to a juvenile sentence, with the adult portion stayed pending successful completion of the juvenile portion, goes beyond mere rehabilitation of a juvenile and injects the specter of retribution. Thus, the EJPA, on its face, violates the equal protection clause of section 4 of this article, by treating juveniles more harshly than adults. The EJPA also violates this section by reducing, rather than enhancing, juveniles' rights as compared to adults' rights. The state has no compelling state interest in treating a juvenile as an adult and restricting the juvenile's physical liberty beyond the restrictions that are imposed upon an adult who commits the same offense as the juvenile. Furthermore, the paternalistic rationale of *parens patriae* does not apply to distinguish between the treatment of a juvenile and an adult when a juvenile is no longer sentenced solely as a juvenile, but as an adult as well. Although the EJPA is subject to a severability clause, the sentencing portion of the EJPA is necessary to its integrity; thus, the remaining provisions of the EJPA cannot be saved by the severability clause. In re S.L.M., 287 M 23, 951 P2d 1365, 54 St. Rep. 1480 (1997), distinguished in In re S.M.K.-S.H., 2012 MT 281, 367 Mont. 176, 290 P.3d 718.

Youth's Standing to Challenge Imposition of Both Juvenile and Adult Sentence: Youth given both juvenile and adult sentences under the Extended Jurisdiction Prosecution Act, with the adult portion stayed pending successful completion of the juvenile portion, who were not the subject of a proceeding to revoke the stay, had standing to challenge the Act on the ground that the Act subjected them to a longer period of incarceration than that permitted for an adult who committed the same offense. There was a threatened injury to the youth's civil rights, and they suffered a legitimate and realistic fear that the adult sentence would be carried out if they violated the juvenile sentence. In re S.L.M., 287 M 23, 951 P2d 1365, 54 St. Rep. 1480 (1997).

Grant of Petition to Dispose of Evidence Held No Denial of Constitutional Rights — Inclusion of Additional Property for Restitution — Order to Dispose of Property Held Not to Impose Restitution Obligation: Woods was convicted of writing a bad check for $3,830. However, Woods continued to write other bad checks totaling over $30,000, even as of the time that his probation officer was preparing his presentence investigation. The investigation showed that the bad checks had been used to purchase merchandise and to obtain cash. After sentencing, which included a requirement for restitution, the state filed a petition for destruction of evidence, requesting that it be allowed to return the merchandise to the rightful owners, to apply the value of that property to satisfy Woods's obligation to make restitution, and to destroy other property that had been seized as evidence. The District Court granted the petition but stayed enforcement pending appeal. Woods contended that the District Court order granting the petition violated his rights under Art. II, sec. 3, 4, 17, and 22, Mont. Const., and this section and under the 5th, 8th, and 14th amendments to the United States Constitution. The Supreme Court held that Woods had waived his right to object to restitution, even restitution in an amount greater than $3,830, because Woods promised to make restitution in response to the recommendation of his probation officer that Woods make restitution in an amount in the "tens of thousands of dollars". The Supreme Court held, contrary to Woods's claim that the state misinterpreted the District Court order as to the amount of restitution, that the District Court had ordered Woods to make "full restitution" and that the order included the amounts over and above the $3,830 involved in the underlying conviction for writing a bad check. Woods also objected to the timing of the state's petition, arguing that he was not required to make restitution until he was released from jail. In response, the Supreme Court pointed out that Woods misconstrued the purpose of the state's petition; all the state wanted to do was receive permission from the District Court to return the merchandise to its rightful owners and apply the value to Woods's obligation for restitution. For this reason, the Supreme Court held that the District Court did not err when it granted the state's petition. St. v. Woods, 286 M 355, 951 P2d 981, 54 St. Rep. 1445 (1997).

Mandatory Transfer of Prosecution of Older Youth to District Court — No Denial of Equal Protection Under U.S. or Montana Constitution: Plaintiff alleged that the automatic transfer provisions of 41-5-206(3) infringed upon a youth's rights to equal protection under the equal protection provisions of the U.S. Constitution and the Montana Constitution. The Supreme Court held that a classification based on age and gravity of the offense for automatic transfer of prosecution to District Court from Youth Court requires only a rational relationship to a legitimate

state interest. The court found that interest in curbing homicides committed by teenagers and in protecting society from these violent offenders. Strict scrutiny analysis under federal equal protection is not required because procedural due process is not a fundamental right, nor is age a suspect class. Under Art. II, sec. 4, Mont. Const., the Supreme Court determined that no provision exists in the Montana Constitution that provides a youth with a fundamental right to special treatment, and thus the state's middle tier analysis is inapplicable and only a rational relationship to a legitimate state interest is required. In re Wood, 236 M 118, 768 P2d 1370, 46 St. Rep. 228 (1989).

Mandatory Transfer of Prosecution of Older Youth to District Court — Not Violation of Doctrine of Separation of Powers: The automatic transfer provisions of 41-5-206(3), providing for the prosecution of older youth for certain offenses in District Court rather than Youth Court, are not a usurpation of the judiciary's power to hear and decide motions and is not in violation of the Montana Constitution's requirement for separation of powers. The transfer provision is within the Legislature's inherent power to create other courts under Art. VII, sec. 1, Mont. Const. The 1987 amendment providing for transfer without hearing on mitigating factors was merely a revision of protection afforded youth under earlier legislative action and not a violation of the separation of powers doctrine. In re Wood, 236 M 118, 768 P2d 1370, 46 St. Rep. 228 (1989).

Youth Sixteen Years Old and Older — Mandatory Transfer of Homicide Prosecution to District Court — No Denial of Due Process: A youth does not have a constitutional due process right to a hearing to determine whether a homicide prosecution should be transferred to District Court. However, whatever criteria is set in state law for the transfer must be followed. The Supreme Court held that in a homicide prosecution, the requirement for a transfer hearing for youth between 12 years and 16 years of age and for a mandatory transfer for youth 16 years old or older is permissible. Since no irregularities in the transfer of an older youth for homicide prosecution in District Court were alleged, there was no violation of his federal due process rights. In re Wood, 236 M 118, 768 P2d 1370, 46 St. Rep. 228 (1989).

Statute of Limitations — State — Child: A male child was born out of wedlock. The State obtained an assignment of the mother's claim for support from the putative father. The State brought an action against the father more than 3 years after the birth of the child. As to children born out of wedlock, the Statute of Limitations in 40-6-108 creates an unfair burden and unfairly discriminates against them and is therefore unconstitutional. Their guardian, guardian ad litem, or next friend cannot be barred access to the courts for them. However, in that the State's interest is economic, the paternal parent protection offered by the statute as against the State has a substantial relation to the intended purpose and therefore, as against the State, is constitutional. St. v. Wilson, 193 M 318, 631 P2d 1273, 38 St. Rep. 1299 (1981).

Law Review Articles

Children, Language and the Law, Shuy, 66 Mont. L. Rev. 61 (2005).

Fixing Foster Care or Reducing Child Poverty: The Pew Commission Recommendations and the Transracial Adoption Debate, Ramsey, 66 Mont. L. Rev. 21 (2005).

The Practice of Law for Children, Ventrell, 66 Mont. L. Rev. 1 (2005).

Parental Notification of Abortion and Minors' Rights Under the Montana Constitution, Hayhurst, 58 Mont. L. Rev. 565 (1997).

Section 16. The administration of justice.

Convention Notes

Adds to 1889 constitution by specifically granting to a person injured in employment the right to sue a third party causing the injury, except his employer or fellow employee when his employer provides coverage under workmen's compensation laws.

Compiler's Comments

Void Election: Constitutional Initiative No. 30, proposed by initiative petition and approved at the general election held November 4, 1986, amended this section as follows: "Section 16. The administration of justice. (1) Courts of justice shall be open to every person, and speedy remedy afforded for injury of person, property, or character. Right and justice shall be administered without sale, denial, or delay.

(2) No person shall be deprived of legal redress for injury incurred in employment for which another person may be liable except as to fellow employees and his immediate employer who hired him if such immediate employer provides coverage under the Workmen's Compensation Laws of this state.

(3) This section shall not be construed as a limitation upon the authority of the legislature to enact statutes establishing, limiting, modifying, or abolishing remedies, claims for relief,

damages, or allocations of responsibility for damages in any civil proceeding; except that any express dollar limits on compensatory damages for actual economic loss for bodily injury must be approved by a 2/3 vote of each house of the legislature."

In State ex rel. Montana Citizens for the Preservation of Citizens' Rights v. Waltermire, 227 M 85, 738 P2d 1255, 44 St. Rep. 913 (1987), the Montana Supreme Court held that the proposed amendment failed because of material constitutional defects in the manner it was presented to the electors.

Former Constitutional Provision: This section is similar to Art. III, sec. 6, 1889 Mont. Const.

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DECISIONS UNDER 1972 CONSTITUTION

GENERAL

Entry of Trial Court Judge Into Jury Room Without Defendant — No Infringement on Defendant's Right to Public Trial: The defendant moved for a new trial after a jury conviction. One issue asserted by the defendant was that he was deprived of his right to a public trial when the District Court Judge approached the jury room outside his presence while the jury was deliberating, briefly addressed the jury regarding whether it would finish that night, and then left. The District Court held a hearing regarding the interaction with the jury outside the defendant's presence and denied the motion for a new trial. On appeal, the Supreme Court affirmed, reasoning that in order to determine whether a closure to the public violates the right to a public trial or is merely trivial, courts generally look toward how the closure relates to the interests a public trial is designed to protect, as well as to the scope and duration of the closure and whether the trial court intentionally effectuated the closure. As applied in this case, the scope, duration, and context of the closure did not impair the fairness of the defendant's trial. The interaction between the judge and the jury occurred after evidence and argument concluded, the interaction was only for a few moments regarding an administrative matter, and the appearance of fairness was preserved when the interaction with the jury was placed on the record after allowing both parties to present evidence on the matter. St. v. Northcutt, 2015 MT 267, 381 Mont. 81, 358 P.3d 179. See also St. v. Tapson, 2001 MT 292, 307 Mont. 428, 41 P.3d 305.

ACCESS TO COURT

Judgment Discharged Prior to Bankruptcy — Case Not Moot: A debtor's attempt to recover items seized from his home to satisfy a judgment in a separate action issued prior to his bankruptcy was not rendered moot by the bankruptcy. Hall v. Hall, 2015 MT 226, 380 Mont. 224, 354 P.3d 1224.

Forum Selection — Similar Issues to Be Tried in Same Forum: After a dispute arose involving two contracts between two companies based in California, one company filed suit in California and the other filed suit in Montana. The Montana District Court denied a motion to dismiss or stay, prompting a petition to the Supreme Court for supervisory control. Applying the doctrine of forum non conveniens, the Supreme Court granted the petition that the Montana suit should be dismissed, concluding that the terms of one contract required the contract to be litigated in California and that the second contract, which involved similar issues, would be more appropriately tried in the same forum in order to promote judicial expediency and prevent inconsistent judgments. San Diego Gas & Electric Co. v. Ninth Judicial District Court, 2014 MT 191, 375 Mont. 517, 329 P.3d 1264.

Factors in Sanctioning Person as Vexatious Litigant Adequately Weighed — Requirement of Court Approval for Future Lawsuits Proper — Mandatory Bond for Future Lawsuits Against Court or Court Employees Abuse of Discretion: In a temporary order of protection proceeding, the District Court determined that the respondent abused the state judicial system by repeatedly filing frivolous, malicious, and vexatious lawsuits. Accordingly, the District Court enjoined the respondent from filing any complaint or initiating any proceeding without leave from the District Court Judge. Additionally, the District Court order provided that if a lawsuit or proceeding named judges or court employees, the respondent had to tender a $50,000 bond sufficient to satisfy an award of sanctions. On appeal, the Supreme Court concluded that the District Court adequately

weighed the factors set out in Motta v. Granite County Comm'rs, 2013 MT 172, 370 Mont. 469, 304 P.3d 720, in sanctioning the respondent as a vexatious litigant through imposing a prefiling order. However, the Supreme Court struck the requirement of a $50,000 bond requirement because there was no evidence of past litigation involving judges or court employees. Boushie v. Windsor, 2014 MT 153, 375 Mont. 301, 328 P.3d 631.

No Error in Sanctioning Plaintiff as Vexatious Litigant and Prohibiting Filing of Further Actions: The Supreme Court held that the District Court had not erred in requiring the plaintiff to pay the county's attorney fees and prohibiting him from filing any lawsuits against governmental agencies without prior approval of the District Court on the basis that he was a vexatious litigant. The Supreme Court held that the District Court had properly applied the five-part test established by the Ninth Circuit Court of Appeals in Molski v. Evergreen Dynasty Corp., 500 F.3d 1047 (9th Cir. 2007). Motta v. Granite County Comm'rs, 2013 MT 172, 370 Mont. 469, 304 P.3d 720.

Standing — Juridical Relationship Exception: Plaintiff employees sued defendant employers, healthcare businesses, challenging the discontinuation of a sick leave buyback program. Defendants claimed the plaintiffs lacked standing to sue the defendants, for whom the plaintiffs did not work directly. The Supreme Court, applying the juridical relationship exception adopted in Murer v. St. Comp. Mut. Ins. Fund, 257 Mont. 434, 849 P.2d 1036 (1993), concluded that the plaintiffs had standing to sue all of the defendants because the injuries alleged were the result of a concerted scheme and a juridical link existed between the defendants based on common ownership and identical employment terms. Chipman v. NW. Healthcare Corp., 2012 MT 242, 366 Mont. 450, 288 P.3d 193.

Parties Not Members of Special Lighting District — Not Directly Affected by Use of Non-LED Lights — No Standing to File Complaint with Public Service Commission: Four Montana taxpayers filed a complaint with the Public Service Commission (PSC) against NorthWestern Energy over ownership overcharges and its refusal to use LED streetlights. NorthWestern filed a motion to dismiss, claiming that the taxpayers lacked standing because they were not "directly affected" pursuant to 69-3-321 since none were members of a special lighting district. The PSC dismissed the complaint and the taxpayers appealed to District Court. After the District Court affirmed the decision, the taxpayers appealed to the Supreme Court, which agreed that the taxpayers were not directly affected by NorthWestern's actions. Moreover, the Supreme Court rejected the taxpayers' theories that they had standing based on either the constitutional right to a "clean and healthy environment" or on their status as general taxpayers. Williamson v. Pub. Serv. Comm'n, 2012 MT 32, 364 Mont. 128, 272 P.3d 71.

Taxpayer in Street Lighting District — "Directly Affected" Party — Standing to Challenge Lighting Rates and Policy — PSC and District Court Reversed: Four Montana taxpayers filed a complaint with the Public Service Commission (PSC) against NorthWestern Energy over ownership overcharges and its refusal to use LED streetlights. NorthWestern filed a motion to dismiss, claiming that the taxpayers lacked standing because they were not "directly affected" by its actions as none of them were members of a special lighting district. The taxpayers amended their complaint to include taxpayers who were members of a special lighting district. The PSC dismissed the amended complaint and noted that even the members of a special lighting district were not "directly affected" because they did not pay NorthWestern directly; instead, they paid taxes to a municipality, which in turn paid NorthWestern. The Supreme Court concluded that PSC's interpretation of "directly affected" was too restrictive and held that there is a sufficiently close logical, causal, or consequential relationship between NorthWestern's rates and charges and the taxes paid by the members of a special lighting district. The Supreme Court reversed and remanded the matter to the PSC. Williamson v. Pub. Serv. Comm'n, 2012 MT 32, 364 Mont. 128, 272 P.3d 71.

Analysis for Jurisdiction of District Court Over Tribal Member and Tribal Property: The correct analysis in both regulatory and adjudicatory actions involving tribal members or lands is whether the exercise of jurisdiction by a state court or regulatory body is preempted by federal law or, if not, whether it infringes on tribal self-government. If either element is met, a state may not assume civil jurisdiction or take regulatory action over Indian people or their territories within the boundaries of their reservations. In re Estate of Big Spring, 2011 MT 109, 360 Mont. 370, 255 P.3d 121, overruling Iron Bear v. District Court, 162 Mont. 335, 512 P.2d 1292 (1973), in its entirety and In re Marriage of Skillen, 1998 MT 43, 287 Mont. 399, 956 P.2d 1, in part and overruling numerous cases to the extent they followed the principles of Iron Bear or Skillen.

No Subject Matter Jurisdiction for District Court in Probate for Tribal Member — Jurisdiction Presumptively With Tribal Court — Proceedings Before District Court Void: The District Court

erred when it assumed subject matter jurisdiction over the probate of an enrolled Blackfeet Tribal member's estate when all of the decedent's estate property was located within the exterior boundaries of the Blackfeet Reservation. The Supreme Court overruled Iron Bear and held that civil jurisdiction over non-Indians and Indians on reservation lands presumptively lies in the tribal court. Absent express congressional limitation, the tribe maintained sovereign power and exclusive jurisdiction over the probate of the decedent. A state court has an independent obligation to determine whether it has jurisdiction in a case involving an Indian person and Indian Country. The court declared void the 7 years of proceedings before the District Court with reference to the decedent's estate. In re Estate of Big Spring, 2011 MT 109, 360 Mont. 370, 255 P.3d 121, overruling Iron Bear v. District Court, 162 Mont. 335, 512 P.2d 1292 (1973), in its entirety and In re Marriage of Skillen, 1998 MT 43, 287 Mont. 399, 956 P.2d 1, in part and overruling numerous cases to the extent they followed the principles of Iron Bear or Skillen.

Jurisdiction of Montana Courts' Over Tribal Member: Montana courts have jurisdiction over a tribal member whose actions involve significant contacts with the state outside reservation boundaries. By taking a constitutional oath of office to support, protect, and defend the Montana Constitution, a justice of the peace made himself subject to Montana courts when running for elective tribal office. Judicial Standards Comm'n v. Not Afraid, 2010 MT 285, 358 Mont. 532, 245 P.3d 1116.

Medical Negligence — Right of Tribal Member to Pursue State Court Action Against Nontribal Member — State Court Jurisdiction: The plaintiff alleged medical negligence against a medical clinic that cared for the plaintiff's husband, who was a member of the Confederated Salish and Kootenai Tribes. The plaintiff was not a tribal member, the clinic was not affiliated with a tribe, and the acts took place both on and off the reservation. The District Court held that state courts do not have jurisdiction on the Confederated Salish and Kootenai Reservation over actions for medical negligence. The plaintiff appealed, and the Supreme Court reversed. The court noted that it is well established under both state and federal law that tribal members may bring civil actions against nontribal members in state court, and that tribal autonomy and self-government are not impeded when a state allows an Indian to seek relief in state court against a non-Indian for a claim arising in Indian country. This right of access to courts applies to residents of each Montana Indian reservation. Therefore, the plaintiff was not precluded from bringing the medical negligence action in state court and the state court had jurisdiction to hear the case. Morigeau v. Gorman, 2010 MT 36, 355 Mont. 225, 225 P.3d 1260. See also State ex rel. Iron Bear v. District Court, 162 Mont. 335, 512 P.2d 1292 (1973), and Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'r, 476 US 877 (1986).

Pretrial Detainees Entitled to Visitation With Counsel — Precautions to Protect Public Health Allowed: The Office of State Public Defender sought a writ of mandamus requiring Missoula County to vacate its visitation policy at the county detention center that suspended contact visits during flu season. The Supreme Court noted that pretrial detainees have an undisputed constitutional right to access to the courts, which includes contact visitation with counsel, and that the right may not be arbitrarily abridged. The public defender's office established that the visitation policy precluded pretrial detainees from exercising their constitutional rights, and because the detainees lacked a plain, speedy, and adequate remedy to protect that right, a writ of mandamus was appropriate. The court ordered that the detention facility immediately allow attorneys representing pretrial detainees to conduct private, confidential visits with their clients but also held that the detention facility could impose reasonable precautions related to public health, such as masking and hand sanitizing to reduce the risk of infection. Office of St. Public Defender v. McMeekin, 2009 MT 439, 354 M 130, 224 P3d 616 (2009).

Change in Credit Agreement Via "Bill Stuffer" Insufficient Notice on Which Unilateral Change to Contract Acceptable — Enforcement of Arbitration Clause: Defendant issued plaintiff a credit card and subsequently sent a "bill stuffer" with plaintiff's monthly statement that significantly changed the terms of the credit agreement. The change provided for arbitration of all credit disputes and prohibited jury trials and class actions. When plaintiff later filed a claim against defendant for multiple fair debt collections, defendant attempted to compel arbitration, asserting that plaintiff agreed to the credit agreement change through plaintiff's continued use of the credit card. The District Court agreed with defendant, issued an order compelling arbitration, and dismissed plaintiff's action. Plaintiff appealed and the Supreme Court reversed. Making a change in the credit agreement through use of a "bill stuffer" did not provide sufficient consumer notice on which acceptance of a unilateral change to a contract of adhesion could expressly or implicitly be found, including plaintiff's waiver of the fundamental constitutional right to a jury trial. The case was reversed for further proceedings. Kortum-Managhan v. Herbergers NBGL,

2009 MT 79, 349 M 475, 204 P3d 693 (2009), following Keesun Partners v. Ferdig Oil Co., Inc., 249 M 331, 816 P2d 417 (1991), and followed in Riehl v. Cambridge Ct. GF, LLC, 2010 MT 28, 355 Mont. 161, 226 P.3d 581. See also Kloss v. Edward D. Jones & Co., 2002 MT 129, 310 M 123, 54 P3d 1 (2002).

Forum Selection Clause Valid by Operation of Choice of Law Clause: In a contract containing a paragraph that contained both a choice of law clause for Washington state and a forum selection clause that included Spokane, Washington, the Supreme Court determined that the choice of law clause was valid under the factors set out in Modroo v. Nationwide Mutual Fire Insurance Company, 2008 MT 275, 345 M 262, 191 P3d 389 (2008), and since Washington law recognizes forum selection clauses and Appleway chose Spokane as the venue, Montana venue is improper. Polzin v. Appleway Equipment Leasing Inc., 2008 MT 300, 345 M 508, 191 P3d 476 (2008), followed in San Diego Gas & Electric Co. v. Ninth Judicial District Court, 2014 MT 191, 375 Mont. 517, 329 P.3d 1264.

How State Law Preempted by Federal Law: The Montana Supreme Court recognizes three ways in which federal law may preempt state law. First, Congress may include a preemption clause in a federal statute that expressly provides that state law may not apply in the area governed by the federal statute. Second, federal law may supersede state law when a state law actually conflicts with a federal law. This conflict preemption occurs either when one cannot comply with both federal and state law or when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Third, Congress may imply its intent to preempt state law in a particular area when regulation of the area is so comprehensive that it is reasonable to conclude that Congress intended to occupy the field and leave no room for supplementary state regulation. In analyzing whether preemption has occurred, the Supreme Court starts with the presumption that the historic powers of the states were not to be superseded by federal law unless that was the clear and manifest purpose of Congress. Fenno v. Mtn. W. Bank, 2008 MT 267, 345 M 161, 192 P3d 224 (2008). See also Favel v. Am. Renovation & Constr. Co., 2002 MT 266, 312 M 285, 59 P3d 412 (2002), and Vitullo v. Int'l Bd. of Elec. Workers, Local 206, 2003 MT 219, 317 M 142, 75 P3d 1250 (2003).

Wrongful Discharge of Bank Officer Whistleblower Not Preempted by Federal Law: A bank officer was dismissed after blowing the whistle on a bank's lending practices. The officer filed a state wrongful discharge claim. The bank argued that federal law in 12 U.S.C. 24 (Fifth) and 12 U.S.C. 1831j(a)(1) preempted the state claim. The District Court agreed and granted summary judgment for the bank. The officer appealed and the Supreme Court reversed. Preemption cannot shield a bank from tort liability for dismissing an employee in violation of a state public policy that is consistent with the purpose of federal statutes, nor may a bank avail itself of the federal "at pleasure" provision unless one cannot comply with both state and federal law or the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. The state retaliatory discharge provision comports with the purpose of the federal whistleblower statute and does not present an obstacle to the federal law, nor does a conflict exist between the policies of the state and federal law, because both laws protect employees who take steps in their employment to promote the enforcement of laws and regulations. Fenno v. Mtn. W. Bank, 2008 MT 267, 345 M 161, 192 P3d 224 (2008), following Tiede v. CorTrust Bank, N.A., 748 NW 2d 748 (S. Dak. 2008). See also Favel v. Am. Renovation & Constr. Co., 2002 MT 266, 312 M 285, 59 P3d 412 (2002).

Duty of Unsuccessful Intervenor to Monitor Litigation in Order to Perfect Appeal — No Due Process Violation in Failure to Notify Unsuccessful Intervenor of Final Judgment: The Department of Environmental Quality issued a pollution discharge elimination system permit to a silver mine company. Plaintiffs challenged the issuance of the permit, but the company was not named in the action. About 3 years after the suit was filed and while plaintiffs' motion for summary judgment was pending, the company sought to intervene as a defendant in the action, but the motion to intervene was dismissed as untimely. The company did not participate further in the litigation or seek supervisory control by the Supreme Court. Ultimately, final judgment was entered for the department, but no party served a notice of entry of judgment on the company. Plaintiffs appealed part of the final judgment, but the company sought to dismiss the appeal, arguing that the company was entitled to service of notice of entry of judgment as a matter of due process. The Supreme Court disagreed. As a nonparty, the company was not entitled to notice of judgment. Additionally, the company failed to exercise its right to seek supervisory control, but in the absence of supervisory control, the company could have monitored the litigation in order to take a timely appeal as an unsuccessful intervenor following final judgment. The company's obligation, in order to protect its claimed interests, was to monitor the litigation and file a timely

appeal. The Supreme Court declined to apply due process as a remedy for irresponsibility or to relieve the company of the duty to superintend its own affairs. Clark Fork Coalition v. Dept. of Environmental Quality, 2007 MT 176, 338 M 205, 164 P3d 902 (2007).

Standing of Person in Zoning District to Bring Action Against Developer of Condominiums in Same District: To establish standing to bring suit, a complaining party must clearly allege past, present, or threatened injury to a property right or a civil right that is distinguishable from an injury to the public generally. Thus, a property owner who lived in the same zoning district as a proposed condominium development and who would be directly affected by a subdivision review or the lack of a subdivision review had standing to challenge the development. Shults v. Liberty Cove, Inc., 2006 MT 247, 334 M 70, 146 P3d 710 (2006), following Fleenor v. Darby School District, 2006 MT 31, 331 M 124, 128 P3d 1048 (2006). Fleenor was overruled in Schoof v. Nesbit, 2014 MT 6, 373 Mont. 226, 316 P.3d 831, to the extent Fleenor requires a plaintiff in a right to know or right to participate case to allege an injury beyond failure to receive notice or to allege a personal stake in a particular governmental decision for purposes of establishing standing to pursue a claim.

Judgment on Pleadings — Pro Se Litigant Not Denied Opportunity to Be Heard or Access to Courts: Plaintiff filed an action for damages for breach of contract and nonpayment of an account. Defendant filed a pro se response, after which plaintiff moved for judgment on the pleadings. The District Court granted the motion based on defendant's failure to state a legal defense. Defendant appealed on grounds that he was denied the opportunity to be heard and denied access to the courts, but the Supreme Court affirmed. Although pro se litigants may be given a certain amount of latitude, that latitude cannot be so broad as to prejudice the other party, and it is reasonable to expect pro se litigants to adhere to procedural rules. Here, defendant's filing of an answer in response to the complaint demonstrated access to the courts, and defendant identified no impediment beyond the pro se status that prevented pleading a legal defense. Defendant was not denied the opportunity to be heard or access to the courts. Neil Consultants, Inc. v. Lindeman, 2006 MT 80, 331 M 514, 134 P3d 43 (2006).

Reasonable Accommodation of Incarcerated Plaintiff's Opportunity to Prosecute Claim — Dismissal for Failure to Prosecute Affirmed: Following remand of Hauschulz v. Michael Law Firm, 2001 MT 160, 306 M 102, 30 P3d 357 (2001), the District Court gave Hauschulz, who was incarcerated out of state, about 1 1/2 years to obtain counsel and participate in the proceedings, but Hauschulz was unable to specify when he would be able to prosecute the claim. The District Court subsequently dismissed Hauschulz's claim for failure to prosecute, and Hauschulz appealed. The Supreme Court affirmed, holding that although incarceration undoubtedly restricts one's ability to exercise civil liberties, it does not give rise to a right to an indefinite postponement of civil proceedings, particularly over the objection of the other party. Applying the factors in Westland v. Weinmeister, 259 M 412, 856 P2d 1374 (1993), the Supreme Court found no abuse of the District Court's discretion in balancing the competing public policy interests when dismissing Hauschulz's claim with prejudice. Hauschulz v. Michael Law Firm, 2005 MT 189, 328 M 95, 117 P3d 908 (2005).

No Res Judicata Absent Final Judgment in Related Case: Brown was one of 64 prisoners who filed a complaint in 2002 alleging that the Department of Corrections improperly transferred prisoners to prisons where treatment, training, and rehabilitation opportunities were not available. While that case was pending, Brown filed suit in 2004 against the Department, alleging that his liberty interest in parole was violated because the Department transferred him to locations where he was unable to obtain the sex offender treatment required for parole eligibility. The District Court concluded that the 2004 case was barred by res judicata because Brown was a plaintiff in the 2002 case, which presented identical claims. Brown appealed, and the Supreme Court reversed and remanded. Under Audit Serv., Inc. v. Anderson, 211 M 323, 684 P2d 491 (1984), the primary requirement necessary to sustain a plea of res judicata is that there be a judgment on the merits. Because the 2002 case was still pending, dismissal of the 2004 case on res judicata grounds was error. Brown v. Dept. of Corrections, 2005 MT 58, 326 M 231, 108 P3d 498 (2005).

Preclusion of Wrongful Discharge Suit by Collective Bargaining Agreement Not Unconstitutional Impediment to Access to Courts: When plaintiff filed a wrongful discharge claim, defendant pointed out that the employment was covered by a union collective bargaining agreement (CBA) and that 39-2-912(2) precludes an employee covered by a CBA from seeking relief under the Wrongful Discharge From Employment Act. Plaintiff argued that if she was precluded from bring a wrongful discharge claim solely because her employment was covered by a CBA, then 39-2-912 unconstitutionally violated her access to courts, full redress, and a jury

trial. However, constitutionality of a statute is presumed unless the person challenging it proves unconstitutionality beyond a reasonable doubt. Here, plaintiff presented nothing to overcome the presumption of constitutionality. Plaintiff's argument concerning lack of legal redress also failed because a possible action against the union was still available. LaFournaise v. Mont. Developmental Center, 2003 MT 240, 317 M 283, 77 P3d 202 (2003).

Common-Law Recognition and Sovereignty of Little Shell Tribe — Suit Against Tribal Officials Barred: Plaintiffs were candidates in an election of the Little Shell Tribe of Indians and sued in Montana District Court for tort damages and injunctive relief against the incumbent candidates, claiming that plaintiffs had won the election. The District Court dismissed on grounds of lack of jurisdiction, and plaintiffs appealed. The Supreme Court noted that the tribe had been pursuing federal tribal recognition since the 1930s, but as yet, the tribe is not recognized by the federal government. Nevertheless, Montoya v. U.S., 180 US 261 (1901), establishes criteria for common-law recognition of a tribe. The court examined the Montoya criteria and held that the Little Shell Tribe satisfied each element of the test for common-law recognition, so the tribe is entitled to sovereignty. Tribal members are of the same or similar race, are united in a community, exist under one leadership or government, and inhabit a particular though sometimes ill-defined territory. Further, under Santa Clara Pueblo v. Martinez, 436 US 49 (1978), Indian tribes and their officials enjoy sovereign immunity from suit unless expressly limited by Congress. Thus, because the tribal officials in this case were acting in their official capacities, suit against them in state court was barred under the doctrine of sovereign immunity. Dismissal of the action by the District Court for lack of jurisdiction was affirmed. Koke v. Little Shell Tribe of Chippewa Indians of Mont., Inc., 2003 MT 121, 315 M 510, 68 P3d 814 (2003).

Irrigation District Has Standing to Challenge Constitutionality of Legislation Affecting Land Included in District: The Legislature enacted legislation primarily directed at the Missoula Irrigation District (MID) allowing certain landowners to opt out of MID. MID challenged Geil's petition for removal from MID on grounds that the legislation was unconstitutional. Geil argued that MID did not have standing to challenge the legislation. The Supreme Court, applying the law as it existed in 1997, held that MID did have standing because under 85-7-1802 and 85-7-1846 (now terminated), only MID could object to a petition for removal and further that if certain individuals were allowed to withdraw from MID, the remaining members would be subject to pay an increased amount to maintain MID. Geil v. Missoula Irrigation District, 2002 MT 269, 312 M 320, 59 P3d 398 (2002).

State Remedy and State Court Enforcement of Contract Wages Required by Federal Davis-Bacon Act: The District Court had subject matter jurisdiction of state contract law claims against a contractor and subcontractors by workers hired to build housing on Malmstrom Air Force base under a contract between the contractor and the Air Force. The workers claimed that they were not paid the prevailing wages required by the federal Davis-Bacon Act. The defendants claimed that there was no private right of action and that the workers had not exhausted their federal administrative remedies. The evidence showed that the workers extensively used the administrative remedies, taking all proper steps to attempt to administratively resolve the dispute. The workers were not seeking to enforce the Davis-Bacon Act labor standards; they sought to enforce a contract that includes wages required by the Act, a subtle but important distinction. The Act does not preempt the workers' right to a state enforcement action, using state remedies, under the facts of this case. That right is in keeping with Montana's longstanding policy and constitutional guarantee in this section of citizens' access to Montana courts when they are aggrieved. As third-party beneficiaries of the contract, the workers have the right to sue in state court to enforce the contract under state law. Favel v. Am. Renovation & Constr. Co., 2002 MT 266, 312 M 285, 59 P3d 412 (2002).

Unincorporated Association Considered Person Subject to Suit: MacPheat filed a libel complaint against Schauf and the insurance company association to which Schauf belonged, claiming that Schauf wrote a libelous letter on the association letterhead to the judge who was presiding over one of MacPheat's criminal proceedings. The association moved to be removed from the action, asserting that it was simply a federally registered service mark and not a person or legal entity subject to service of process. The District Court agreed and dismissed the association from the suit. MacPheat appealed, and the Supreme Court reversed. The association made the same service mark argument in Oliver v. Farmers Ins. Group of Cos., 941 P2d 985 (Okla. 1997). In that case, the Oklahoma Supreme Court acknowledged that under traditional common law, a voluntary, unincorporated association could not be sued under its name because it did not have a legal status apart from that of its individual members, but that because of the unjustness of the rule in present day society, the rule has been modified in many jurisdictions. The Oklahoma

court dismissed the service mark argument, because whatever else the association did, it clearly had a name under which a number of companies insured against risks for profit. The Montana Supreme Court found that reasoning persuasive. An unincorporated association was defined in Assoc. Press v. Mont. Senate Republican Caucus, 286 M 172, 951 P2d 65 (1997), as a voluntary group of persons, without a charter, formed by mutual consent for the purpose of promoting a common enterprise or prosecuting a common objective. The association in this case was thus considered a person within the definition in former Rule 4A, M.R.Civ.P. (now superseded), and to conclude otherwise and sanction the association's intangible classification would unnecessarily restrict those who can be sued in Montana courts and fly in the face of Montana's constitutional open courts provision. The association name was one under which its affiliates transacted business, so MacPheat could properly serve and bring suit against the association under 25-5-104 without naming and serving process on the members individually. However, once the association was brought before the court, MacPheat still had the burden of establishing the liability of the association's members, if any, under the applicable substantive law. MacPheat v. Schauf, 2002 MT 23, 308 M 215, 41 P3d 895 (2002).

Injunction in Arbitration Award Not Restrictive of Constitutional Right to Access Courts: The Langemeiers and Kuehls became involved in a dispute over a county road easement between their adjoining lands, and the dispute eventually was submitted to arbitration. The final arbitration award provided injunctive relief to the Langemeiers by prohibiting the Kuehls from commencing or prosecuting any further action or proceeding regarding the property or challenging the ownership of the parcel. The Kuehls complained that the injunctive language was so overbroad that it took property from them without due process of law and improperly restricted their constitutional right to access courts. However, the initial memorandum of understanding, the settlement agreement, and the final arbitration award all established that the Kuehls had no property interest in the disputed roadway, so they could not complain that they were deprived of the use of property that was not theirs to use. Further, the injunctive language only sought to restrain the Kuehls from contesting matters already decided and from pursuing repetitive claims previously resolved by the settlement agreement concerning property in which they had no interest. The Kuehls had already enjoyed access to the courts as the dispute wound its way through two arbitrations, approval by the District Court, and a Supreme Court appeal. Although the constitution guarantees every person access to the courts, it does not grant a license to relitigate a cause or to burden the resources of the courts with successive claims. Therefore, the injunction did not deny the Kuehls of the use of property or access to the courts, and the arbitration award was affirmed. Langemeier v. Kuehl, 2001 MT 306, 307 M 499, 40 P3d 343 (2001).

Procedural Rules Apply to All Litigants and Not Unconstitutional When Applied to Employees' Claims: Otto's attorney argued that this section precluded limitations on claims by employees against persons other than their employer or fellow employees and that therefore dismissal of the plaintiff's suit because of the 12-month time period required by former Rule 41(e), M.R.Civ.P. (now superseded), to have a summons issued was an unconstitutional limitation on the plaintiff employee's right to bring an action. The Supreme Court held that the plaintiff's case had been properly dismissed because the former Rule 41(e) was a procedural rule that applied equally to all litigants and that to adopt the plaintiff's logic would mean that no rules leading to dismissal of an employee's action would be constitutional, including statutes of limitation. Otto v. Dept. of Fish, Wildlife, and Parks, 2000 MT 333, 303 M 86, 15 P3d 402, 57 St. Rep. 1406 (2000).

Writ of Supervisory Control Inappropriate in Appealing Department of Corrections' Decision Regarding Good Time Allowance — Writ of Habeas Corpus Granted: Inmate Eisenman applied to the Supreme Court for a writ of supervisory control and moved to proceed in forma pauperis, requesting that the court order the Department of Corrections to direct the reduction of his sentence for good time served. Supervisory control is an extraordinary remedy that is appropriate only when a District Court is proceeding upon a mistake of law that, if not corrected, would cause significant injustice and when the remedy by appeal is inadequate. The Supreme Court held that a writ of supervisory control was inappropriate in this case because the court's power to issue that writ extends only to inferior courts, not to other governmental agencies. Eisenman's claims were more appropriately asserted by a writ of habeas corpus because habeas corpus relief is available to every imprisoned person. The state claimed that a writ of habeas corpus was not appropriate either because Eisenman failed to plead that he would be entitled to release if he received the good time credits as requested. However, under Peyton v. Rowe, 391 US 54 (1968), and Garlotte v. Fordice, 515 US 39 (1995), immediate physical release is not the only remedy available under a writ of habeas corpus, so it was not premature to consider a habeas corpus

petition prior to Eisenman's release. The Supreme Court thus considered Eisenman's application for writ of supervisory control to be a petition for writ of habeas corpus and proceeded to consider the good time issue on that basis. Eisenman v. St., 2000 MT 170, 300 M 322, 5 P3d 542, 57 St. Rep. 704 (2000).

Dismissal of Intervention Action Not Clear Error: A husband and wife owed about $6,000 in back taxes on their property, which was in jeopardy of being sold at a tax sale. The couple was unable to obtain a loan because of a prior bankruptcy, so they arranged to transfer the property to the husband's mother, who then took out a loan to pay the taxes, using the property as collateral. When the couple later sought to dissolve their marriage, their petition made no mention of any real property acquired during the marriage. The husband testified at the hearing, but the wife did not attend, and dissolution was granted without addressing the wife's interest in the property. The wife moved to set aside the judgment pursuant to 40-4-135. The District Court subsequently voided the deed transferring the property to the mother, subject to her right to intervene to assert her right to the property. Following a hearing, the court dismissed the mother's motion to intervene, issued a court deed naming the mother as grantor and the husband and wife as grantees to hold the property as tenants in common, and included the property in the marital estate. The mother contended that dismissal of her intervention action constituted a denial of her constitutional rights under section 17 of this article and this section because she was not properly joined as a party. The Supreme Court noted that the mother was served with a summons and a copy of motions to set aside the dissolution decree and was directed to appear at the initial show cause hearing. Her constitutional rights were not violated despite dismissal of her motion to intervene. In re Marriage of Bell, 2000 MT 88, 299 M 219, 998 P2d 1163, 57 St. Rep. 381 (2000).

Statute Establishing Time Bar to Medical Malpractice Actions Not Violative of Constitutional Right to Equal Protection or Access to Court: In 1974, shortly after the premature birth of Richard Best, a doctor placed an umbilical vein catheter in the baby, who subsequently developed liver problems. In 1995, Best filed a complaint against the doctor's estate, claiming that the doctor's actions were negligent, constituting medical malpractice resulting in injuries for which Best sought a variety of damages. The estate moved for summary judgment on grounds that the complaint was time-barred by the statute of limitations in 27-2-205(2). The District Court denied the motion, agreeing with Best that the statute of limitations violated Best's constitutional rights to equal protection of the law and access to courts. Following acceptance of the estate's writ for supervisory control, the Supreme Court reversed. The rational basis test applicable to review of the statute of limitations required only that the classification created by 27-2-205(2) bear a rational relationship to a legitimate legislative purpose. In this case, the statute passed the test because ensuring the availability and affordability of health care services and reducing the costs of medical malpractice insurance are legitimate legislative objectives, and the classification, narrowly defined to minors injured between birth and 4 years of age, was rationally related to the legitimate legislative objectives. Further, Best presented no persuasive argument or authority supporting the contention that the statute was not rationally related to legitimate legislative objectives and therefore failed to meet the burden of establishing that the statute was unconstitutional beyond a reasonable doubt. Best was required to bring the action before October 1, 1989, and failing to do so, the estate was entitled to summary judgment because the statute of limitations applied. Estate of Dennis McCarthy, M.D. v. District Court, 1999 MT 309, 297 M 212, 994 P2d 1090, 56 St. Rep. 1241 (1999), distinguishing Carson v. Maurer, 424 A2d 825 (N.H. 1980), Schwan v. Riverside Methodist Hosp., 425 NE 2d 1337 (Ohio 1983), Sax v. Votteler, 648 SW 2d 661 (Tex. 1983), Barrio v. San Manuel Div. Hosp., Magma Copper, 692 P2d 280 (Ariz. 1984), Strahler v. St. Luke's Hosp., 706 SW 2d 7 (Mo. 1986), Lyons v. Lederle Laboratories, 440 NW 2d 769 (S.Dak. 1989), and Torres v. County of Los Angeles, 257 Cal. Rep. 211 (Cal. App. 1989).

Vagueness of Statute — Standing to Challenge Vagueness — "Reasonable and Prudent" Speed Limit Held Void: Stanko was arrested by Officer Breidenbach of the Montana Highway Patrol for driving 85 miles an hour on a stretch of Highway 200 that was narrow, that had no shoulders, that had occasional frost heaves in the surface of the highway, and where Stanko's view of the road was occasionally obstructed by hills and curves in the highway. Relying on Parker v. Levy, 417 US 733 (1974), the Supreme Court held that Stanko's conduct was, under the circumstances, not so clearly prohibited that Stanko lacked standing to challenge the speed limit on the basis of facial vagueness. The Supreme Court held, citing Grayned v. Rockford, 408 US 104 (1972), Kolender v. Lawson, 461 US 352 (1983), Whitefish v. O'Shaughnessy, 216 M 433, 704 P2d 1021 (1985), and St. v. Crisp, 249 M 199, 814 P2d 981 (1991), that 61-8-303(1) was void for vagueness

because there was no numerical speed limit in the statute and because it was dependent upon each driver of a motor vehicle or each law enforcement officer to determine what the speed limit was under any given set of circumstances. St. v. Stanko, 1998 MT 321, 292 M 192, 974 P2d 1132, 55 St. Rep. 1302 (1998).

Full Faith and Credit Afforded Out-of-State Renewable Child Support Judgment — Res Judicata Applicable: Article IV, sec. 1, U.S. Const., provides that full faith and credit be given in each state to the public acts, records, and judicial proceedings of every other state. As restated in Baker v. Gen. Motors Corp., 522 US 222, 139 L Ed 2d 580, 118 S Ct 657 (1998), a final judgment in one state, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land. When issues of jurisdiction have been determined by one court, the doctrine of res judicata precludes a second court from considering jurisdiction as long as the first court fully and fairly considered the issue, and that judgment, as to jurisdiction, is entitled to full faith and credit in the second court. In the present case, a Utah renewable child support judgment, in which the Utah court established jurisdiction of the parties, was entitled to full faith and credit in Montana, despite contentions by the husband that he no longer had minimum contacts with Utah after moving to Montana. The jurisdiction arguments raised before the Montana Supreme Court were identical to the arguments that were previously raised, fairly considered, and finally decided in Utah, precluding relitigation by the Montana court under res judicata. In re Child Support of Mason, 1998 MT 192, 290 M 253, 964 P2d 743, 55 St. Rep. 803 (1998), followed with regard to full faith and credit of a judgment by an out-of-state court following full and fair consideration of jurisdiction in Genuine Parts Co. v. Rascal's Auto Parts, Inc., 2008 MT 313, 346 M 56, 192 P3d 1153 (2008).

Indians — Subject Matter Jurisdiction Over Dissolution of Marriage — Different Residences of Parties — Factors to Be Considered — Bertelson Followed: Stacey, an enrolled member of the Fort Peck Tribes, married Shane, a non-Indian. After the marriage ceremony, Stacey returned to the Fort Peck Indian Reservation and Shane went to Forsyth, where his parents lived and where he worked. Some time later, Stacey had a child who also became an enrolled member and lived with Stacey on the Fort Peck Indian Reservation. Still later, Shane filed a dissolution action in a state District Court. The District Court ordered joint custody and ordered that Shane would be the primary residential custodian. Approximately 1 month later, the Fort Peck Tribal Court awarded temporary custody to Stacey. She then filed a motion in District Court under former Rules 12(h) and 60, M.R.Civ.P. (now superseded), to dismiss Shane's dissolution action for lack of subject matter jurisdiction. The District Court held that it had subject matter jurisdiction over the case and issued a final decree of dissolution. In that decree, the District Court held that the parties' child had significant contacts both off and on the reservation, held that the District Court shared concurrent jurisdiction with the tribal court, and therefore denied Stacey's motion to dismiss. The Supreme Court reviewed its previous holdings regarding tribal jurisdiction and child custody jurisdiction under the Uniform Child Custody Jurisdiction Act. The Supreme Court also reviewed the purposes of the Indian Child Welfare Act, which, while not strictly applicable to the case before it, cautions that state courts should be careful not to erode the sovereignty of tribes and tribal courts. In reliance upon In re Bertelson, 189 M 524, 617 P2d 121 (1980), the Supreme Court held that the best interests of the child should be determined and followed in deciding whether a state or tribal court has jurisdiction for the purposes of awarding custody but that when an Indian child resides off the reservation, state courts and tribal courts share concurrent jurisdiction. The Supreme Court then held, in further reliance upon Bertelson, that even when jurisdiction is concurrent, it does not mean that states courts should exercise jurisdiction and that in deciding whether to exercise concurrent jurisdiction, the state courts should consider: (1) 40-4-102, 40-4-107, 40-4-211, and 40-7-108; (2) certain policy issues; and (3) the residence of the parties pursuant to 1-1-215. For this reason, the Supreme Court remanded the case to the District Court for a determination of the residence of Stacey and her child, saying that if the District Court determines that both reside on the reservation, the District Court must dismiss the case. However, if the District Court finds that Stacey's child is not a resident of the reservation and that the District Court shares jurisdiction with the tribal court, the District Court must then consider factors from Bertelson, previously discussed by the Supreme Court, to determine whether the District Court or the tribal court is better able to determine the best interests of the child. In re Marriage of Skillen, 1998 MT 43, 287 M 399, 956 P2d 1, 55 St. Rep. 147 (1998).

Deletion of Hanging as Form of Capital Punishment Not Denial of Ability to Present Argument Regarding Cruel and Unusual Punishment: Pursuant to the version of 46-19-103 that was in effect at the time that Langford was sentenced for execution, he affirmatively elected that death

be imposed by hanging rather than lethal injection. Langford appealed to the District Court for a declaration that execution by hanging was cruel and unusual punishment that violated the eighth amendment to the U.S. Constitution. The District Court denied the motion, holding that Langford's choice of hanging rendered the cruel and unusual punishment argument moot. Langford appealed to the appropriate federal courts for a writ of habeas corpus, applying the same argument. During the pendency of Langford's federal habeas corpus proceedings, the Montana Legislature met and amended 46-19-103 by removing the hanging option, rendering the federal proceedings moot and nonjusticiable. Langford asserted that the amendment to 46-19-103 violated numerous constitutional provisions by denying him the ability to present the cruel and unusual punishment argument to the federal courts. The Supreme Court found no merit in Langford's argument that the state Attorney General advised the Legislature to amend 46-19-103 in order to deny Langford the grounds for appeal, because the Attorney General supported but did not initiate the legislation. Further, the court did not agree with Langford's assertion that the amendment rendered the time that Langford spent in pursuing the cruel and unusual punishment argument retroactively useless and chargeable to the state as a form of cruel and unusual punishment in itself, because the eighth amendment argument was not the only claim that Langford pursued. Therefore, the entire time could not be charged to the state as being related to the amendment to 46-19-103. Having concluded that Langford failed to establish any constitutional violations, his petition for writ of injunction staying his execution was denied. Langford v. St., 287 M 107, 951 P2d 1357, 54 St. Rep. 1522 (1997).

Political Caucuses Considered Person Subject to Suit: A political party caucus is by definition considered an unincorporated association or body of two or more persons having a joint or common interest. Drawing no distinction between presession and session caucuses, the Supreme Court held, on the basis of the plain language in former Rule 4A, M.R.Civ.P. (now superseded), that a political party caucus is a person subject to court jurisdiction. Assoc. Press v. Mont. Senate Republican Caucus, 286 M 172, 951 P2d 65, 54 St. Rep. 1360 (1997).

Sale of Trust Lands Within Flathead Reservation — No Jurisdiction Found for Purposes of Breach of Contract, Fraud, and Negligent Misrepresentation: Neuman, an enrolled member of the Confederated Salish and Kootenai Tribes, sought assistance from the Bureau of Indian Affairs (BIA) to clear the title to trust land within the Flathead Reservation so that Neuman could sell it. He also engaged a real estate broker. Both Neuman and prospective buyers, the Krauses, made considerable efforts to consummate the sale, but Neuman was informed by the BIA that there was a substantial cloud on the title. Neuman therefore terminated the listing agreement, and the Krauses sued for damages, alleging breach of contract, fraud, constructive fraud, fraud in the inducement, and negligent misrepresentation. The District Court, on the recommendation of a special master and after applying the test laid out in State ex rel. Iron Bear v. District Court, 162 M 335, 512 P2d 1292 (1973), found a lack of subject matter jurisdiction. The Supreme Court held that 25 U.S.C. 345 and 28 U.S.C. 1353 vest exclusive jurisdiction in the federal courts over disputes involving allotted lands within Indian reservations and that 28 U.S.C. 1360 preempted its jurisdiction. The Supreme Court also held that the Krauses' lawsuit was a dispute involving title to allotted lands even though the action was a tort claim and breach of contract claim because all of the Krauses' claims could not be separated from questions of title to Indian trust lands. Noting that it had already held in In re Marriage of Wellman, 258 M 131, 852 P2d 559 (1993), that an attempt by state courts to adjudicate rights in Indian trust land for the purpose of money damages was precluded by federal law, the Supreme Court held that it made no difference that the Krauses had deleted from their complaint a prayer for specific performance. The claims could still not be separated from the issue of title to Indian lands. Krause v. Neuman, 284 M 399, 943 P2d 1328, 54 St. Rep. 937 (1997).

Inability to Pay for Second Medical Examination Held Not to Deny Access to Justice: Grooms filed a workers' compensation claim with her insurer, the State Fund, alleging that she suffered from a skin allergy condition. The State Fund denied liability under the Workers' Compensation Act and requested the Department of Labor and Industry to process the claim under the Occupational Disease Act of Montana (now repealed and merged with Workers' Compensation Act) by providing her with a medical examination. Subsequently, Grooms claimed that her inability to pay for a second medical examination denied her right to access to justice. The Workers' Compensation Court concluded that when her claim was denied under the Workers' Compensation Act, Grooms retained the right under 39-72-611 (now repealed) to have her claim resolved by the Workers' Compensation Court. Therefore, Grooms was not precluded from pursuing her claim and thereby denied access to justice. The Supreme Court affirmed the Workers' Compensation Court, noting that when her claim was denied, Grooms was informed

by an order of the Department that she had the right to request a second examination under 39-72-602 (now repealed), which she would pay for, and a right to request a hearing pursuant to 39-72-611 (now repealed) before the Department issued its final determination. The Supreme Court noted that Grooms' right to a hearing to pursue her claim was not dependent upon a second medical examination. Thus, she was not denied access to justice by the requirement that she pay for any second medical examination. Grooms v. Ponderosa Inn, 283 M 459, 942 P2d 699, 54 St. Rep. 725 (1997).

Limitation on Entitlement to Uninsured Employers' Fund Benefits Not Equal Protection Violation or Restriction on Access to Courts: Zempel was injured while working for an enrolled tribal member on a reservation. Although the tribe carried insurance covering tribal members, Zempel's employer was not covered by workers' compensation insurance, nor was Zempel an enrolled tribal member. Zempel sought benefits from the tribe's insurer through tribal court, but it was determined that the employer was not required to carry insurance. Zempel then sought benefits under the uninsured employers' fund, but the claim was denied because the employer was not an uninsured employer as defined in 39-71-501. Zempel appealed on the grounds that 39-71-501 deprived him of equal protection and violated his constitutional right of access to courts. However, equal protection does not require that all persons be treated alike regardless of whether their circumstances are the same but only that all persons be treated alike under like circumstances. Only injured employees of employers meeting the definition of uninsured employer contained in 39-71-501 are entitled to the substitute workers' compensation benefits that the uninsured employers' fund was created to provide to injured employees of employers who have failed to properly comply with the law. The limitation on entitlement to uninsured employers' fund benefits bears a reasonable relationship to the purpose of that law because it is only those employers subject to the law in the first place upon whom the state can impose the reimbursement and penalty obligations that provide the source of the uninsured employers' fund benefits. Applying the rational basis test, the Supreme Court found no constitutional violation under 39-71-501 on either issue because Zempel failed to meet the burden of establishing the invalidity of the statute. Zempel was not precluded from pursuing other remedies outside the Workers' Compensation Act. The Supreme Court offered a further observation that when Montana citizens avail themselves of jobs on Indian reservations, they agree to abide by tribal rules. Zempel v. Uninsured Employers' Fund, 282 M 424, 938 P2d 658, 54 St. Rep. 415 (1997).

Administrative Law Judge Decision — Four-Year Delay Held Violation of Due Process and Right to Justice Without Undue Delay: Based upon an interstate referral from North Dakota, the Child Support Enforcement Division (CSED) of the Department of Social and Rehabilitation Services (now Department of Public Health and Human Services) instituted a collection action against Connell to recover child support payments. After a hearing on February 15, 1991, after which Connell submitted proposed findings and conclusions and an order, the administrative law judge (ALJ) failed to make a decision and no further action was taken on the case until December 23, 1994. At that time, a different ALJ required appearance of the parties in a telephone hearing. After the hearing, Connell moved for a default judgment against CSED or dismissal. Citing Mont. Power Co. v. Pub. Serv. Comm'n, 206 M 359, 671 P2d 604 (1983), the Supreme Court pointed out that the due process clause of the Montana Constitution applies to state agencies. The Supreme Court held that the 44-month delay in deciding Connell's case, which CSED tried to explain by saying that the contract of the previous ALJ had terminated and it was unsure how to proceed, violated Art. II, sec. 17, Mont. Const., 40-5-414, and this section and several administrative rules of the Department. The Supreme Court remanded the case to the District Court for an order dismissing the income withholding action and tax offset against a state warrant for Connell. In re Connell v. St., 280 M 491, 930 P2d 88, 54 St. Rep. 28 (1997), distinguished in Emery v. St., 286 M 376, 950 P2d 764, 54 St. Rep. 1454 (1997).

Civil Action by Indians Against Non-Indians — Jurisdiction Upheld: Lamberts, enrolled members of the Fort Peck Tribe, sued Ryozik and others who were Canadian citizens for injuries sustained in an automobile accident that occurred within the exterior boundaries of the Fort Peck Indian Reservation. The District Court dismissed the action for lack of subject matter jurisdiction. Citing Emerson v. Boyd, 247 M 241, 805 P2d 587 (1990), and using the three-part test applied in Iron Bear v. District Court, 162 M 335, 512 P2d 1292 (1973), the Supreme Court held that there was no threat to tribal sovereignty posed by Indian citizens of Montana seeking to invoke the jurisdiction of the District Court as plaintiffs in an action against non-Indians for injuries sustained on a reservation. The Supreme Court noted that the use of the courts is guaranteed to all state citizens under this section. A failure to recognize that right would constitute a denial of due process guaranteed by Art. II, sec. 17, of the Montana Constitution and

a denial of equal protection guaranteed by Art. II, sec. 4, of the Montana Constitution. Lambert v. Ryozik, 268 M 219, 886 P2d 378, 51 St. Rep. 1250 (1994). In In re Estate of Big Spring, 2011 MT 109, 360 Mont. 370, 255 P.3d 121, the Supreme Court overruled Iron Bear in its entirety and Lambert v. Ryozik to the extent it relied on the Iron Bear test.

Marriage Dissolution Brought by Tribal Member Against Non-Indian Spouse — Jurisdiction to Apportion Indian Trust Land: Wife who was a member of the Blackfeet Tribe sought a marriage dissolution in state court from her husband who was a non-Indian. The District Court granted the dissolution but held it did not have jurisdiction to apportion the parties' marital estate, which consisted of about 4,000 acres of Indian trust land on the Blackfeet Reservation, and granted wife's motion to dismiss. On appeal, husband contended that the state court had jurisdiction, relying on a provision in the Blackfeet Tribal Law and Order Code that all divorces must be consummated in accordance with Montana law. However, that provision did not cede jurisdiction to the state but merely governed the tribal court's choice of law. While the state has an interest in ensuring the existence of a forum in which marital property within its borders may be apportioned upon a dissolution, that interest is met by the availability of an alternative forum in the Blackfeet Tribal Court. The state's interest in the property and proceedings is inconsequential compared with the federal and tribal interests at stake. Therefore, the District Court did not err in concluding that it lacked jurisdiction to adjudicate the disposition of the Indian trust land that was the parties' only significant marital asset. In re Marriage of Wellman, 258 M 131, 852 P2d 559, 50 St. Rep. 462 (1993), following White Mountain Apache v. Bracker, 448 US 136, 65 L Ed 2d 665, 100 S Ct 2578 (1980), and N. Mex. v. Mescalero Apache Tribe, 462 US 324, 76 L Ed 2d 611, 103 S Ct 2375 (1983), and distinguishing Sheppard v. Sheppard, 655 P2d 895 (Idaho 1982). In re Marriage of Wellman was followed as to lack of jurisdiction over trust lands, in the context of the sale of real property, in Krause v. Neuman, 284 M 399, 943 P2d 1328, 54 St. Rep. 937 (1997).

State Constitution — No Guarantee of Fundamental Right to Particular Cause of Action: In response to a motion by the plaintiff in a wrongful discharge case, the lower court ruled that the Wrongful Discharge From Employment Act was unconstitutional because it limited the plaintiff's right to full legal redress. The Supreme Court overruled the lower court stating that in Meech v. Hillhaven W., Inc., 238 M 21, 776 P2d 488, 46 St. Rep. 1058 (1989), it had ruled that there is no constitutional guarantee to a particular cause of action, and therefore the Legislature may alter common-law causes of action, remedies, and redress. Johnson v. St., 238 M 215, 776 P2d 1221, 46 St. Rep. 1214 (1989).

Delaying Access to Courts by Using Agency to Handle Racial Discrimination Complaints Not Unconstitutional: The defendant's suit in District Court alleging that his employment was terminated due to race was dismissed because by statute he was required to file his complaint with the Commission for Human Rights. The defendant filed an appeal, alleging that the requirement denied him due process and access to the courts. The Supreme Court held that the state's purpose of combating illegal discrimination was a rational basis for delaying access to the courts and therefore did not violate the federal or state constitution. Romero v. J&J Tire, 238 M 146, 777 P2d 292, 46 St. Rep. 1159 (1989).

Right to Full Legal Redress Not Violated by Grant of Immunity for Acts of Legislative Body: The right to full legal redress under the state constitution is not violated by a statute granting a legislative body immunity from suit for its acts. The right involved in this case is one of access to the courts. It is not fundamental. The immunity statute's constitutionality in regard to the right is thus presumed, and the state need only show a rational basis for the immunity statute. The statute has previously passed that test. Peterson v. School District, 237 M 376, 773 P2d 316, 46 St. Rep. 880 (1989), followed in Miller v. Fallon County, 240 M 241, 783 P2d 419, 46 St. Rep. 2087 (1989).

Factors Necessary for Acceptance of Original Jurisdiction: Once standing to bring an action is established, the question shifts to whether the action meets the necessary factors for the Supreme Court to accept original jurisdiction. Assumption of original jurisdiction is proper when: (1) constitutional issues of major statewide importance are involved; (2) the case involves purely legal questions of statutory and constitutional construction; and (3) urgency and emergency factors exist, making the normal appeal process inadequate. Butte-Silver Bow Local Gov't v. St., 235 M 398, 768 P2d 327, 46 St. Rep. 87 (1989), followed in Montanans for the Coal Trust v. St., 2000 MT 13, 298 M 69, 996 P2d 856, 57 St. Rep. 73 (2000). See also State ex rel. Greely v. Water Court, 214 M 143, 691 P2d 833 (1984).

Tort Claim Against Production Credit Association — Subject Matter Jurisdiction: For the purpose of determining subject matter jurisdiction of a tort claim against a Production Credit Association (PCA), a PCA is not a federal instrumentality for the purposes of the Federal Tort

Claims Act (FTCA), and therefore jurisdiction does not rest exclusively in federal court. The Montana Supreme Court determined that under tests set forth in recent federal District Court decisions, PCAs are essentially nongovernmental, independent entities that Congress did not intend FTCA to cover. The court, which was reluctant to deprive court access to plaintiffs for this type of claim, found subject matter jurisdiction outside FTCA. Tooke v. Miles City Prod. Credit Ass'n, 234 M 387, 763 P2d 1111, 45 St. Rep. 1993 (1988).

Relitigation or Successive Claims Not Inherent in Right to Access to Courts: While the constitutional mandates of due process and the administration of justice guarantee every person access to the courts, such rights do not grant a person license to relitigate a cause or to burden the resources of the courts with successive claims that could have been brought in one action. St. v. Perry, 232 M 455, 758 P2d 268, 45 St. Rep. 1192 (1988), distinguished in St. v. Gollehon, 274 M 116, 906 P2d 697, 52 St. Rep. 1182 (1995).

Initiative Amendment Void — Material Language Difference — Improper Publication Procedures: The language of an amendment to Art. II, sec. 16, Mont. Const., as filed and certified by the Secretary of State, was not the same language submitted to the voters at the election. Because the difference in language was material and because publication of the proposed initiative prior to election did not follow constitutional mandates, the purported amendment was held to be void. State ex rel. Mont. Citizens for the Preservation of Citizens' Rights v. Waltermire, 227 M 85, 738 P2d 1255, 44 St. Rep. 913 (1987). Petitions for rehearing, reconsideration, and clarification denied, 44 St. Rep. 929A (1987).

Right of Access to Court Not Denied — Access to Legal Library: Appellant, accused of intimidation, proceeded pro se with his defense. Court-appointed counsel assisted him with legal research and allowed appellant use of his own Montana codes. The Sheriff at the county jail accommodated appellant's request to do research at the jail and prepare a brief. After conviction, appellant appealed on several grounds, one of them being that he was denied access to a substantial legal library. On appeal, the Supreme Court held that appellant was provided with more than adequate legal assistance during the short time he was incarcerated and that his right of access to the courts was not denied. The Supreme Court expressed no opinion on whether the constitutionally mandated requirement that prisons provide inmates with adequate legal libraries or some other reasonable alternative extends to persons awaiting trial while in county jails or whether it extends to nonindigents. St. v. Lance, 222 M 92, 721 P2d 1258, 43 St. Rep. 1086 (1986), followed in St. v. Mason, 253 M 419, 833 P2d 1058, 49 St. Rep. 506 (1992).

Contract Forum Selection Clauses Void: A Montana distributor sued an out-of-state manufacturer in Montana court for tort and contract claims arising from their agreement which provided that Minnesota would be the sole forum for such disputes. The District Court denied defendant's motion to dismiss. The Supreme Court affirmed and held that the forum selection clause was void under 28-2-708 because it restricted the parties from enforcing their contract rights. State ex rel. Polaris Indus., Inc. v. District Court, 215 M 110, 695 P2d 471, 42 St. Rep. 220 (1985), followed in Keystone, Inc. v. Triad Sys. Corp., 1998 MT 326, 292 M 229, 971 P2d 1240, 55 St. Rep. 1321 (1998).

Citizen Taxpayer — Standing: Plaintiff filed a complaint for declaratory judgment in the Supreme Court seeking to determine the validity of several acts of the Legislature allowing the issuance of state revenue bonds. Plaintiff, in his complaint, alleged that he was a citizen, resident, elector, and taxpayer. Prior cases held that in order to establish standing to sue a governmental entity: (1) the issue for review must represent a case or controversy; (2) the complaining party must allege past, present, or threatened injury to a property or civil rights; and (3) the alleged injury must be distinguishable from injury to the public generally, but need not be exclusive to the complaining party. The Supreme Court added a further exception. The court stated that it would recognize the standing of a taxpayer, without more, to question the constitutional validity of a tax or use of tax money where the issue or issues presented directly affect the constitutional validity of the state or its political subdivisions acting to collect the tax, issue bonds, or use the proceeds thereof. The court said it would accept original jurisdiction of such suits when special circumstances, presenting issues of urgent or emergency nature, exist requiring speedy determination. Grossman v. St., 209 M 427, 682 P2d 1319, 41 St. Rep. 804 (1984), followed in Montanans for the Coal Trust v. St., 2000 MT 13, 298 M 69, 996 P2d 856, 57 St. Rep. 73 (2000).

Determination of Public's Right to Use Dearborn River — Standing of Coalition of Citizens: In action for determination of the public's right to use the Dearborn River, whether the Montana Coalition for Stream Access, Inc., had standing to bring suit was immaterial because the Department of State Lands (now Department of Natural Resources and Conservation) and the

Department of Fish, Wildlife, and Parks were also plaintiffs. Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984).

Voters' Standing to Challenge Restriction on Judge Running for Office: Sections 3-1-607 and 3-1-608 forbid what Art. VII, sec. 10, Mont. Const., allows in that they require a Supreme Court Justice or Chief Justice or a District Court Judge to resign if he becomes a candidate for any elective office, while Art. VII, sec. 10, Mont. Const., provides that such a person does not have to resign if he runs for another judicial office. Standing to challenge the constitutionality of 3-1-607 and 3-1-608 existed where a petition for declaratory judgment was brought by registered voters and the two statutes adversely affected the election process contemplated by the constitution. The registered voters had standing to assert the public interest clearly intended by Art. VII, sec. 10, Mont. Const., to assert the integrity and supremacy of the constitution, and to assert the public interest in challenging the legality of legislative action that allegedly flies in the face of the constitution. The Comm. for an Effective Judiciary v. St., 209 M 105, 679 P2d 1223, 41 St. Rep. 581 (1984). See also Butte-Silver Bow Local Gov't v. St., 235 M 398, 768 P2d 327, 46 St. Rep. 87 (1989).

Action on Promissory Notes Held in Trust — Real Party in Interest: The plaintiff bank filed an action to collect payment on four promissory notes, and the defendant contended that the bank was not a real party in interest to the case. The Supreme Court found that the District Court's finding that the plaintiff was the holder of legal title to each of the promissory notes and that it was therefore a real party in interest was supported by substantial evidence in both the transcripts and exhibits. First Nat'l Bank & Trust of Wibaux v. Security Bank, 199 M 168, 648 P2d 1167, 39 St. Rep. 1270 (1982).

Transitory Action Arising in Another State — Effect of Federal Full Faith and Credit on Montana Jurisdiction: The Full Faith and Credit Clause of the United States Constitution does not prohibit a state from exercising jurisdiction in a transitory cause of action, even though a sister state has provided that action on the particular claim may not be brought outside its territory. Kane v. Kane, 198 M 335, 646 P2d 505, 39 St. Rep. 1036 (1982).

Comity — Divorce Proceeding Arising in Another State — Dispute Over Montana Land: Wyoming residents were divorced under a Wyoming divorce decree which provided that disagreements between the parties arising out of any transaction relating to the decree were to be submitted to the Wyoming District Court for resolution. A disagreement arose in connection with the parties' interests in property located in Montana. Husband filed suit in Montana, and wife sought a ruling that the Montana court lacked jurisdiction and that the Wyoming court was the proper forum. The Montana District Court properly decided that it should decline to exercise jurisdiction on the basis of the doctrine of comity, though it did have jurisdiction. Application of the comity doctrine did not contravene the public policy of Montana or the open court policy mandated by the Montana Constitution. Kane v. Kane, 198 M 335, 646 P2d 505, 39 St. Rep. 1036 (1982).

Right of Access to Courts Hindered — Rational Basis: The panel act does not deny plaintiff his right of access to the courts. In cases not involving a fundamental right, access may be hindered if there exists a rational basis for doing so. The articulated basis for the panel acts in other states has been the malpractice crisis existing in many states, with this legislation intended as a means to limit malpractice filings to those which are clearly meritorious. The Montana act was enacted by the Legislature for the same reason. Linder v. Smith, 193 M 20, 629 P2d 1187, 38 St. Rep. 912 (1981).

Double Undertaking Required for Appeal to District Court Unconstitutional: Section 25-33-201, which requires the filing of a sum equal to twice the amount of any money judgment before an appeal from Justice's or City Court may be taken, as applied to the indigent appellant, violates her 14th amendment equal protection rights based on the traditional equal protection test. The classification established by the double undertaking requirement for an appeal to District Court is arbitrary and rests on grounds wholly irrelevant to the achievement of the state's objectives in enactment of this provision. Merchants Ass'n v. Conger, 185 M 552, 606 P2d 125 (1979).

Proper Forum Selection — Application of Forum Non Conveniens to FELA Actions:

With the plaintiff, the scene of the injury, and most of the witnesses in Idaho, a suit for personal injuries filed in Montana was dismissed by the District Court under the doctrine of forum non conveniens. The Supreme Court reversed stating that the doctrine must be tempered by an open-door policy and that the doctrine should not presently be applied to Federal Employers' Liability Act actions. Bevacqua v. Burlington N., Inc., 183 M 237, 598 P2d 1124 (1979).

The doctrine of forum non conveniens is not applicable to a Federal Employers' Liability Act suit filed in a Montana District Court. There is a strong policy favoring plaintiff's forum selection

in FELA cases, and the Montana Constitution states that the courts of justice must be open to all persons. Labella v. Burlington N., Inc., 182 M 202, 595 P2d 1184 (1979).

Standing of Environmental Groups: Unlawful environmental degradation is within the judicial cognizance of the state, and environmental groups alleging injury to their members have standing to seek injunctive relief. Mont. Wilderness Ass'n v. Bd. of Health & Environmental Sciences, 171 M 477, 559 P2d 1157 (1976).

Indian Plaintiff — Wrongful Death Action: Montana court had jurisdiction over action for wrongful death brought by Indian plaintiff against a non-Indian as a result of an automobile accident within the boundaries of the reservation since all persons are given free access to Montana courts and equal protection of its laws. McCrea v. Busch, 161 M 442, 524 P2d 781 (1974), followed in Lambert v. Ryozik, 268 M 219, 886 P2d 378, 51 St. Rep. 1250 (1994).

LEGAL REMEDY

Loss of Consortium Claim by Adult Child of Injured Parent — Claim Recognized by Montana Law — Evidentiary Standard: A Montana federal district court certified to the Montana Supreme Court the question of whether Montana law recognized a loss of consortium claim filed by an adult child of an injured parent. Here, the father was seriously injured in a car accident when his daughter was 18. In a matter of first impression, the court concluded that Montana law does recognize such a claim and that the claim is a natural extension of Montana's common law and is consistent with the state constitution's guarantee of full legal redress. The court also ruled that the evidentiary standard for such a claim is the same as that for a claim brought by a minor child as adopted in Keele v. St. Vincent Hosp. & Health Care Center, 258 Mont. 158, 852 P.2d 574 (1993). North Pacific Ins. Co. v. Stucky, 2014 MT 299, 377 Mont. 25, 338 P.3d 56.

Insured Made Whole for Property Damage Under Separate Collision Coverage — Subrogation Available: The U.S. District Court certified to the Montana Supreme Court the question of whether an insurer is prohibited from exercising its rights of subrogation when payment had been made for property damage under one coverage but the insured asserted he was not made whole for bodily injury damages paid under a different coverage. The plaintiff had purchased his auto insurance policy from the defendant, including separate, optional collision coverage, and was subsequently involved in an accident in which another driver was at fault. As a result of the accident, the plaintiff suffered both property damage and bodily injury; he recovered money for his bodily injury damages under the original policy from the defendant and from the other driver's insurance company but claimed that his bodily injury damages exceeded both the payments he received and the policy limits. The defendant also paid the costs for the property damage under the provisions of the collision coverage policy, then sought subrogation for these expenses from the other driver's insurance company. The plaintiff brought suit alleging that the defendant violated Montana law by seeking subrogation for the property damage before he had been made whole for the related personal injuries. The Supreme Court held that the defendant was entitled to seek subrogation because the insured had been made whole for the element of damage for which he purchased insurance under the separate property damage policy. Van Orden v. United Serv. Auto. Ass'n, 2014 MT 45, 374 Mont. 62, 318 P.3d 1042.

State Employee Health Care Benefits — State Subject to Regulation as Insurer: The plaintiffs claimed that under the state employee health care benefit program, they were not fully compensated for their injuries because the state had retained refunded payments it had made to their medical providers in cases where the provider had already been paid by a third-party insurer. The state claimed that under its coordination of benefits policy, it was allowed to accept the refunded payments without first ensuring the plaintiffs had been fully compensated for their injuries. The District Court granted the plaintiffs summary judgment, concluding that the state is an insurer in operating the benefit plan and that its coordination of benefits policy contravened the "made whole" requirements of 2-18-902. The state appealed to the Supreme Court, which affirmed the District Court and further agreed that the state, as an insurer to its employees through its employee health care benefit plan, is subject to the same regulations as other insurers. Diaz v. St., 2013 MT 331, 372 Mont. 393, 313 P.3d 124. See also Diaz I, 2011 MT 322, 363 Mont. 151, 267 P.3d 756.

Class Action Alleging Insurance Subrogation Prior to Insured Being Made Whole — Definition of Class Including Those Not Timely Filing Claims Upheld: The plaintiffs claimed that a health insurer violated its members' statutory made-whole rights by exercising its subrogation rights without first reviewing whether the member had been made whole. The District Court certified the class and defined the class to include those who had not filed claims with the insurer if the insurer had avoided making payment to the member without first conducting a made-whole

analysis. The insurer appealed and argued that the ruling ran counter to the ruling in Diaz v. Blue Cross & Blue Shield of Mont., 2011 MT 322, 363 Mont. 151, 267 P.3d 756, in which the class had been defined more narrowly. The Supreme Court disagreed and affirmed the District Court's definition of the class. Rolan v. New W. Health Serv., 2013 MT 220, 371 Mont. 228, 307 P.3d 291. However, see Diaz v. St., 2013 MT 219, 371 Mont. 214, 308 P.3d 38 (upholding definition of class that excluded those who did not timely file claims).

Class Action Alleging Insurance Subrogation Prior to Insured Being Made Whole — Definition of Class Excluding Those Not Timely Filing Claims Upheld: The plaintiffs claimed that the state health plan violated its members' statutory made-whole rights by exercising its subrogation rights without first reviewing whether the member had been made whole. The plaintiffs appealed the District Court's class certification order that limited the class to only those who had timely filed claims with the state health insurance plan. They argued that the definition excluded those who had not filed claims and that the District Court had abused its discretion by limiting the class. The Supreme Court affirmed, concluding that the definition of the class, which could be modified by the District Court as discovery progressed, did not frustrate the intended purpose of the class complaint, was equitable, and did not constitute an abuse of discretion. Diaz v. St., 2013 MT 219, 371 Mont. 214, 308 P.3d 38. However, see Rolan v. New W. Health Serv., 2013 MT 220, 371 Mont. 228, 307 P.3d 291 (upholding definition of class that included those who did not timely file claims).

Administration of Justice — No Abuse of Discretion — Department Ordered to Compile Data: The District Court did not abuse its discretion by ordering the Department of Public Health and Human Services to compile and submit a report containing specific information regarding each of the 2,500 plaintiffs, including their names, the amounts of their Medicaid liens and the amounts collected, the total amount of a third-party settlement, and other information. The Department contended that the information to be compiled was needlessly broad. The Supreme Court concluded that the District Court was in the best position to determine the most fair and efficient procedure for conducting litigation in a class action. Blanton v. Dept. of Public Health and Human Services, 2011 MT 110, 360 Mont. 396, 255 P.3d 1229.

Human Rights Complaint — Gravamen Test No Longer Applicable: The plain language of the Montana Human Rights Act, Title 49, ch. 2, after its 2007 amendments, states that a charging party may file a complaint in District Court once the Human Rights Bureau dismisses a complaint as long as the party complies with 49-2-511. Thus it is no longer necessary to apply a "gravamen" analysis when determining whether a suit may be filed in District Court following the notice of dismissal. A "gravamen" analysis may still be proper in a claim alleging discrimination that is filed in District Court without first filing a claim before the Human Rights Bureau and receiving a notice of dismissal. Griffith v. Butte School Dist. No. 1, 2010 MT 246, 358 Mont. 193, 244 P.3d 321.

Legal Malpractice Claim — No Duty of Care to Revise Trust Beneficiary Status: Failure of a couple that established a family trust to provide necessary information to the defendant attorney in order to amend provisions of the family trust did not result in the defendant attorney owing a duty to third-party trust beneficiaries. Harrison v. Lovas, 2010 MT 128, 356 Mont. 380, 234 P.3d 76.

Statutory Discrimination and Wage Claims Not Clearly Covered in Collective Bargaining Agreement — Arbitration Not Required Prior to Filing in District Court: When the terms of a collective bargaining agreement did not clearly and unmistakably cover plaintiffs' statutory discrimination and wage claims, arbitration of the claims pursuant to the agreement was not required as a precondition to filing suit in District Court. Edwards v. Cascade County Sheriff's Dept., 2009 MT 451, 354 M 307, 223 P3d 893 (2009), following Wright v. Universal Maritime Serv. Corp., 525 US 70 (1998).

Genuine Issue of Fact Concerning Parties' Intent in Entering Release From Future Claims — Remand: Sinclair sued defendant railroad for injuries received during employment. As part of the settlement, Sinclair signed a release of claims for injuries, illnesses, or damages that were unknown at the time of settlement. Sinclair later filed another complaint alleging manganese poisoning damages incurred during his employment as a welder for the defendant. The District Court concluded that the release was valid and precluded pursuit of further Federal Employers' Liability Act (FELA) claims. On appeal, the Supreme Court reversed. There were genuine issues of material fact as to the parties' intent in entering the release and whether it covered Sinclair's manganese poisoning claims. The intent of the parties regarding the release should have been determined by a trier of fact, and the case was remanded for further proceedings. Sinclair v.

Burlington N. & Santa Fe Ry. Co., 2008 MT 424, 347 M 395, 200 P3d 46 (2008), following Wicker v. Consol. Rail Corp., 142 F3d 690 (3rd Cir. 1998).

Release of Federal Claims Precluding State Claim for Damages — Fraud and Punitive Damage Claims Preempted by Federal Law Properly Dismissed: Sinclair sued the defendant railroad for injuries received during employment. As part of the settlement, Sinclair signed a release of claims for injuries, illnesses, or damages that were unknown at the time of settlement. Sinclair learned later that the defendant had similar safety complaints and injury reports dating back several years that had not been disclosed to Sinclair during discovery. Sinclair then filed another complaint alleging fraud and seeking punitive damages, including an alternative claim under the Federal Employers' Liability Act (FELA), so that if the state claims were dismissed, Sinclair could rescind the prior settlement on grounds of fraud and relitigate the FELA case. Defendant's motion to dismiss the state claims was granted on grounds that the state claims were preempted by FELA, so Sinclair could not simultaneously affirm the validity of the release and independently pursue state law fraud claims. Sinclair appealed, but the Supreme Court affirmed. Sinclair executed a FELA release that was inextricably linked to Sinclair's claims, and under FELA Sinclair could challenge the validity of the release and have the release set aside if there was fraud in the inducement. However, federal law did not permit Sinclair to affirm the release and then separately sue for state law damages. Therefore, the District Court did not err in dismissing the state law fraud and punitive damages claims on grounds that they were preempted by FELA. Sinclair v. Burlington N. & Santa Fe Ry. Co., 2008 MT 424, 347 M 395, 200 P3d 46 (2008), distinguishing Reidelbach v. Burlington N. & Santa Fe Ry. Co., 2002 MT 289, 312 M 498, 60 P3d 418 (2002). See also Counts v. Burlington N. RR Co., 896 F2d 424 (9th Cir. 1990).

Doctrine of Priority Jurisdiction Not Considered General Rule: An automobile injury that occurred in Montana involved a Nevada insurer that filed an action in Nevada prior to plaintiff's case being filed in Montana. The insurer contended that the Montana court should have abstained from jurisdiction under the doctrine of priority jurisdiction, which holds that the first court to exercise concurrent jurisdiction retains jurisdiction to dispose of the entire case. The Supreme Court recognized that it had applied priority jurisdiction in Agri W. v. Koyama Farms, Inc., 281 M 167, 933 P2d 808 (1997), but that case involved federal law and tribal court jurisdiction and was distinguishable from the present case. The doctrine has not been adopted as a general rule, and the court declined to apply it in this case. Tenas v. Progressive Preferred Ins. Co., 2008 MT 393, 347 M 133, 197 P3d 990 (2008).

Insurance Subrogation Prior to Insured Being Made Whole — Requirements for Class Action Certification Met: Ferguson sought class action certification of a case involving an insurer that subrogated against the tortfeasor's insurance carrier before Ferguson was made whole. The District Court denied certification on grounds that under Swanson v. Hartford Ins. Co. of the Midwest, 2002 MT 81, 309 M 269, 46 P3d 584 (2002), the legal duty for insurers taking subrogation eliminated the common issue and on grounds that because Ferguson's case required fact-specific determinations of "made whole" entitlements, class action was not appropriate. On appeal, the Supreme Court reversed. As in Sieglock v. Burlington N. Santa Fe Ry. Co., 2003 MT 355, 319 M 8, 81 P3d 495 (2003), the District Court failed to consider whether the plaintiff class presented common issues of fact, particularly the common issues of fact arising from the insurer's subrogation program. The existence of the well-established duty on the part of the insurer to make the insured whole prior to subrogation, as set out in Swanson, did not eliminate the common fact issue of whether the insurer programmatically breached that duty, and when a common scheme of deceptive conduct is alleged, common questions of law or fact will exist (see Powers v. Gov't Employees Ins. Co., 192 FRD 313 (S.D. Fla. 1998)). Thus, Ferguson satisfied the commonality issue. The District Court further erred in reasoning that Ferguson failed to demonstrate that any common issues predominate over questions affecting only individual members of the affected class. Ferguson's challenge was not to an error in the insurer's application of the "made whole" rule to any given insured, but rather to the procedures of a program of subrogation that systematically deprived all class members of any consideration of their "made whole" rights, so predominance was not required for class certification in this case. Last, the efficient remedy of classwide declaratory relief was appropriate because the size of the average claim was so small that relief for the average class member was not economically available outside class litigation. The case was remanded for further proceedings as a class action. Ferguson v. Safeco Ins. Co. of America, 2008 MT 109, 342 M 380, 180 P3d 1164 (2008), followed in Diaz v. Blue Cross & Blue Shield of Mont., 2011 MT 322, 363 Mont. 151, 267 P.3d 756. See also Diaz v. St., 2013 MT 219, 371 Mont. 214, 308 P.3d 38, and Rolan v. New W. Health Serv., 2013 MT 220, 371 Mont. 228, 307 P.3d 291 (regarding definition of certified class).

Pursuit of Discrimination or Tort Claim Based on Gravamen of Complaint: In determining whether a claimant has stated a tort claim or a discrimination claim, the Supreme Court looks to the gravamen of the complaint. When the gravamen is ascertained, the complaint is designated as either a tort action or a discrimination action. If the alleged conduct falls outside the definition of unlawful discrimination in Title 49, ch. 2, commonly known as the Montana Human Rights Act (MHRA), a plaintiff may maintain a tort action. However, because the MHRA establishes the exclusive means of legal redress for unlawful discrimination, the plaintiff may not simultaneously proceed in District Court with a discrimination claim based on the same allegations when it is determined that the complaint sounds in tort. Saucier v. McDonald's Restaurants of Mont., 2008 MT 63, 342 M 29, 179 P3d 481 (2008), distinguished in Griffith v. Butte School Dist. No. 1, 2010 MT 246, 358 Mont. 193, 244 P.3d 321, after 2007 amendment of Montana Human Rights Act. See also Harrison v. Chance, 244 M 215, 797 P2d 200 (1990), and Lay v. St. Dept. of Military Affairs, 2015 MT 158, 379 Mont. 365, 351 P.3d 672.

No Error in Montana Court's Refusal to Accord Full Faith and Credit to Competing Rulings Issued by Courts of Another State: While a Montana case concerning insurance policy stacking issues was pending, defendant North Dakota insurance company raised the same issues in North Dakota courts, received a favorable declaratory judgment against stacking in the North Dakota Supreme Court, and then argued that the full faith and credit clause of Art. IV, sec. 1, of the U.S. Constitution required the Montana District Court to give preclusive effect to the North Dakota rulings. The Montana Court refused to give full faith and credit to the North Dakota rulings, and defendant appealed. The Montana Supreme Court noted that under Carr v. Bett, 1998 MT 266, 291 M 326, 970 P2d 1017 (1998), a final judgment rendered by a state court is entitled to full faith and credit in the courts of its sister states, that full faith and credit generally requires every state to give to a judgment at least the res judicata effect that the judgment would be accorded in the state that rendered the judgment, and that there is no public policy exception for the full faith and credit due judgments from another state. In this case, the basic elements of res judicata seemed to be satisfied by the North Dakota rulings. However, full faith and credit due to the judgment from a sister state is not automatic. The clause leaves some scope for state control within its borders of affairs that are particularly its own and does not compel a state to substitute the statutes of another state for its own statutes "dealing with a subject matter concerning which it is competent to legislate". The court cited the rationale in Restatement (Second) of Conflicts of Laws 103 that a judgment rendered in one state need not be recognized or enforced in a sister state if that recognition and enforcement are not required by the national policy of full faith and credit because it would involve an improper interference with important interests of the sister state. Here, the North Dakota declaratory judgment action was begun in an attempt to apply North Dakota law through the back door to avoid a potentially adverse result in Montana. The court declined to be bound by a North Dakota declaratory judgment aimed at exerting control over ongoing litigation in Montana. According to the Restatement, it would defeat the purpose of forging national unity to use full faith and credit to needlessly expand a single cause of action into multistate litigation and would interfere with ongoing Montana litigation. Thus, in the narrow context of this case, the Montana court did not err in refusing to give full faith and credit to the North Dakota rulings. Wamsley v. Nodak Mut. Ins. Co., 2008 MT 56, 341 M 467, 178 P3d 102 (2008).

Wrongful Discharge Claim Not Premised on Discrimination Not Precluded by Dismissal of Employment Discrimination Claim — Summary Dismissal of Wrongful Discharge Claim Improper: Plaintiff filed a wrongful discharge from employment claim and an employment discrimination claim. The Department of Labor and Industry found no grounds for the discrimination claim, and the District Court subsequently granted defendant summary judgment on both claims, finding that the exclusive remedy provisions of Montana employment discrimination law precluded the wrongful discharge claim. Plaintiff appealed on grounds that dismissal of the discrimination claim did not preclude the wrongful discharge claim and that genuine issues of material fact existed in support of the wrongful discharge claim. The Supreme Court agreed on both issues. Discrimination can occur without a wrongful discharge and vice versa. When a plaintiff charges discrimination but fails to demonstrate a prima facie case warranting recovery, dismissal of the discrimination claim does not preclude a wrongful discharge claim that is not based on underlying claims of discrimination. In this case, plaintiff raised genuine issues of material fact regarding the legitimacy of the proffered reasons for his discharge that were outside the scope of discrimination, and it was error for the District Court to summarily dismiss the wrongful discharge claim. The case was remanded for trial on the wrongful discharge claim. Vettel-Becker v. Deaconess Medical Center of Billings, Inc., 2008 MT 51, 341 M 435, 177 P3d 1034 (2008),

followed, with regard to a claim in tort, in Saucier v. McDonald's Restaurants of Mont., 2008 MT 63, 342 M 29, 179 P3d 481 (2008). See also Tonack v. Mont. Bank of Billings, 258 M 247, 854 P2d 326 (1993), and Arthur v. Pierre Ltd., 2004 MT 303, 323 M 453, 100 P3d 987 (2004).

Calculation of Restoration Damages — Burk Guidelines Applied: Defendant's refinery contaminated property and ground water in Sunburst, Montana, over a period of many years. Following trial, the District Court held defendant strictly liable as a matter of law for conducting an abnormally dangerous activity and found that defendant's trespass extended to all Sunburst plaintiffs who owned property above the contamination plume. Part of the damage award included costs reasonably necessary to restore plaintiffs' property to the condition that it would have been absent defendant's contamination. On appeal of the restoration costs, the Supreme Court applied the guidelines for cases involving damage to real property as set out in Burk Ranches, Inc. v. St., 242 M 300, 790 P2d 443 (1990). Although the difference between the value of the property before and after the injury, or the diminution in value, generally constitutes the appropriate measure of damages, no single measure of damages can serve in every case to adequately compensate an injured party. Restoration costs may be awarded if an injury is temporary, and a temporary injury may be abated or discontinued at any time either by an act of the wrongdoer or by the injured party. The ability to repair an injury must be more than a theoretical possibility in order for an injury to be temporary. A presumption exists that when restoration costs exceed the market value of the property, the injuries are considered permanent and the diminution in value rule applies, but the presumption of permanence can be overcome by statutory and common laws, such as environmental laws, that compel repair or replacement. However, the court held that a strict cap on restoration damages would equip the tortfeasor with the equivalent of a private right of inverse condemnation akin to a private right of eminent domain and would also fail to provide an adequate remedy for an injury to the environment or a special purpose property, such as an area with great ecological value but little or no commercial value. Evidence that restoration damages will be used to repair the damaged property may overcome the general rule in favor of diminution in value as the appropriate measure of damages. Sunburst School District No. 2 v. Texaco, Inc., 2007 MT 183, 338 M 259, 165 P3d 1079 (2007). See also Lampi v. Speed, 2011 MT 231, 362 Mont. 122, 261 P.3d 1000, in which the Supreme Court, applying and clarifying Sunburst and the restoration damages rule set forth in Restatement (Second) of Torts 929, concluded that the District Court wrongly denied the plaintiff's motion to establish restoration damages as the appropriate measure of damages in the plaintiff's lawsuit to recover damages for lost trees and vegetation, and McEwen v. MCR, LLC, 2012 MT 319, 368 Mont. 38, 291 P.3d 1253, in which the Supreme Court concluded that a property owner may seek to recover restoration costs for a commercial family ranch, where the family lives and earns its living, in the same manner that a property owner may recover restoration damages for recreational or residential use.

Nonapplicability of Constitutional Tort Theory When Adequate Remedy Exists Under Statutory or Common Law: Plaintiffs brought a common-law action against defendant for restoration damages related to environmental damage caused by defendant's refinery. The trial court held defendant strictly liable for conducting an abnormally dangerous activity and instructed the jury to award monetary damages pursuant to Art. II, sec. 3, Mont. Const., for any constitutional tort violating the fundamental right to a clean and healthful environment. Defendant appealed the application of the constitutional tort theory. The Supreme Court noted that Dorwart v. Caraway, 2002 MT 240, 312 M 1, 58 P3d 128 (2002), recognized that common-law causes of action that are intended to regulate relationships among and between individuals may not always be adequate to redress the type of damage caused by the invasion of constitutional rights by government actors and that, as a result, recognition of a constitutional tort was necessary in the absence of any other remedy. However, in the present case, the Supreme Court also adopted Restatement (Second) of Torts 929 to allow for recovery of restoration damages, which served to ensure restoration of a clean and healthful environment. Absent a showing that restoration costs were inadequate to address potential damages caused by defendant's contamination, it was error for the trial court to instruct the jury on the constitutional tort theory when adequate remedies existed under statutory or common law. Sunburst School District No. 2 v. Texaco, Inc., 2007 MT 183, 338 M 259, 165 P3d 1079 (2007), followed in Shammel v. Canyon Resources Corp., 2007 MT 206, 338 M 541, 167 P3d 886 (2007).

Failure to Provide Trial Transcript Precluding Review of Compensatory Damage Award and Jury Instructions: Plaintiff asserted that the trial court erred by failing to grant plaintiff's motion for a new trial based on the jury's award of zero compensatory damages for pain and suffering and by refusing to allow the issue to go to the jury, contending that a new trial was necessary to protect the right to full legal redress. Plaintiff stated at least 14 times on appeal that evidence

of pain and suffering was uncontroverted. However, plaintiff's counsel neglected to submit a trial transcript on appeal or to follow the alternative transcript submission procedures set out in former Rule 9, M.R.App.P. (now superseded), relying instead on District Court minutes and evidence of injuries as opposed to evidence of pain and suffering. Without a trial transcript, the Supreme Court was unable to address the merits of plaintiff's appeal, so the District Court was affirmed. Giambra v. Kelsey, 2007 MT 158, 338 M 19, 162 P3d 134 (2007).

No Right to Subrogation From Insurance Loss Payee — Summary Judgment Proper: The Montana Petroleum Tank Release Compensation Board reimbursed a gas station owner $254,842 for expenses incurred in an environmental remediation, and the Board then sought to exercise subrogation rights against the owner's insurer and a lessee for reimbursement. The District Court granted summary judgment to the insurer after finding that the Board had no right of subrogation through the gas station owner, and the Board appealed. The Supreme Court noted that the gas station owner was at most a loss payee under its insurance policy, so the Board had no right of subrogation through the owner or through the corporation established to run the gas station, which had no part in funding the remediation or obligation to pay for any part of the remediation. The Board could not show that the owner's insurer was unjustly enriched by failing to pay a claim that the insurer did not owe, so subrogation did not apply. Thus, the Board had no right to subrogation through either the owner or the lessee to recover damages from the owner's insurer, and summary judgment was proper. Mont. Petroleum Tank Release Comp. Bd. v. Capitol Indem. Co., 2006 MT 133, 332 M 352, 137 P3d 522 (2006), distinguishing Swingley v. Riechoff, 112 M 59, 112 P2d 1075 (1941).

Failure to Admit Person to Jail When Committed by Competent Authority Negligent Violation of Duty of Care: Russell violated the terms of his suspended sentence and was ordered to report to the county jail no later than 8 a.m. on December 28, 1998. When Russell appeared at the jail, a written order of commitment could not be found, so Russell was turned away. On December 30, Russell stabbed Prindel at a party, and Russell was sentenced to life in prison for attempted deliberate homicide. Prindel subsequently sued the county, alleging that the failure to incarcerate Russell on the 28th, despite a court order that Russell begin serving a sentence on that day, amounted to negligence that proximately caused Prindel's injury. The District Court granted summary judgment to the county, concluding that the county had no duty to prevent Russell from injuring Prindel and that the issue of causation need not be addressed. On appeal, the Supreme Court reversed. The county's argument that it had no duty of care without a written order was without merit because the oral pronouncement of sentence constituted the competent authority to incarcerate Russell, and the jail's ignorance of the commitment order did not diminish the court order's status as a competent authority. The county had a special relationship of custody under 7-32-2205 to take Russell into custody for the protection of the public, and failure to do so was negligence as a matter of law. Russell posed a foreseeable risk, Prindel was a foreseeable plaintiff, and the county owed a duty to Prindel to exercise reasonable care to protect him against Russell. Reasonable minds could differ as to whether Russell's act of stabbing Prindel was so unforeseeable as to sever the chain of causation, so summary judgment for the county was error. Prindel v. Ravalli County, 2006 MT 62, 331 M 338, 133 P3d 165 (2006), following Lopez v. Great Falls Pre-Release Serv., Inc., 1999 MT 199, 295 M 416, 986 P2d 1081 (1999), and LaTray v. Havre, 2000 MT 119, 299 M 449, 999 P2d 1010 (2000).

Constitutionality of Statute Governing Community Placement of Developmentally Disabled Individuals: Respondent attacked the constitutionality of 53-20-132 on grounds that District Courts are statutorily not allowed to directly place individuals within community services following expiration of involuntary commitments, in violation of individuals' right of access to courts. The Supreme Court noted that under Art. XII, sec. 3, Mont. Const., the Legislature has enacted a statutory scheme, of which 53-20-132 is a part, that designates the forms of available public assistance and that the scheme provides community-based services to the disabled through the administrative process as opposed to a direct judicial order. However, the preference for community placement over institutionalization does not create an absolute right to community placement, nor does 53-20-132 preclude a person who is denied services through the administrative process from administrative appeal or judicial review. Respondent's constitutional challenge failed to recognize that the statute is only one part of the statutory scheme, and given respondent's overly narrow focus, the court concluded that 53-20-132 is facially constitutional. In re T.W., 2005 MT 340, 330 M 84, 126 P3d 491 (2005), followed in In re R.E.A., 2006 MT 12, 330 M 392, 127 P3d 517 (2006).

Former Statute of Repose Precluding Redress Under Former Occupational Disease Act: Hardgrove was employed by W.R. Grace until 1984. About 14 years later, Hardgrove discovered

that he had been exposed to asbestos while employed and filed an occupational disease claim 1 month and 1 day after discovering the problem. The employer's insurer refused to cover the claim. The District Court concluded that Hardgrove's claim was barred under 39-72-403(3) (subsection (3) deleted in 1985 and section now repealed) and that the statute violated neither the constitutional equal protection clause nor the full legal redress clause. On appeal, the Supreme Court affirmed after characterizing 39-72-403(3) (now repealed) as a statute of repose. As distinguished from a statute of limitations, which limits the time within which a claimant may pursue a right, a statute of repose extinguishes the existence of the underlying right itself and establishes the absolute time beyond which no party is liable if the statutory period for bringing the claim can lapse before the action accrues. A court may equitably toll a statute of limitations, but only a legislative mandate can toll a statute of repose. In this case, the statute of repose extinguished Hardgrove's right to the cause of action 3 years after Hardgrove finished work, so the claim filed 14 years later was barred and Hardgrove had no right to legal redress under the former Occupational Disease Act of Montana (now repealed and merged with Workers' Compensation Act). Without deciding whether Hardgrove had a legal remedy outside the former Act, the Supreme Court nevertheless affirmed that 39-72-403(3) (now repealed) was a statute of repose that did not violate the constitutional equal protection and full redress provisions. Hardgrove v. Transp. Ins. Co., 2004 MT 340, 324 M 238, 103 P3d 999 (2004).

Human Rights Act Exclusive Remedy for Sexual Discrimination Complaint — Summary Dismissal by District Court Affirmed: Arthur filed a sexual discrimination complaint with the Montana Commission for Human Rights but failed to rebut a defendant's response, so the Commission sent Arthur a notice of dismissal and right to file a civil action in District Court. Arthur filed neither a timely objection to dismissal nor a timely action in District Court. Instead, Arthur filed a tort action against defendants, alleging various torts and requesting compensatory and punitive damages. An amended complaint filed 2 years later asserted: (1) failure to provide a safe workplace; (2) negligent retention of the employee who allegedly sexually harassed Arthur; (3) negligent supervision of the employee; (4) intentional infliction of emotional distress; (5) negligent infliction of emotional distress; and (6) sexual harassment under Title 49, ch. 2, commonly known as the Montana Human Rights Act. The District Court summarily dismissed the first five complaints as barred by the exclusive remedy provision of 49-2-509 (now repealed) and dismissed the sixth complaint as barred by the statute of limitations in 49-2-509 (now repealed). On appeal, the Supreme Court affirmed. Arthur's tort claims were a recharacterization of the initial sexual harassment claim, and pursuant to 49-2-509 (now repealed), the Montana Human Rights Act is the exclusive remedy for claims of sexual discrimination and precludes other tort claims that arise from underlying allegations of sexual discrimination or harassment. Further, under Hash v. U.S. W. Communication Serv., 268 M 326, 886 P2d 442 (1994), equitable tolling of the statute of limitations is not applicable in a discrimination case when a claimant does not have more than one legal remedy available, any one of which could be pursued in good faith. Rather, the claimant's exclusive remedy is under the Montana Human Rights Act. Arthur had knowledge of the vital facts underlying the sexual discrimination claim and could not claim inability to obtain the information in order to toll the statute of limitations. Arthur v. Pierre Ltd., 2004 MT 303, 323 M 453, 100 P3d 987 (2004), following Harrison v. Chance, 244 M 215, 797 P2d 200 (1990), Bruner v. Yellowstone County, 272 M 261, 900 P2d 901 (1995), and Fandrich v. Capital Ford Lincoln Mercury, 272 M 425, 901 P2d 112 (1995).

No Showing That Defendants' Actions in School Bus Incident More Than Likely Caused Student's Physical and Mental Injuries — Factors in Judicial Determination of Duty of Care — Summary Dismissal of School District Liability Proper: A student returning home on a school bus from a performance with the school pep band asked the director to stop the bus so that the student could use the restroom, but the director refused. The student was subsequently disciplined by the school for various actions related to the incident and soon after became seriously ill. The student and his parents filed an action against the school district, the director, and the bus driver, alleging that various breaches of the duty of care triggered or accelerated the student's development of diabetes and caused his posttraumatic stress disorder. The District Court granted summary judgment for defendants, and on appeal, the Supreme Court affirmed. The existence of a duty of care depends on the foreseeability of the risk and on a weighing of the policy considerations for and against the imposition of liability, including: (1) moral blame attributable to defendant's conduct; (2) prevention of future harm; (3) extent of the burden placed on defendant; (4) consequences to the public of imposing a duty; and (5) availability of insurance for the risk involved. Further, the law of torts holds a defendant liable only for injuries to others that were to the defendant at the time reasonably foreseeable. A defendant owes a duty with

respect to risks and hazards whose likelihood made the conduct unreasonably dangerous and hence negligent in the first instance. The specific injury need not be foreseeable, rather the question is whether defendant could have foreseen that the conduct would result in injury to plaintiff. The District Court here concluded that defendants owed no duty of care because the student's injuries were not foreseeable, which was an erroneous focus on the particular injury rather than on the foreseeability that defendants' conduct could result in the injury. However, if a plaintiff fails to offer proof of any one of the elements of negligence—duty, breach, causation, and damages—then summary judgment in favor of defendant is proper. The question remained whether plaintiffs' experts adequately established causation, and the Supreme Court held that they did not. The experts testified that defendants' conduct could have caused or accelerated the student's injuries, but under Butler v. Domin, 2000 MT 312, 302 M 452, 15 P3d 1189 (2000), the testimony did not meet the threshold of establishing that defendants' actions more than likely caused the injuries. Absent a causal connection between defendants' actions and the student's injuries, summary judgment for defendants was proper. Hinkle v. Shepherd School District No. 37, 2004 MT 175, 322 M 80, 93 P3d 1239 (2004), distinguishing Kolar v. Bergo, 280 M 262, 929 P2d 867 (1996).

Attorney's Duty of Care Owed to Estate Beneficiary — Standing of Estate to Bring Legal Malpractice Action: A personal representative brought a legal malpractice damage suit on behalf of the estate against an attorney who drafted a trust document and will. Before granting summary judgment to the attorney, the District Court raised the issue of whether the estate and personal representative had standing to bring the suit, based on a questionable fiduciary relationship between the plaintiffs and the attorney. On appeal, the Supreme Court concluded that as a representative of the decedent, the estate stood in the shoes of the decedent and was thus considered to be in privity with the attorney, so the estate had standing to bring a malpractice claim. Further, the question of whether the trust and the personal representative had standing was a question of fact to be determined at trial, so summary judgment was precluded and the case remanded for further proceedings. Watkins Trust v. Lacosta, 2004 MT 144, 321 M 432, 92 P3d 620 (2004).

Legal Duty of Sheriff to Protect Domestic Violence Victim — Exception to Public Duty Doctrine Immunity Created Between Sheriff and Victim: Plaintiffs' mother was a domestic violence victim who was killed by her husband. Plaintiffs sued the County Sheriff for negligently failing to take action to protect the victim. A jury found the Sheriff negligent and awarded plaintiffs $358,000. The Sheriff moved for judgment as a matter of law, and the District Court granted the motion and vacated the jury verdict, finding that no special relationship existed between the victim and the Sheriff under the domestic violence statutes that would trigger a legal duty upon the Sheriff to protect the victim. On appeal, the Supreme Court noted an exception to the public duty doctrine's immunity provision in cases when a special relationship between the victim and an officer has been created. The domestic violence statutes created such a special relationship, which gave rise to a special duty by virtue of the victim's status as a member of a protected class. The Sheriff had a statutory duty to protect the victim with a notice of her rights under 46-6-602, and by failing to give the victim the required notice, the jury could conclude that the Sheriff was negligent and, arguably, negligent per se. Although arrest of the husband was discretionary, the Sheriff also had a mandatory duty under 46-6-603 to seize the husband's weapon, which had been displayed during a prior domestic dispute, but failed to do so. Thus, the jury had sufficient evidence to conclude that the Sheriff's negligence or negligent per se conduct led to the victim's death, and the District Court committed reversible error in granting judgment to the contrary. Massee v. Thompson, 2004 MT 121, 321 M 210, 90 P3d 394 (2004), following Nelson v. Driscoll, 1999 MT 193, 295 M 363, 983 P2d 972 (1999).

Doctrine of Abstention Properly Applied by District Court Over Matter Subject to Tribal Court Jurisdiction: Defendants who were enrolled tribal members brought suit in tribal court, seeking damages for plaintiff's failure to timely close the purchase of real and personal property described in a buy-sell agreement. Plaintiff was also a tribal member who resided on the reservation. The tribal court concluded that it had subject matter and personal jurisdiction over the litigation. Plaintiff contended that the tribal court did not have jurisdiction, and while the matter was pending in tribal appellate court, filed the present action in state District Court, alleging various claims based on or arising out of buy-sell agreements. The District Court dismissed the state action, and plaintiff appealed. The Supreme Court noted that Montana courts are open to all Montana citizens, including Indian citizens, who may sue in state court as long as Congress has not expressly retained jurisdiction in the United States, particularly if the Indian is a Montana citizen and the matter does not interfere with tribal self-government. Conversely, the court also

recognized the sovereignty of a tribe to maintain the right of self-government and to control the internal relations of tribal members and recognized that tribal courts have jurisdiction over tribal members conducting business on tribal land with other tribal members. Thus, because the tribal court exercised jurisdiction and because the subject matter of plaintiff's state suit was based on or arose from the same sales agreements that were the subject of the tribal court case, the District Court properly exercised the doctrine of abstention and deferred to the tribal court opinion on the basis of comity. Dismissal of the state suit by the District Court was affirmed. Nielsen v. Brocksmith Land & Livestock, Inc., 2004 MT 101, 321 M 37, 88 P3d 1269 (2004). See also State ex rel. Stewart v. District Court, 187 M 209, 609 P2d 290 (1980), In re Marriage of Limpy, 195 M 314, 636 P2d 266 (1981), and Agri W. v. Koyama Farms, Inc., 281 M 167, 933 P2d 808 (1997).

Failure to Follow Mandatory Collective Bargaining Agreement Grievance Procedure — "May" Construed — Suit Precluded: Two nursing instructors were harassed by a student and sued the Board of Regents and the University System for failure to maintain a safe working environment, common-law constructive discharge, statutory constructive discharge, and breach of the covenant of good faith and fair dealing. Although the instructors were not union members, their employment was governed by a collective bargaining agreement that included a grievance procedure. The instructors interpreted the grievance procedure as permissive rather than mandatory because it stated that an employee may file a grievance. The Supreme Court disagreed. Use of the word "may" meant that if an employee chose to seek a remedy, it could be done through a written grievance, but the employee may also choose not to file a grievance. However, the word "may" did not mean that use of the grievance procedure was not mandatory. The court held that use of the grievance procedure was not permissive, but clearly mandatory. The collective bargaining agreement covered the dispute and was interpreted as requiring use of the grievance procedure. An employee who is covered by a collective bargaining agreement that contains a grievance procedure must exhaust that remedy before bringing suit, and having failed to avail themselves of the remedy available through the collective bargaining agreement, the instructors were foreclosed from maintaining the suit. The Supreme Court ordered dismissal of the complaint. Mackay v. St. Bd. of Regents, 2003 MT 274, 317 M 467, 79 P3d 236 (2003), following Small v. McRae, 200 M 497, 651 P2d 982 (1982), and Brinkman v. St., 224 M 238, 729 P2d 1301 (1986). See also Edwards v. Cascade County Sheriff's Dept., 2009 MT 451, 354 M 307, 223 P3d 893 (2009), where irrespective of whether discrimination claims were covered by a collective bargaining agreement, the claims were barred for failure to comply with the Montana Human Rights Act.

Wrongful Discharge Act Preempted by Federal Labor-Management Reporting and Disclosure Act: Vitullo was an assistant business manager with a union local. When Vitullo decided to run for the position of business manager, he was informed that it was a conflict and his employment was terminated. Vitullo then sued the union local for wrongful discharge in violation of 39-2-904. The District Court concluded that the state claim was preempted by the federal Labor-Management Reporting and Disclosure Act of 1959 and summarily dismissed the claim, so Vitullo appealed. In determining whether the state claim was preempted, the Supreme Court applied Dukes v. Sirius Constr., Inc., 2003 MT 152, 316 M 226, 73 P3d 781 (2003), concluding that a state law that interfered with the longstanding practice of union patronage was not only contrary to the purpose of the federal law, but directly conflicted with the democratic process that the federal law sought to protect. Courts have recognized that the ability of elected union officials to select their own administrators is an integral part of ensuring that union administrators are responsive to the will of union members. The union's constitution recognized the ability of a business manager to choose staff, and a state law that interfered with that ability frustrated the goals and objectives of the federal law. Thus, to the extent that the Montana Wrongful Discharge From Employment Act interferes with the constitutional appointment authority of elected union officers, it conflicts with the Labor-Management Reporting and Disclosure From Employment Act and is preempted. Summary dismissal was affirmed. Vitullo v. Int'l Bhd. of Elec. Workers, Local 206, 2003 MT 219, 317 M 142, 75 P3d 1250 (2003). See also Finnegan v. Leu, 456 US 431 (1982).

Montana Scaffolding Law Not Preempted by Federal Occupational Safety and Health Act: Dukes died after being injured while performing scaffolding work. His estate sued the city of Missoula, claiming that the city failed to enforce state scaffolding laws by performing inspections required under former 50-77-106 (repealed 1999) and that the failure to inspect was a breach of a legal duty and negligence per se under state law. The District Court held that state law was preempted by the federal Occupational Safety and Health Act of 1970 (OSHA), that the state therefore could not impose a legal duty on the city, and that without a legal duty, the city could

not be held negligent under state law. The estate appealed. The Supreme Court noted that there are three ways that federal law may preempt state law: (1) by express preemption through a preemption clause in the federal law stating that state law will not apply; (2) through implied field preemption, wherein federal regulation is so pervasive or comprehensive that it is reasonable to infer that Congress intended to occupy the field and leave no room for supplementary state regulation; and (3) through implied conflict preemption, which manifests itself as an inability of state law to comply with federal law or when state law stands as an obstacle to the objectives of Congress. Express preemption must be clearly manifested, and because no provision of OSHA expressly preempts state health and safety standards or statutory duties, express preemption did not apply. Field preemption also was inapplicable. States can promulgate occupational safety and health standards and enforce them in the absence of OSHA standards; OSHA does not affect state workers' compensation laws or enlarge or diminish state common law or tort law available to injured workers; and OSHA does not create a right of action for injured workers, but allows injured workers to pursue rights of action under state law. Finally, the building inspector's duty to inspect and enforce compliance with OSHA scaffolding standards also survived conflict preemption because nothing in OSHA contemplates that inspection and enforcement are the sole responsibility of the federal government and inspection and enforcement by a state official are preempted only if in conflict with OSHA. Thus, the District Court erred in holding that OSHA preempted state law, so the case was reversed and remanded for further proceedings. Dukes v. Sirius Constr., Inc., 2003 MT 152, 316 M 226, 73 P3d 781 (2003). See also Traudt v. Potomac Elec. Power Co., 692 A2d 1326 (D.C. 1997).

State Not Liable for Unforeseeable Accident — Intervening Criminal Act of Third Person — Expert Testimony on Foreseeability Proper: Samson's son was killed by Bercier, a youth who walked away from a nonsecure, supervised licensed youth group home. Samson sued the state for negligence. The jury returned a verdict for the state, and Samson appealed. Rather than retry the case and evaluate the facts to determine whether the state was negligent, the Supreme Court reviewed the verdict to determine if there was substantial evidence to support it and determined that there was. In order to sustain a negligence action, plaintiff must establish a legal duty on the part of defendant, a breach of that duty, causation, and damages. In cases involving a dispute over the intervening criminal act of a third party, foreseeability must be analyzed twice—first with regard to the existence of a legal duty and second with regard to proximate causation. Samson contended that the District Court erred in allowing the state to present evidence in the form of expert testimony and to argue that the shooting was an unforeseeable accident. The state argued that the expert testimony was relevant and aided the jury. Given the need to determine the foreseeability of Bercier's actions, the expert testimony was properly allowed. Further, in cases alleging an intervening cause, juries must be instructed that the specific injury to plaintiff need not have been foreseen. Samson v. St., 2003 MT 133, 316 M 90, 69 P3d 1154 (2003), affirming Lacock v. 4B's Restaurants, Inc., 277 M 17, 919 P2d 373 (1996). See also Lopez v. Great Falls Pre-Release Serv., Inc., 1999 MT 199, 295 M 416, 986 P2d 1081 (1999), and St. v. LaTray, 2000 MT 262, 302 M 11, 11 P3d 116 (2000).

Separate and Distinct Claims Against Multiple Defendants — Settlement Proceeds of One Defendant Not Offset Against Settlement Against Another Defendant: Plaintiffs entered a settlement and release agreement with one defendant, apportioning the settlement proceeds to plaintiffs' claim for emotional distress, and releasing that defendant. Damages were awarded on plaintiffs' claim against another defendant, Schonrock, for violating the Montana Unfair Trade Practices and Consumer Protection Act of 1973. Schonrock claimed to be entitled to an offset of the emotional distress settlement against the verdict based on violation of the Act. The District Court denied the offset, and the Supreme Court affirmed. Under Schuff v. A.T. Klemens & Son, 2000 MT 357, 303 M 274, 16 P3d 1002 (2000), a dollar-for-dollar pro tanto offset reduction applies only if two or more concurrent or joint tortfeasors cause a single invisible harm. Here, the award of damages by the jury and the settlement proceeds were the result of separate and distinct injuries, so an offset of the settlement against the damages was not appropriate. Plath v. Schonrock, 2003 MT 21, 314 M 101, 64 P3d 984 (2003). See also Jim's Excavating Serv., Inc. v. HKM Associates, 265 M 494, 878 P2d 248 (1994).

State Law Tort Claims Not Protected or Prohibited by FELA — Dismissal for Failure to State Claim Improper: Reidelbach worked for the railroad for about 20 years but was forced to stop working because of job-related disabling cumulative spinal injuries. Reidelbach reached an agreement with the railroad's claim representatives under which he would forego pursuing a claim under the Federal Employers' Liability Act (FELA) and the railroad would propose a fair settlement for the injuries. After 2 years, no settlement was offered, and ultimately the parties

exchanged counteroffers, but no agreement on an amount was reached. Reidelbach then filed a timely FELA claim and also brought several state claims, alleging that the railroad had engaged in unfair, dilatory, and fraudulent claims practices. The District Court concluded that all the postinjury state claims were preempted by FELA and dismissed them pursuant to former Rule 12(b), M.R.Civ.P. (now superseded), so Reidelbach appealed. Following an extensive analysis of federal law related to preemption in its various forms, the Supreme Court held that Reidelbach's state claims were neither expressly nor impliedly preempted by FELA and did not conflict with or stand as an obstacle to the accomplishment and execution of FELA. Therefore, the District Court erred in dismissing Reidelbach's state claims on grounds of FELA preemption, and the case was reversed and remanded for trial in state court. Reidelbach v. Burlington N. & Santa Fe Ry. Co., 2002 MT 289, 312 M 498, 60 P3d 418 (2002).

Action for Damages Allowed Against Local Peace Officers Violating Person's Self-Executing State Constitutional Rights to Privacy, Due Process, and Freedom From Unreasonable Searches and Seizures: Plaintiffs filed a civil action against the Sheriff and two deputies for damages for violation of plaintiffs' Montana constitutional rights to privacy, due process, and freedom from unreasonable searches and seizures. The court held that those three rights are self-executing. The court also held that plaintiffs were entitled to damages. The court based the right to recover damages on: (1) federal cases allowing damage suits for violation of rights under the U.S. Constitution; (2) Restatement (Second) of Torts 874A (1979), which follows the principle in those federal cases by stating that when a constitutional provision protects a class of persons and does not provide a remedy for a violation of the provision, the court may, if appropriate, allow an action under an existing tort or a new cause of action similar to an existing tort; (3) 1-1-109 providing that the common law of England is the rule of decision in Montana courts to the extent that it is not repugnant to or inconsistent with the U.S. or Montana Constitution or Montana statutes, and cases from other states using the English common law as a basis for granting a remedy for a state official's violation of a person's state constitutional rights; (4) 27-1-202 allowing recovery of damages by a person who suffers detriment from the unlawful act or omission of another; and (5) the right under this section to a remedy for every injury. The court stated that there is a great distinction between wrongs, such as assault, conversion, and trespass, by a private individual against another private individual and wrongs against a private individual by a person acting under authority of the state in violation of a person's constitutional rights and stated that common-law causes of action remedying the former are not adequate to remedy the latter. Dorwart v. Caraway, 2002 MT 240, 312 M 1, 58 P3d 128 (2002).

No State and Local Employee Qualified Immunity for Violation of State Constitution Similar to Qualified Immunity of Federal Employee Violating Federal Constitution: Montana has no immunity for a state or local government employee who violates a person's rights under the Montana Constitution comparable to the federal common-law presumption of qualified immunity of a federal employee for violating a person's rights under the U.S. Constitution and laws. In fact, Art. II, sec. 18, Mont. Const., prohibits immunity unless it is specifically provided for by a two-thirds vote of each house of the Legislature. The Legislature has not provided a qualified immunity for state and local employees who violate a person's rights under the Montana Constitution, and the court need not decide whether it can. Furthermore, this section provides that courts of justice are open to every person and that speedy remedy is afforded for every injury of person, property, or character. For these reasons, state and local government employees do not have qualified immunity for violation of a person's rights under the Montana Constitution. Dorwart v. Caraway, 2002 MT 240, 312 M 1, 58 P3d 128 (2002).

Writs of Execution Used to Enter, Search, and Seize — Damages for Violation of Constitutional Rights — Immunity of Peace Officers: Two brothers sued the Sheriff and two deputies for violating their Montana constitutional rights to privacy, due process, and freedom from unreasonable searches and seizures. Neither writs of execution issued to enforce default judgments against one brother nor the postjudgment statutes under which they were issued expressly directed or authorized local peace officers to enter the other brother's house and search for and seize property of the brother against whom the writs were issued and who lived in the house. Therefore, 2-9-103 did not give the peace officers immunity from suit on the basis that they acted "under the authority of law". However, to the extent that any claim for damages for violation of due process is based on failure to provide the brother against whom the writs were issued with notice of property that is exempt from execution and a timely hearing, the claim results from the execution statutes' constitutional inadequacy, and recovery for those procedural inadequacies is barred by the provision in 2-9-103 for immunity for an action under authority of a law subsequently found

unconstitutional. The District Court's dismissal, based on statutory immunity, of the brothers' other claims was reversed. Dorwart v. Caraway, 2002 MT 240, 312 M 1, 58 P3d 128 (2002).

Two Rules of Subrogation — Colorado Subrogation Choice of Law Provision Violative of Montana Public Policy: The Swansons were part-time residents of Montana and Colorado. They paid their automobile insurance premiums through Hartford Insurance Company (Hartford) in Colorado, but were involved in an accident in Montana with a truck owned by USF/Reddaway, incurring over $50,000 in medical expenses. Their policy included: (1) a Colorado statutorily required type of no-fault insurance called personal injury protection, or PIP, under which Hartford was required to pay certain losses and expenses, including medical expenses, lost wages, and rehabilitation expenses; (2) a subrogation clause granting Hartford the right to recover any payments made under PIP in the event that the Swansons recovered damages from the party responsible for the bodily injury; and (3) a choice of law provision providing that any dispute concerning the denial or delay of PIP benefits or subrogation rights would be governed by Colorado law. Hartford paid some claims but denied others, and later learned that USF/Reddaway's insurer intended to pay the Swansons, so Hartford decided to pursue subrogation to recover money that it had paid. The Swansons settled with USF/Reddaway's insurer, but USF/Reddaway's limits of liability exceeded the amount of the settlement. The Swansons eventually sued Hartford for breach of contract and unfair claim settlement. Hartford had the case removed to Montana federal District Court, which certified three questions to the Montana Supreme Court. The Supreme Court cited Skauge v. Mtn. St. Tel. & Tel., 172 M 521, 565 P2d 628 (1977), for the doctrine that an insured must be made whole before an insurer may assert its subrogation rights, which means that not only must the insured recover all losses, but costs of recovery as well, including attorney fees and litigation costs. The 1997 amendments to 33-23-203 allowed for reasonable subrogation, but did not include a specific "made whole" requirement. Nevertheless, common law and the statute jointly establish two rules of subrogation. First, an insured should not receive duplicate payments for the same element of loss, and second, the insurer may not assert subrogation rights until the insured has been fully compensated for damages, regardless of any contract language to the contrary. The Colorado provision providing a choice of law would allow subrogation before the insured is made whole, and is therefore a violation of Montana public policy. Swanson v. Hartford Ins. Co. of the Midwest, 2002 MT 81, 309 M 269, 46 P3d 584 (2002), following Youngblood v. Am. St. Ins. Co., 262 M 391, 866 P2d 203 (1993), and followed in Oberson v. Federated Mut. Ins. Co., 2005 MT 329, 330 M 1, 126 P3d 459 (2005). See also DeTienne Associates Ltd. Partnership v. Farmers Union Mut. Ins. Co., 266 M 184, 879 P2d 704 (1994).

Failure to State Cognizable Claim Under 42 U.S.C. 1983 — Judgment on Pleadings Properly Granted: Brown filed a complaint in District Court seeking to address alleged deprivations of his rights by prison officials under 42 U.S.C. 1983, but the complaint was dismissed on the pleadings for failure to state a cognizable claim under the federal law. The District Court found that Brown's claims were barred by Heck v. Humphrey, 512 US 477 (1994), which held that a state prisoner's claim for damages is not cognizable under 42 U.S.C. 1983 if a judgment in favor of plaintiff would necessarily imply the invalidity of the conviction or sentence, unless the prisoner can demonstrate that the conviction or sentence has been previously invalidated. Brown appealed, seeking to distinguish Heck by casting his claim as one for an earlier parole appearance, rather than as affecting his ultimate release date. The Supreme Court was not persuaded. Brown's claims, if proved, would necessarily imply the invalidity of his conviction or sentence and thus were not cognizable under 42 U.S.C. 1983, unless Brown could demonstrate that the conviction or sentence had been invalidated. The District Court's dismissal of Brown's 42 U.S.C. 1983 claim was affirmed. Brown v. St., 2002 MT 58, 309 M 106, 46 P3d 42 (2002), distinguishing Neal v. Shimoda, 131 F3d 818 (9th Cir. 1997).

Workers' Compensation Claimant's Comparative Negligence Not Applicable in Determining Eligibility — Subrogation Appropriate Only After Claimant Made Whole: McMillan was injured in January 1987 while his employer was performing logging work for the U.S. government. McMillan filed a worker's compensation claim in Montana for which the state did not dispute liability, and he then filed an action under the Federal Tort Claims Act. The federal District Court determined that McMillan was entitled to recover $4,762,686 in damages from the United States, diminished by 45% for McMillan's comparative negligence to $2,619,477. The State Compensation Insurance Fund (State Fund) then sought a determination from the Workers' Compensation Court that the State Fund could assert a subrogation claim against McMillan's recovery from the United States and cease paying benefits. The Workers' Compensation Court held that the full measure of McMillan's loss was $4,762,686, the total amount of damages determined by the federal District

Court, and that pursuant to the equitable "made whole" doctrine articulated in In re Zacher v. Am. Ins. Co., 243 M 226, 794 P2d 335 (1990), McMillan must recover that amount, plus the costs of recovery, before the State Fund was entitled to subrogation. The State Fund appealed, contending that the amount necessary to make McMillan whole was actually $2,619,477 after taking into account McMillan's comparative negligence, plus attorney fees and costs of recovery. The Supreme Court affirmed. The Zacher formula does not contemplate a deduction from a claimant's entire loss for comparative negligence, in accordance with state law, which does not consider a claimant's fault in determining eligibility. Reducing the calculation of McMillan's entire loss, and thus his eligibility for benefits, for comparative negligence would introduce a claimant's fault into the workers' compensation system in violation of Montana law. Thus, the State Fund's subrogation interest could be properly asserted only after McMillan recovered the full amount of the total amount of damages determined by the federal District Court. St. Comp. Ins. Fund v. McMillan, 2001 MT 168, 306 M 155, 31 P3d 347 (2001).

No Constitutional Right to Attorney Fees or to Reduction of Collateral Source or Settlement Offset by Plaintiff's Attorney Fees: The right to full legal redress contained in this section is limited to the recovery of those damages provided by the general tort law, and pursuant to the American Rule on attorney fees, attorney fees are not damages recoverable pursuant to the general tort law because it pertains to survival and wrongful death actions. Montana Supreme Court cases that include the costs of recovery in the concept of full compensation and that relate to equitable principles unique to the law of legal subrogation are inapplicable to the constitutional issue of whether full legal redress under the constitution requires payment of attorney fees. Montana's common law has followed the American Rule that attorney fees are not an element of damages unless expressly provided by statute or contract. Attorney fees are the subject of a contract between a party and the party's attorney. They are what the party chooses to do with part of the recovered damages, based on a prior agreement. Therefore, the right to full legal redress does not create a right to attorney fees, and the defendant's right to have collateral source and settlement payments offset against the judgment was not subject to a right of the plaintiff to have the offset amount reduced by the plaintiff's attorney fees. Schuff v. A.T. Klemens & Son, 2000 MT 357, 303 M 274, 16 P3d 1002, 57 St. Rep. 1499 (2000).

Offsetting Judgment by Amount of Settlement or Collateral Source Payment Not Denial of Full Compensation for Loss: An offset against a judgment of an amount received through settlement or from a collateral source does not deny full compensation for a loss. It simply ensures a single recovery for a single injury. Schuff v. A.T. Klemens & Son, 2000 MT 357, 303 M 274, 16 P3d 1002, 57 St. Rep. 1499 (2000).

Double Analysis of Foreseeability in Dispute Over Intervening Act of Third Party — Duty of Police to Protect Hospital Worker From Intoxicated Person in Voluntary Custody: Havre police received a report of two girls fighting downtown. They responded and found two intoxicated women fighting, one of whom appeared to require medical treatment. LaTray was working as a nurse at a hospital emergency room when police officers delivered the woman for treatment, accompanied by her sister. The injured woman was placed in protective custody, but neither woman was arrested. When attempting to administer medical care to the injured woman, LaTray was intentionally assaulted and injured by the sister, and LaTray filed an action against the city police officers for negligently failing to exercise proper control over the sister. The District Court found that because the intentional assault was not reasonably foreseeable as a matter of law, there was no duty owed LaTray by the city, and summary judgment was granted to the city. The Supreme Court held that intervening criminal acts of third persons are not automatically unforeseeable as a matter of law, but rather must be addressed in the foreseeability context on a case-by-case basis (see Starkenburg v. St., 282 M 1, 934 P2d 1018 (1997)). Although foreseeability is ordinarily analyzed only under the duty element of negligence, in a dispute over intervening criminal acts of a third party, foreseeability must be analyzed twice: first with regard to the existence of a legal duty and, second, with regard to proximate causation (see Lopez v. Great Falls Pre-Release Serv., Inc., 1999 MT 199, 295 M 416, 986 P2d 1081 (1999)). The city relied on Phillips v. Billings, 233 M 249, 758 P2d 772 (1988), arguing that because LaTray did not claim the existence of a special relationship or otherwise show that the officers owed LaTray a greater duty of care than that owed to the general public, the city owed LaTray no duty of care. The Supreme Court noted that Phillips has been clarified in Nelson v. Driscoll, 1999 MT 193, 295 M 363, 983 P2d 972 (1999), which stated that a duty to protect third persons arises only when a police officer actually makes an arrest or otherwise takes possession or custody of an individual. Although the officers did not actually arrest the sister or otherwise have a basis for taking her into custody in this case, the officers voluntarily undertook possession or custody in transporting

her to the hospital and consequently harbored the ability to control her actions and prevent an unreasonable risk of harm to third persons like LaTray, who falls within the scope of the risk that negligent supervision would foreseeably entail. Thus, the Supreme Court held that, as a matter of law, the city owed a duty of reasonable care to adequately supervise the sister so as to prevent harm to a third person who would foreseeably be placed within the scope of risk arising from negligent supervision. Whether the city breached that duty is an issue for the jury because the causal issue of intervening acts of third parties normally involves questions of fact. Viewed in the light most favorable to LaTray, there was sufficient evidence of the sister's irascible conduct to raise a jury question as to whether she posed a danger to those around her on the day in question, and reasonable jurors could differ as to whether she presented a foreseeable risk of injury to persons in her immediate vicinity. These contested issues of material fact precluded a grant of summary judgment as a matter of law, and the case was reversed and remanded for a new trial. LaTray v. Havre, 2000 MT 119, 299 M 449, 999 P2d 1010, 57 St. Rep. 497 (2000), followed, with regard to appropriateness of summary judgment on issues of negligence, in Prindel v. Ravalli County, 2006 MT 62, 331 M 338, 133 P3d 165 (2006). See also Morrow v. FBS Ins. Montana-Hoiness LaBar, Inc., 230 M 262, 749 P2d 1073 (1988), and Estate of Strever v. Cline, 278 M 165, 924 P2d 666 (1996).

No Duty Constituting Negligence When Danger or Risk Unforeseeable — Summary Judgment Proper Absent Material Fact Regarding Legal Duty: The father could not reasonably foresee that, by giving his child permission to go to a friend's house to play, the child would go to the house of a different friend, participate along with other children in burning a photograph using gasoline, and be burned when another friend accidentally kicked the container of flaming gasoline onto his child. The duty element of negligence turns primarily on foreseeability, and if a reasonably prudent defendant can foresee neither any danger of direct injury nor any risk from an intervening cause, there is no negligence. Ordinarily, negligence actions involve questions of fact and are not susceptible to summary judgment, but in this case, reasonable minds could not differ regarding the absence of material fact regarding any duty owed by the father, so summary judgment was proper as a matter of law. Poole v. Poole, 2000 MT 117, 299 M 435, 1 P3d 936, 57 St. Rep. 489 (2000), following Busta v. Columbus Hosp. Corp., 276 M 342, 916 P2d 122 (1996). See also Lopez v. Great Falls Pre-Release Serv., Inc., 1999 MT 199, 295 M 416, 986 P2d 1081 (1999), and Gourneau v. Hamill, 2013 MT 300, 372 Mont. 182, 311 P.3d 760.

No Claim for Wrongful Termination Apart From Either Contract or Wrongful Discharge Act: Solle claimed that her employer violated the common-law duty of good faith and fair dealing by failing to renew her employment contract when she had a reasonable expectation that a renewal would be offered. Solle's employer moved to compel arbitration, the motion was granted, and Solle appealed. Under Meech v. Hillhaven W., Inc., 238 M 21, 776 P2d 488, 46 St. Rep. 1058 (1989), claims for wrongful termination from tort or express or implied contract are no longer viable under Montana law. Rather, 39-2-913 explicitly preempts all common-law remedies but bars only tort and contract claims that are "for discharge". A threshold determination in cases alleging wrongful termination is whether the parties' relationship is governed by a written contract for a specific term or whether it falls under the provisions of the Wrongful Discharge From Employment Act, which applies to noncontract situations. Solle's employment was covered by a written contract containing an arbitration clause, and her claim for breach of the implied covenant of good faith and fair dealing was inextricably intertwined with and based upon her termination from employment. Although breach of a contract is not a prerequisite to breach of the implied covenant of good faith and fair dealing, the covenant arises out of a contractual relationship between the parties, and a breach of the covenant is a breach of the contract. Solle's contract was silent as to whether there was an obligation on the employer's part to renew the contract or on Solle's part to accept a renewal offer, so Solle argued that the failure to include such a provision indicated the employer's intent not to cover a claim like this under the arbitration clause. The Supreme Court disagreed and proceeded to treat the dispute as arising out of the employment contract. Solle was not allowed to maintain a wrongful termination claim apart from either the contract or the Wrongful Discharge From Employment Act. Solle's contract contained a provision that any unresolved dispute would be subject to arbitration, but the arbitration clause did not explicitly provide that it would govern issues concerning contract nonrenewal. Nevertheless, the contract governed Solle's employment, termination, and postemployment relationship and did not explicitly exclude disputes arising after contract termination. The presumption favors arbitrability, and the District Court did not err in holding that Solle's claim was subject to arbitration. Solle v. W. St. Ins. Agency, Inc., 2000 MT 96, 299 M 237, 999 P2d 328, 57 St. Rep. 391 (2000). See also Nolde Bros., Inc. v. Bakery & Confectionery Workers Union, 430

US 243, 51 L Ed 2d 300, 97 S Ct 1067 (1977), and Marsden v. Blue Cross & Blue Shield of Mont., 2012 MT 306, 368 Mont. 34, 291 P.3d 1229.

Special Relationship of Custody or Control by Prerelease Center — Responsibility for Public Safety Within Zone of Risk — Foreseeability: A prerelease center entered a contract with the Department of Corrections to supervise residents like Gardipee, who walked away from the center and subsequently injured Lopez. The District Court granted summary judgment for the center on grounds that the attack on Lopez was unforeseeable. Generally, there is no duty to protect others against harm by third persons, but in this case, the contract created a special relationship of custody or control, in turn creating a special responsibility upon the center to protect those members of the public who would be placed within the foreseeable zone of risk created by negligent supervision of a prerelease resident. As a matter of law, the center owed a duty of reasonable care to all persons present within the zone of danger created by the center's failure to exercise reasonable care in supervising Gardipee. Here, reasonable minds could differ as to whether it was reasonably foreseeable by the center that a failure to supervise Gardipee could pose an unreasonable risk of harm to Lopez in particular. There was a genuine issue of material fact as to whether the center knew or should have known that there was enmity between Gardipee and Lopez and a possibility of violence if Gardipee escaped, as well as whether Gardipee's attack was a superseding cause of the harm to Lopez. Both questions were suitable for resolution by a trier of fact, precluding summary judgment. The Supreme Court reversed and remanded for a trial on the merits. Lopez v. Great Falls Pre-Release Serv., Inc., 1999 MT 199, 295 M 416, 986 P2d 1081, 56 St. Rep. 771 (1999).

Actionable Section 1983 Claim Under State-Created Danger Theory: A government official who, while acting under color of state law, deprives an individual of constitutionally protected rights may be subject to personal liability for civil damages pursuant to 42 U.S.C. 1983. Generally, a government official's failure to protect an individual from harm does not constitute a due process violation. Inaction by the state, even when a danger is known, does not trigger a due process obligation except under the "state-created danger" theory, derived from DeShaney v. Winnebago County Dept. of Social Services, 489 US 189, 103 L Ed 2d 249, 109 S Ct 998 (1989), which provides that a constitutional duty to protect may be imposed when state actors have affirmatively acted to create plaintiff's danger or to render plaintiff more vulnerable to it. Adopting the test in Huffman v. County of Los Angeles, 147 F3d 1054 (9th Cir. 1998), the Supreme Court held that to assert an actionable 42 U.S.C. 1983 claim under the state-created danger theory, plaintiff must demonstrate that the state acted affirmatively, with deliberate indifference, in creating a foreseeable danger to plaintiff, leading to deprivation of plaintiff's constitutional rights. In the present case, material facts existed as to whether an officer affirmatively and with deliberate indifference placed a woman in danger, increased her vulnerability to danger, or deprived her of her right to life; thus, summary dismissal of her husband's personal liability claim against the officer was reversible error. Nelson v. Driscoll, 1999 MT 193, 295 M 363, 983 P2d 972, 56 St. Rep. 744 (1999). See also Wood v. Ostrander, 879 F2d 583 (9th Cir. 1989), and Kneipp v. Tedder, 95 F3d 1199 (3rd Cir. 1996).

Public Duty Doctrine as Applied to Law Enforcement Personnel — Exception in Cases of Special Relationship: Trina admitted that she had been drinking when stopped in her vehicle by Officer Driscoll, who nevertheless believed that sufficient probable cause did not exist to arrest the woman. Instead, thinking Trina might be impaired, the officer suggested a ride home or that Trina walk the 2-mile distance and warned Trina about returning to the vehicle. Trina decided instead to walk to a phone and call for a ride and was killed in traffic. Trina's husband brought suit for civil damages under 42 U.S.C. 1983, claiming that the officer breached the duty to protect, in violation of Trina's due process rights. The District Court summarily dismissed the claim, holding that because no probable cause existed for Trina's arrest, the officer had no duty to protect Trina from harm and that without a duty, the action failed. The public duty doctrine provides that a police officer's duty to protect and preserve the peace is owed to the public at large rather than to a particular person, unless a special relationship exists, thus giving rise to a special duty that is more particular than that owed to the public. A special relationship is established: (1) by a statute intended to protect a specific class of persons, of which the plaintiff is a member, from a particular type of harm; (2) when a government agent undertakes specific action to protect a person or property; (3) by governmental actions that reasonably induce detrimental reliance by a member of the public; and (4) under certain circumstances when the agency has actual custody of the plaintiff or of a third person who harms the plaintiff. Relying on Stewart v. Standard Publishing Co., 102 M 43, 55 P2d 694 (1936), the Supreme Court agreed that although the officer may not have initially owed Trina a duty to protect, that duty was assumed as a matter of law

when the officer prevented the woman from driving her car and ensured that she did not attempt to drive. The question of whether the duty to protect was breached is a question of fact for the jury, so summary dismissal was improper. Nelson v. Driscoll, 1999 MT 193, 295 M 363, 983 P2d 972, 56 St. Rep. 744 (1999), clarifying and distinguishing Phillips v. Billings, 233 M 249, 758 P2d 772 (1988), and followed in Massee v. Thompson, 2004 MT 121, 321 M 210, 90 P3d 394 (2004). Nelson was followed, as to elements of exception to the public duty doctrine, in Prosser v. Kennedy Enterprises, Inc., 2008 MT 87, 342 M 209, 179 P3d 1178 (2008). See also Krieg v. Massey, 239 M 469, 781 P2d 277, 46 St. Rep. 1839 (1989), Busta v. Columbus Hosp. Corp., 276 M 342, 916 P2d 122 (1996), and Eves v. Anaconda-Deer Lodge County, 2005 MT 157, 327 M 437, 114 P3d 1037 (2005).

Workers' Compensation Benefit Reduction Provision Violative of Right to Full Legal Redress: Under 39-71-416(1) (now repealed), an insurer was entitled to reduce by 30% the benefits otherwise payable to an injured worker if the worker received anything short of full legal redress. The effect of this provision was to transfer dollars recovered from a third-party tortfeasor back to the insurer, which plainly violates the constitutional entitlement to full legal redress. The statute did not create a new class of benefits or eliminate any benefits, nor was it dictated by federal law; rather, it simply allowed the automatic and arbitrary reduction of benefits whenever a worker obtained a third-party settlement or award. The District Court did not err in finding the benefit reduction provision to be an unconstitutional violation of the right to full legal redress. Connery v. Liberty NW. Ins. Corp., 1998 MT 125, 289 M 94, 960 P2d 288, 55 St. Rep. 496 (1998), distinguishing Watson v. Seekins, 234 M 309, 763 P2d 328 (1988), Stratemeyer v. Lincoln County, 259 M 147, 855 P2d 506 (1993), and Murer v. St. Comp. Mut. Ins. Fund, 267 M 516, 885 P2d 428 (1994).

No Duty of Attorney to Nonclient in Child Custody Case: An attorney must be able to vigorously advocate a client's interests in litigation without being compromised by obligations to nonclients. If an attorney were considered to owe the same duty of care to both a parent and child in an adversarial custody case, neither parent nor child would be served effectively. Because the interests of a parent and those of a child may not be identical, the attorney's duty runs solely to the client except if the conduct rises to the level of deceit or collusion or is intentionally reckless. Rhode v. Adams, 1998 MT 73, 288 M 278, 957 P2d 1124, 55 St. Rep. 303 (1998). See also Crane Creek Ranch, Inc. v. Cresap, 2004 MT 351, 324 M 366, 103 P3d 535 (2004), and Redies v. Attorneys Liability Protection Soc'y, 2007 MT 9, 335 M 233, 150 P3d 930 (2007).

Child Support Enforcement Remedies Held Separate Remedies to Be Exercised Within Ten-Year Statute of Limitations — Due Process Requirements Applicable to Separate Remedies — Connell Distinguished: Emery was divorced from Keep in 1987, and Emery was ordered to pay child support. In exchange for Keep's receipt of payments under the Aid to Families With Dependent Children (now FAIM financial assistance) program, Keep assigned the Child Support Enforcement Division (CSED) of the Department of Public Health and Human Services her right to receive child support and her right to enforcement of support. In 1991, CSED served Emery with a Notice of Intent (NOI) to collect the child support payments by referral of his debt to the Internal Revenue Service (IRS) for collection by interception of any federal tax refund owed to Emery. In response to the NOI, Emery timely requested an administrative hearing before CSED, which was granted, but the hearing was indefinitely continued, and no interception was made by the IRS. In 1992, CSED sent a second NOI to Emery, but Emery made no response. In 1992, no interception was made by the IRS. Also in 1992, Emery and Keep executed a stipulated change of their children's custody. In that stipulation, Keep waived her ability to collect child support arrearages, and the District Court approved the stipulation in an order. In 1995, CSED sent a third NOI to Emery notifying him of CSED's intent to collect child support payments by interception of Emery's federal tax refund. In response to the 1995 NOI, Emery requested a hearing before the CSED. Within 8 months from service of the 1995 NOI upon Emery, the Administrative Law Judge (ALJ) held that CSED's assigned right to child support was not affected by the waiver because CSED was not a party to the stipulation. The District Court approved the decision of the ALJ. On a motion for alteration or amendment of the District Court's order, the District Court, relying upon In re Connell v. St., 280 M 491, 930 P2d 88 (1997), held that the delay between Emery's 1991 request for administrative review and the 1996 hearing before the ALJ violated Emery's right to due process of law and his right to the administration of justice without delay. The Supreme Court reviewed its decision in Connell and pointed out that in that case, 44 months elapsed before the ALJ made a decision in response to Connell's request for administrative review of a CSED NOI and that the 44-month lapse denied Connell his constitutional rights to due process and administration of justice without delay. In contrast, the

Supreme Court held that the NOI served upon Emery in 1995 in the case before it was a separate proceeding from the NOI served upon him in 1991 and was not, as interpreted by the District Court, a continuation of the 1991 proceeding because the 1991 proceeding was discontinued once the IRS failed to make an interception of the federal tax refund owed to Emery. Further, the Supreme Court pointed out that the various administrative remedies, such as state debt offsets, license suspension, warrants for distraint, and state income withholding, are all separate remedies for the CSED to pursue, and election of one remedy does not preclude pursuit of another remedy after, or at the same time as, the remedy chosen by the CSED until the debt assigned to the CSED is fully paid. Any of the remedies, the Supreme Court held, were subject to the 10-year statute of limitations provided in 27-2-201. The Supreme Court therefore held that because the lapse of time in the case before it was between different proceedings and not within one proceeding and the lapse of time within the 1995 proceeding was reasonable, Emery's right of due process and right to administration of justice without delay were not violated. The Supreme Court also held that because Emery had no right under Montana law to a hearing when no action was being taken by the CSED against him, the failure of the CSED to grant a hearing did not implicate Emery's rights of due process and administration of justice. In response to Emery's argument that the CSED did not act soon enough in initiating its collection action, the Supreme Court held that this section imposes no requirement that the CSED act "speedily and without delay" within the 10-year statute of limitations provided in 27-2-201, noting that imposition of such a requirement would effectively eliminate that 10-year limitation period. For these reasons, the Supreme Court reversed the decision made by the District Court that Emery's constitutional rights were violated by the decision of the CSED. Emery v. St., 286 M 376, 950 P2d 764, 54 St. Rep. 1454 (1997).

Liability of State to Suit — Active Duty U.S. Army Worker Injured While Assigned to National Guard — Tort Claim Not Barred: While in full-time service to the U.S. Army, Trankel was assigned to a Montana Army National Guard unit rebuilding armored vehicles and was injured by toxic chemicals during the rebuilding project. Trankel sued the state, asserting violations of the Occupational Health Act of Montana, the Montana Safety Act, and the Employee and Community Hazardous Chemical Information Act. The state contended that Feres v. U.S., 340 US 135, 95 L Ed 152, 71 S Ct 153 (1950), and Evans v. Mont. Nat'l Guard, 223 M 482, 726 P2d 1160 (1986), barred a claim that was incident to military service regardless of the substantive law upon which the claim was based, the status of the plaintiff at the time of injury, or the status of the party against whom the claim was made and that the alleged violations of the state Acts did not provide a private cause of action and could be enforced only through the administrative remedies provided for in the Acts. The District Court agreed with the state and dismissed Trankel's complaint with prejudice. On appeal, the Supreme Court distinguished Feres and related federal cases because they were based on federal rather than state tort claims, with little bearing on rights under state law and the Montana Constitution. The Supreme Court overruled the holding in Evans that the National Guard was not a political subdivision subject to suit, finding instead that the National Guard and the Department of Military Affairs were clearly governmental entities within the meaning of 2-9-101 and that the constitutional premise on which Evans was based did not apply. Consistent with other applications of this section, any statute or court decision that deprives an employee of the right to full legal redress, as defined by general Montana tort law against third parties, is absolutely prohibited. Because Trankel was not employed by the Montana Army National Guard or the Department of Military Affairs at the time of injury, Trankel's claim against the state pursuant to the tort claims statutes was not barred. Further, applying the rationale in Pollard v. Todd, 148 M 171, 418 P2d 869 (1966), the Supreme Court held that the statutory state Acts did not give rise to causes of action independent from a claim of negligence subject only to the administrative remedies contained in the Acts, but rather established duties, the violation of which is negligence per se. Trankel v. St., 282 M 348, 938 P2d 614, 54 St. Rep. 380 (1997), distinguishing Feres v. U.S., 340 US 135, 95 L Ed 152, 71 S Ct 153 (1950), U.S. v. Johnson, 481 US 681, 95 L Ed 2d 648, 107 S Ct 2063 (1987), and Stauber v. Cline, 837 F2d 395 (9th Cir. 1988); following Webb v. Mont. Masonry Constr. Co., 233 M 198, 761 P2d 343 (1988), Meech v. Hillhaven W., Inc., 238 M 21, 776 P2d 488 (1989), and Francetich v. St. Comp. Mut. Ins. Fund, 252 M 215, 827 P2d 1279 (1992); overruling Evans v. Mont. Nat'l Guard, 223 M 482, 726 P2d 1160 (1986); and followed in Lake v. St., 282 M 484, 938 P2d 698, 54 St. Rep. 442 (1997), and Oberson v. Federated Mut. Ins. Co., 2005 MT 329, 330 M 1, 126 P3d 459 (2005).

Portion of Workers' Compensation Subrogation Statute Unconstitutional Impairment of Right to Full Redress: Subsection (6)(a) of 39-71-414, which directs that an insurer has a right to subrogate even though the injured worker's damages exceed his total recoveries, has the effect

of legislatively overruling the equitable theory that subrogation cannot begin until the injured worker is made whole, and that subsection is in violation of the constitutional right to legal redress expressed in this section, in that it restricts an injured worker's right to full redress against third-party tortfeasors. In a case of reasonably clear liability in which a claimant is forced to settle for the limits of an insurance policy that, together with claimant's workers' compensation award, do not grant full legal redress to claimant under general tort law, an insurer is not entitled to subrogation rights under workers' compensation law. Francetich v. St. Comp. Mut. Ins. Fund, 252 M 215, 827 P2d 1279, 49 St. Rep. 222 (1992), following Skauge v. Mtn. St. Tel. & Tel., 172 M 521, 565 P2d 628 (1977), and White v. St., 203 M 363, 661 P2d 1272 (1983), distinguishing Meech v. Hillhaven W., Inc., 238 M 21, 776 P2d 488 (1989), and overruling Brandner v. Travelers Ins. Co., 179 M 208, 587 P2d 933 (1978). See also Hall v. St. Comp. Ins. Fund, 218 M 180, 708 P2d 234 (1985), and Zacher v. Am. Ins. Co., 243 M 226, 794 P2d 335 (1990).

State and State Officials Not "Persons" for Purposes of Federal Suit Involving Deprivation of Rights: Neither the state nor its officials acting in their official capacities are "persons" for purposes of a civil action for deprivation of rights under 42 U.S.C. 1983. State ex rel. Div. of Workers' Comp. v. District Court, 246 M 225, 805 P2d 1272, 47 St. Rep. 1911 (1990), following Will v. Mich. Dept. of State Police, 491 US 58, 105 L Ed 2d 45, 109 S Ct 2304 (1989), and Brandon v. Holt, 469 US 464, 83 L Ed 2d 878, 105 S Ct 873 (1985).

Constitutionality of Wrongful Discharge Law: Title 39, ch. 2, part 9, the Wrongful Discharge From Employment Act, does not wrongfully deprive an individual falling within its purview of the right to full legal redress within the meaning of Art. II, sec. 16, Mont. Const. The Act does not deny full legal redress or a speedy remedy; it simply defines what constitutes the facts that must be established to obtain remedy and redress in the context of wrongful discharge. No fundamental right to a particular cause of action, remedy, or redress is constitutionally created, and for the court to derive such a right would violate the separation of powers by preventing the Legislature and the people through the initiative process from restricting or modifying the common law relative to injuries of person, property, or character. Rather, Art. II, sec. 16, guarantees only a right to access to courts to seek a remedy for wrongs recognized by common law or statutory authority. No one has a vested interest in any rule of common law. The Legislature may alter common-law causes of action to promote legitimate state interests and may alter or abrogate causes of action sounding in tort. Meech v. Hillhaven W., Inc., 238 M 21, 776 P2d 488, 46 St. Rep. 1058 (1989), overruling Pfost v. St., 219 M 206, 713 P2d 495, 42 St. Rep. 1957 (1985), White v. St., 203 M 363, 661 P2d 1272, 40 St. Rep. 507 (1983), and Corrigan v. Janney, 192 M 99, 626 P2d 838, 38 St. Rep. 545 (1981), distinguished in Ross v. Great Falls, 1998 MT 276, 291 M 377, 967 P2d 1103, 55 St. Rep. 1127 (1998).

Accepted Work Rule Doctrine — Contractor Nonliability: The District Court properly granted summary judgment in favor of a contractor on the issue of negligence based on the accepted work rule doctrine. The doctrine, first recognized in Ulmen v. Schwieger, 92 M 331, 12 P2d 856 (1932), is based on the rule that an independent contractor is not liable to third parties for injuries that occur after the work has been completed and turned over to and accepted by the employer. Instead, the person employing the contractor is substituted as the responsible party. The Supreme Court affirmed the doctrine by refusing to extend contractor liability to foreseeable injury caused by negligent construction. Harrington v. LaBelle's of Colo., Inc., 235 M 80, 765 P2d 732, 45 St. Rep. 2176 (1988), overruled by Pierce v. ALSC Architects, P.S., 270 M 97, 890 P2d 1254, 52 St. Rep. 93 (1995).

Unlawful Conduct Not Necessarily Bar to Negligence Action: Plaintiff and defendant were engaged in the illegal activity of hunting coyotes from defendant's airplane without a proper permit when the plane crashed. The pari delicto doctrine, found in 1-3-215, does not bar plaintiff's negligence action against the defendant as pilot. Conduct prohibited by law that is not strongly condemned by public policy as a matter of serious criminal conduct or delinquency may not be sufficient to bar recovery. The hunting statute in issue is not of a type involving conduct of which the law so strongly disapproves as a matter of public policy that access to the courts should be denied for tort purposes. In light of this holding, the court overrules two prior Montana cases that relied on the pari delicto doctrine to bar lawsuits. The two are Melville v. Butte-Balaklava Copper Co., 47 M 1, 130 P 441 (1913), and Jackson v. Lomas, 60 M 8, 198 P 434 (1921). Waller v. Engelke, 227 M 470, 741 P2d 385, 44 St. Rep. 1241 (1987).

Veterans' Preference Statute: Plaintiff applied for a position with the Montana University System, claiming entitlement to the then statutory veterans' preference in employment. He was not interviewed for the job; a nonveteran was hired. Plaintiff petitioned the District Court for an order to show cause why he should not have been hired. Before a hearing was held, the preference

was repealed. Violation of the preference statute was not recognized by statutory or common law as compensable in money damages. As violation of the preference statute did not result in a compensable injury within this section, repeal of the preference did not deprive plaintiff of a remedy for an injury. Femling v. Mont. St. Univ., 220 M 133, 713 P2d 996, 43 St. Rep. 235 (1986).

Award of Damages for Mental Anguish — Findings Required — Improper Jury Instruction: One instruction given to the jury stated that if they found for plaintiffs, the jury "must award them damages for all emotional distress and mental anguish suffered as a result of the defendants' conduct". In effect, this instruction directed a verdict on damages for emotional distress even if plaintiffs recovered only on their contract claim. In Johnson v. Supersave Markets, Inc., 211 M 465, 686 P2d 209, 41 St. Rep. 1495 (1984), the Supreme Court set out the criteria for determining whether distress is compensable absent a showing of physical or mental injury, which included whether the tortious conduct "caused a significant impact upon the person of the plaintiff". In the present case, McGregor testified that his financial problems bothered him a lot, but the record disclosed no serious emotional distress or anxiety as required by the holding in Johnson. The court held that the jury instruction improperly required an award of damages for emotional distress and mental anguish without finding a significant impact on the plaintiffs. The judgment awarding damages for mental anguish was reversed. McGregor v. Cushman/Mommer, 220 M 98, 714 P2d 536, 43 St. Rep. 206 (1986).

Subrogation Rights Based on Full Legal Redress: The Workers' Compensation Court, relying on 39-71-414(1), concluded that Elwell's employer, ASARCO, was entitled to subrogation against Elwell's third-party settlement from a co-employee. On appeal, Elwell contended that although he was receiving the maximum benefits allowed under the Workers' Compensation Act, they were not sufficient to compensate him for his injury, so ASARCO was not entitled to subrogation. The Supreme Court, citing its decision in Hall v. St. Comp. Ins. Fund, 218 M 180, 708 P2d 234, 42 St. Rep. 1502 (1985), held that when a claimant is forced, in a case of clear liability, because of maximum limits of an insurance policy, into a settlement with a third-party tortfeasor, the amount of which settlement, together with claimant's workers' compensation award, does not give the claimant full legal redress, the insurer or the employer is not entitled to subrogation rights under 39-71-414 until the claimant has attained full legal redress. A question of fact exists as to whether the total prospective workers' compensation benefits, plus the recovery from the third-party insurer, will give the claimant full legal redress. The judgment of the Workers' Compensation Court was reversed and the cause remanded for a determination of whether full legal redress was obtained, and if that is the case, ASARCO would then be entitled to subrogation for that portion which exceeded full legal redress. Elwell v. Am. Smelting & Ref., Inc., 219 M 248, 711 P2d 819, 42 St. Rep. 1992 (1985).

Limitations on Certain Types of Government Tort Damages — Constitutionality: Article II, sec. 16, Mont. Const., guarantees that all persons shall have a speedy remedy for every injury to person, property, or character. The constitution's language "every injury" embraces all recognized compensable components of injury, including the right to be compensated for physical pain, mental anguish, and the loss of enjoyment of living. The right to bring a civil action for personal injury is a fundamental right, and the strict scrutiny test, requiring that the statutory scheme be found unconstitutional unless the State could demonstrate that it was necessary to promote a compelling government interest, applied to 2-9-104 (repealed, 1983). Subsection (1) of 2-9-104 (repealed, 1983) provided that neither the state, a county, municipality, taxing district, nor any other political subdivision of the state was liable in tort for: (a) noneconomic damages; or (b) economic damages in excess of $300,000 a claimant and $1 million an occurrence. The State argued a compelling state interest in insuring that there would be sufficient funds to supply needed services to those governed by state and local government and that government has to engage in a wide range of activities, some extremely dangerous and not confronted by private industry. This bare assertion fell far short of justifying the subsection (1)(a) class discrimination that infringed upon fundamental rights. Denying noneconomic damages while allowing economic damages was unconstitutional under the strict scrutiny equal protection test. Furthermore, to strike (1)(a) and leave (1)(b) intact would create new discrimination problems in that those with economic loss could get only limited damages, while those with noneconomic loss would have no limit imposed; and since the State failed to demonstrate a compelling state interest justifying any limitation, subsection (1) was unconstitutional in its entirety. Though some liability limit may comport with equal protection, the limitation could not discriminate between those suffering pain and loss of life quality and those suffering primarily economic loss. White v. St., 203 M 363, 661 P2d 1272, 40 St. Rep. 507 (1983), overruled, Meech v. Hillhaven W., Inc., 238 M 21, 776 P2d 488, 46 St. Rep. 1058 (1989), distinguished in Nick v. Dept. of Highways, 219 M 168, 711 P2d

795, 42 St. Rep. 1926 (1985), followed in Pfost v. St., 219 M 206, 713 P2d 495, 42 St. Rep. 1957 (1985) (overruled, Meech v. Hillhaven W., Inc., 238 M 21, 776 P2d 488, 46 St. Rep. 1058 (1989)), in which the Supreme Court invalidated on similar grounds the Legislature's enactment of 2-9-107 as violative of the fundamental right to redress, insofar as it limits the liability of the state or any political subdivision, in tort actions for damages suffered from an act or omission of an officer, agent, or employee of the entity, to amounts not in excess of $300,000 for each claimant and $1,000,000 for each occurrence. The court rejected the legislative findings that prefaced enactment of 2-9-107 as a substitute for 2-9-104, which was declared unconstitutional in White. The legislative findings denigrate the right of the individual to full legal redress in favor of not raising taxes and do not constitute a compelling state interest.

Availability of Wrongful Death Remedy Under Former Law: The defendants in this wrongful death and survival action owned a rental house leased to the plaintiff. The plaintiff's husband died of an electrical shock received through the plumbing of the house. The plaintiff appealed the granting of a summary judgment motion to the defendants. The Residential Landlord and Tenant Act of 1977 was adopted after this case arose, so its adoption of the doctrine of implied warranty of habitability was inapplicable. The Supreme Court here examined case law prior to the new statute and overruled a holding in the Dier case that if the landlord fails to repair, after notice, the tenant may himself repair, within a certain limit, or move out; but he has no redress in damages for injury to person or property consequent upon the landlord's failure to repair. That holding was not applicable to cases involving tenant suits for personal injuries against a landlord. Citing Art. II, sec. 16, Mont. Const., the court said that it would be patently unconstitutional to deny a tenant all causes of action for personal injuries or wrongful death arising out of the alleged negligent management of rental premises by a landlord. A repair and deduct statute provides no alternative remedy for damages caused by personal injury or wrongful death. The duty of care in section 58-607, R.C.M. 1947, now 27-1-701, was held applicable. This is a duty to exercise ordinary care in the management of the premises to avoid exposing persons thereon to an unreasonable risk of harm, subject to the defenses of contributory negligence or assumption of risk. Corrigan v. Janney, 192 M 99, 626 P2d 838, 38 St. Rep. 545 (1981), overruled, Meech v. Hillhaven W., Inc., 238 M 21, 776 P2d 488, 46 St. Rep. 1058 (1989).

Constitutionality of Retraction Provision: Sections 27-1-814 through 27-1-817 (now repealed), barring a libel action unless the defendant is given an opportunity to correct the libelous matter, were unconstitutional as being in contravention of Art. II, sec. 16, Mont. Const., which mandates state courts to be open to every person and to afford a remedy for every injury to character, and Art. II, sec. 7, Mont. Const., which provides that a person is responsible for abusing the freedom of the press. Madison v. Yunker, 180 M 54, 589 P2d 126 (1978).

Abolition of Common-Law Right: The Legislature has the power to eliminate a common-law right when there is no interference with a vested right, and a statutory provision limiting actions for damages arising out of or resulting from construction of improvements to real property to 10 years after their completion was not unconstitutional under this section. Reeves v. Ille Elec. Co., 170 M 104, 551 P2d 647 (1976).

Retroactive Application: This section was inapplicable when a cause of action arose prior to the effective date of the 1972 Constitution. The right to seek redress against a statutory employer is a right created for the first time. Poulson v. Walsh-Groves, 166 M 163, 531 P2d 1335 (1975).

WORKERS' COMPENSATION

Sole Remedy Aspect of Workers' Compensation Held Not to Deny Substantive Due Process or Denial of Full Legal Redress: The decedent, an unmarried worker with no children, was killed in an at-work accident and his mother, who was not his dependent, was paid $3,000 for his death. The mother then filed suit challenging the constitutionality (fundamental fairness) of the workers' compensation statutes, arguing that the quid pro quo of giving up the remedy of a legal action in exchange for only a $3,000 payment was insufficient to sustain the constitutionality of the statutes and citing Stratemeyer v. Lincoln County, 276 Mont. 67, 915 P.2d 175 (1996). The Supreme Court held that Stratemeyer was distinguishable, that the Legislature made a constitutional distinction in payable benefits between dependents and nondependents of injured or killed workers, and that the mother had not met her burden of proving beyond a reasonable doubt that the statutes were unconstitutional. Walters v. Flathead Concrete Products, Inc., 2011 MT 45, 359 Mont. 346, 249 P.3d 913.

No Genuine Issue Whether Employer Acted With Intention or Malice in Employee's Injury — Summary Judgment Proper Under Sherner Standard: Roy contended that his employer was liable for damages beyond workers' compensation coverage by failing to provide training in

ladder safety, having no policy concerning the use of safety belts on aerial ladders, and failing to abide by a letter from the federal Occupational Safety and Health Administration (OSHA) giving notice that there was a high probability that employees would be injured while performing midline work on aerial ladders without a safety belt. The District Court summarily dismissed the claims, and on appeal, the Supreme Court affirmed. Although the employer did not provide training in the use of safety belts, there was no evidence that the employer failed to train Roy in the face of knowledge that Roy would be injured if a safety belt was not used, nor was there a genuine issue of fact whether the employer had a policy requiring the use of safety belts on aerial ladders. Roy also failed to show that the employer was aware of the OSHA letter, and given the unclear language of federal regulations on the issue, Roy could not prove that the employer acted with malice, as defined in 27-1-221. Applying Sherner v. Conoco, Inc., 2000 MT 50, 298 M 401, 995 P2d 990 (2000), the Supreme Court concluded that absent a showing that the employer had knowledge of a high probability of injury and acted with intentional indifference to or disregard of that knowledge, summary judgment was proper. Roy v. Blackfoot Tel. Co-op, Inc., 2004 MT 316, 324 M 30, 101 P3d 301 (2004). See also Gee v. Egbert, 209 M 1, 679 P2d 1194 (1984).

Employer Unaware That Employee Would Be Injured During Routine Job Activity — No Showing of Employer Malice Under Sherner Standard: Olszewski was seriously injured while loading building trusses onto a flatbed truck. Olszewski recovered workers' compensation benefits but also brought an action alleging that the injury was covered under the 1999 intentional act exception in 39-71-413, which was in effect when the injury occurred. The District Court found no showing of malicious action on the part of the employer or foreman and granted summary judgment to the employer and foreman. On appeal, the Supreme Court applied the malicious intent standard in Sherner v. Conoco, Inc., 2000 MT 50, 298 M 401, 995 P2d 990 (2000), and affirmed. Olszewski was unable to provide evidence that the employer knew that employees would actually be injured by a routine that was usually performed without incident, and absent a showing of that material fact, the statutory exception did not apply and summary judgment was proper. Olszewski v. BMC W. Corp., 2004 MT 187, 322 M 192, 94 P3d 739 (2004).

No Showing of Malicious Act or Omission by Coworker in Death of Employee — Workers' Compensation Exclusivity Doctrine Applicable under 1999 Statute: Under the 1999 version of 39-71-413 and Sherner v. Conoco, Inc., 2000 MT 50, 298 M 401, 995 P2d 990 (2000), a plaintiff was required to show both an intentional and malicious act or omission in order to avoid the workers' compensation exclusivity doctrine (revised in 2001 to require only the showing of an intentional act or omission). Here Everhard, a mine worker, was killed by a train driven by Aafedt after signaling that Aafedt could proceed. Everhard's estate sued Aafedt and the mining company. The District Court concluded that Aafedt's conduct was intentional when he moved the train without seeing Everhard, but there was no showing that Everhard suffered an injury caused by actual malice by Aafedt or the company, so summary judgment was granted to defendants. The Supreme Court affirmed. As a matter of law, it could not be said that Aafedt deliberately proceeded to act in conscious or intentional disregard or even indifference to the high probability of injury to Everhard under the definition of actual malice, so the estate failed to overcome the workers' compensation exclusive remedy rule, and summary judgment was proper. Blain v. Stillwater Min. Co., 2004 MT 141, 321 M 403, 92 P3d 4 (2004).

No Workers' Compensation Lump-Sum Award on Demand — Best Interests Test for Award of Lump-Sum Distribution: Martin unsuccessfully attempted to negotiate a lump-sum settlement with respondent insurer, so Martin petitioned the Workers' Compensation Court for an order awarding him a lump-sum distribution. The request was denied, and on appeal, the Supreme Court affirmed, noting that lump-sum distributions have always been the exception to the rule favoring periodic payments and that Montana's statutory scheme does not allow for the award of lump sums on demand. Rather, the court set out a best interests test for evaluating lump-sum requests, allowing courts to consider all aspects of a claimant's personal situation, including: (1) physical and mental health; (2) family situation; (3) level of maturity; and (4) financial condition. Consideration of financial condition may encompass the claimant's outstanding indebtedness and pressing financial needs, as well as a spouse's income, which also must be considered to avoid an absurd treatment of the realities of a marital or family association. After hearing the evidence in this case, the Workers' Compensation Court properly concluded that Martin's financial situation was not pressing and that a lump sum was not in Martin's overall best interests, given that Martin: (1) had assets in excess of debt; (2) was doing well on biweekly benefits; (3) had monthly income in excess of expenses; (4) had other sources of income to allow for payment of extraordinary expenses; (5) was able to assist his children financially from time to time; (6)

had invested in annuities and gold; and (7) was able to take periodic vacations. Martin v. The Hartford, 2004 MT 57, 320 M 206, 86 P3d 569 (2004).

Workers' Compensation Claimant's Comparative Negligence Not Applicable in Determining Eligibility — Subrogation Appropriate Only After Claimant Made Whole: McMillan was injured in January 1987 while his employer was performing logging work for the U.S. government. McMillan filed a worker's compensation claim in Montana for which the state did not dispute liability, and he then filed an action under the Federal Tort Claims Act. The federal District Court determined that McMillan was entitled to recover $4,762,686 in damages from the United States, diminished by 45% for McMillan's comparative negligence to $2,619,477. The State Compensation Insurance Fund (State Fund) then sought a determination from the Workers' Compensation Court that the State Fund could assert a subrogation claim against McMillan's recovery from the United States and cease paying benefits. The Workers' Compensation Court held that the full measure of McMillan's loss was $4,762,686, the total amount of damages determined by the federal District Court, and that pursuant to the equitable "made whole" doctrine articulated in In re Zacher v. Am. Ins. Co., 243 M 226, 794 P2d 335 (1990), McMillan must recover that amount, plus the costs of recovery, before the State Fund was entitled to subrogation. The State Fund appealed, contending that the amount necessary to make McMillan whole was actually $2,619,477 after taking into account McMillan's comparative negligence, plus attorney fees and costs of recovery. The Supreme Court affirmed. The Zacher formula does not contemplate a deduction from a claimant's entire loss for comparative negligence, in accordance with state law, which does not consider a claimant's fault in determining eligibility. Reducing the calculation of McMillan's entire loss, and thus his eligibility for benefits, for comparative negligence would introduce a claimant's fault into the workers' compensation system in violation of Montana law. Thus, the State Fund's subrogation interest could be properly asserted only after McMillan recovered the full amount of the total amount of damages determined by the federal District Court. St. Comp. Ins. Fund v. McMillan, 2001 MT 168, 306 M 155, 31 P3d 347 (2001).

Issue of Department of Labor and Industry Jurisdiction Raised in Two Separate Hearings — Collateral Estoppel Applicable — Due Process Rights Not Implicated When Party Fails to Pursue Available Remedies: The Workers' Compensation Court concluded that the Department of Labor and Industry should have allowed plaintiff to raise the argument that State Fund had improperly canceled plaintiff's policy for nonpayment of a premium as a defense to the claim by the Uninsured Employers' Fund for assessments and penalties. The court said that the issue was not barred by collateral estoppel because an order from a first hearing only determined whether the Department had subject matter jurisdiction over contract disputes between an insurance carrier and its policyholder (a determination that plaintiff did not appeal) and did not address the issue raised in a second hearing, which was whether the Department had jurisdiction to determine coverage in a proceeding seeking a penalty and indemnification. The court held that collateral estoppel did not apply because the issues in the two hearings were not identical. The court went on to hold that the Department did have jurisdiction, through its quasi-judicial power, to resolve the dispute regarding whether State Fund had rightfully canceled the policy. The Supreme Court disagreed. In the first case, a hearings officer determined that the Department did not have subject matter jurisdiction over the contractual dispute between plaintiff and State Fund, noting that proper adjudication would be in the District Court. The Department only has jurisdiction granted to it by statute, and the adjudication of insurance contracts does not fall within its jurisdiction. Plaintiff's failure to appeal the issue from the first hearing precluded it from arguing that the Department did have jurisdiction over the insurance contract dispute regarding a penalty and indemnification in the second hearing, so relitigation of the jurisdiction question in the second proceeding was barred by collateral estoppel. Further, it was error to give the Department jurisdiction to adjudicate the insurance contract dispute pursuant to its general quasi-judicial powers because an administrative agency may not assume jurisdiction without express delegation by the Legislature and there is no statutory delegation of authority to the Department to resolve contract disputes. Rather, regulation of insurance contracts is governed by the Insurance Commissioner and the relevant statutes relating to insurance disputes. The Department cannot and should not be adjudicating disputes between insurance companies and employers. The Workers' Compensation Court's conclusion that plaintiff was denied due process when it was prevented from presenting evidence relating to the insurance contract between itself and State Fund was also erroneous. Plaintiff had the opportunity to appeal the initial Department order to the Workers' Compensation Court, but failed to do so. Plaintiff also had the opportunity to pursue its remedies against State Fund in District Court, but again failed to do so. There is no denial of due process when a party fails to pursue the remedies provided. Auto

Parts of Bozeman v. Employment Relations Div. Uninsured Employers' Fund, 2001 MT 72, 305 M 40, 23 P3d 193 (2001).

Procedural Rules Apply to All Litigants and Not Unconstitutional When Applied to Employees' Claims: Otto's attorney argued that this section precluded limitations on claims by employees against persons other than their employer or fellow employees and that therefore dismissal of the plaintiff's suit because of the 12-month time period required by former Rule 41(e), M.R.Civ.P. (now superseded), to have a summons issued was an unconstitutional limitation on the plaintiff employee's right to bring an action. The Supreme Court held that the plaintiff's case had been properly dismissed because the former Rule 41(e) was a procedural rule that applied equally to all litigants and that to adopt the plaintiff's logic would mean that no rules leading to dismissal of an employee's action would be constitutional, including statutes of limitation. Otto v. Dept. of Fish, Wildlife, and Parks, 2000 MT 333, 303 M 86, 15 P3d 402, 57 St. Rep. 1406 (2000).

Liability of Employer for Tortious Act: Although the language of 39-71-413 provides for a cause of action only against a fellow employee for intentional or malicious injury, pursuant to Sitzman v. Schumaker, 221 M 304, 718 P2d 657, 43 St. Rep. 831 (1986), such an action may be brought against an employer as well. To fail to hold employers liable in the same manner as their employees by permitting an employer to commit an intentional and malicious act or omission that causes an injury to an employee and then to allow the employer to hide behind the exclusivity statutes would defeat the purpose of the Workers' Compensation Act. Sherner v. Conoco, Inc., 2000 MT 50, 298 M 401, 995 P2d 990, 57 St. Rep. 241 (2000). See also Enberg v. Anaconda Co., 158 M 135, 489 P2d 1036 (1971).

New Standard for Determining Whether Intentional or Malicious Act by Employer Constitutes Tortious Conduct — Summary Judgment Improper: Sherner was injured on the job and sued his employer, Conoco, Inc. (Conoco), for damages on grounds that Conoco was guilty of malicious acts or omissions that caused the injuries. The District Court ruled that the tort claim against Conoco was barred by the exclusivity provision in 39-71-411. Citing Calcaterra v. Mont. Resources, 1998 MT 187, 289 M 424, 962 P2d 590 (1998), the court concluded that Sherner was required to allege and establish that Conoco had actual knowledge that Sherner was being harmed in order to establish that Conoco's acts were malicious and, absent sufficient facts to raise a genuine issue of material fact that Conoco directed intentional harm at Sherner, granted summary judgment for Conoco. In District Court, Sherner sufficiently raised the issue of the proper standard for determining whether Conoco's act was malicious to allow the Supreme Court to address the issue on appeal, so the court proceeded to create a new standard, applying the plain meaning of the statutory definitions, by which to judge whether an act or omission is intentional or malicious. Applying common definitions of "intentional" and "act" and the appropriate definition of "malice" for use in 39-71-413—the one provided in 27-1-221, rather than the one in 1-1-204—the Supreme Court reversed, finding that genuine issues of material facts existed, regarding whether Conoco acted maliciously, as to preclude summary judgment. A worker need show only that an employer's act or omission, which caused the injury, was intentional or malicious to bring a tort action against the employer under 39-71-413. Sherner v. Conoco, Inc., 2000 MT 50, 298 M 401, 995 P2d 990, 57 St. Rep. 241 (2000), following Sitzman v. Schumaker, 221 M 304, 718 P2d 657, 43 St. Rep. 831 (1986). See also Enberg v. Anaconda Co., 158 M 135, 489 P2d 1036 (1971). See also Olszewski v. BMC W. Corp., 2004 MT 187, 322 M 192, 94 P3d 739 (2004), in which summary judgment was held to be proper under the Sherner standard absent evidence that an employer knew that an employee would actually be injured by a routine that was usually performed without incident.

Constitutionality of Section Allowing Setoff to Claim Against Uninsured Employers' Fund: Thayer died from an injury on the job, after incurring medical expenses of $253,207.98. Because the employer did not carry workers' compensation insurance, Thayer's wife, Phyllis, was entitled to receive medical benefits and death benefits provided by the uninsured employers' fund, pursuant to 39-71-503. The fund paid $85,000 in medical cost reimbursement, which the state accepted in full satisfaction of its claim. Phyllis subsequently brought negligence actions against the employer and a coemployee and product liability actions against the retail seller and the manufacturer of the product that Thayer was using when he was fatally injured. The uninsured employers' fund discharged Phyllis's claim for wage loss benefits following her receipt of a $100,000 settlement from the employer, applying the setoff pursuant to 39-71-511 in order to discharge the remaining future benefits that Phyllis would have been entitled to receive from the fund, but did not seek recovery of any of the benefits paid to Phyllis prior to receipt of the settlement or the benefits paid based on the amounts recovered from third parties. Phyllis asserted that the setoff essentially gave the fund a subrogation interest in her settlement from the employer, that the fund could not subrogate until she was made whole, and that to hold otherwise would be a

violation of her constitutional right to full legal redress. The Supreme Court disagreed. Because the fund is merely a legislatively provided safety net standing in place of the employer to provide some basis for recovery when the employer is impecunious, it is reasonable to condition the fund's obligations on the extent to which the employer fails to provide compensation. Further, because the fund is not an insurer, limiting the fund's obligation to the extent of the uninsured employer's ability to compensate the employee or the employee's family does not diminish the employee's right to full legal redress. The plain language of this section does not distinguish between third parties and uninsured employers. In this case, the employee was uninsured, so the exclusive remedy provision in 39-71-411 did not apply, and Phyllis could pursue benefits from the fund up to the amount of workers' compensation benefits that she would have received if the employer were insured. Also, pursuant to 39-71-509, Phyllis could bring a tort action against the employer in addition to any responsible third party. Thayer v. Uninsured Employers' Fund, 1999 MT 304, 297 M 179, 991 P2d 447, 56 St. Rep. 1223 (1999), following Trankel v. St., 282 M 348, 938 P2d 614, 54 St. Rep. 380 (1997), and followed in Shattuck v. Kalispell Regional Medical Center, Inc., 2011 MT 229, 362 Mont. 100, 261 P.3d 1021.

Principles Controlling When Allegations Sufficient to Avoid Exclusive Remedy Provisions — Employer's Knowledge of Employee's Risk and Violations of Safety Standards Insufficient Basis for Intentional Tort: While the language of 39-71-413 provides for a cause of action only against a fellow employee or other servant who intentionally and maliciously injures an employee, an action of this nature may be brought against an employer as well, pursuant to Sitzman v. Shumaker, 221 M 304, 718 P2d 657 (1986). Allegations of negligence, no matter how wanton, are insufficient to avoid the exclusive remedy of the Workers' Compensation Act, as set out in 39-71-411. A plaintiff who attempts to avoid the exclusive remedy provisions must establish that an intentional act with malice caused the injury at issue. An employer's violation of safety statutes or regulations is insufficient to avoid exclusivity because that violation would at most constitute negligence and does not serve as a basis for an intentional tort. Even an employer's knowledge of a high degree of risk to an employee working under dangerous conditions does not, in itself, establish the intentional act necessary to avoid exclusivity. Allegations or evidence that an employer knew that its act created a high degree of harm to an employee is sufficient to meet the intentional act requirement of 39-71-413; however, the employee must allege and establish that the employer had actual knowledge that the employee was being harmed, because mere allegations that the employer had ample reason to know of the harm are insufficient. In the present case, the employer's knowledge that Calcaterra was working 10 feet above the floor on an unsecured ladder and without a safety belt and lanyard, thus risking injury, was insufficient to raise a genuine issue of material fact that the employer directed intentional harm at Calcaterra. The employer's motion for summary judgment was properly granted, absent a genuine issue of material fact, and the claim was barred by the exclusivity provision. Calcaterra v. Mont. Resources, 1998 MT 187, 289 M 424, 962 P2d 590, 55 St. Rep. 762 (1998), distinguishing Lockwood v. W.R. Grace & Co., 272 M 202, 900 P2d 314 (1995). See also Calcaterra v. Mont. Resources, 2001 MT 193, 306 M 249, 32 P3d 764 (2001), in which it was held that a decisional law change regarding the definition of intentional and malicious in Sherner v. Conoco, Inc., 2000 MT 50, 298 M 401, 995 P2d 990 (2000), did not constitute sufficient extraordinary circumstances under former Rule 60(b)(6), M.R.Civ.P. (now superseded), so as to allow reopening the 1998 Calcaterra decision.

Injury by Fellow Servant — Recovery Limited to Workers' Compensation Benefits: Plaintiff, a Deputy Sheriff, was injured when his vehicle was rear-ended by a vehicle driven by a highway patrolman who was acting as an assisting officer. Under the mutual assistance statute, the patrolman was under the authority of the plaintiff and was granted the same immunities as his employer. Under 44-11-101, the patrolman was a fellow servant of the plaintiff when he injured plaintiff. Plaintiff was not deprived of "full legal redress" because this section provides that coverage of a fellow servant is limited to workers' compensation benefits. Scott v. St., 247 M 429, 808 P2d 451, 48 St. Rep. 73 (1991).

Lump-Sum Application Procedure as Improper Delegation of Legislative Authority and Unconstitutional Deprivation of Access to Courts: Under 39-71-741, as amended in 1987, no application for a lump-sum conversion may be made to the Department of Labor and Industry unless the conversion is agreed upon by the claimant and the insurer. If they fail to agree, there is no dispute over which a mediator or the Workers' Compensation Court has jurisdiction. The effect of the amendment places a tilt in favor of the insurer or the claimant, either of whom can withhold consent for a conversion for any reason or for no reason. In cases when a claimant agrees with an insurer, the legislature has thus improperly and unconstitutionally delegated to

the insurer an absolute discretion as to whether a lump-sum conversion of permanent partial wages settlement benefits will be converted. This not only deprives the Workers' Compensation Court of jurisdiction but it also deprives the Supreme Court of its appellate power, the only appeal allowed by law, amounting to an abrogation of the principle that judicial power cannot be taken away by legislative action and negating the constitutional mandate that insurers and claimants have the right of access to the courts. (This decision does not affect cases that occurred prior to the effective date of the 1987 amendment.) Ingraham v. Champion Int'l, 243 M 42, 793 P2d 769, 47 St. Rep. 650 (1990).

No Denial of Full Legal Redress: Claimant was not denied full legal redress because of the requirement that a worker be disabled for more than 5 days to receive compensation. Claimant argued that if he had remained off the job for more than 5 days, he would have received full compensation under the Workers' Compensation Act, but because he missed only 2 days of work, the statutory requirement arbitrarily denies him his right to full legal redress. Claimant was not denied full legal redress because he has not been denied any compensation under the Workers' Compensation Act; he is entitled to benefits only under the Occupational Disease Act (now repealed and merged with Workers' Compensation Act). Eastman v. Atlantic Richfield Co., 237 M 332, 777 P2d 862, 46 St. Rep. 845 (1989), distinguished in Henry v. St. Comp. Ins. Fund, 1999 MT 126, 294 M 449, 982 P2d 456, 56 St. Rep. 506 (1999).

No Workers' Compensation Act Limitation on Contractor Liability to Compensate Employee of Uninsured Subcontractor: When a general contractor is compelled, pursuant to 39-71-405, to pay workers' compensation benefits to an employee of an uninsured subcontractor, the general contractor's liability is not limited by 39-71-411 to compensation under the Workers' Compensation Act. Therefore, the Supreme Court held that the employee could maintain an action for negligence against the general contractor, despite the subcontractor's failure to provide workers' compensation coverage. Webb v. Mont. Masonry Constr. Co., 233 M 198, 761 P2d 343, 45 St. Rep. 1420 (1988).

Trench Collapse Not Intentional Harm — Workers' Compensation Exclusive Remedy: When a trench collapsed on a worker installing pipe, there was nothing to indicate an intentional and malicious act on the part of the employer. The conduct was, at most, gross negligence; therefore, the exclusivity clause of the Workers' Compensation Act applied. Adsem v. Roske, 224 M 269, 728 P2d 1352, 43 St. Rep. 2188 (1986).

Res Judicata — Workers' Compensation Court: Claimant's lump-sum award was reduced to its present value. Subsequently the Supreme Court (prior to the 1985 amendment) decided, in a different case, that lump-sum awards cannot be discounted to present value. However, the doctrine of res judicata bars the reopening of claimant's case on the issue of the lump-sum award. Cole v. Greyhound Lines, Inc., 220 M 503, 716 P2d 611, 43 St. Rep. 562 (1986).

Workers' Compensation — Employer Not Liable for Contribution or Indemnity: In workers' compensation cases, the second sentence of this section affords a limitation upon the broad provisions in the first sentence. When an employer has provided workers' compensation coverage, an employee constitutionally may be deprived of full legal redress for injury against his employer, both directly and indirectly. Denying liability for any claims for contribution or indemnity by a third party does not violate this section. Raisler v. Burlington N. RR, 219 M 254, 717 P2d 535, 42 St. Rep. 1997 (1985).

Contractor's Duty of Care to Employees of Subcontractor — Nondelegable Contract Obligations: In an action brought by an employee of a subcontractor against the defendant general contractor for damages for injuries received in a fall from the subcontractor's scaffolding, the trial court erred in holding that the defendant general contractor had no duty of care to the plaintiff and in granting summary judgment for the defendant. The defendant's contract obligations to maintain a safe workplace by supervising safety compliance could not, as a result of the doctrine of nondelegable duty announced in Ulmen v. Schwieger, 92 M 331, 12 P2d 856 (1932), be delegated to the subcontractor. As a result of the adoption of Art. II, sec. 16, Mont. Const., that duty extends to employees of a subcontractor. Stepanek v. Kober Constr., 191 M 430, 625 P2d 51, 38 St. Rep. 385 (1981), followed in Nave v. Harlan Jones Drilling, 252 M 199, 827 P2d 1239, 49 St. Rep. 147 (1992), Steiner v. Dept. of Highways, 269 M 270, 887 P2d 1228, 51 St. Rep. 1496 (1994), Gibby v. Noranda Minerals Corp., 273 M 420, 905 P2d 126, 52 St. Rep. 1042 (1995), and United Nat'l Ins. Co. v. St. Paul Fire & Marine Ins. Co., 2009 MT 269, 352 M 105, 214 P3d 1260 (2009).

Intentional Torts Arising During Workers' Compensation Settlement: An injured employee brought suit against the workers' compensation insurance carrier and the insurance adjuster for the intentional torts of fraud, conversion, and infliction of emotional distress. The suit was brought after the injured employee prevailed in his claim for workers' compensation. The Supreme Court

said this suit is not barred by the exclusivity provision of 39-71-411. The claimed injury is distinct from the original on-the-job injury; it occurred after the employment relation terminated, and it is not covered by the Workers' Compensation Act. Hayes v. Aetna Fire Underwriters, 187 M 148, 609 P2d 257 (1980), followed in Spadaro v. Midland Claims Serv., Inc., 227 M 445, 740 P2d 1105, 44 St. Rep. 1221 (1987).

Workers' Compensation: The allowance of subrogation in workers' compensation cases is in furtherance of equity and justice, and the claimant is not thereby deprived of "full legal redress", because in any event he recovers either through the Workers' Compensation Act or from the responsible party or from the responsible third party such amounts as he is legally allowed to recover. Brandner v. Travelers Ins. Co., 179 M 208, 587 P2d 933 (1978), overruled in Francetich v. St. Comp. Mut. Ins. Fund, 252 M 215, 827 P2d 1279, 49 St. Rep. 222 (1992).

Injury by Coemployee Covered by Workers' Compensation: In an action for damages for personal injuries in which defendants were coemployees of plaintiff and plaintiff's injury arose out of an industrial accident for which he received workers' compensation, the defendants carried the burden of showing a complete absence of any genuine issue as to material facts. Forrester v. Kuck, 177 M 44, 579 P2d 756 (1978).

DECISIONS UNDER 1889 CONSTITUTION

Jurisdiction Over Indian Divorce:

State court had jurisdiction over petition for divorce filed by one Indian against another where Indian tribal court had not attempted to exercise jurisdiction over marriage and divorce; the courts of this state are open to all Indian citizens, and they are entitled to the protection of the state laws and utilization of state courts. Bad Horse v. Bad Horse, 163 M 445, 517 P2d 893, certiorari denied, 419 US 847, 42 L Ed 2d 76, 95 S Ct 83 (1974), distinguished in Fisher v. District Court, 424 US 382, 47 L Ed 106, 96 S Ct 943 (1974). Bad Horse overruled in In re Marriage of Limpy, 195 M 314, 636 P2d 266 (1981), holding that tribal court has exclusive jurisdiction over a dissolution involving tribal members residing on a reservation when the tribal court asserts jurisdiction. See also In re Marriage of Skillen, 1998 MT 43, 287 M 399, 956 P2d 1, 55 St. Rep. 147 (1998).

State has jurisdiction over divorce action brought by an Indian plaintiff against an Indian defendant, both residing on reservation, since the power to grant a divorce has not been preempted by the federal government and does not interfere with reservation self-government. State ex rel. Iron Bear v. District Court, 162 M 335, 512 P2d 1292 (1973). See also Krause v. Neuman, 284 M 399, 943 P2d 1328, 54 St. Rep. 937 (1997), and In re Marriage of Skillen, 1998 MT 43, 287 M 399, 956 P2d 1, 55 St. Rep. 147 (1998). In In re Estate of Big Spring, 2011 MT 109, 360 Mont. 370, 255 P.3d 121, the Supreme Court overruled Iron Bear in its entirety and Skillen in part and overruled Krause and Bad Horse to the extent they relied on Iron Bear or Skillen.

Indians: Indians may sue and be sued in Montana state courts. Bonnet v. Seekins, 126 M 24, 243 P2d 317 (1952).

Appeals by Poor Persons: District Court has authority and acts within its jurisdiction in issuing an order directing the official court stenographer to furnish to convicted person unable to pay for services a full and complete transcript on appeal, including the number of copies required for appeal under the court's rules, and stenographer is entitled to pay from county for furnishing such copies. Sullivan v. Bd. of County Comm'rs, 124 M 364, 224 P2d 135 (1950).

Inconvenience to Jurors: Inconvenience or loss to prospective jurors or lack of adequate travel, hotel, or eating facilities for them constitutes no excuse for depriving a litigant of his constitutional right to prompt disposition of his litigation. State ex rel. Carlin v. District Court, 118 M 127, 164 P2d 155 (1945).

Mandamus to Compel District Court to Call Jury Term: Under Art. III, sec. 6 and 23, 1889 Mont. Const., mandamus will lie to compel a District Court to call a jury and dispose of a case even though trial court has determined that the matter is not properly before it and refused such actions. State ex rel. Carlin v. District Court, 118 M 127, 164 P2d 155 (1945).

Defendant Convicted of Crime Unable to Pay for Transcript: Where a defendant convicted of crime is unable to meet the expense incident to procuring a transcript of the evidence to enable him to present his appeal to the Supreme Court for review, it is the duty of the court to order the county to pay therefor under 3-5-604, evidently enacted to carry out the command of this constitutional provision. State ex rel. Parmenter v. District Court, 111 M 453, 110 P2d 971 (1941).

Irregularity in Tax Sale:

Under the rule that this provision applies to such injuries as the law recognizes as actionable, held that the argument that under section 11-1306, R.C.M. 1947 (now repealed), relieving cities

and towns from liability for injuries sustained by fall on icy sidewalk, injured person would be deprived of his constitutional right to have a remedy if the abutting owner is not held liable, is not meritorious. Stewart v. Standard Publishing Co., 102 M 43, 55 P2d 694 (1936).

Sections 15-18-401 (now repealed) and 15-18-403 (now repealed), as applied to an action to enjoin the issuance of a tax deed for irregularities in the tax sale proceedings and not for absolute want of power to tax, are not rendered invalid under Art. III, sec. 6, 1889 Mont. Const., declaring that courts of justice shall be open to every person without price. State ex rel. Souders v. District Court, 92 M 272, 12 P2d 852 (1932).

Means Actionable Injuries: This provision, addressed to the courts, means no more than that the courts must be accessible to all persons alike and afford a speedy remedy for such injuries as the law recognizes as actionable. Stewart v. Standard Publishing Co., 102 M 43, 55 P2d 694 (1936).

Interspousal Torts: Neither sec. 3 nor sec. 6 of Art. III, 1889 Mont. Const., in effect providing, respectively, that all persons are born equally free, have certain inalienable rights, etc., and that courts of justice shall be open to every person and a speedy remedy afforded for every injury to person or property, can be said to have any applicability in determining whether the Legislature has by statute abrogated the age-old common-law doctrine that neither spouse has the right to maintain a personal tort action against the other. Conley v. Conley, 92 M 425, 15 P2d 922 (1932), but see Miller v. Fallon County, 222 M 214, 721 P2d 342, 43 St. Rep. 1185 (1986).

Quarantine: The provisions of the 14th amendment to the Constitution of the United States and of Art. III, sec. 6 and 7, 1889 Mont. Const., to the effect that no person may be deprived of his liberty without due process of law, have no application to the case of one detained in quarantine because affected with a dangerous communicable disease. In re Caselli, 62 M 201, 204 P 364 (1922).

Application Only to Courts: This section is addressed exclusively to the courts. The courts are its sole subject matter, and it relates directly to the duties of the judicial department of the government. It means no more or less than that under the provisions of the Constitution and laws constituting them, the courts must be accessible to all persons alike, without discrimination, at the time or times and the place or places appointed for their sitting, and afford a speedy remedy for every wrong recognized by law as being remediable in a court. The term "injury", as therein used, means such an injury as the law recognizes or declares to be actionable. Shea v. North-Butte Min. Co., 55 M 522, 179 P 499 (1919).

Workmen's Compensation: The Workmen's Compensation Act of 1915 (Title 39, ch. 71, now Workers' Compensation Act) is not repugnant to this section, as closing access to the courts by the injured employee and compelling him to seek relief through the Industrial Accident Board (now Division of Workers' Compensation). Shea v. North-Butte Min. Co., 55 M 522, 179 P 499 (1919).

Corrupt Practices: Sections 94-1467 and 94-1468, R.C.M. 1947 (now repealed), of the Corrupt Practices Act, awarding the successful party in an election contest attorney's fees, etc., are not open to constitutional objections that they deny to the unsuccessful one the equal protection of the laws, grant to the former a special privilege not enjoyed by successful litigants in other cases, violate the provision that justice shall be administered without sale, denial, or delay, and constitute an attempt to delegate legislative power to the courts. Doty v. Reece, 53 M 404, 164 P 542 (1917).

Wrongful Judicial Conduct: A District Judge cannot, by his own wrongful conduct, deny to a litigant the right to be heard in a court established for the purpose of administering judicial remedies. Stephens v. Nacey, 47 M 479, 133 P 361 (1913).

Injury to Business: The provisions of this section, as well as the section of the Code defining a nuisance, may be invoked for the protection of a person whose business is interfered with by reason of aggressive manifestations by crowds in the alleged interest of organized labor. Iverson v. Dilno, 44 M 270, 119 P 719 (1911).

Mining Claim: The courts of the state are open to afford a remedy for such an injury as might be suffered by the holder of a valid subsisting mining claim through another person's proceeding to obtain patent to the same ground. Poore v. Kaufman, 44 M 248, 119 P 785 (1911).

Disqualification of Judges: The act approved December 10, 1903, authorizing each party to disqualify five District Judges by filing an affidavit of prejudice does not violate this section. State ex rel. Anaconda Copper Min. Co. v. Clancy, 30 M 529, 77 P 312 (1904).

Lien Foreclosure: The act approved March 14, 1889, providing that in actions for the foreclosure of mechanics' liens (now construction liens), the owner of the property subject to the lien shall pay as costs a reasonable attorney's fee, is not unconstitutional as being repugnant to

this section. Wortman v. Kleinschmidt, 12 M 316, 30 P 280 (1892). But see Mills v. Olson, 43 M 129, 115 P 33 (1911). See also Doty v. Reece, 53 M 404, 164 P 512 (1917).

Maintenance: Maintenance of a wife may be enforced by the District Courts of this state, in the exercise of their equity jurisdiction, by decreeing proper relief in an action brought by the wife against her husband, independently of an action for divorce, where it is shown that he without just cause abandoned her or by his cruelty or other improper conduct has given her cause for living separate and apart from him and she is without means of support and he is able to maintain her. Edgerton v. Edgerton, 12 M 122, 29 P 966 (1892).

Attorney General's Opinions

Judicial Decision Invalidating Constitutional Amendments — Constitutional Language and Statutory Implementation Language Restored: In 2002, Montana voters approved Constitutional Amendment Nos. 37 and 38, along with statutory implementing provisions, to modify county distribution requirements for signatures to qualify an initiative petition for the ballot. In Mont. PIRG v. Johnson, CV 03-183-M-DWM (D.C. Mont. 2005), a federal District Court held that the amended distribution requirements resulted in an unequal treatment of qualified electors in different counties and were unconstitutional on their face and invalid. The Attorney General cited State ex rel. Woodahl v. District Court, 162 M 283, 511 P2d 318 (1973), in concluding that the nullification of the constitutional amendments by the judicial decision invalidating the county distribution requirements restored the language of the constitution and implementing statutes as they existed before the approval of the invalid amendments. 51 A.G. Op. 2 (2005).

Law Review Articles

Spreading Justice to Rural Montana, Wandler, 76 Mont. L. Rev. 225 (2015).

Administering Justice in Montana's Rural Courts, McKeon & Rice, 70 Mont. L. Rev. 201 (2009).

Toward a "Civil Gideon" Under the Montana Constitution: Parental Rights as the Starting Point, McNeal, 66 Mont. L. Rev. 81 (2005).

Constitutional Initiative 30: What Constitutional Rights Did Montanans Surrender in Hopes of Securing Liability Insurance?, Burke, 48 Mont. L. Rev. 53 (1987).

Section 17. Due process of law.

Convention Notes

Identical to 1889 Constitution.

Compiler's Comments

Former Constitutional Provision: This section is the same as Art. III, sec. 27, 1889 Mont. Const.

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DECISIONS UNDER 1972 CONSTITUTION

GENERAL

Credit for Time Served — Due Process Violated by State's Delay in Extraditing Defendant: On appeal, the Supreme Court reversed the District Court's decision to deny credit for the defendant's time served while incarcerated in another state. The Supreme Court reasoned that due process requires the state to execute an arrest warrant without unreasonable delay and that nothing in the record explained why the state waited 17 months after the arrest warrant was issued to extradite the defendant. St. v. Graves, 2015 MT 262, 381 Mont. 37, 355 P.3d 769.

Treatment Plan Executed in Good Faith Despite Case Worker Turnover — Due Process Not Violated in Termination Proceedings: The mother appealed the termination of her parental rights, arguing that she was denied due process of law when the Department of Public Health and Human Services did not execute her treatment plan in good faith because it did not adequately account for her history as a victim of domestic violence and because she was assigned six different child protection specialists during the course of her case. The Supreme Court affirmed, concluding that the Department took notice of the mother's history as a victim of domestic violence and, given the Department's provision of numerous services and its efforts to reunite the family, the fact that the mother was assigned numerous case workers did not in itself establish a due process violation. In re T.D.H., 2015 MT 244, 380 Mont. 401, 356 P.3d 457.

Prohibition on Same-Sex Marriage Unconstitutional: Under the due process and equal protection clauses of the 14th amendment to the United States Constitution, same-sex couples have a fundamental right to marry. A state is required to license a marriage between same-sex couples and to recognize a same-sex marriage validly performed out of state. A state law that provides otherwise is unconstitutional. Obergefell v. Hodges, 576 US __, 135 S. Ct. 2584 (2015).

Rejected Plea Deal — Subsequent Charges Based on Subsequent Behavior — No Prosecutorial Vindictiveness: After being charged with issuing a bad check, the defendant failed to appear and was charged with bail jumping. The defendant subsequently failed to appear on multiple occasions, and new charges of bail jumping were added by the prosecutor after the defendant was sentenced for the original charges. After a failed plea agreement, the defendant moved to dismiss the new charges because of vindictive prosecution. The defendant did not have the right to compel the state to give him the benefit of a failed plea bargain, and he was not entitled to escape responsibility for additional charges stemming from conduct occurring after the original charges. A finding of vindictive prosecution was therefore not warranted. St. v. Ridge, 2014 MT 288, 376 Mont. 534, 337 P.3d 80.

Valid Authority to Impose Restitution Recommendation — Doctrine of Case Inapplicable: After a prior Supreme Court decision determined that the District Court lacked authority to impose a restitution payment as a condition of parole, the District Court was not prevented by the law of the case doctrine from restating its parole eligibility restrictions and conditions as recommendations or from specifying the total amount of restitution. Furthermore, although the defendant argued that her sentence violated due process because it was based on the amount of time it would take her to pay restitution, the District Court did not err when it based the defendant's sentence on many factors but did not make financial obligations the basis of the sentence. St. v. Winter, 2014 MT 235, 376 Mont. 284, 333 P.3d 222.

Record of Intentional and Knowing Waiver — Involuntary Commitment: The Supreme Court reversed an involuntary commitment that was stipulated to by the prospective ward, finding that although the District Court advised the ward of his rights, the ward read a statement of those rights before the hearing, and the ward indicated he had no questions, neither the ward nor his attorney represented that the ward understood his rights, understood the nature of the proceedings, or had the capacity to knowingly and intentionally waive procedural rights. Because the District Court did not make an affirmative determination on the record concerning the prospective ward's comprehension and intentional waiver of his procedural rights, the ward's statutory and due process rights were violated. In re A.M., 2014 MT 221, 376 Mont. 226, 332 P.3d 263.

Statute Denying Benefits Due to Incarceration — Constitutional — No Violation of Due Process: The plaintiffs filed suit against the State Fund for wrongfully denying them partial disability benefits due to their incarceration. They alleged that 39-71-744 of the Workers' Compensation Act violated their substantive and procedural due process rights. The Workers' Compensation Court rejected their substantive due process argument, concluding that 39-71-744 effectuates the fundamental compromise embodied in the Act that is rationally related to a legitimate governmental interest. The Workers' Compensation Court also rejected the procedural due process claims regarding an alleged lack of notice prior to the forfeiture of benefits. On appeal, the Supreme Court agreed that the plaintiffs' argument failed because there was no risk of an erroneous deprivation of rights. Goble v. Mont. St. Fund, 2014 MT 99, 374 Mont. 453, 325 P.3d 1211.

Tardy Public Duty Doctrine Defense Not Allowed: In a suit for negligent firefighting techniques, the state submitted a proposed pretrial order claiming that the public duty doctrine applied and that the state did not owe a specific duty to the plaintiff. The District Court determined that the public duty doctrine was an affirmative defense that was waived after the state failed to plead or otherwise raise it, and alternatively, even if it was not an affirmative defense it prejudiced the

plaintiffs. On appeal, the Supreme Court declined to analyze whether the public duty doctrine must be raised as an affirmative defense, and it upheld the District Court on the grounds that raising the defense at such a late stage in the proceedings would unfairly prejudice the plaintiffs. Weaver v. St., 2013 MT 247, 371 Mont. 476, 310 P.3d 495.

Plaintiff's Failure to File Accurate Complaint Not Detrimental — Defendant Had Notice of Nature of Claim: A tenant filed a complaint with the Human Rights Commission alleging that her landlord committed sexual harassment under the public accommodations provision in 49-2-304. The Commission determined that 49-2-304 was inapplicable, as the rental property was private property, but it allowed the tenant to pursue a claim based on the real estate transaction provision in 49-2-305. The landlord then petitioned the District Court for judicial review, reasoning that his due process rights would be violated if the tenant was allowed to pursue a claim under 49-2-305. The District Court agreed with the landlord and reversed the Commission, but the Supreme Court, in turn, reversed the District Court and determined that while the tenant could have been clearer in asserting a claim under 49-2-305, the landlord had sufficient notice of the nature of the claim and no evidence was presented showing that the landlord would have presented any additional evidence in a 49-2-305 defense. Bates v. Neva, 2013 MT 246, 371 Mont. 466, 308 P.3d 114.

Delay Not Prejudicial to Defendant's Due Process Rights: After a defendant absconded from probation and was returned to the state 8 years later, he argued that the state had an obligation, based on his due process rights, to pursue his return to face probation proceedings. However, the Supreme Court found that the defendant had not raised the issue in District Court and failed to persuasively argue that a manifest miscarriage of justice had occurred. St. v. Sullivant, 2013 MT 200, 371 Mont. 91, 305 P.3d 838.

Failure to Record Portion of State's Case In Chief — Reconstructed Record Sufficient to Afford Effective Appellate Review — No Violation of Due Process: A jury found the defendant guilty of sexual intercourse without consent and the defendant appealed. In preparing the record for appeal, it was discovered that a portion of the state's case in chief was not recorded. Both the state and the defendant submitted statements and other documentation to reconstruct the unrecorded portion of the trial, and the District Court issued an order adopting a statement of unavailable evidence under Rule 8(7)(d), M.R.App.P., to which the defendant objected. On appeal, the defendant claimed that the lack of a complete record diminished his ability to pursue his appeal and consequently violated his right to due process. Applying the two-pronged test in Britt v. N.C., 404 US 226 (1971), the Supreme Court concluded that the reconstructed record was sufficient to afford effective appellate review and affirmed. St. v. Caswell, 2013 MT 39, 369 Mont. 70, 295 P.3d 1063.

Husband Charged With Sexual Intercourse Without Consent — Evidence of Prior Assault on Wife Admitted at Trial — Probative Value on Issue of Consent Exceeding Prejudice: The defendant was charged with sexual intercourse without consent with his wife of 40 years. The defendant claimed that his wife had consented. At trial, the state sought to admit evidence of an earlier assault against the wife, including photographs of her injuries and her 9-1-1 call. Against the defendant's objection, the District Court permitted the introduction of some evidence of the earlier assault and instructed the jury several times that the purpose of the evidence was limited to showing the wife's state of mind. Following his conviction, the defendant appealed and claimed that the admitted evidence was irrelevant, was unfairly prejudicial, and raised an improper propensity reference and therefore should have been excluded. The Supreme Court affirmed the District Court's evidentiary ruling, concluding that the defendant's claim that his wife consented made the evidence of his prior assault of her relevant to determine the issue of consent. St. v. Caswell, 2013 MT 39, 369 Mont. 70, 295 P.3d 1063.

Administrative Bias Not Rising to Level of Substantial Prejudice: The plaintiff applied to the Department of Natural Resources and Conservation (DNRC) for a ground water permit. DNRC denied the permit, and during ensuing litigation, the Supreme Court remanded the permit application. The plaintiff requested a neutral party to consider its application, but DNRC denied this request. A DNRC employee was appointed to hear the request, and e-mails suggested the employee exhibited bias against the defendant. Although there may have been error in the application process, the District Court independently reached the same conclusions as DNRC. Because the plaintiff failed to show substantial prejudice, the Supreme Court affirmed the District Court's findings. Bostwick Properties, Inc. v. Dept. of Natural Resources and Conservation, 2013 MT 48, 369 Mont. 150, 296 P.3d 1154, following Erickson v. St., 282 Mont. 367, 938 P.2d 625 (1997).

Failure of Defendant to Produce Affirmative Evidence Establishing That Prior Conviction Was Constitutionally Infirm: When evidence produced by defendant was ambiguous and self-serving, the District Court's decision was not clearly erroneous and the defendant failed to meet his burden to produce affirmative evidence that his 1992 DUI conviction was constitutionally infirm. St. v. Nixon, 2012 MT 316, 367 Mont. 495, 291 P.3d 1154.

Right to Present Defense — No Enhanced Right Under Montana Constitution — Jury Instruction on Intoxication Proper: The defendant was convicted of deliberate homicide despite his testimony that he was intoxicated at the time of the shooting and that an accidental jerk of his arm caused the gun to fire. Over the defense's objection, the District Court permitted a jury instruction, based on 45-2-203, that intoxication is not a defense to any offense except in limited circumstances. The defendant claimed that both the instruction and the statute violated his right to present a defense and improperly reduced or shifted the state's burden of proof. He further argued that the Montana Constitution provides broader protections to the right to present a defense than does the U.S. Constitution. The Supreme Court disagreed, ruling that the defendant had been allowed to present his defense, that 45-2-203 is constitutional, and thus that the instruction based on the statute was proper. St. v. Myran, 2012 MT 252, 366 Mont. 532, 289 P.3d 118. See also St. v. Ring, 2014 MT 49, 374 Mont. 109, 321 P.3d 800.

No Breach of Plea Agreement — Prosecution Allowed to Rebut Contention: The District Court accepted a plea agreement and added an additional condition that the defendant was not eligible for parole. Subsequently, the defendant moved for specific performance of the plea agreement in order to protest the parole restriction. The prosecutor opposed the motion, and on appeal the defense claimed that the prosecutor breached the plea agreement by opposing the motion. The Supreme Court affirmed the parole restriction, holding that the prosecutor was entitled to rebut the defendant's claim without breaching the plea agreement. St. v. Lewis, 2012 MT 157, 365 Mont. 431, 282 P.3d 679.

Rule of Lenity Not Applicable — Fair Notice That Hashish Not Medical Marijuana: The definitions of "marijuana" and "usable marijuana" were clear and unambiguous under the former Medical Marijuana Act as set forth in 50-46-101 through 50-46-210 (now repealed). Consequently, the defendant had fair notice that possession of hashish was prohibited under the Act and the rule of lenity did not apply. St. v. Pirello, 2012 MT 155, 365 Mont. 399, 282 P.3d 662.

Personal Jurisdiction Over Nonresident Business — Exercise of Long-Arm Jurisdiction Proper: The nonresident defendant business conducted sufficient business in Montana to support the extension of long-arm jurisdiction over the defendant when the defendant knew that the plaintiff intended to use the defendant's product in its Montana business, the defendant had previously sold its product to the plaintiff, and the defendant had serviced its product through other Montana businesses. Further, because the defendant purposefully availed itself of the privilege of conducting business in Montana, resulting in the plaintiff's alleged injury in Montana, and because the defendant reasonably could have anticipated defending itself in Montana, Montana's exercise of personal jurisdiction over the defendant comported with due process. Grizzly Sec. Armored Express, Inc. v. The Armored Group, LLC, 2011 MT 128, 360 Mont. 517, 255 P.3d 143.

Use of Pre-Miranda Statements Not Violation of Due Process When Defendant Testifies at Trial: Defendant appealed her jury conviction of felony DUI. During the trial, the prosecutor cross-examined the defendant about inconsistencies between the defendant's initial account given to police and a different account given during trial. When the defendant testifies at trial, the state can properly use pre-Miranda statements to expose possible false testimony; the prosecutor did not improperly comment on the defendant's post-Miranda silence or seek to take advantage of that silence to create an inference of guilt. St. v. Schaff, 2011 MT 19, 359 Mont. 185, 247 P.3d 727.

Plea Agreement for Release and Adoption of Dogs — Proposed Adopters as Incidental Beneficiaries Lacking Standing to Enforce Plea Agreement: Ronning and Dennehy brought a specific performance action in District Court to enforce a plea agreement giving them the choice to adopt several of a number of dogs that were cruelly treated. The Supreme Court held that because the parties to the plea agreement had discharged their duties under the agreement, the controlling document became the court's judgment and sentence. Because the plea agreement therefore terminated, the plaintiffs could not be intended third-party beneficiaries of the agreement, and because there was no court order naming them as intended third-party beneficiaries, Ronning and Dennehy were, at most, incidental beneficiaries with no standing to enforce the plea agreement. Ronning v. Yellowstone County, 2011 MT 79, 360 Mont. 108, 252 P.3d 178.

Sole Remedy Aspect of Workers' Compensation Held Not to Deny Substantive Due Process or Denial of Full Legal Redress: The decedent, an unmarried worker with no children, was killed

in an at-work accident and his mother, who was not his dependent, was paid $3,000 for his death. The mother then filed suit challenging the constitutionality (fundamental fairness) of the workers' compensation statutes, arguing that the quid pro quo of giving up the remedy of a legal action in exchange for only a $3,000 payment was insufficient to sustain the constitutionality of the statutes and citing Stratemeyer v. Lincoln County, 276 Mont. 67, 915 P.2d 175 (1996). The Supreme Court held that Stratemeyer was distinguishable, that the Legislature made a constitutional distinction in payable benefits between dependents and nondependents of injured or killed workers, and that the mother had not met her burden of proving beyond a reasonable doubt that the statutes were unconstitutional. Walters v. Flathead Concrete Products, Inc., 2011 MT 45, 359 Mont. 346, 249 P.3d 913.

Due Process Not Violated When Sentencing Court Does Not Rely on Erroneous Information: When the sentence was based on stipulated facts and the defendant's voluntary statements at hearing and the defendant failed to prove that the District Court relied on misinformation, due process was not violated. St. v. Morris, 2010 MT 259, 358 Mont. 307, 245 P.3d 512.

Fourfold Increase in Sentence Following Mistrial — Appearance and Reasonable Likelihood of Prosecutorial Vindictiveness: The defendant argued that the assault with a weapon charge that carries a maximum 20-year sentence should have been dismissed for prosecutorial vindictiveness when, during a previous trial that resulted in a mistrial, the defendant was charged with assault on a minor in violation of 45-5-212, which carries a maximum 5-year sentence. Following U.S. v. Goodwin, 457 U.S. 368, 102 S. Ct. 2485 (1982), the Supreme Court reversed and remanded. By rejecting the state's deal to plead guilty to the assault on a minor charge, the defendant exercised his right to proceed to trial. The threat of a fourfold increase in punishment for the assault with a weapon charge had the appearance of prosecutorial vindictiveness when after the mistrial the facts and witnesses were known, the state had discovered and assessed all of the information, and no new evidence or information came to light between the trials. St. v. Knowles, 2010 MT 186, 357 Mont. 272, 239 P.3d 129.

Due Process Applicable to Revocation Proceedings, Not Deprivation of Property —Failure to Raise Due Process Claims in Motion to Dismiss — Summary Judgment Properly Denied: McDaniel was sentenced to 20 years for burglary, with the sentence suspended subject to several conditions. About 4 months after sentencing, McDaniel tested positive for drugs, and the probation officer elected to initiate an intervention hearing, where an agreement was entered into in lieu of a formal violation being filed. Upon learning of the intervention hearing, the County Attorney filed a petition to revoke McDaniel's suspended sentence based on McDaniel's drug use. McDaniel moved for partial summary judgment on grounds that litigation of the revocation petition should be barred on due process grounds because the issue had already been litigated and thus should be barred by issue preclusion. The District Court denied the motion and McDaniel appealed, but the Supreme Court affirmed. The issue preclusion argument failed because the due process question as a deprivation of property was not raised in the analysis of the state's liability for a procedural due process violation, nor was the state afforded an opportunity to argue the deprivation of property due process claim. Additionally, McDaniel never raised a due process argument in the motions to dismiss, so the state did not address the due process issue that McDaniel claimed was adjudicated in District Court. Thus, McDaniel's motion for summary judgment on the due process claim was properly denied. McDaniel v. St., 2009 MT 159, 350 M 422, 208 P3d 817 (2009).

Personal Jurisdiction Over Nonresident Defendant Unreasonable — Jurisdiction Denied: Bunch purchased an airplane in Oregon and died in a crash in Montana while on a flight from Minnesota. Bunch's wife filed a product liability, negligence, and breach of warranty claim in Montana against the aircraft designers, manufacturers, and sellers, who were all out-of-state corporations. Defendants moved to dismiss the claims for lack of personal jurisdiction on grounds that they had no contacts with Montana other than the fact that their products were involved in the crash that occurred here and argued that the exercise of personal jurisdiction in Montana would be unreasonable and would not comport with due process. Bunch argued that personal jurisdiction was proper because defendants established minimum contacts with Montana when they distributed their products into the interstate stream of commerce and thus submitted themselves to jurisdiction in all states where their products might cause injury. Bunch also moved for jurisdictional discovery. The District Court agreed with defendants that personal jurisdiction did not apply, but the court concluded that because the alleged tort occurred in Montana, the exercise of long-arm jurisdiction was proper. The court then went on to consider whether the exercise of long-arm jurisdiction comported with traditional notions of fair play and substantial justice, applying the test adopted in Simmons v. St., 206 M 264, 670 P2d 1372 (1983), and followed in B.T. Metal Works v. United Die & Mfg. Co, 2004 MT 286, 323

M 308, 100 P3d 127 (2004), for determining whether the exercise of jurisdiction comports with due process: (1) did the nonresident defendant do some act or consummate some transaction with the forum or perform some act to purposefully avail himself of the privilege of conducting business in the forum, thereby invoking its laws; (2) did the claim arise out of or result from defendant's forum-related activities; and (3) would the exercise of jurisdiction be reasonable? The court concluded that defendants had not purposefully availed themselves of Montana law, that the claim did not arise from defendants' forum-related activities because the claim arose solely from the random, fortuitous, and unilateral activity of Bunch in flying to Montana, and that under the criteria set out in World-Wide Volkswagen Corp. v. Woodson, 444 US 286 (1980), jurisdiction would not comport with notions of fair play and substantial justice, so the court dismissed the claims for lack of personal jurisdiction. On appeal, the Supreme Court affirmed. For a Montana court to exercise jurisdiction over a nonresident defendant, two questions must be answered: (1) does the nonresident come within the provisions of Montana's long-arm jurisdiction statute; and (2) would exercise of long-arm jurisdiction comport with notions of fair play and substantial justice? In this case, the District Court correctly concluded that specific long-arm jurisdiction would be appropriate because the alleged tort accrued in Montana, but the court properly analyzed the personal jurisdiction question under former Rule 4B(1), M.R.Civ.P. (now superseded), in determining that personal jurisdiction would not comport with due process and would be unreasonable under these circumstances. Thus, defendants' motions to dismiss were properly granted and Bunch's motion for jurisdictional discovery was properly denied. Bunch v. Lancair Int'l, Inc., 2009 MT 29, 349 M 144, 202 P3d 784 (2009), distinguishing Rockwell Int'l Corp. v. Costruzioni Aeronautiche Giovanni Agusta, 553 F. Supp. 328 (E. Dist. Penn. 1982), and Vibratech, Inc. v. Frost, 661 S.E.2d 185 (Ga. App. 2008).

Failure to Establish Race-Based Sentencing — Illegal Incarceration Argument Dismissed: Baker contended that the District Court illegally based her sentence for vehicular homicide on race, in violation of constitutional guarantees of equal protection, no cruel or unusual punishment, and no discrimination. However, Baker presented no case law or legal analysis in support of the constitutional arguments, and thus failed to establish trial court error. The Supreme Court declined to consider Baker's unconstitutional incarceration argument. St. v. Baker, 2008 MT 396, 347 M 159, 197 P3d 1001 (2008).

Fair Trial Not Violated by Prosecutor's Closing Argument Relative to Rebuttable Presumption When Arrested Driver Refuses Breath Test: It was not improper for the prosecutor to comment upon the rebuttable presumption concerning the failure to take a breath test because that statutory inference has been held to be constitutional. St. v. Slade, 2008 MT 341, 346 M 271, 194 P3d 677, (2008).

Delay in Bringing Defendant Before District Court on Petition to Revoke Suspended Sentence Implicated Due Process Rights: Defendant made a threshold showing that plain error review of his claim was appropriate for a delay of 26 months in bringing him before the court on a petition to revoke a suspended sentence. However, delay was only one of several factors for the court to consider in the totality of circumstances approach to unreasonableness of delay, and thus the case was remanded for an evidentiary hearing. St. v. West, 2008 MT 338, 346 M 244, 194 P3d 683, (2008). However, see St. v. Sullivant, 2013 MT 200, 371 Mont. 91, 305 P.3d 838.

No Abuse of Discretion in Montana Court's Failure to Stay Proceedings Pending Outcome of North Dakota Proceedings: Defendant North Dakota insurance company claimed that, on grounds of comity, a Montana District Court abused its discretion by denying a motion to stay proceedings in the Montana court pending the outcome of defendant's motion for a declaratory judgment in the North Dakota courts concerning insurance stacking issues. The Supreme Court disagreed and found no abuse of discretion. Both states had an interest in the stacking issue, and both states were entitled to comity. It was within the judicial competency of the Montana court to decide the issue in the interests of preventing piecemeal litigation. Additionally, the fact that defendant sought to delay the issue in Montana in hopes of achieving a more favorable decision in North Dakota belied the comity argument. Wamsley v. Nodak Mut. Ins. Co., 2008 MT 56, 341 M 467, 178 P3d 102 (2008), following Simmons v. St., 206 M 264, 670 P2d 1372 (1983).

No Prejudice Shown in Incorporation of Tribal Court Juvenile Record Into Sentencing Procedure — Due Process Not Violated: Phillips sought postconviction relief on grounds that his tribal court juvenile record had been illegally requested by the state and incorporated into the presentence investigation report and sentencing proceedings in violation of due process. The petition was denied, and on appeal, the Supreme Court affirmed without addressing the issue of release of the record under tribal law. Phillips did not present any evidence that the juvenile record or any information in the presentence investigation report was materially inaccurate, that

the tribal court record influenced placement with the Department of Corrections, or that he was prejudiced by the tribal court record in violation of due process, so dismissal of the petition for postconviction relief was not erroneous. St. v. Phillips, 2007 MT 117, 337 M 248, 159 P3d 1078 (2007).

State Breach of Plea Agreement — Remand for Resentencing in Conformity With Sentencing Stipulation: Pursuant to a plea bargain, a youth was placed on probation until age 18 with a sentencing stipulation that if the youth did not follow treatment plans or meet other requirements, the matter would be transferred to District Court and adult supervision. The youth subsequently violated probation and was sent to the Pine Hills correctional facility. The youth reoffended at Pine Hills, and the state moved to transfer the case to District Youth Court. Despite the sentencing stipulation, the state moved for a custodial sentence, and the Youth Court concurred with the state's recommendation and sentenced the youth to the Department of Corrections until age 25, with the last 3 years suspended. The youth appealed. The Supreme Court reversed. Both parties were bound by the terms of the plea agreement, and although the case was transferred to District Court as per the agreement, the state failed to follow the terms of the agreement when it sought a custodial sentence rather than adult supervision for the youth. Upon resentencing following the subsequent revocation for violation of sentencing conditions, the youth was entitled to receive the sentence that was presented to and approved by the Youth Court, and the Youth Court abused its discretion by failing to hold the state to the terms of the sentencing stipulation and by ordering the custodial sentence. On remand, the Youth Court was ordered to resentence the youth in accordance with the terms of the sentencing stipulation. In re H.C.R., 2007 MT 64, 336 M 369, 155 P3d 1221 (2007), following St. v. Rardon, 1999 MT 220, 296 M 19, 986 P2d 424 (1999), and St. v. Rardon, 2002 MT 345, 313 M 321, 61 P3d 132 (2002).

State Allowed to Present Evidence Regarding Veracity of Information Defendant Raises in Arguing for Sentence Without Breaching Plea Agreement: At a sentencing hearing, Bartosh testified regarding information in the presentence investigation report, asserting that he had complied with his treatment plan and that certain transcripts of telephone conversations attached to the report should be stricken because they undermined the plea agreement. The District Court declined to strike the transcripts and allowed the probation officer who prepared the report to testify in response to Bartosh's testimony. On appeal, Bartosh contended that it was error to allow the probation officer to testify because the testimony undermined the plea agreement. The Supreme Court held that the telephone transcripts were relevant and properly allowed as indicative of Bartosh's acts. The court also affirmed the sentencing court's decision to allow the probation officer's testimony. Once Bartosh testified as to his conduct concerning compliance with the treatment plan, the state was justified in presenting the probation officer who had conflicting information. If a defendant chooses to present information in support of a sentence, the state may counter with testimony to the effect that the information is misleading or untrue without breaching a plea agreement. St. v. Bartosh, 2007 MT 59, 336 M 212, 154 P3d 58 (2007).

Plaintiff Subject to McDonnell Douglas Test to Prove Employment Discrimination: Ray argued that his position as department head at Montana Tech of the University of Montana was not renewed because of his environmental activities and criticism of engineering students and also because of his marital status because one of the administrators was opposed to his being married to another member of the faculty. The Commission for Human Rights determined that the university had presented legitimate reasons for the nonrenewal and found for the school. The decision was upheld by the District Court. On appeal, Ray asserted that he was not subject to the McDonnell Douglas test adopted by the Montana Supreme Court in Martinez v. Yellowstone County Welfare Dept., 192 M 42, 626 P2d 242 (1981). The Supreme Court found that Ray had not presented any direct evidence that he was discriminated against based upon his political beliefs or marital status and therefore was subject to the test that provides that a plaintiff, relying on circumstantial evidence, has the initial burden of proving a prima facie case of discrimination. However, if the other party then meets its burden of rebutting the prima facie case, the burden reverts to the plaintiff. The Supreme Court agreed with the Commission for Human Rights that Ray had met the initial burden. However, the Supreme Court ruled that Montana Tech had then met its burden of showing legitimate reasons for the nonrenewal, which were supported by substantial credible evidence. The Supreme Court upheld the Commission's and District Court's findings that Montana Tech had presented reasons for the nonrenewal that were not pretextual, and that shifted the burden back to Ray who had not presented any convincing evidence that the reasons given for the nonrenewal were pretextual. Ray v. Mont. Tech of the Univ. of Mont., 2007 MT 21, 335 M 367, 152 P3d 122 (2007). See also Baumgart v. St., 2014 MT 194, 376 Mont. 1, 332

P.3d 225, holding that speculative and conclusory statements were insufficient to show the prima facie case for political affiliation discrimination.

Sufficient Accurate Information to Support Sentence for Distribution of Methamphetamine: Harper was sentenced to 20 years in prison with 10 years suspended and fined $12,000 after pleading guilty to possession of dangerous drugs with intent to distribute. Harper appealed on grounds that the sentencing court based the sentence on inaccurate and insufficient evidence that Harper was the center of the drug operation. Harper had a right to be sentenced based on correct evidence, but also had the affirmative duty to show, beyond mere unsupported contentions, that the alleged misinformation was materially inaccurate and to present information establishing inaccuracies in the presentence investigation report. In this case, the sentencing court did nothing more than consider relevant information relating to the nature and circumstances of the possession of drugs found during the search of Harper's home, including unrefuted information that Harper was at the center of a methamphetamine distribution business conducted from the home. Information in the presentence investigation report simply underscored Harper's involvement in drug distribution and supported that charge to which Harper pleaded guilty. The information was properly before the sentencing court, and the court did not err in imposing a sentence within the statutory parameters. The sentence was affirmed. St. v. Harper, 2006 MT 259, 334 M 138, 144 P3d 826 (2006), followed in St. v. Walker, 2007 MT 205, 338 M 529, 167 P3d 879 (2007), with respect to defendant's affirmative duty to show, beyond mere unsupported contentions, that alleged misinformation in a presentence investigation report was materially inaccurate and to present information establishing inaccuracies in the presentence investigation report.

Blood on Coat Considered Admissible Based Upon Defendant's Oral and Written Consent: Jones agreed to voluntarily come to the police station on two occasions to answer question relating to a homicide case. Although the police had a warrant for his arrest, it was never served. Both times Jones was read his Miranda rights. During one interview, he stated that he was "through talking" but then continued to answer questions. During one of the interviews, Jones was asked what he was wearing on the day of the murder and then was asked if the police could examine the coat that he had on that day. Jones agreed and was driven to his home and retrieved the coat for the officers. The coat was subsequently found to have the victim's blood on it. Jones argued that the coat was inadmissible because he did not sign the consent form given to him until after the police had possession of the coat. The officers testified that he had signed the release prior to turning over the coat. The Supreme Court held that regardless of when the release was signed, Jones had previously given oral consent for the police to look at the coat. The Supreme Court also ruled that the police had the right to not only look at the coat but to take possession of it based on the clear language contained in the consent form. St. v. Jones, 2006 MT 209, 333 M 294, 142 P3d 851 (2006).

Defendant's Statement That He Was "Through Talking" Not Invocation of Constitutional Rights: Jones agreed to voluntarily come to the police station on two occasions to answer question relating to a homicide case. Although the police had a warrant for his arrest, it was never served. Both times Jones was read his Miranda rights. During one interview, he stated that he was "through talking" but then continued to answer questions. After he was convicted, he argued that his statement was an unequivocal assertion of his right to counsel and to remain silent. The Supreme Court upheld the trial court's finding that Jones' subsequent statements were not coerced or involuntary. Any evidence gathered from the subsequent statements was not subject to suppression. St. v. Jones, 2006 MT 209, 333 M 294, 142 P3d 851 (2006).

Probation Officer's Actions Fail to Constitute Coercion With Respect to Statements Made by Defendant to Police: Jones argued that evidence gathered from statements that he made during interviews with the police regarding a homicide case should have been suppressed because he was illegally coerced into making the statements by his probation officer who told him that he needed to talk to the police and because the probation officer had issued an arrest warrant when Jones missed his scheduled meeting. The Supreme Court noted that the probation officer had not told Jones of the arrest warrant and that Jones voluntarily walked over to the police station from the meeting with the probation officer because Jones said that he had nothing to hide. The Supreme Court ruled that the probation officer's statement that Jones needed to talk to the police did not constitute an illegal act to compel Jones to answer questions and that evidence gained from Jones' subsequent statements was not subject to suppression. St. v. Jones, 2006 MT 209, 333 M 294, 142 P3d 851 (2006).

Sentence for Negligent Homicide Not Considered "Trial Tax" in Violation of Due Process: English contended that a sentence of 20 years with 10 suspended for negligent homicide

constituted a "trial tax" imposed for taking the case to trial rather than pleading guilty, in view of the disparity between his sentence and cases cited by the trial court in which defendants pleaded guilty or nolo contendere. The Supreme Court disagreed. The trial court focused on the aggravating circumstances in English's case, not on the sentences imposed in prior negligent homicide cases, and there was no indication that the trial court imposed a "trial tax" on English for proceeding to trial. There may be appropriate differences between sentences imposed on defendants who have pleaded guilty and those who have proceeded to trial for the same offense. The sentence was within statutory parameters, did not violate English's due process rights, and was affirmed. St. v. English, 2006 MT 177, 333 M 23, 140 P3d 454 (2006).

Trial Court's Improper Determination of Veracity of Recanted Testimony —Remand: In ruling on Crosby's motion for a new trial based on the recanted testimony of a witness, the District Court erroneously concluded that Crosby was entitled to a new trial only when the trial judge was satisfied that the recantation was untrue, which improperly placed the court in the role of factfinder. Instead, the court should have applied the test in St. v. Clark, 2005 MT 330, 330 M 8, 125 P3d 1099 (2005), to determine whether a new trial should be granted based on newly discovered evidence. The Supreme Court remanded for application of the Clark standard in determining whether Crosby was entitled to postconviction relief and a new trial. Crosby v. St., 2006 MT 155, 332 M 460, 139 P3d 832 (2006). In Marble v. St., 2015 MT 242, 380 Mont. 366, 355 P.3d 742, the Supreme Court overruled Crosby to the extent it applied the fifth factor in the Clark test to a petition for postconviction relief that is based upon newly discovered evidence.

Failure of Trial Court to Rule on Motion to Dismiss Not Violative of Due Process Rights — Plenary Review of Constitutional Question: Following a sentencing hearing, Smerker simultaneously filed notice of appeal to the Supreme Court and a motion to dismiss a felony DUI charge on grounds that two prior misdemeanor DUI violations were constitutionally invalid and could not be used to enhance the current charge to a felony. The sentencing court declined to rule on the motion to dismiss, which Smerker contended was a violation of due process rights. The Supreme Court disagreed. Smerker's arguments were based on documentary evidence related to the prior offenses, and the Supreme Court is in as good a position as a District Court to judge the weight of documentary evidence. Therefore, the Supreme Court exercised plenary review of the constitutional validity of the prior convictions. Because the Supreme Court could adequately address the issue, the District Court's failure to rule on the motion to dismiss did not affect Smerker's substantial due process rights. St. v. Smerker, 2006 MT 117, 332 M 221, 136 P3d 543 (2006).

Voluntary Nolo Contendere Guilty Plea — No Good Cause to Withdraw Plea: Although maintaining innocence to sexual assault charges, Leitheiser sought to avoid trial and possible sex offender treatment, so Leitheiser entered plea negotiations, and the state agreed to amend the information to consist of charges of felony assault on a minor and to remain silent regarding sex offender treatment in exchange for Leitheiser's guilty plea. At the change of plea hearing, Leitheiser entered a voluntary guilty plea to the amended charges. The trial court did not accept the guilty plea at that time, but ordered Leitheiser to undergo a presentence interview. The probation officer recommended sexual offender treatment, and Leitheiser moved to withdraw the nolo contendere guilty plea. The motion was denied, and Leitheiser appealed, contending that the plea to nonsexual charges combined with the bargain that the prosecution would not recommend sexual offender treatment induced the guilty plea. The Supreme Court disagreed. Leitheiser's guilty plea was voluntary, and the state kept its part of the plea bargain. Leitheiser's grievance was with the probation officer, who was not a party to the plea bargain, rather than with the prosecution. Denial of Leitheiser's motion to withdraw the guilty plea was affirmed. St. v. Leitheiser, 2006 MT 70, 331 M 464, 133 P3d 185 (2006). See also St. v. Bowley, 282 M 298, 938 P2d 592 (1997).

Recantation of Sexual Assault Victim's Testimony — Remand for Consideration of New Trial — Perry Partially Overruled: Following Clark's conviction of sexual assault against his stepdaughter, she recanted her testimony and Clark moved for a new trial, citing St. v. Perry, 232 M 455, 758 P2d 268 (1988). The Supreme Court overruled Perry to the extent that it stands for the proposition that a trial judge is required to grant a new trial only when satisfied that the recantation of the witness is true. However, the Perry proposition that the weight to be given to recanted testimony is for the trial judge to determine was retained as authoritative precedent to be considered as part of the analysis set out in Berry v. St., 10 Ga. 511 (Ga. 1851), describing when it is proper to grant a new trial based on newly discovered evidence, as adopted in St. v. Greeno, 135 M 580, 342 P2d 1052 (1959). In applying the restated Berry test, a District Court is not to make factual determinations as to the veracity of the recantation, but should evaluate

the recantation for materiality and its tendency to be cumulative or impeaching and should determine whether there is a reasonable probability that a new trial would produce a different outcome, keeping in mind the aspects of recantations that make them inherently suspect. If the Berry elements are met, a new trial is warranted; if not, the prior judgment stands. Here, the record was not clear as to the District Court's reasons for denying a new trial and whether the court correctly applied the law, so the case was remanded to allow the District Court to readdress Clark's motion for a new trial. St. v. Clark, 2005 MT 330, 330 M 8, 125 P3d 1099 (2005), followed in Crosby v. St., 2006 MT 155, 332 M 460, 139 P3d 832 (2006).

On remand, the District Court found that evidence of the victim's recanted testimony was neither cumulative nor impeaching and that a new trial based on the testimony had no reasonable probability of resulting in a different outcome, so Clark's motion for a new trial was denied. Clark appealed, but the Supreme Court affirmed. In the first trial, the jury had already heard Clark's theory, which was essentially confirmed by the recanted testimony, but had rejected the theory and convicted Clark. Thus, there was no probability that a new trial based on the same theory would result in a different outcome, so a new trial was unwarranted. St. v. Clark, 2008 MT 391, 347 M 113, 197 P3d 977 (2008), following Crosby v. St., 2006 MT 155, 332 M 460, 139 P3d 832 (2006). In Marble v. St., 2015 MT 242, 380 Mont. 366, 355 P.3d 742, the Supreme Court held that it erred in applying the Clark factors to a petition for postconviction relief, in particular the fifth factor, and overruled three cases to the extent they applied that factor to a petition for postconviction relief.

Lack of Counsel — No Due Process Violation Following Termination of Parental Rights: A mother's parental rights were terminated in 2001, after which her counsel withdrew and the District Court appointed a public defender without notifying the defender. The mother contended that her due process rights were violated because she did not have adequate representation once her counsel withdrew. The Supreme Court recognized that due process and fundamental fairness require that a parent be represented by counsel at proceedings to terminate parental rights and that the mother had counsel during the termination proceedings and on direct appeal. The mother failed to establish that the proceedings did not comport with relevant statutory and constitutional due process requirements, and her argument was without merit. Termination of her parental rights was affirmed. In re T.H. & C.D.F., 2005 MT 237, 328 M 428, 121 P3d 541 (2005), following In re A.S., 2004 MT 62, 320 M 268, 87 P3d 408 (2004).

Criminal Trespass Statute Not Vague and Overbroad: Allum caused a disturbance in a grocery store and was asked by the manager to leave. When Allum refused, he was arrested for trespass. Allum contended that the manager did not have the authority to ask Allum to leave without written authority from the property owner. Allum asserted that the trespass statute violated free speech and due process and was vague and overbroad unless the phrase "authorized person" in 45-6-201(1) was narrowly construed to mean someone who has explicit written authority from the landowner. The Supreme Court noted that a statute is void for vagueness if it fails to give a person of ordinary intelligence fair notice that the statute does not permit a contemplated conduct. Section 45-6-201 gives fair notice and is not vague. St. v. Allum, 2005 MT 150, 327 M 363, 114 P3d 233 (2005), following the overbreadth test in St. v. Lilburn, 265 M 258, 875 P2d 1036 (1994).

Third Sentence Not Violative of Due Process Rights — Change in Parole Component Offset by Reduction of Overall Sentence: Rardon twice appealed his sentence and prevailed both times. Rardon's initial sentence was 60 years with parole eligibility after 35 years. On remand, Rardon's second sentence was 50 years with parole eligibility after 25 years. On remand for a third sentencing hearing, the District Court sentenced Rardon to 37 years with no eligibility for parole. Rardon contended that his due process rights were violated because the third sentence was harsher than either of the first two. The Supreme Court noted that although the third sentence guaranteed that Rardon would spend more time actually incarcerated, it also guaranteed that Rardon would not spend as much time as he could have served under either of the first two sentences, so the third sentence, in its entirety, was not more harsh than the first two sentences. Parole eligibility was the only sentencing component that was harsher in the third sentence, but the parole component was offset by the reduction in the overall term. Therefore, Rardon's due process argument failed, and the third sentence was affirmed. St. v. Rardon, 2005 MT 129, 327 M 228, 115 P3d 182 (2005).

Felony-Murder Rule Not Violation of Due Process — Underlying Felony Need Not Be Independent of Homicide: Burkhart was charged in the death of the victim whom Burkhart struck once in the head with a ball-peen hammer and then chased after him and struck him several more times, resulting in the victim's death. Burkhart was convicted of deliberate homicide under

the felony-murder rule. The predicate offense underlying the felony-murder charge was felonious assault with a weapon. Burkhart argued that the state abridged his due process rights because the predicate offense was not independent of the homicide, that the charge precludes him from raising certain defenses and lesser included offenses available under the deliberate homicide statute, and that the state was relieved from having to prove a specific mental state for homicide. The Supreme Court held that Montana's felony-murder rule is not unconstitutional and that the underlying offense need not be independent of the homicide. Because the felony-murder rule does not in fact raise a presumption of the existence of an element of the crime, it does not violate the due process clause. St. v. Burkhart, 2004 MT 372, 325 M 27, 103 P3d 1037 (2004).

Analysis of District Court Personal Jurisdiction Over Nonresident Defendant — Due Process Test: The Supreme Court applies a two-part analysis in determining whether a District Court may exercise specific personal jurisdiction over a nonresident defendant. The analysis involves whether jurisdiction exists pursuant to former Rule 4B(1), M.R.Civ.P. (now superseded), and whether the District Court's exercise of jurisdiction comports with due process. There is a three-part test for determining whether the exercise of jurisdiction comports with due process: (1) the nonresident defendant must do some act or consummate some transaction with the forum or perform some act by which the defendant purposefully avails the defendant of the privileges of conducting activities in the forum; (2) the claim must be one that arises out of or results from the defendant's forum-related activities; and (3) the exercise of jurisdiction must be reasonable. A plaintiff is not required to demonstrate each of these elements, and once a plaintiff shows that the defendant has purposefully availed the defendant of the privileges of conducting activities in this state, a presumption of reasonableness arises that the defendant can overcome only by presenting a compelling case that jurisdiction would not be reasonable. A presumption also arises that the exercise of jurisdiction over third-party defendants is reasonable, which can be overcome only by demonstrating with compelling reasons that jurisdiction would be unreasonable. In the present case, after an employee's claims were settled, plaintiff and the employer stipulated to dismissal of plaintiff's claims, but the District Court also dismissed the third-party action after concluding that no Montana parties remained in the action. However, plaintiff's dismissal did not remove the last Montana party from the action because the third-party employer was an ongoing business entity engaged in commercial activity in this state and was thus considered a person for determining jurisdictional questions under former Rule 4B and was entitled to consideration as a Montana resident for jurisdictional purposes. The District Court correctly held that the actions of the third-party defendants fell within the plain language of former Rule 4B, subjecting them to Montana's specific jurisdiction and erred in declining to exercise jurisdiction over the third-party defendants. The third-party defendants purposefully availed themselves to Montana jurisdiction, and the exercise of jurisdiction over them was reasonable and comported with due process. The case was therefore remanded for further proceedings. Nasca v. Hull, 2004 MT 306, 323 M 484, 100 P3d 997 (2004). See also Simmons Oil Corp. v. Holly Corp., 244 M 75, 796 P2d 189 (1990), and Bitterroot Int'l Sys., Ltd. v. W. Star Trucks, Inc., 2007 MT 48, 336 M 145, 153 P3d 627 (2007), following B.T. Metal Works v. United Die & Mfg. Co., 2004 MT 286, 323 M 308, 100 P3d 127 (2004).

Summary Dismissal Proper Absent Evidence Supporting Inmate's Freedom of Religion and Equal Protection Claims: While a prisoner at the Crossroads Correctional Facility, Cape sued the facility and the food service providers for violating Cape's freedom of religion for failing to provide religious meals, for failing to provide access to a priest and religious materials, and for violating his right to equal protection by denying Cape's request for group prayer and Bible study while providing those services to other inmates. Cape was subsequently transferred to a regional jail facility. The District Court granted summary judgment for defendants on grounds that the matter was moot because Cape was no longer in the custody of the facility. On appeal, the Supreme Court acknowledged that Cape could be transferred back to the facility and thus suffer the same alleged deprivation of rights. Nevertheless, the Supreme Court affirmed absent evidence to support Cape's freedom of religion and equal protection claims. Cape v. Crossroads Correctional Center, 2004 MT 265, 323 M 140, 99 P3d 171 (2004).

No Constitutional Violation in Admission of Telephonic Testimony at Revocation Hearing — No Abuse of Discretion Upon Good Cause: To accommodate counsel, the state moved to allow the admission of telephonic testimony from two law enforcement officers who could not attend Megard's sentence revocation hearing in person. Megard objected, relying on Rule 611, M.R.Ev. (Title 26, ch. 10), and In re Marriage of Bonamarte, 263 M 170, 866 P2d 1132 (1994). The District Court held that neither the rule nor Bonamarte applied and that Megard's fundamental rights would be adequately protected, so the motion was granted. On appeal, Megard also contended

that allowing the telephonic testimony violated his due process right and the right to confront witnesses. The Supreme Court affirmed. The District Court was familiar with the witnesses. Allowing telephonic testimony did not impede the ability to judge a witness's credibility in relation to other witnesses, who corroborated the testimony, because knowledge of a witness's identity and credentials may constitute a special circumstance under which telephonic testimony is allowed. Although telephonic testimony is generally not allowed in trials absent special circumstances or the parties' consent, evidentiary rules do not apply to revocation proceedings. Because a revocation hearing is not a criminal trial, Megard had no constitutional right to confront witnesses at the hearing. Further, Megard's due process rights were not violated because his counsel actually cross-examined the witnesses, and good cause existed for the District Court to admit the telephonic testimony to address scheduling conflicts. Even if error occurred, it was harmless, given Megard's failure to establish prejudice pursuant to St. v. Pedersen, 2003 MT 315, 318 M 262, 80 P3d 79 (2003). St. v. Megard, 2004 MT 67, 320 M 323, 87 P3d 448 (2004).

Parent's Due Process Right to Effective Assistance of Counsel During Parental Rights Termination Proceedings: Because a parent's right to the custody and care of the parent's child is a fundamental liberty interest that must be protected by fundamentally fair procedures, a parent is entitled not only to assistance of counsel during parental rights termination proceedings, but also to effective assistance of counsel during those proceedings. The Supreme Court will evaluate effectiveness of counsel in parental rights termination cases by following the nonexclusive factors of training and experience and of advocacy. In the present case, a mother's counsel was not prepared to perform the duty to zealously advocate for the mother at a termination hearing, nor was advocacy beyond counsel's means, as demonstrated by the fact that counsel was prepared at a later hearing. However, because the mother did not suffer prejudice because of counsel's failure to provide effective assistance, termination of the mother's parental rights was affirmed. In re A.S., 2004 MT 62, 320 M 268, 87 P3d 408 (2004), followed in In re J.J.L., D.J.L., and R.D.L.L., 2010 MT 4, 355 Mont. 23, 223 P.3d 921, In re A.J.W., 2010 MT 42, 355 Mont. 264, 227 P.3d 1012, and In re T.N.-S., 2015 MT 117, 379 Mont. 60, 347 P.3d 1263.

Justifiable Preindictment Delay Not Prejudicial to Defendant's Due Process Rights: DuBray was charged with a deliberate homicide committed over 10 years earlier and later appealed the denial of his motion to dismiss on grounds that preindictment delay violated his due process rights. The Supreme Court applied the two-step process in St. v. Taylor, 1998 MT 121, 289 M 63, 960 P2d 773 (1998), which required first that DuBray show actual and substantial prejudice from the delay and, if so, a consideration of the reasons for the delay and the length of the delay. Under Taylor, preindictment delay leads to a violation of due process rights if it can be said that requiring a defendant to stand trial violates those fundamental concepts of justice that lie at the base of civil and political institutions and that define the community sense of fair play and decency. The Supreme Court distinguished Taylor because in that case, the state had a known suspect yet inexplicably failed to investigate and file charges in a timely manner, while here, investigators were not made aware of DuBray's involvement until shortly before he was charged. Thus, after weighing any prejudice suffered by DuBray, such as potential failure of witnesses' memories, against the reasons for the delay and the length of the delay, the Supreme Court concluded that DuBray's due process rights were not prejudiced by the lengthy preindictment delay. St. v. DuBray, 2003 MT 255, 317 M 377, 77 P3d 247 (2003).

Presumption of Punishment for Going to Trial Based on Difference Between Pretrial Offer and Actual Sentence — Remand: As set out in St. v. Baldwin, 192 M 521, 629 P2d 222 (1981), when a District Court becomes involved in plea negotiations and an offer is made, any difference in the sentencing after trial must point out the factors justifying an increased sentence, and failure to enumerate the factors leads to the presumption that a greater sentence has been imposed for a vindictive purpose. Here, when the District Court failed to justify having an 11-year sentence run consecutively rather than concurrently with another sentence, the Baldwin standard requiring an explanation for imposing a harsher sentence than that offered in plea negotiations was not met, constituting reversible error. The case was remanded for resentencing. St. v. Hall, 2003 MT 253, 317 M 356, 77 P3d 239 (2003).

Absence of Facts Indicating Unconstitutional Sentence — Maximum Sentence Affirmed: Brown cited St. v. Baldwin, 192 M 521, 629 P2d 222 (1981), and St. v. Tate, 196 M 248, 639 P2d 1149 (1982), in arguing that a disparity between his sentence for deliberate homicide and a plea bargain offered by the state indicated that his due process rights were violated. The Supreme Court distinguished Baldwin and Tate because in Brown's case, the District Court was not directly involved with the plea negotiation process. Rather, the District Court enumerated a lengthy list of factors that were considered in imposing the maximum sentence on Brown. Absent anything in

the record to support Brown's claim that his sentence was unconstitutional, the Supreme Court affirmed the sentence. St. v. Brown, 2003 MT 166, 316 M 310, 71 P3d 1215 (2003).

Probationer Not Entitled to Good Time Credit for Time Served on Original Sentence: Williams' suspended sentence for felony assault was revoked after Williams violated the terms of the suspension. Williams requested that he be credited for good time that he served on the suspended sentence. The District Court concluded that Williams was a probationer, not a parolee, and declined to grant good time credit. Williams appealed, but the Supreme Court affirmed. Williams' original sentence did not provide that Williams be treated as a parolee, so as a probationer, Williams was not entitled to credit for good time under McDermott v. Dept. of Corrections, 2001 MT 134, 305 M 462, 29 P3d 992 (2001). St. v. Williams, 2003 MT 136, 316 M 140, 69 P3d 222 (2003).

Defendant's Affirmation of Correctness of Information in Presentence Investigation Constituting Waiver of Due Process Challenge: McLeod challenged the legality of his dangerous drug sentence on due process grounds because the sentencing court relied on a presentence investigation (PSI) report that indicated that McLeod had five previous felony drug convictions instead of the actual four previous convictions. A convicted defendant has a due process guarantee against a sentence predicated on misinformation. Here, McLeod was given proper notice of the information in the PSI, availed himself of the opportunity to extensively review the information, was represented by counsel at the time that the PSI was made known to him and reviewed the information with counsel, and was given repeated opportunities to rebut the information but chose instead to affirm the accuracy of the PSI. Thus, pursuant to St. v. Orsborn, 170 M 480, 555 P2d 509 (1976), McLeod was afforded the process due to a criminal defendant at sentencing. McLeod's affirmation of the correctness of the PSI constituted a waiver of a due process challenge, and the sentence was affirmed. St. v. McLeod, 2002 MT 348, 313 M 358, 61 P3d 126 (2002).

Improper Prosecutorial Solicitation of Testimony Intended to Undermine Plea Agreement — Choice of Remedies on Remand: The prosecutor in Rardon's sexual assault trial gave lip service to the letter of a plea agreement by recommending the sentence suggested in the presentence investigation, but then went on to solicit inflammatory testimony from the victims that would almost undoubtedly cause the court to question the appropriateness of the recommended sentence, which effectively undercut the plea agreement. Although it is appropriate for a prosecutor to questions victims and solicit their testimony at a sentencing hearing and for victims to express their fears and feelings, it is not acceptable for a prosecutor to aggressively solicit testimony that is clearly intended to undermine a plea agreement and to convince the sentencing court that a bargained sentence agreement should not be accepted. A plea agreement is subject to contract law standards, and prosecutors must meet strict and meticulous standards of both promise and performance. A guilty plea resting on an unfulfilled promise in a plea bargain is involuntary, and prosecutorial violations, even if made inadvertently or in good faith to obtain a just and mutually desired end, are unacceptable. When the prosecution breaches a plea agreement, the sentencing judge may determine the appropriate remedy, which may include withdrawal of the guilty plea or specific performance of the plea agreement in a new sentencing hearing with a different prosecutor and judge. St. v. Rardon, 2002 MT 345, 313 M 321, 61 P3d 132 (2002).

On remand, the prosecutor's presentation of the state's case did not undermine the plea bargained sentence recommendation or violate the contract law standards of the plea agreement. The sentencing judge was entitled to consider evidence of Rardon's abusive history and violent tendencies, as well as Rardon's daughter's opinion that Rardon should receive a lengthy sentence. None of the prosecutorial improprieties identified in previous hearings were present in the third sentencing hearing, nor did Rardon demonstrate any other kind of prosecutorial impropriety, so Rardon's third sentence was affirmed. St. v. Rardon, 2005 MT 129, 327 M 228, 115 P3d 182 (2005). The 2005 Rardon decision was followed in St. v. Bartosh, 2007 MT 59, 336 M 212, 154 P3d 58 (2007), St. v. Rahn, 2008 MT 201, 344 M 110, 187 P3d 622 (2008), and St. v. McDowell, 2011 MT 75, 360 Mont. 83, 253 P.3d 812. See also St. v. Lamere, 272 M 355, 900 P2d 926 (1995), St. v. Bowley, 282 M 298, 938 P2d 592 (1997), and St. v. Munoz, 2001 MT 85, 305 M 139, 23 P3d 922 (2001).

No Reliance on Misinformation in Sentencing — Due Process Rights Not Violated: Despite the District Court's statement to the contrary, Winkle contended that the court relied on misinformation in sentencing, violating Winkle's due process rights. Due process requires that an offender be given an opportunity to explain, argue, and rebut any information, including presentencing information, that may lead to a deprivation of life, liberty, or property. Winkle argued that, given the timing of the information, he did not have an opportunity to rebut, so the court should have granted a continuance in the sentencing hearing. The decision to grant a

continuance is in the discretion of the sentencing court, and the timeliness of a continuance motion is a legitimate factor for the court to consider in determining whether to grant the motion. When a criminal defendant contests matters in a presentence report, the defendant has an affirmative duty to present evidence establishing inaccuracies, and if the defendant feels that inadequate time has been allowed to accurately rebut the information, a motion for continuance is in order. Here, the motion for continuance was untimely because it was made after counsel twice indicated sentencing should proceed and after the oral imposition of sentence. Winkle's contention that the sentencing court erroneously relied on certain information in imposing sentence was also flawed. The court did not explicitly state the materials that it was deleting from the presentence report, and absent specific objection, a sentencing court is not required to do so. There was information that Winkle was unable to successfully complete the presentence investigation questionnaire, and this is the information that the court relied on. Failing to establish either any misinformation or that he had no opportunity to rebut information, Winkle's due process rights were not violated, and the sentence was affirmed. St. v. Winkle, 2002 MT 312, 313 M 111, 60 P3d 465 (2002), followed in St. v. Roedel, 2007 MT 291, 339 M 489, 171 P3d 694 (2007). See also St. v. Simmons, 2011 MT 264, 362 Mont. 306, 264 P.3d 706, holding a criminal defendant's due process rights were not violated during the sentencing hearing when the District Court referred to the defendant's negative behavior while incarcerated and cut short the defendant's cross-examination of a witness.

Different Tax Rates on Coal, Oil, and Natural Gas Versus Classified Property Not Violation of Equal Protection and Due Process: Certain counties and individual taxpayers argued that a statewide 50-mill increase on classified property to aid in equalization of school funding that was not imposed on coal, oil, and natural gas that was taxed at a fixed rate was effectively tax-shifting and increased the burden on all other taxable property in the state and therefore was a violation of equal protection and due process. The Supreme Court stated that the presumption was that the law was valid and that the appellants did not provide convincing arguments that the rational basis tier of equal protection analysis did not apply in this case. The Supreme Court held that there had been a showing that the legislation was not arbitrary and bore a substantial relation to the object of the legislation—equality of tax burden and economic competitiveness. Powder River County v. St., 2002 MT 259, 312 M 198, 60 P3d 357 (2002).

No Showing That Evidence Exculpatory or Intentionally Withheld — Summary Dismissal Proper: Hiebert sued the county and several county officials for withholding exculpatory evidence in Hiebert's trial for sexual assault. The District Court dismissed the suit on summary judgment, and Hiebert appealed. The prosecution has a duty to disclose all favorable evidence to the defense, and when considering the withholding of exculpatory evidence from the defense, a due process violation of Brady v. Md., 373 US 83 (1963), occurs if: (1) the evidence at issue is favorable to the accused, either because it has exculpatory or impeachment value; (2) the evidence was willfully or inadvertently suppressed by the state; and (3) the suppression resulted in prejudice to the accused. In this case, Hiebert failed to demonstrate that evidentiary transcripts were exculpatory or withheld intentionally, other than by speculating that one official lied in testifying that the transcript was not withheld, and speculation is insufficient to avoid summary judgment. The Supreme Court affirmed summary judgment. Hiebert v. Cascade County, 2002 MT 233, 311 M 471, 56 P3d 848 (2002). See also St. v. Wagner, 2013 MT 47, 369 Mont. 139, 296 P.3d 1142.

Action for Damages Allowed Against Local Peace Officers Violating Person's Self-Executing State Constitutional Rights to Privacy, Due Process, and Freedom From Unreasonable Searches and Seizures: Plaintiffs filed a civil action against the Sheriff and two deputies for damages for violation of plaintiffs' Montana constitutional rights to privacy, due process, and freedom from unreasonable searches and seizures. The court held that those three rights are self-executing. The court also held that plaintiffs were entitled to damages. The court based the right to recover damages on: (1) federal cases allowing damage suits for violation of rights under the U.S. Constitution; (2) Restatement (Second) of Torts 874A (1979), which follows the principle in those federal cases by stating that when a constitutional provision protects a class of persons and does not provide a remedy for a violation of the provision, the court may, if appropriate, allow an action under an existing tort or a new cause of action similar to an existing tort; (3) 1-1-109 providing that the common law of England is the rule of decision in Montana courts to the extent that it is not repugnant to or inconsistent with the U.S. or Montana Constitution or Montana statutes, and cases from other states using the English common law as a basis for granting a remedy for a state official's violation of a person's state constitutional rights; (4) 27-1-202 allowing recovery of damages by a person who suffers detriment from the unlawful act or omission of another; and (5) the Montana Constitution, Art. II, sec. 16, right to a remedy for every injury. The court stated

that there is a great distinction between wrongs, such as assault, conversion, and trespass, by a private individual against another private individual and wrongs against a private individual by a person acting under authority of the state in violation of a person's constitutional rights and stated that common-law causes of action remedying the former are not adequate to remedy the latter. Dorwart v. Caraway, 2002 MT 240, 312 M 1, 58 P3d 128 (2002).

Writs of Execution Used to Enter, Search, and Seize — Damages for Violation of Constitutional Rights — Immunity of Peace Officers: Two brothers sued the Sheriff and two deputies for violating their Montana constitutional rights to privacy, due process, and freedom from unreasonable searches and seizures. Neither writs of execution issued to enforce default judgments against one brother nor the postjudgment statutes under which they were issued expressly directed or authorized local peace officers to enter the other brother's house and search for and seize property of the brother against whom the writs were issued and who lived in the house. Therefore, 2-9-103 did not give the peace officers immunity from suit on the basis that they acted "under the authority of law". However, to the extent that any claim for damages for violation of due process is based on failure to provide the brother against whom the writs were issued with notice of property that is exempt from execution and a timely hearing, the claim results from the execution statutes' constitutional inadequacy, and recovery for those procedural inadequacies is barred by the provision in 2-9-103 for immunity for an action under authority of a law subsequently found unconstitutional. The District Court's dismissal, based on statutory immunity, of the brothers' other claims was reversed. Dorwart v. Caraway, 2002 MT 240, 312 M 1, 58 P3d 128 (2002).

Termination of Parental Rights — Fundamental Fairness Issues Not Considered When Raised for First Time on Appeal: On appeal, the father raised numerous issues to support his claim that he was denied fundamental fairness in procedures resulting in the termination of his parental rights. However, by failing to raise the objections in District Court, the father failed to properly preserve the issues for appeal and waived the right to have the issues considered by the Supreme Court. A District Court cannot correct statutory deficiencies if those concerns are not brought to its attention during the course of the proceedings, and the court will not be faulted for failing to address issues not raised before it. The District Court properly considered the best interests of the children in this case, and termination of the father's parental rights was affirmed. In re T.E., M.E., & M.E., 2002 MT 195, 311 M 148, 54 P3d 38 (2002), following In re D.H., 2001 MT 200, 306 M 278, 33 P3d 616 (2001), and In re M.W., 2002 MT 126, 310 M 103, 49 P3d 31 (2002).

Failure to State Cognizable Claim Under 42 U.S.C. 1983 — Judgment on Pleadings Properly Granted: Brown filed a complaint in District Court seeking to address alleged deprivations of his rights by prison officials under 42 U.S.C. 1983, but the complaint was dismissed on the pleadings for failure to state a cognizable claim under the federal law. The District Court found that Brown's claims were barred by Heck v. Humphrey, 512 US 477 (1994), which held that a state prisoner's claim for damages is not cognizable under 42 U.S.C. 1983 if a judgment in favor of plaintiff would necessarily imply the invalidity of the conviction or sentence, unless the prisoner can demonstrate that the conviction or sentence has been previously invalidated. Brown appealed, seeking to distinguish Heck by casting his claim as one for an earlier parole appearance, rather than as affecting his ultimate release date. The Supreme Court was not persuaded. Brown's claims, if proved, would necessarily imply the invalidity of his conviction or sentence and thus were not cognizable under 42 U.S.C. 1983, unless Brown could demonstrate that the conviction or sentence had been invalidated. The District Court's dismissal of Brown's 42 U.S.C. 1983 claim was affirmed. Brown v. St., 2002 MT 58, 309 M 106, 46 P3d 42 (2002), distinguishing Neal v. Shimoda, 131 F3d 818 (9th Cir. 1997).

Failure to Record Voir Dire Examination — Britt Test to Determine Whether Failure to Record Portions of Criminal Trial Violative of Due Process: Deschon argued that his right to a meaningful appeal of his deliberate homicide conviction was violated because he had tenable appellate theories, such as possible juror prejudice, that could not be determined without a transcript of the voir dire proceedings, and that there was no alternative to a transcript available. The state pointed out that former Rule 9(d), M.R.App.P. (now superseded), provides a procedure whereby a party can submit its version of unrecorded portions of the record to the District Court, and then the court can generate a written summary to be included in the appeal. However, the state contended that Deschon made no effort to recreate the circumstances of voir dire and thus could not claim that the lack of a record was reversible error. The Supreme Court noted that a trial court should order its court reporter to record the voir dire examination and that diligent defense counsel should demand recording of voir dire proceedings (St. v. Seitzinger, 180 M 136, 589 P2d 655 (1979)). However, when the trial court fails to record portions of a criminal trial, Britt v. N.C., 404 US 226 (1971), is applied to determine whether due process has been violated,

and two criteria are relevant to the determination: (1) the value of the transcript to defendant in connection with the appeal or trial for which it is sought; and (2) the availability of alternative devices that would fulfill the same function as a transcript, such as an evidentiary hearing to reconstruct the unrecorded portions of the trial. Here, Deschon established the first part of the Britt test by showing that a transcript was valuable in determining whether any jurors were prejudiced by pretrial publicity. The second part of the Britt test would be satisfied by a written summary prepared pursuant to former Rule 9(d), M.R.App.P. (now superseded), but lacking that summary, the Supreme Court remanded for an evidentiary hearing to reconstruct the unrecorded portions of the voir dire proceedings. St. v. Deschon, 2002 MT 16, 308 M 175, 40 P3d 391 (2002). Following remand and an evidentiary hearing to reconstruct the unrecorded voir dire portions of Deschon's trial, Deschon appealed again on grounds that the hearing was insufficient to provide information to determine whether jurors were biased. The Supreme Court concluded that, taken as a whole, the combined testimony from jurors, attorneys, and Deschon, together with the trial notes in exhibit, created a record of sufficient completeness to ensure that Deschon's right to due process was not violated and that the reconstruction hearing comprised an adequate alternative to the verbatim voir dire transcript to establish a fair and accurate picture of what transpired that was sufficiently complete to accord review of Deschon's issues on appeal, satisfying the second part of the Britt test. St. v. Deschon, 2004 MT 32, 320 M 1, 85 P3d 756 (2004). See also U.S. v. Cashwell, 950 F2d 699 (11th Cir. 1992), U.S. v. Preciado-Cordobas, 981 F2d 1206 (11th Cir. 1993), and St. v. Caswell, 2013 MT 39, 369 Mont. 70, 295 P.3d 1063,.

Prosecutor's Comment Alleging Uncontradicted Evidence Erroneous When Defendant Who Asserted Right to Remain Silent Was Only Person Who Could Offer Contradictory Evidence — Error Harmless: Harrington was arrested for DUI, was read his Miranda rights, and chose to remain silent. Harrington contended that his due process rights and privilege against self-incrimination were violated by testimony elicited and statements made by the prosecution during trial. Although Harrington failed to preserve the issues in the District Court, the Supreme Court applied the plain error doctrine pursuant to its discretionary power enunciated in St. v. Finley, 276 M 126, 915 P2d 208 (1996), considering the totality of the circumstances and evaluating the nature of the constitutional rights implicated, rather than the sufficiency of the evidence. The court decided that because no comment was made that Harrington at any time refused to give a statement or refused to testify and because the prosecutor did not insinuate that an innocent person would have given a statement or testified, no Doyle error occurred (see Doyle v. Ohio, 426 US 610 (1976)). However, the prosecutor did comment during rebuttal that there was no evidence to contradict the state's case, which was error as an improper reference to Harrington's decision not to testify because Harrington was the only person who could have offered contradictory testimony (see St. v. Hart, 154 M 310, 462 P2d 885 (1969)). To determine whether the error was prejudicial, the court applied the test in St. v. Van Kirk, 2001 MT 184, 306 M 215, 32 P3d 735 (2001). The error was considered a trial error rather than a structural error, and because the error concerned comment rather than evidence, the court went on to determine whether it was harmless and contributed to the conviction. In this case, the single comment that the evidence was uncontradicted was an isolated one, and there was no reasonable possibility that it contributed to Harrington's conviction given the fact that during closing, the prosecutor focused on the driving errors Harrington made before being stopped, the videotape of Harrington's field sobriety tests, the arresting officer's expertise, and the results of the preliminary breath test. Harrington's constitutional rights were not prejudiced by the improper reference to his decision not to testify. Columbus v. Harrington, 2001 MT 258, 307 M 215, 36 P3d 937 (2001).

Failure to Hold Hearing to Determine Defendant's Competence to Stand Trial Not Erroneous — Competency Standard: Following conviction for theft and forgery, Garner argued that he was not competent at the time that he entered guilty pleas because he was not taking prescribed antidepressant medication and that his conduct at trial, coupled with his attorney's expressed doubt about his competence, provided enough evidence to require a competency hearing. The state contended that evidence was insufficient to require a hearing. The Supreme Court agreed with the state. Constitutional due process requirements and 46-14-103 provide that a person who is unable to understand the proceedings or assist in the defense as a result of mental disease or defect may not be tried, convicted, or sentenced for commission of an offense as long as the incapacity endures. The standard for determining whether an accused is competent to stand trial is whether the defendant has sufficient present ability to consult with counsel with a reasonable degree of rational understanding and has a rational as well as factual understanding of the proceedings. When sufficient doubt is raised as to an accused's competency to stand trial, the District Court has a duty to sua sponte order a hearing on the issue; however, there is no fixed

or immutable signs that invariably indicate the need for further inquiry because that inquiry is necessarily based on the individual circumstances presented. A defendant's use of drugs does not per se necessitate a competency hearing. Here, Garner clearly had a strained relationship with his attorney, but insisted that his depression was not a basis for the strained relationship and repeatedly told the court that he was competent to proceed. Despite Garner's argument that his overall behavior at trial necessitated a competency hearing, the Supreme Court found, after examining the record, that Garner's behavior indicated a fair degree of competency. Garner capably questioned witnesses and presented a cogent account of his actions and failed to raise any issue before the court relating to not having the antidepressant medication prior to entering the guilty pleas. The evidence presented before the trial judge did not raise a bona fide doubt as to Garner's capacity to participate in his trial. Garner's alternative argument, that the District Court should have at least held a retrospective competency hearing when presented with additional evidence of a previous suicide attempt and past psychological treatment, was also unpersuasive. Given that 7 years elapsed since Garner's hospitalization and the fact that Garner failed to demonstrate how the additional evidence affected his competence to stand trial, the District Court properly declined to hold a retrospective competency hearing. St. v. Garner, 2001 MT 222, 306 M 462, 36 P3d 346 (2001).

Failure to Complete Prison Sex Offender Program Not Because of Defendant's Willful Conduct — Consideration of Incarceration Alternatives Constitutionally Required: Lee was sentenced to two concurrent 40-year terms in prison for sexual intercourse without consent and attempted sexual intercourse without consent and was ineligible for parole during the first 10 years of the sentence unless a sex offender treatment plan was successfully completed. Lee entered prison in 1995 and immediately requested enrollment in Phase I of the two-phase program. Lee was finally enrolled in Phase I after a 3-year wait, successfully completed that phase, and was placed on a waiting list for enrollment in Phase II. Because of a sitdown strike, Lee was unable to complete Phase II by his scheduled release date. The state petitioned to revoke Lee's suspended sentence because the program was not completed, and Lee moved to dismiss on grounds that the failure to complete treatment was not his fault. The District Court found that Lee's failure to complete the program was not due to any volitional conduct on Lee's part, but the court nevertheless determined that the failure constituted a violation of the terms of the suspended sentence and ordered Lee to serve the remaining 30 years on each count, declaring Lee ineligible for parole until both phases of treatment were completed. Lee appealed on grounds that the court violated his right to due process because it was impossible to complete the program during incarceration because of prison waiting periods and the length of the program. The Supreme Court agreed. In St. v. Williams, 1999 MT 240, 296 M 258, 993 P2d 1 (1999), it was held that a court could revoke a suspended sentence even though a probationer's failure to comply with the terms of the sentence was not willful, and the court in this case affirmed Williams to the extent that violations of nonfinancial probationary conditions need not necessarily be willful in order to justify revocation. However, the probationer in Williams was unable to gain acceptance into sex offender programs because of a lack of social skills, immaturity, and "acting out" behavior, whereas Lee was unable to access the programs because of actions of the state. Due process required the trial court to consider whether there were alternatives to incarceration that would further the purpose of Lee's suspended sentence. The Supreme Court remanded for a determination of whether there were any reasonable alternative measures other than continued incarceration because to do otherwise would deprive Lee of his conditional freedom simply because the state prevented him from completing the sex offender program while imprisoned. St. v. Lee, 2001 MT 176, 306 M 173, 31 P3d 998 (2001), distinguished in St. v. Price, 2008 MT 319, 346 M 106, 193 P3d 921 (2008), and in St. v. Cook, 2012 MT 34, 364 Mont. 161, 272 P.3d 50.

Waiver of Right to Earn Good Time Credits in Boot Camp Program — Incarceration for Full Term Not Considered Cruel and Unusual Punishment: After being sentenced to 5 years in prison for negligent homicide, Campbell applied for admission to the boot camp program. As part of the application process, Campbell was required to read and sign a detailed, clearly written explanation of program goals, objectives, rules, and criteria, which included an acknowledgment that Campbell would be ineligible for good time credits while in the program. Pursuant to its administrative authority, the Department of Corrections had determined that good time credits would conflict with the program's emphasis on positive achievement, earned rewards, and the possibility of sentence reductions for successful program completion. Campbell was accepted in the program and spent nearly 3 months in boot camp, but did not complete the program because of a series of infractions. As a consequence, Campbell did not earn either a sentence reduction or the good time credits that might have been earned in prison. Campbell then filed a writ of habeas

corpus, contending that he had a right to good time credits and that the Department's refusal to award the credits deprived him of liberty without due process and resulted in his being held beyond the lawful term of his sentence, which constituted cruel and unusual punishment. The Supreme Court noted that under Orozco v. Day, 281 M 341, 934 P2d 1009 (1997), Campbell had a protected liberty interest in the opportunity to earn good times credits at boot camp. However, Campbell voluntarily chose to relinquish his interest in good time credits in order to gain the benefits of boot camp. Thus, the state did not deprive Campbell of anything, and his due process claim failed. The Supreme Court went on to examine the distinction between nonwaivable public rights and waivable private rights, as contemplated in 1-3-204, holding that there were no grounds to conclude that Campbell could not voluntarily waive his interest in good time credits. Allowing an inmate to waive good time credits does not defeat any protectionist purpose of the good time allowance statute, particularly when the inmate chooses to relinquish the benefits of one legislatively created program for another. Finally, Campbell's cruel and unusual punishment argument was predicated on the belief that he was entitled to good time credits, but by choosing to forego the opportunity to earn good time at boot camp, Campbell actually received all the good time credit to which he was entitled and could not complain that incarceration for the full term of his lawfully imposed sentence was cruel and unusual. Campbell v. Mahoney, 2001 MT 146, 306 M 45, 29 P3d 1034 (2001). See also Davidson v. Cannon, 474 US 344 (1986), and Zinermon v. Burch, 494 US 113 (1990).

No Liberty Interest in Good Time Credits for Probationers — Credit for Time Served on Probation Properly Denied: McDermott pleaded guilty in early 1995 to issuing a bad check, felony common scheme, and received a 6-year deferred sentence and was placed on probation. After nearly 4 years on probation, McDermott had failed to comply with the conditions of probation, so the District Court revoked the deferred sentence and sentenced McDermott to 5 years at the state prison, specifying that no credit was allowed for time served while on probation or for good time. McDermott contended that he was improperly denied good time credit while on probation and that 53-30-105 (repealed 1995) violated equal protection guarantees because it granted good time credit for parolees but not probationers. The Supreme Court disagreed. Although it was held in Orozco v. Day, 281 M 341, 934 P2d 1009 (1997), that 53-30-105 created a liberty interest in good time credit for inmates, the court concluded that a similar liberty interest is not created for probationers. Because probationers are not statutorily entitled to good time credits and because the terms of probation are part of the sentence, the state's decision not to award good time credits during probation did not create an atypical and significant hardship or inevitably affect the duration of McDermott's sentence. McDermott had no protected liberty interest and was denied no process to which he was constitutionally entitled. Further, McDermott's argument that 53-30-105 violated equal protection by treating probationers differently than parolees also failed. Applying the rational basis test, the court concluded that the state has a legitimate interest in the disparate treatment of parolees and probationers regarding eligibility for sentence-reducing credits, including jurisdictional differences as well as penological interests. McDermott was properly credited with good time for the time that he was incarcerated and was properly denied credit for time spent on probation against his subsequent sentence. Thus, McDermott showed no constitutional basis for the claim that he was being illegally restrained, so his petitions for writs of habeas corpus and mandate were denied. McDermott v. Dept. of Corrections, 2001 MT 134, 305 M 462, 29 P3d 992 (2001). See also St. v. Bruns, 213 M 372, 691 P2d 817 (1984), and St. v. Nelson, 275 M 86, 910 P2d 247 (1996).

No Denial of Due Process or Showing of Prosecutorial Misconduct in Arrest on Immigration Charges Following Testimony in Child Custody Proceedings: A mother testifying in a permanent custody hearing regarding the disposition of her child was arrested by an immigration agent in open court immediately following her testimony. She maintained that the state had engaged in prosecutorial misconduct by improperly summoning the agent with the intent of facilitating her deportation and that the arrest in open court raised the suspicion of criminal activity, thereby prejudicing the fact finder against her and denying her right to due process by precluding her attendance at the remainder of the custody hearing. The Supreme Court found no merit to the arguments. The immigration agent testified that the mother was in the country illegally and that immigration was aware of her status and of the custody proceeding independent of any communication with the state. The agent stated that it was his decision to allow the mother to testify before arresting her and that the agent had initiated contact with the prosecution and informed the state that the arrest would take place. Moreover, the mother did not argue that her citizenship status was improperly before the court or suggest that the District Court's decision was influenced by her citizenship status or by the fact that she was detained for deportation

proceedings. Further, the mother failed to provide support for the contention that she was denied due process when she was precluded from being present at the remainder of the custody hearing. She was allowed to testify at both that hearing and the hearing regarding temporary investigative authority and was represented by counsel throughout all proceedings. In re A.C., 2001 MT 126, 305 M 404, 27 P3d 960 (2001).

Liberty Interest in Parole by Inmates Who Committed Offenses Prior to 1989 — Due Process Consideration: As a general rule, inmates have no liberty interest in parole. However, prior to amendment in 1989, 46-23-201 required the Board of Pardons (now Board of Pardons and Parole) to release on parole any prison inmate when the Board determined that there was a reasonable probability that the prisoner could be released without detriment to the prisoner or the community. The U.S. Supreme Court subsequently held in Bd. of Pardons v. Allen, 482 US 369 (1987), that this mandatory statutory language created a liberty interest in parole that was protected by the federal constitutional due process clause. Although the mandatory language was removed in 1989, the Montana Supreme Court later held in Worden v. Bd. of Pardons & Parole, 1998 MT 168, 289 M 459, 962 P2d 1157 (1998), that inmates who committed offenses prior to 1989 continue to enjoy a federally protected liberty interest in parole. In the present case, McDermott committed his offenses in 1985 and 1986, so pursuant to Allen and Worden, his liberty interest in parole could not be denied without due process. McDermott v. McDonald, 2001 MT 89, 305 M 166, 24 P3d 200 (2001), followed in George v. Bd. of Pardons, 2001 MT 163, 306 M 115, 30 P3d 1065 (2001).

Breach of Plea Agreement by State — Defendant's Right to Choose Remedy: The state conceded that it breached a plea agreement that had been offered to Munoz, so the order of the District Court denying Munoz's motion to withdraw his guilty plea was erroneous. The question then became whether the sentencing court or Munoz should have the right to choose the remedy. Generally, when the state breaches a plea agreement, one of two equitable remedies is available to safeguard the defendant's due process rights. The notion of an equitable remedy for a breach is guided by the general principles of contract law. The first remedy is specific performance by the government, requiring the state to uphold its end of the bargain and, before a new sentencing judge, comply with the terms of the plea agreement by recommending a specific sentence, moving for dismissal of other charges, or simply not opposing the defendant's requested sentence. When specific performance is imposed, a defendant enjoys no contractual right or entitlement to a specific sentence. The second equitable remedy is rescission, requiring that a defendant be allowed to withdraw the guilty plea and then face trial on the original charge as if the plea agreement had never been entered. In cases of rescission, a defendant's constitutional rights that were waived by the guilty plea are reinstated. However, the seminal federal case that established these remedies, Santobello v. N.Y., 404 US 257 (1971), never reached the question of choice of remedies, leaving to the discretion of the state court the decision as to which remedy would be appropriate under the circumstances. Federal circuit courts and various state courts have also split on the question of choice of remedies. Until now, the Montana Supreme Court has also applied two lines of reasoning—in some cases leaving the choice of remedies to the discretion of the sentencing court and in other cases providing instructions that a defendant be allowed to choose the remedy. In light of the underlying principles of contract law, a nonbreaching defendant must be afforded the initial right to choose from available remedies when the state breaches a plea agreement. As the breaching party, the state bears the substantial burden of demonstrating through clear and convincing evidence that a defendant's choice of remedy would result in a miscarriage of justice, and only upon such a showing may a District Court disallow a defendant's choice. St. v. Munoz, 2001 MT 85, 305 M 139, 23 P3d 922 (2001), following St. v. Bowley, 282 M 298, 938 P2d 592 (1997), and St. v. Sanders, 1999 MT 136, 294 M 539, 982 P2d 1015 (1999), overruling St. v. Persak, 256 M 404, 847 P2d 280 (1993), and St. v. Rardon, 1999 MT 220, 296 M 19, 986 P2d 424 (1999), and followed in St. v. Rardon, 2002 MT 345, 313 M 321, 61 P3d 132 (2002).

Assertion of Error in Alleged Comment on Post-Miranda Silence — No Doyle Violation: Clausell contended that the state violated his right to due process and privilege against self-incrimination by commenting on his silence after he received a Miranda warning, relying on Doyle v. Ohio, 426 US 610 (1976). The Supreme Court found that the issue was reviewable under the common-law plain error doctrine set out in St. v. Finley, 276 M 126, 915 P2d 208 (1996); however, the court found no Doyle violation in this case. Not only did the record fail to support Clausell's assertion that the prosecution commented on his post-Miranda silence, it also did not support his assertion that he was silent after he received Miranda warnings. In fact, between the time that they arrived at the hospital and the time of being arrested and given the warnings, Clausell gave five different accounts of how his girlfriend was injured. He had

not received a Miranda warning prior to making any of the statements that the state referred to in arguments at trial. The Doyle rule is limited to instances in which the prosecution seeks to impeach a defendant's testimony based on silence after Miranda warnings are given, and no construction of Doyle could be read to preclude the state from comparing Clausell's voluntary, inconsistent statements. Clausell failed to establish any improper comment on his post-Miranda silence, and thus his constitutional rights were not violated by the state's comments at trial. St. v. Clausell, 2001 MT 62, 305 M 1, 22 P3d 111 (2001).

Parent Not Represented by Counsel During Show Cause Hearing Regarding Whether Child a Youth in Need of Care — Due Process Rights Not Violated: At the time of a show cause hearing on whether her child was a youth in need of care, the mother was an indigent mental patient civilly committed to the state hospital. She appeared at the hearing without representation of counsel. The mother contended that the District Court violated her due process rights by making that critical determination regarding the child when she was unrepresented. Although in In re A.S.A., J.L.A., G.A., & A.J.A., 258 M 194, 852 P2d 127 (1993), the Supreme Court held that the constitutional right to due process guarantees an indigent parent the right to court-appointed counsel in parental rights termination proceedings, the court has not extended the right to counsel to a pretermination proceeding in which the focal issue is whether a child is a youth in need of care. Rather, appointment of counsel at any time prior to the initiation of termination proceedings is within the discretion of the District Court. In this case, the initial determination that the child was a youth in need of care was made by order pursuant to a finding of probable cause even before the mother's first appearance in any proceedings when the District Court relied on a report submitted by a social worker showing that the child was abused or neglected or in danger of abuse or neglect and that removal from the home was necessary to protect the child's welfare. Subsequent to the initial determination, the District Court reached the same conclusion on at least three separate occasions when the mother was represented by counsel, including one hearing when the social worker was subjected to cross-examination by the mother's counsel. The Supreme Court applied In re M.F., 201 M 277, 653 P2d 1205 (1982), and in re D.S., H.S., R.S., R.S., J.S., R.S., & K.S., 253 M 484, 833 P2d 1090 (1992), and in holding that the state is not required to provide counsel at proceedings concerning temporary investigative authority or temporary custody. Thus, the mother's due process rights were not violated when the District Court made the determination that the child was a youth in need of care at a time when the mother was not represented by counsel. In re A.M., 2001 MT 60, 304 M 379, 22 P3d 185 (2001).

Postconviction Relief — Cumulative Error Doctrine Does Not Apply When There is No Error: Although cumulative error may serve as a basis for reversal, the court will not apply the doctrine when no errors have been shown. Kills On Top v. St., 2000 MT 340, 303 M 164, 15 P3d 422, 57 St. Rep. 1444 (2000).

Sentence of Restitution Based on Defendant's Indigency Constituting Due Process Violation: Pritchett entered the garage of a former employer in an effort to return two hunting rifles that he had stolen and pawned to support his gambling habit. Pritchett dropped his flashlight and, unable to find it in the dark, lit a cigarette lighter, which ignited a leaking propane bottle and caused an explosion that destroyed the garage and its contents. Pritchett was convicted of burglary and ordered to pay restitution of $63,569.25. Noting that the amount of restitution was "enormous", the probation officer who prepared the presentence investigation report stated that Pritchett should receive a 20-year suspended sentence to allow adequate time to pay off the restitution. The District Court adopted the sentencing recommendation exactly as proposed. Although the court did not expressly state that it was sentencing Pritchett to the maximum term to provide sufficient time to pay the ordered restitution, there was sufficient evidence in the record to show that the length of the sentence was based on Pritchett's indigency because, given Pritchett's limited financial resources, no shorter time would allow payment of restitution. Under St. v. Farrell, 207 M 483, 676 P2d 168 (1984), basing a prison term on a defendant's indigency is a violation of the right to due process. Thus, the Supreme Court vacated the sentence and remanded for further proceedings. St. v. Pritchett, 2000 MT 261, 302 M 1, 11 P3d 539, 57 St. Rep. 1093 (2000).

Negligent, Not Intentional, Failure to Provide Defendant With Witness Interview Transcript — No Showing of Materiality of Evidence in Light of Defendant's Confession of Crime: Three taped interviews were conducted with a sexual assault victim. The first two related to Baker's alleged assault of the victim, while the third related to separate allegations that the victim had also been abused by a family member, although Baker's name was also mentioned. Baker was not provided with a copy or transcript of the third interview prior to trial. When that information came out at trial, Baker was provided a copy and viewed it during a recess. Following the break and Baker's

review of the transcript, Baker moved for a mistrial on grounds that the prosecution's failure to provide a transcript had denied him exculpatory evidence and impaired his ability to cross-examine witnesses, violating his right to due process and a fair trial. The motion was denied, and Baker appealed. Citing St. v. Brown, 1999 MT 133, 294 M 509, 982 P2d 468 (1999), the Supreme Court noted that an intentional suppression of exculpatory evidence by the prosecution is a per se violation of due process. However, in this case, the state's failure to provide Baker with a transcript of the third interview was negligent rather than intentional, so it did not amount to a due process violation unless the evidence was material, of substantial use, vital to the defense, and exculpatory. In light of the fact that Baker had admitted during one interview that he assaulted the victim and related details of the incident, there was no reasonable probability that the outcome of the trial would have been different had the state disclosed the third interview prior to trial. Baker failed to meet the burden of establishing materiality, so his due process right was not violated, nor did the court err in denying his motion for a mistrial. St. v. Baker, 2000 MT 235, 301 M 323, 8 P3d 817, 57 St. Rep. 976 (2000). See also St. v. Buckles, 1999 MT 79, 294 M 95, 979 P2d 177 (1999).

Jury Instruction Disallowing Evidence of Intoxication in Determining State of Mind Not Error — Full and Fair Instructions on Law: Following Raugust's criminal trial, the court instructed the jury that it could not consider evidence of intoxication for any purpose, pursuant to 45-2-203. Raugust maintained on appeal that the instruction was in error because depriving him of the ability to admit intoxication evidence lessened the state's burden of proof and confused the jury, in violation of his due process rights. However, the error urged on appeal was not contained in the objection made to the instruction during the final settling of jury instructions, constituting waiver of the argument on appeal. Moreover, the plain error doctrine did not apply because review under that doctrine was requested for the first time on appeal. Here, the jury was instructed regarding: (1) the elements of each offense charged and the state's burden of proving each element beyond a reasonable doubt; (2) the definition of the applicable mental states—purposely and knowingly; (3) the fact that the existence of a mental state may be inferred from the acts of the accused and from the facts and circumstances connected with the offense; (4) the difference between direct and circumstantial evidence; (5) witness credibility; and (6) the need for a unanimous verdict. Read as a whole, these instructions fairly and fully instructed the jury on the law applicable to the case, and giving the instruction disallowing the defense of intoxication was not erroneous. St. v. Raugust, 2000 MT 146, 300 M 54, 3 P3d 115, 57 St. Rep. 570 (2000). See also St. v. Hagen, 283 M 156, 939 P2d 994 (1997).

Minimal Liberty Interest of Prison Inmate: As an inmate at the state prison, Jellison participated in a sitdown demonstration, repeatedly disobeying direct orders from corrections officers. Jellison claimed that his subsequent detention and custody reclassification violated his due process rights and right to be free from cruel and unusual punishment. The Supreme Court disagreed and denied Jellison's petition for relief. Considering that prison disciplinary actions take place in a closed, tightly controlled environment peopled by those who have chosen to violate the criminal law and have been lawfully incarcerated for doing so, the liberty interest of an inmate is minimal and is generally limited to freedom from restraint that, although not exceeding the sentence in such an unexpected manner as to give rise to protection by the due process clause by its own force, nevertheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life. Discipline in segregated confinement does not generally rise to that level, nor does custody classification generally implicate a liberty interest sufficient to give rise to due process protection for an inmate. Further, Jellison was not subjected to cruel and unusual punishment because prison officials are accorded wide-ranging deference in adopting policies to preserve internal order and discipline among the inmates, including prophylactic and preventative measures intended the reduce the incidence of breaches of prison order. Jellison v. Mahoney, 1999 MT 217, 295 M 540, 986 P2d 1089, 56 St. Rep. 853 (1999).

Actionable Section 1983 Claim Under State-Created Danger Theory: A government official who, while acting under color of state law, deprives an individual of constitutionally protected rights may be subject to personal liability for civil damages pursuant to 42 U.S.C. 1983. Generally, a government official's failure to protect an individual from harm does not constitute a due process violation. Inaction by the state, even when a danger is known, does not trigger a due process obligation except under the "state-created danger" theory, derived from DeShaney v. Winnebago County Dept. of Social Services, 489 US 189, 103 L Ed 2d 249, 109 S Ct 998 (1989), which provides that a constitutional duty to protect may be imposed when state actors have affirmatively acted to create plaintiff's danger or to render plaintiff more vulnerable to it. Adopting the test in Huffman v. County of Los Angeles, 147 F3d 1054 (9th Cir. 1998), the Supreme Court held that

to assert an actionable 42 U.S.C. 1983 claim under the state-created danger theory, plaintiff must demonstrate that the state acted affirmatively, with deliberate indifference, in creating a foreseeable danger to plaintiff, leading to deprivation of plaintiff's constitutional rights. In the present case, material facts existed as to whether an officer affirmatively and with deliberate indifference placed a woman in danger, increased her vulnerability to danger, or deprived her of her right to life; thus, summary dismissal of her husband's personal liability claim against the officer was reversible error. Nelson v. Driscoll, 1999 MT 193, 295 M 363, 983 P2d 972, 56 St. Rep. 744 (1999). See also Wood v. Ostrander, 879 F2d 583 (9th Cir. 1989), and Kneipp v. Tedder, 95 F3d 1199 (3rd Cir. 1996).

Public Duty Doctrine as Applied to Law Enforcement Personnel — Exception in Cases of Special Relationship: Trina admitted that she had been drinking when stopped in her vehicle by Officer Driscoll, who nevertheless believed that sufficient probable cause did not exist to arrest the woman. Instead, thinking Trina might be impaired, the officer suggested a ride home or that Trina walk the 2-mile distance and warned Trina about returning to the vehicle. Trina decided instead to walk to a phone and call for a ride and was killed in traffic. Trina's husband brought suit for civil damages under 42 U.S.C. 1983, claiming that the officer breached the duty to protect, in violation of Trina's due process rights. The District Court summarily dismissed the claim, holding that because no probable cause existed for Trina's arrest, the officer had no duty to protect Trina from harm and that without a duty, the action failed. The public duty doctrine provides that a police officer's duty to protect and preserve the peace is owed to the public at large rather than to a particular person, unless a special relationship exists, thus giving rise to a special duty that is more particular than that owed to the public. A special relationship is established: (1) by a statute intended to protect a specific class of persons, of which the plaintiff is a member, from a particular type of harm; (2) when a government agent undertakes specific action to protect a person or property; (3) by governmental actions that reasonably induce detrimental reliance by a member of the public; and (4) under certain circumstances when the agency has actual custody of the plaintiff or of a third person who harms the plaintiff. Relying on Stewart v. Standard Publishing Co., 102 M 43, 55 P2d 694 (1936), the Supreme Court agreed that although the officer may not have initially owed Trina a duty to protect, that duty was assumed as a matter of law when the officer prevented the woman from driving her car and ensured that she did not attempt to drive. The question of whether the duty to protect was breached is a question of fact for the jury, so summary dismissal was improper. Nelson v. Driscoll, 1999 MT 193, 295 M 363, 983 P2d 972, 56 St. Rep. 744 (1999), clarifying and distinguishing Phillips v. Billings, 233 M 249, 758 P2d 772 (1988), and followed in Massee v. Thompson, 2004 MT 121, 321 M 210, 90 P3d 394 (2004). Nelson was followed, as to elements of exception to the public duty doctrine (nonlaw enforcement case), in Orr v. St., 2004 MT 354, 324 M 391, 106 P3d 100 (2004), and Prosser v. Kennedy Enterprises, Inc., 2008 MT 87, 342 M 209, 179 P3d 1178 (2008). See also Krieg v. Massey, 239 M 469, 781 P2d 277, 46 St. Rep. 1839 (1989), Busta v. Columbus Hosp. Corp., 276 M 342, 916 P2d 122 (1996), and Eves v. Anaconda-Deer Lodge County, 2005 MT 157, 327 M 437, 114 P3d 1037 (2005).

Reliance of Sentencing Judge on Other Conviction Valid at Time of Sentencing but Later Found Invalid — Inability of Defendant to Address Vacation of Prior Convictions as Due Process Violation: In 1983, Bauer was charged with and convicted of two felonies in Silver Bow County and sentenced to terms in the state prison. Bauer challenged the convictions. About 8 years later, Bauer was charged with felony intimidation in Powell County and was sentenced to an additional 5 years in prison. Following the 1991 prison riots, Bauer was moved to Blaine County, where he was later charged with three felonies arising out of an incident with a female inmate at the Blaine County jail. The presentence investigation report (PSI) referred to the Silver Bow County convictions, and the sentencing court expressly referred to the PSI in sentencing Bauer. The court held that if Bauer was successful in challenging the 1983 convictions, the sentences for the Blaine County offenses would run from the date of judgment and sentence and Bauer would be credited with any time served from the date of filing of the information to the date of imposition of the Blaine County sentences. Bauer's 1983 sentences were subsequently voided based on newly discovered DNA evidence that exonerated Bauer. Bauer then sought postconviction relief on grounds that his due process rights had been violated when the sentencing court in Blaine County relied on the now incorrect information in the PSI regarding the Silver Bow County convictions. Under both the federal and state constitutions, a defendant is protected from a sentence predicated on misinformation about that defendant's criminal history and must be given an opportunity to explain, argue, and rebut any information, including presentencing information, that may lead to a deprivation of life, liberty, or property. Bauer could not be said

to have been given that opportunity because the 1983 convictions were still valid at the time of sentencing in Blaine County, nor did the sentencing court have a full opportunity to consider the procedural and substantive consequences of the actual vacation of the 1983 convictions or the specific grounds upon which postconviction relief was granted by the Silver Bow County court. What was correct information at the time of sentencing became misinformation after the fact. Notwithstanding that the sentencing court specifically stated that it did not rely on the 1983 convictions, the Supreme Court reversed on grounds of fundamental fairness, refusing to allow the misinformation to go unchallenged before the District Court by denying Bauer the opportunity to be resentenced on the basis of materially accurate information. The case was remanded for resentencing before a new District Court Judge. Bauer v. St., 1999 MT 185, 295 M 306, 983 P2d 955, 56 St. Rep. 715 (1999), following St. v. Orsborn, 170 M 480, 555 P2d 509 (1976), St. v. Redding, 208 M 24, 675 P2d 974, 41 St. Rep. 147 (1984), and Bishop v. St., 254 M 100, 835 P2d 732, 49 St. Rep. 650 (1992).

Vagueness of Statute — Standing to Challenge Vagueness — "Reasonable and Prudent" Speed Limit Held Void: Stanko was arrested by Officer Breidenbach of the Montana Highway Patrol for driving 85 miles an hour on a stretch of Highway 200 that was narrow, that had no shoulders, that had occasional frost heaves in the surface of the highway, and where Stanko's view of the road was occasionally obstructed by hills and curves in the highway. Relying on Parker v. Levy, 417 US 733 (1974), the Supreme Court held that Stanko's conduct was, under the circumstances, not so clearly prohibited that Stanko lacked standing to challenge the speed limit on the basis of facial vagueness. The Supreme Court held, citing Grayned v. Rockford, 408 US 104 (1972), Kolender v. Lawson, 461 US 352 (1983), Whitefish v. O'Shaughnessy, 216 M 433, 704 P2d 1021 (1985), and St. v. Crisp, 249 M 199, 814 P2d 981 (1991), that 61-8-303(1) was void for vagueness because there was no numerical speed limit in the statute and because it was dependent upon each driver of a motor vehicle or each law enforcement officer to determine what the speed limit was under any given set of circumstances. St. v. Stanko, 1998 MT 321, 292 M 192, 974 P2d 1132, 55 St. Rep. 1302 (1998).

Rule Governing Introduction of Crime Laboratory Reports Violative of Due Process and Confrontation Clause Provisions: Under the Montana Constitution, a criminal defendant is guaranteed the fundamental right to a face-to-face confrontation with an accuser, including the right to cross-examination. Further, the constitution's due process guarantee makes it the state's duty in a criminal prosecution to prove beyond a reasonable doubt every element of the crime charged. Rule 803(8), M.R.Ev. (Title 26, ch. 10), which governs the introduction of state crime laboratory reports, effectively requires a defendant to subpoena and produce the state's expert in order to rightfully take advantage of the confrontation clause. The rule also compels the defendant to produce evidence during the case in chief, which in many cases will be incriminating, should the defendant choose to test the state's case. Therefore, the portion of Rule 803 that governs the introduction of state crime laboratory reports violates both the confrontation clause in section 24 of this article and the due process guarantee in this section. St. v. Clark, 1998 MT 221, 290 M 479, 964 P2d 766, 55 St. Rep. 919 (1998), distinguished in St. v. Delaney, 1999 MT 317, 297 M 263, 991 P2d 461, 56 St. Rep. 1267 (1999).

Mere Loss of Potential Witness Not Sufficiently Prejudicial to Implicate Due Process Rights: The mere loss of a potential witness does not constitute actual and substantial prejudice sufficient to implicate a defendant's due process rights, and defendant's bare speculation that a lost witness's testimony would have been exculpatory is insufficient to prove actual prejudice. However, in the present case, the testimony of two doctors who would have provided a key discussion on the mechanics of a workers' compensation incident, in the context of defendant Taylor's overall history and symptoms, but for their deaths during a lengthy preindictment period, was critically important to Taylor's defense. Without the doctors' testimony, Taylor was actually and substantially prejudiced in his ability to defend himself, warranting dismissal of the information. St. v. Taylor, 1998 MT 121, 289 M 63, 960 P2d 773, 55 St. Rep. 481 (1998).

Multiple Negligent Homicides Arising Out of Same Act — Consecutive Sentences Allowed: Defendant was sentenced to two consecutive 10-year sentences for the deaths of two men in a drunken driving accident. Defendant appealed on double jeopardy grounds, claiming that the convictions arose out of a single act and that the District Court could only impose concurrent sentences. The Supreme Court held that because two people were killed in the accident, two distinct offenses of negligent homicide were committed. Montana law not only authorizes consecutive sentences for multiple offenses but presumptively requires them. St. v. Weigle, 285 M 341, 947 P2d 1053, 54 St. Rep. 1182 (1997).

Error in Requiring Summaries of Defense Witnesses' Testimony — Due Process Violated — No Prejudicial Error Found: When Huerta was tried on charges of felony assault (now assault with a weapon) of a juvenile, he attempted to introduce testimony of 26 witnesses who would testify that the child's mother had the habit of severely punishing the child. In an effort to reduce delay caused by redundant testimony, the District Court required Huerta to summarize the testimony of all of the witnesses by affidavits. Huerta claimed that the required affidavits were ordered in violation of 46-15-328 and in violation of his due process rights because a similar burden was not placed upon the prosecution. The Supreme Court held that the District Court's order was in violation of 46-15-323(8), which specifically prohibits summaries of defense testimony, and in violation of Huerta's right of due process because Wardius v. Oreg., 412 US 470 (1973), and State ex rel. Carkulis v. District Court, 229 M 265, 746 P2d 604 (1987), require reciprocal discovery. However, the Supreme Court also held that Huerta did not establish that the violation of his rights was reversible error pursuant to 46-20-701 because he failed to show how the violations of statute and due process affected the outcome of the trial. St. v. Huerta, 285 M 245, 947 P2d 483, 54 St. Rep. 1133 (1997).

Necessity of Criminal Charge and Due Process in Contempt Proceeding Resulting in Criminal Penalty: The District Court stated that the purpose of its sentence for contempt for practicing law without a license was to compel performance and that the court was thus acting under 3-1-520, which allows incarceration until performance occurs. However, in reality, the sentence, 30 days in jail, to be suspended upon paying a $500 fine within 10 days, was punishment for past acts. Therefore, the contempt proceeding was properly characterized as criminal rather than civil because a contempt is classified as criminal if the purpose of the sanction imposed is punishment and civil if the purpose of the sanction imposed is to compel compliance with a court order. A criminal contempt proceeding must be under the procedures in Title 46 to ensure that criminal penalties are not imposed without affording the proper protections. The lower court erred by imposing a criminal sentence when no criminal charges were brought under 45-7-309, creating the crime of criminal contempt, and defendant was not afforded the due process that is guaranteed by the state and federal constitutions. Huffine v. District Court, 285 M 104, 945 P2d 927, 54 St. Rep. 1065 (1997).

Answer Pleading Insufficient Knowledge Creates Factual Dispute Subject to Trial — Disposition of Trial Issues by TRO Prohibited — Verified Complaint Not Basis for Agreed Facts — Denial of Due Process: After a writ of execution was issued against certain property belonging to her husband, Nancy filed a verified complaint against the Sheriff who would execute on the property. She also filed a petition for a temporary restraining order (TRO), claiming to be a tenant by the entirety in the property subject to execution. The District Court issued the TRO and, at a later show cause hearing, discussed the underlying law with counsel but took no testimony. The Sheriff then filed his answer, pleading insufficient knowledge to admit or deny. A creditor was later allowed to intervene. The creditor's answer also pleaded insufficient knowledge, but his brief took a position opposing Nancy's view of the law applicable to ownership of the property. Nancy then responded with a brief in which she asked the District Court to allow oral argument and reiterated her view of the law. The District Court issued findings and conclusions and quashed the writ of execution, relying upon the "undisputed" facts alleged in Nancy's verified complaint. The Supreme Court reversed, noting that under former Rule 8(b), M.R.Civ.P. (now superseded), the effect of pleading insufficient knowledge is to deny a plaintiff's allegations. The Sheriff's and intervenor's answers pleading insufficient knowledge put into issue the allegations in Nancy's complaint. The only way that those issues of fact could be resolved, short of a trial on the merits, was by a motion for summary judgment or judgment on the pleadings, neither of which was made. The Supreme Court also noted that there was no discovery and no hearing at which facts were determined because there was no testimony taken by the District Court. Citing Porter v. K&S Partnership, 192 M 175, 627 P2d 836 (1981), and Knudson v. McDunn, 271 M 61, 894 P2d 295 (1995), the Supreme Court held that a District Court may not determine, in proceedings on a preliminary injunction or a temporary restraining order, those issues that may arise in a trial on the merits. In this case, the District Court negated Nancy's burden of proof and, without notice, precluded discovery and deprived the Sheriff and the intervenor of the opportunity to disprove Nancy's allegations concerning her right of ownership in the property, thereby depriving the Sheriff and intervenor of their right to procedural due process under the Montana Constitution. For these reasons, the Supreme Court reversed the District Court and remanded for proceedings consistent with the Supreme Court's opinion. Lurie v. Sheriff, 284 M 207, 944 P2d 205, 54 St. Rep. 847 (1997).

Failure to Exercise Statutory Procedural Right Held Not to Violate Due Process: Grooms filed a workers' compensation claim with her insurer, the State Fund, alleging that she suffered from a skin allergy condition. The State Fund denied liability under the Workers' Compensation Act and requested the Department of Labor and Industry to process the claim under the Occupational Disease Act of Montana (now repealed and merged with Workers' Compensation Act). Subsequently, Grooms claimed that the decision to process her claim under the Occupational Disease Act (now repealed and merged with Workers' Compensation Act) rather than the Workers' Compensation Act denied her due process of law by denying her notice and an opportunity to be heard. The Workers' Compensation Court concluded that when her claim was denied under the Workers' Compensation Act, Grooms retained the statutory rights to have her claim resolved by mediation and to have her claim heard by the Workers' Compensation Court and, therefore, Grooms was not denied due process of law. The Supreme Court affirmed the Workers' Compensation Court, holding that Grooms still had available to her various statutory remedies that she chose not to pursue after her claim was denied by the State Fund. The Supreme Court held that her failure to pursue those remedies did not result in a denial of due process. Grooms v. Ponderosa Inn, 283 M 459, 942 P2d 699, 54 St. Rep. 725 (1997).

New or Expanding Industry Tax — Discretionary Tax Break Held Not to Violate Substantive Due Process: After granting new or expanding industry tax reductions to several applicants whose property also received a tax break pursuant to another program, the Board of County Commissioners of Yellowstone County amended its resolution implementing the new or expanding industry tax reduction to provide that applicants were to no longer be entitled to a reduction but that reductions would be granted in the discretion of the Board and would not be granted if the property of the applicant was already subject to a tax break through some other program. Pursuant to these changes, the County Commissioners denied Cenex's application for a tax reduction under 15-24-1402 on pollution control equipment that had already received a different tax reduction from the state. Cenex brought a declaratory judgment action against the Board, claiming that the statute under which the Board had acted violates Cenex's right to substantive due process of law. Citing Plumb v. District Court, 279 M 363, 927 P2d 1011 (1996), the Supreme Court held that the statute does not violate the company's right to substantive due process of law. Cenex, Inc. v. Yellowstone County Bd. of Comm'rs, 283 M 330, 941 P2d 964, 54 St. Rep. 695 (1997).

Section 1983 Action for Damages and Declaratory and Injunctive Relief — State Agency Held Not a "Person" — Individual or Official Capacity of Individual Defendants Determined — Test for Qualified Immunity in Damages Action — Remington Overruled: Orozco, an inmate in the Montana State Prison, brought a civil action for damages pursuant to 42 U.S.C. 1983 against the Department of Corrections and Human Services (now Department of Corrections) and several Department employees for the denial of his due process rights in connection with the denial of his ability to earn good time credits. The Department moved for dismissal for failure to state a claim, based upon 11th amendment immunity. As to the Department, the Supreme Court held, citing Will v. Mich. Dept. of St. Police, 491 US 58 (1989), that because the Department has been created as part of the Executive Branch of state government, suing the Department is the same as suing the State of Montana, which is not a "person" for the purposes of a section 1983 action. In response to Orozco's argument that 2-9-305 required him to join the Department as a party, the Supreme Court noted that there is nothing in the text of that section that requires that the state be joined as a party; the section provides only for the tender of a defense and payment of damages by the state if a state employee is sued. Therefore, the Supreme Court held that the District Court correctly dismissed the action for damages against the Department. As to the individual defendants, the Supreme Court held that state employees acting in their official capacities are likewise not "persons" for the purposes of a section 1983 action but that state employees acting in their individual capacities are "persons" within the meaning of section 1983. The Supreme Court noted that Orozco had not clearly indicated the capacities in which the individual defendants were being sued, and so it looked to other provisions of the complaint and to U.S. Supreme Court decisions in order to determine Orozco's intent and held that Orozco intended to sue the individual defendants in their individual capacities. For this reason, the Supreme Court held that the District Court erred in holding that the individually named defendants were not "persons" under 42 U.S.C. 1983 for the purposes of the action for damages. The Supreme Court also held that in enacting 53-30-105 (now repealed) mandating rules for the accrual of good time, the state had created a right to good time. The Supreme Court also held that the immunity analysis used in Remington v. Dept. of Corrections and Human Services, 255 M 480, 844 P2d 50 (1992), was incorrect in light of the later decision of the U.S. Supreme Court in Sandin v. Connor, 515 US 472

(1995), and overruled Remington, but, on the basis of the Sandin immunity analysis, determined that Orozco's liberty interest in the award of good time credits was not clearly established on the date of Orozco's hearing to reclassify him as a maximum security prisoner who was no longer entitled to earn good time credits. For this reason, the Supreme Court held that the Department employees who were sued in their individual capacities were to be given qualified immunity for the purposes of the action for damages but that the District Court improperly dismissed the action for declaratory and injunctive relief and remanded the case to the District Court for a determination of what process was due Orozco before his opportunity to earn good time was revoked and whether he received that process. Orozco v. Day, 281 M 341, 934 P2d 1009, 54 St. Rep. 200 (1997).

Denial of Appeal Allowed When Right to Postconviction Relief Exercised — No Due Process Violation Found: Finney argued on appeal that he had been denied his right to effective assistance of counsel. Citing Evitts v. Lucey, 469 US 387 (1985), the Supreme Court held that when, as in this case, a criminal defendant was afforded a remedy in postconviction proceedings that have already been reviewed under a different part of the Supreme Court's opinion, there is no violation of the defendant's due process rights in denial of appeal. St. v. Finney, 281 M 58, 931 P2d 1300, 54 St. Rep. 58 (1997), distinguished in Hans v. St., 283 M 379, 942 P2d 674, 54 St. Rep. 654 (1997).

Administrative Law Judge Decision — Four-Year Delay Held Violation of Due Process and Right to Justice Without Undue Delay: Based upon an interstate referral from North Dakota, the Child Support Enforcement Division (CSED) of the Department of Social and Rehabilitation Services (now Department of Public Health and Human Services) instituted a collection action against Connell to recover child support payments. After a hearing on February 15, 1991, after which Connell submitted proposed findings and conclusions and an order, the administrative law judge (ALJ) failed to make a decision and no further action was taken on the case until December 23, 1994. At that time, a different ALJ required appearance of the parties in a telephone hearing. After the hearing, Connell moved for a default judgment against CSED or dismissal. Citing Mont. Power Co. v. Pub. Serv. Comm'n, 206 M 359, 671 P2d 604 (1983), the Supreme Court pointed out that the due process clause of the Montana Constitution applies to state agencies. The Supreme Court held that the 44-month delay in deciding Connell's case, which CSED tried to explain by saying that the contract of the previous ALJ had terminated and it was unsure how to proceed, violated Art. II, sec. 16, Mont. Const., 40-5-414, and this section and several administrative rules of the Department. The Supreme Court remanded the case to the District Court for an order dismissing the income withholding action and tax offset against a state warrant for Connell. In re Connell v. St., 280 M 491, 930 P2d 88, 54 St. Rep. 28 (1997), distinguished in Emery v. St., 286 M 376, 950 P2d 764, 54 St. Rep. 1454 (1997).

Prosecutor's Comments on Defendant's Postarrest Silence — No Constitutional Violation: Finley argued that the prosecutor's cross-examination and closing argument impermissibly commented on Finley's postarrest silence, violating the right to due process of law as set forth in Doyle v. Ohio, 426 US 610, 49 L Ed 2d 91, 96 S Ct 2240 (1976), and the privilege against self-incrimination. However, citing St. v. Furlong, 213 M 251, 690 P2d 986 (1984), the Supreme Court held that Doyle does not apply to postarrest silence when the defendant has not been assured of the right to remain silent and of no subsequent penalty for asserting that right, as in this case when Finley was not given any Miranda warning. Further, Finley's privilege against self-incrimination was not violated because Finley voluntarily chose to take the stand during trial. Thus, his credibility was subject to impeachment just like any other witness. Although the prosecutor's comments were not condoned, Finley's constitutional rights were not violated by the comments, absent the giving of a Miranda warning. St. v. Finley, 276 M 126, 915 P2d 208, 53 St. Rep. 310 (1996), following Jenkins v. Anderson, 447 US 231, 62 L Ed 2d 30, 100 S Ct 45 (1980).

Comparative Negligence — Requirement to Allocate Liability of Nonparties Unconstitutional: The portion of 27-1-703 requiring a jury to allocate injuries of a foster child to persons who had been released from liability by the claimant, to persons immune from liability, and to other nonparties without any procedural safeguards was stricken as an unconstitutional violation of substantive due process. (See 1995 amendment to 27-1-703.) Newville v. St., 267 M 237, 883 P2d 793, 51 St. Rep. 758 (1994). The 1995 amendments to 27-1-703 did not cure the due process problem created by the absence of a statutory mechanism by which the negligence of nonparties, including third-party defendants released from liability, can be fairly apportioned by a jury. Here, the District Court properly refused to permit the jury to apportion negligence to third-party defendants who were released from liability by plaintiff and who were impecunious and judgment-proof. Cusenbary v. Mortensen, 1999 MT 221, 296 M 25, 987 P2d 351, 56 St. Rep. 864

(1999), distinguishing Whiting v. St., 248 M 207, 810 P2d 1177, 48 St. Rep. 396 (1991). (See 1997 amendment.)

Defendant Without Standing to Challenge Constitutionality of Hunter Harassment Law on Basis of Vagueness: Lilburn alleged that the hunter harassment law is unconstitutionally vague because it leaves several key terms undefined so that there is no statutory guidance to law enforcement officers or the public as to what type of conduct is prohibited. The Supreme Court held that Lilburn's conduct in standing between a hunter and a bison clearly was conduct that disturbed the hunter in the taking of game and that since Lilburn's conduct is clearly prohibited, he did not have standing to raise a facial vagueness challenge. St. v. Lilburn, 265 M 258, 875 P2d 1036, 51 St. Rep. 507 (1994), followed in St. v. Stubblefield, 283 M 292, 940 P2d 444, 54 St. Rep. 605 (1997).

Hunter Harassment Law Not Violation of Free Speech Rights or Overbroad: Lilburn challenged the hunter harassment law on the basis that its prohibition of "dissuading" a hunter from taking a wild animal is content-based and designed to prevent the message contained in the dissuading language. The Supreme Court held that the Legislature did not use the term "dissuade" in isolation and that, reading the statute as a whole, it is clear that the conduct proscribed is the "disturbance" of a hunter engaged in a lawful activity. The Supreme Court also held that the law is not overbroad and that, to the extent that the statute might reach constitutionally protected expression, whatever overbreadth might exist should be cured on a case-by-case analysis of the fact situations. St. v. Lilburn, 265 M 258, 875 P2d 1036, 51 St. Rep. 507 (1994).

Appointment of Psychiatric Assistance to Help Prepare Case for Mitigation Prior to Sentencing — Due Process Protected: Smith relied on Smith v. McCormick, 914 F2d 1153 (9th Cir. 1990), in claiming that the state's use of a psychiatrist's report and testimony to establish aggravating factors and rebut mitigating evidence violated his due process rights. Because the sentencing court limited the psychiatric examination and required the psychiatrist to report directly to the court, Smith did not have the opportunity to discuss the results with the psychiatrist or to explore other favorable mitigating circumstances, which compromised his ability to present his claims. However, the District Court's subsequent appointment of an independent psychiatrist and three other experts to assist in preparing for the sentencing hearing was sufficient to afford Smith the opportunity to develop additional mitigating circumstances and to protect his due process rights. St. v. Smith, 261 M 419, 863 P2d 1000, 50 St. Rep. 1388 (1993) (Smith II). Following automatic appeal and review, the death sentence was affirmed in St. v. Smith, 280 M 158, 931 P2d 1272, 53 St. Rep. 1345 (1996) (Smith III).

No Conclusive Presumption of Criminal Intent in Presentation of Evidence of Mental Disease or Defect — Sandstrom Not Contravened: Sandstrom v. Mont., 442 US 510, 61 L Ed 2d 39, 99 S Ct 2450 (1979), established that the due process clause of the U.S. Constitution prohibits the use of a presumption that relieves the prosecution from the burden of proving mental state by requiring an inference of the existence of criminal intent from the fact of criminal conduct. Under 46-14-102, evidence of a mental disease or defect is admissible to prove that a criminal defendant did or did not have a state of mind that is an element of the charged offense. Cowan contended that because mental disease or defect does not constitute a valid defense to a criminal charge in Montana, a conclusive presumption is established as to mental state in violation of Sandstrom. However, under Leland v. Oreg., 343 US 790, 96 L Ed 1302, 72 S Ct 1002 (1952), the due process clause does not require the use of a particular insanity test or allocation of burden of proof, and the constitutionality of the abolition of the insanity defense has been affirmed in St. v. Korell, 213 M 316, 690 P2d 992 (1984). Cowan further contended that if, under 45-5-112, any evidence of organized or integrated conduct will suffice to establish criminal conduct beyond a reasonable doubt in spite of clear manifestations of insanity, then no one will ever be acquitted on grounds of insanity because it would be impossible for anyone to cause harm without engaging in a minimal level of organized conduct. However, 45-5-112 establishes a permissive inference rather than a conclusive presumption, and an inference does not violate the Sandstrom rule. Therefore, the Montana statutes governing the presentation of evidence of mental disease or defect do not establish a conclusive or unrebuttable presumption of criminal intent in contravention of the due process clause or Sandstrom. St. v. Cowan, 260 M 510, 861 P2d 884, 50 St. Rep. 1153 (1993), followed in Kills On Top v. St., 273 M 32, 901 P2d 1368, 52 St. Rep. 608 (1995).

Child Support — No Jurisdiction Over Father When No Minimum Contacts by Father With Montana: Verleen and Howard were divorced in California, and Howard was ordered to pay child support. Thereafter, Verleen moved with the children to Montana, where she sought and obtained a decree in Missoula County to modify the California court order with respect to visitation and the amount of child support. Howard was personally served in California but did

not respond to the motion. Later, Verleen obtained a default judgment against Howard. Later still, Verleen sought an order in California that Howard's home be sold to satisfy the Montana judgments. Howard responded that the Montana court had no jurisdiction. The Supreme Court held that while a question of waiver was raised because of Howard's failure to raise the issue of personal jurisdiction under a former Rule 12(b), M.R.Civ.P. (now superseded), motion, the correct analysis is whether the District Court ever had personal jurisdiction over Howard. The Supreme Court held that because the requirements of 40-4-210 had not been satisfied, the only method under which jurisdiction could otherwise obtain was under former Rule 4B, M.R.Civ.P. (now superseded). Citing Kulko v. Calif. Superior Court, 436 US 84 (1978), the Supreme Court held that there were simply no facts to suggest that Howard had any "minimum contacts" with Montana to warrant a Montana court obtaining jurisdiction over him because Howard's only connection with Montana is that his children now reside here. Heinle v. District Court, 260 M 489, 861 P2d 171, 50 St. Rep. 1141 (1993).

Error by Court in Failure to Appoint Counsel for Parental Rights Termination Proceedings: To avoid a parent being placed at an unfair disadvantage during parental rights termination proceedings, due process and fairness require that the parent be represented by counsel. An indigent parent is constitutionally guaranteed the right to court-appointed counsel during the proceedings, and denial of such a request constitutes reversible error. In re A.S.A., J.L.A., G.A., & A.J.A., 258 M 194, 852 P2d 127, 50 St. Rep. 494 (1993).

Department Discretion in Establishing Rules on "Good Time" Credits — University Extension Coursework Properly Credited — Liberty Interest and Equal Protection Considered: The Department of Corrections and Human Services (now Department of Corrections) has virtually unfettered discretion under 53-30-105 (now repealed) in establishing rules that govern "good time" credits for prisoners. Nothing in the prison educational policies conflicts with 53-30-105 (now repealed); therefore, a policy granting credit for a prisoner's participation in an extension program from approved colleges or universities but not for correspondence courses does not create a liberty interest in "good time" credits. Further, in line with the Department's legitimate interest in promoting inmate education while preserving efficient administration of the prison, the Department's careful assessment that denial of "good time" credit for correspondence courses, when applied equally to all inmates, is not violative of equal protection or an unconstitutional restraint of freedom. Remington v. Dept. of Corrections and Human Services, 255 M 480, 844 P2d 50, 49 St. Rep. 1084 (1992), overruled, as to the use of the test of whether the state had created an interest of "real substance" and replaced that test with the test of whether a state had gone beyond issuing procedural guidelines and used "language of an unmistakably mandatory character", in Orozco v. Day, 281 M 341, 934 P2d 1009, 54 St. Rep. 200 (1997).

No Right to Counsel of One's Choice: The right to assistance of counsel does not vest in a defendant the right to counsel of the defendant's choice. St. v. Colt, 255 M 399, 843 P2d 747, 49 St. Rep. 1003 (1992); St. v. Enright, 233 M 225, 758 P2d 779, 45 St. Rep. 1442 (1988), overruled, to the extent that it stands for the proposition that a criminal defendant has a right to a "meaningful attorney-client relationship", in St. v. Gallagher, 2001 MT 39, 304 M 215, 19 P3d 817A (2001).

Right to Counsel: The right to a fair trial inherent in the due process clause of this section guarantees a defendant charged with a crime the right to assistance of counsel. St. v. Colt, 255 M 399, 843 P2d 747, 49 St. Rep. 1003 (1992); St. v. Enright, 233 M 225, 758 P2d 779, 45 St. Rep. 1442 (1988), overruled, to the extent that it stands for the proposition that a criminal defendant has a right to a "meaningful attorney-client relationship", in St. v. Gallagher, 2001 MT 39, 304 M 215, 19 P3d 817A (2001).

Claim That Sentencing Based on Inaccuracies Unfounded — No Due Process Violation: Bishop claimed that his due process rights were violated in sentencing him for robbery, burglary, and use of a weapon because his sentencing was based on a presentence report that contained various inaccuracies. Under U.S. v. Wilson, 900 F2d 1350 (9th Cir. 1990), a court may not rely on materially false information when sentencing a defendant. On review, it was found that the alleged inaccuracies were primarily a matter of Bishop's interpretation of the facts rather than a material falsity. In light of the sentencing court's reliance on Bishop's criminal history in reviewing the presentence report, a 25-year sentence for robbery, a 10-year sentence for burglary, and a 5-year sentence for use of a weapon were affirmed. Bishop v. St., 254 M 100, 835 P2d 732, 49 St. Rep. 650 (1992).

Sua Sponte Instruction on Lesser Included Offense Not Required by Law or Due Process: Defendant contended that the District Court erred in not giving an instruction of its own accord on the lesser offense of misdemeanor sexual assault following his trial for felony sexual intercourse without consent when a request for the instruction was never made by the defense. Although

a defendant has a right to a lesser included offense jury instruction if requested, mandatory instruction on lesser offenses on the judge's own accord is inconsistent with Montana law and the public policy of allowing trial counsel to conduct the case according to strategy and could result in unfair surprise to both the defense and the prosecution. Moreover, a District Court's failure to instruct the jury sua sponte on a lesser included offense does not constitute deprivation of a defendant's right to due process. St. v. Sheppard, 253 M 118, 832 P2d 370, 49 St. Rep. 382 (1992), followed in St. v. Howell, 254 M 438, 839 P2d 87, 49 St. Rep. 759 (1992), and St. v. Leyba, 276 M 45, 915 P2d 794, 53 St. Rep. 7 (1996).

Preindictment Delay — Appropriate Standard — Intentional Delay Alone Not Sufficient to Establish Due Process Violation: The primary guarantee against bringing overly stale criminal charges is the applicable statute of limitations. In considering a defendant's claim that preindictment delay violated his due process rights, the court must first determine whether the defendant suffered actual, substantial prejudice. If the defendant does not demonstrate actual prejudice resulting from the delay, no due process violation will be found. Upon a showing that the defendant suffered actual, substantial prejudice from the delay, the court must then weigh the justification for the delay, as well as the absolute length of the delay, to determine if due process has been denied. If the defendant has established actual prejudice because of unusually lengthy preindictment delay, it then becomes incumbent upon the government to provide the court with its reasons for the delay; negligent conduct will be weighed less heavily than deliberate delays. St. v. Krinitt, 251 M 28, 823 P2d 848, 48 St. Rep. 1088 (1991), followed in St. v. Taylor, 1998 MT 121, 289 M 63, 960 P2d 773, 55 St. Rep. 481 (1998), and St. v. Wright, 2000 MT 322, 302 M 527, 17 P3d 982, 57 St. Rep. 1358 (2000).

Preindictment Delay — No Violation of Due Process: Defendant forged and cashed a check of his wife's and kept the proceeds for himself. The County Attorney's office investigated in March 1988 but declined to prosecute because the wife was barred from testifying against defendant by 26-1-802 (spousal privilege) and 46-16-212 (competency of spouses). The couple was divorced in May 1989. On December 12, 1989, defendant was charged with theft and forgery and was eventually convicted of theft. The Supreme Court affirmed and found that defendant had not shown actual, substantial prejudice as a result of the delay in prosecution. Prosecution was commenced within the applicable 5-year statute of limitations. The fact that defendant could no longer rely on the spousal privilege and competency of spouses statutes to prevent a witness from coming into court and testifying about the theft does not constitute "prejudice" to defendant. St. v. Krinitt, 251 M 28, 823 P2d 848, 48 St. Rep. 1088 (1991).

Suppression of References to First Illegal Interview From Second Legal Interview — Poisoned Tree: Defendant's fifth amendment Miranda rights were violated by interrogating officers during a November interview, but a subsequent December interview was conducted properly. Conceding that the November interview was clearly inadmissible, the state nevertheless argued that all of the December interview was admissible, including references to the November interview, as fruit of the poisoned tree that had been purged of the primary taint of the November Miranda violations by the presence of several factors outlined in In re R.P.S., 191 M 275, 623 P2d 964 (1981). However, references to the November interview were not "fruit" of the poisoned tree; they were the poisoned tree itself by the violation of defendant's constitutional rights. It was unacceptable to suppress the November interview and then admit that evidence by allowing reference to it in discussion of the December interview. The exclusionary rule dictated that the product of the constitutional violations was inadmissible, and therefore the trial court properly suppressed all reference to the November interview from the December interview. St. v. Moore, 250 M 254, 818 P2d 835, 48 St. Rep. 913 (1991).

Ex Parte Communication Between Witness and Judge Not Affecting Revocation of Suspended Sentence: Defendant claimed that his due process rights were violated by the District Court's decision to revoke his suspended sentence based on improper ex parte communication between the probation officer and the District Court Judge. However, absent objective evidence that the private communication was intended to or did influence the revocation decision and because the record was replete with evidence in support of revocation, the defendant's rights were not violated and the suspended sentence was properly revoked. St. v. Champagne, 245 M 147, 800 P2d 154, 47 St. Rep. 1932 (1990).

Felony Conviction When Information Only Charged Misdemeanor: The defendant argued that his due process rights had been violated because the information only charged him with misdemeanor possession and he was convicted of felony possession. The Supreme Court held that the information clearly stated that the defendant was being charged with a felony and that the information's reference to the misdemeanor statute was only to indicate that the amount of

marijuana in his possession was in excess of the misdemeanor amount. Hawkins v. St., 242 M 348, 790 P2d 990, 47 St. Rep. 783 (1990).

Liberty Interest in Parole: The state's failure to provide a prisoner with an annual review of his parole eligibility as required by administrative rule violated due process. Section 46-23-201 creates a due process liberty interest in being considered for parole. Kelly v. Risley, 865 F2d 201 (9th Cir. 1989).

Delaying Access to Courts by Using Agency to Handle Racial Discrimination Complaints Not Unconstitutional: The defendant's suit in District Court alleging that his employment was terminated due to race was dismissed because by statute he was required to file his complaint with the Commission for Human Rights. The defendant filed an appeal, alleging that the requirement denied him due process and access to the courts. The Supreme Court held that the state's purpose of combating illegal discrimination was a rational basis for delaying access to the courts and therefore did not violate the federal or state constitution. Romero v. J&J Tire, 238 M 146, 777 P2d 292, 46 St. Rep. 1159 (1989), followed in Harrison v. Chance, 244 M 215, 797 P2d 200, 47 St. Rep. 1539 (1990).

Youth Sixteen Years Old and Older — Mandatory Transfer of Homicide Prosecution to District Court — No Denial of Due Process: A youth does not have a constitutional due process right to a hearing to determine whether a homicide prosecution should be transferred to District Court. However, whatever criteria is set in state law for the transfer must be followed. The Supreme Court held that in a homicide prosecution, the requirement for a transfer hearing for youth between 12 years and 16 years of age and for a mandatory transfer for youth 16 years old or older is permissible. Since no irregularities in the transfer of an older youth for homicide prosecution in District Court were alleged, there was no violation of his federal due process rights. In re Wood, 236 M 118, 768 P2d 1370, 46 St. Rep. 228 (1989).

No Absolute Right to Counsel at Placement Hearing — Due Process: A delinquent youth was not denied due process when, pursuant to 41-5-523 (renumbered 41-5-1512), he was placed in a youth incarceration facility without an adversarial hearing to decide his placement. Beyond commitment of the youth by the Youth Court, the delinquent youth has no absolute right to counsel at the placement hearing. However, the youth is not without due process rights at the hearing stage. A youth placement committee created by 41-5-525 (renumbered 41-5-121) makes a recommendation to the Department of Family Services (now Department of Public Health and Human Services), which can accept or reject the recommendation under 41-5-527 (renumbered 41-5-123 and now repealed). In addition, the Youth Court can modify that decision if placement is not in the best interests of the child. In re Peterson, 235 M 313, 767 P2d 319, 46 St. Rep. 13 (1989).

Child Support as Restitution and Condition of Probation: Child support violations were noted in the presentence investigation. Defendant should have known that they might be considered by the court, so there was no due process violation. The District Court properly ordered payment of child support as a form of restitution and rehabilitation and as a legitimate condition of parole. St. v. Shaver, 233 M 438, 760 P2d 1230, 45 St. Rep. 1617 (1988).

Different Sentencing Judge — No Presumption of Vindictiveness When Sentence Increased on Remand: Due process rights on resentencing create a presumption of vindictiveness when a sentence is increased on remand. However, when a different judge performs resentencing, there is no presumption of vindictiveness; rather, the defense must show actual vindictiveness. St. v. Forsyth, 233 M 389, 761 P2d 363, 45 St. Rep. 1577 (1988).

Property in State Sufficient for Jurisdiction: In an action to recover unauthorized funds in a bank account in Montana, there were sufficient minimum contacts to establish jurisdiction in Montana even though the plaintiff had no contacts with the state and the defendant had never been in Montana. The deposited funds in the Montana bank account were found to be traceable to the alleged claims of kickback asserted against the defendant in a suit in his home state, and the bank account not only was related to the controversy, it was the subject of the controversy. The tests of "traditional notions of fair play and substantial justice" were met to establish jurisdiction over the nonresident defendant in Montana. Consumers United Ins. Co. v. Syverson, 227 M 188, 738 P2d 110, 44 St. Rep. 999 (1987).

Montana Major Facility Siting Act — Procedural Satisfaction of Due Process: The procedural requirements of the Montana Major Facility Siting Act meet the requirements of due process under the Montana Constitution. Mont. Power Co. v. Fondren, 226 M 500, 737 P2d 1138, 44 St. Rep. 850 (1987).

Liberty Interest: Section 46-23-201, stating that the Board of Pardons (now Board of Pardons and Parole) "shall release on parole" subject to enumerated restrictions, created a due process

liberty interest in parole release. Board of Pardons v. Allen, 482 US 369, 96 L Ed 2d 303, 107 S Ct 2415 (1987).

Interstate Probation — Retaking Violator — Hearing Not Always Required: Montana probationer who had been transferred to Idaho was arrested for assault and then transferred back to Montana, where his probation was revoked after a hearing. He petitioned the Supreme Court for a Writ of Habeas Corpus on the grounds that he had been denied due process because he was not given a preliminary hearing in Idaho. The Supreme Court held that he had not been denied due process and that he was not entitled to a preliminary onsite hearing because he did not have a liberty interest at the time of the revocation proceedings since he was under lawful arrest in Idaho at the time. St. v. Howell, 222 M 136, 720 P2d 1174, 43 St. Rep. 1119 (1986).

Due Process at Sentencing — Protection of Community Versus Defendant's Liberty Interest: At the sentencing stage, due process requires that a convicted person's liberty interest and the risk of unjust deprivation of that interest be balanced against the state's interest in protecting the community. Due process must be observed and defendant's rights protected, but it is clear that his liberty interest does not rise to the level of an accused's at trial. St. v. Nichols, 222 M 71, 720 P2d 1157, 43 St. Rep. 1068 (1986), followed in St. v. Krantz, 241 M 501, 788 P2d 298, 47 St. Rep. 454 (1990).

Right to Notice That State Will Seek Dangerous Offender Designation: Because 46-18-404 (now repealed) states the substantive criteria upon which a nondangerous offender designation must be based, no notice other than notice of the sentencing hearing is needed to comport with due process and it is not a denial of due process that the state is not required to give notice that it will seek application of a dangerous offender designation and to state the factual basis for the requested designation. The statutes governing sentencing provide ample notice of matters that may come up at the sentencing hearing. These statutes, along with notice of the hearing date, the full disclosure of presentencing information in open court, and defendant's ability to propound evidence, confront witnesses, and participate in the hearing, provide a full panoply of due process safeguards for defendant's liberty interest. St. v. Nichols, 222 M 71, 720 P2d 1157, 43 St. Rep. 1068 (1986).

Term "Substantial Danger" Not Void for Vagueness: As used in statute requiring a court to find that a convicted person is a substantial danger to other persons or society before the court may designate him a dangerous offender, the term "substantial danger" is not so loose and uncertain that a court's discretion in defining the term is unfettered. The term does not violate due process for vagueness. St. v. Nichols, 222 M 71, 720 P2d 1157, 43 St. Rep. 1068 (1986).

Workers' Compensation — Employer Not Liable for Contribution or Indemnity: The effect of the amendment of 39-71-411 precluding liability on the part of an insured employer for contribution or indemnity to third parties was to promote the continued economic welfare of employers who pay into the state fund and the welfare of employees who receive compensation benefits. The limitations in the statute are therefore reasonably related to the permissible legislative objective of protecting the public welfare. Assertion of the statute as a defense to liability of an insured employer does not violate this section. Raisler v. Burlington N. RR, 219 M 254, 717 P2d 535, 42 St. Rep. 1997 (1985).

Scienter Element Not Unconstitutionally Vague: In appealing his conviction of deliberate homicide, the defendant argued that due process requires that the conviction be based on an information that charges, and instructions to the jury that require, a finding that the defendant possessed the specific mental state to kill the victim; in other words, that the element of mens rea is constitutionally required. The defendant contended that the statutory element of purposely or knowingly does not satisfy this requirement. The Supreme Court held that the scienter element of 45-5-102 defines the crime of deliberate homicide with sufficient specificity to obviate any claim of unconstitutional vagueness. St. v. Beach, 217 M 132, 705 P2d 94, 42 St. Rep. 1080 (1985).

No Right to Counsel Before Deciding Whether to Submit to Chemical Testing — Blood Alcohol Test Not "Critical Stage" Event, Self-Incriminating Communication, or Denial of Due Process: Defendant was arrested on a charge of driving while under the influence of alcohol. He agreed to a chemical test after being told that he had a right to refuse the test and that he did not have a right to consult an attorney before deciding whether to submit to testing. The District Court granted the defendant's motion to suppress the results of the test on the basis of the 6th and 14th amendments to the U.S. Constitution. The Supreme Court reversed and found that neither the U.S. Constitution nor the Montana Constitution guarantees a defendant the opportunity to seek an attorney's advice before deciding whether to submit to a blood alcohol test, when consent is considered given as a matter of law. A Breathalyzer test is not susceptible to the suggestive manipulation characteristic of the "critical stage" event, the results of the test are not

self-incriminating communications, and the statutory procedures for the test meet due process requirements. St. v. Armfield, 214 M 229, 693 P2d 1226, 41 St. Rep. 2430 (1984), followed in St. v. Van Kirk, 2001 MT 184, 306 M 215, 32 P3d 735 (2001), and St. v. Michaud, 2008 MT 88, 342 M 244, 180 P3d 636 (2008).

Volitionally Impaired Defendant — Due Process Met: Defendant was charged with attempted deliberate homicide and aggravated assault. He gave notice of his intent to rely on a mental disease or defect to prove he did not have the particular state of mind that is an essential element of the offense charged. After conviction, defendant appealed, contending that Montana's statutory insanity defense scheme did not recognize those who lack the ability to conform their conduct to the law. He contended that this elimination of the involuntariness defense violated due process. The Supreme Court held that the volitional aspect of mental disease or defect has not been eliminated from Montana law. Consideration of that factor has been transferred from the jury to the sentencing judge under 46-14-311. Section 45-2-202 provides that a voluntary act is a material element of every offense. That section and the definition of involuntary act in 45-2-101(31) adequately provide for an involuntariness defense. St. v. Korell, 213 M 316, 690 P2d 992, 41 St. Rep. 2141 (1984).

Judge's Off-Record Meeting With Probation Officer — Defense and Defendant Absent — No Due Process Violation — Inaccuracy in Sentence Report or Prejudice Not Shown: The rule in St. v. Redding, 208 M 24, 675 P2d 974, 41 St. Rep. 147 (1984), that an off-the-record private meeting between the sentencing judge and the probation officer without the presence of defendant or his counsel violates due process is to be applied prospectively only, unless, with respect to a sentence rendered prior to the date of the decision in Redding, appellant alleges and shows inaccuracies in the presentence report or prejudice arising from its use by the judge. St. v. Stroud, 210 M 58, 683 P2d 459, 41 St. Rep. 919 (1984).

Consideration of Indigency in Sentencing — Violation of Due Process: Defendant was convicted of theft of public assistance funds in violation of 45-6-301 and sentenced to the maximum term of imprisonment, 10 years. The sentence was then suspended on the conditions that defendant seek alcohol treatment, make restitution of the funds, and pay the fees of his court-appointed attorney. The Supreme Court ruled that if the reason for defendant's receiving the maximum sentence was that he is indigent and will therefore make restitution slowly, the sentence is a violation of his right to due process. The court remanded the case for reconsideration of the sentence in view of the opinion. St. v. Farrell, 207 M 483, 676 P2d 168, 41 St. Rep. 91 (1984), followed in St. v. Pritchett, 2000 MT 261, 302 M 1, 11 P3d 539, 57 St. Rep. 1093 (2000), and St. v. Haldane, 2013 MT 32, 368 Mont. 396, 300 P.3d 657.

Out-of-Court Conference Between Sentencing Judge and Probation Officer — Denial of Due Process: The defendant was denied due process when the sentencing judge conferred with the presentence investigation officer behind closed doors where no opportunity was provided for argument, rebuttal, or explanation. St. v. Redding, 208 M 24, 675 P2d 974, 41 St. Rep. 147 (1984), distinguished in St. v. Pease, 233 M 65, 758 P2d 764, 45 St. Rep. 1296 (1988).

Corporation Protected: A corporation is a person within the Due Process Clause. Mont. Power Co. v. P.S.C., 206 M 359, 671 P2d 604, 40 St. Rep. 1712 (1983).

Court to Consider Reasonableness of Exercise of Jurisdiction Over Nonresident Defendant: For a Montana court to exercise jurisdiction over a nonresident defendant, it must be satisfied that: (1) the resident defendant comes within the provisions of the long-arm statutes; and (2) the exercise of long-arm jurisdiction over the nonresident defendant comports with traditional notions of fair play and substantial justice. Simmons v. St., 206 M 264, 670 P2d 1372, 40 St. Rep. 1650 (1983), followed in Columbia Falls Aluminum Co. v. Hindin/Owne/Engelke, Inc., 224 M 202, 728 P2d 1342, 43 St. Rep. 2132 (1986), and in Nelson v. San Joaquin Helicopters, 228 M 267, 742 P2d 447, 44 St. Rep. 1510 (1987).

Nonresident Laboratory Subjected to Suit Under Long-Arm Statute — Exercise of Jurisdiction Unreasonable — Violation of Due Process: Since 1977, the Montana Department of Health and Environmental Sciences (now Department of Public Health and Human Services), the agency responsible under Title 59, ch. 19, part 2, for the testing of newborns for metabolic disorders, has contracted with an Oregon state laboratory for the testing. Plaintiff's minor son was born in June 1977. A sample of his blood was sent to the Oregon laboratory. No abnormality was reported. A few months later the son exhibited symptoms of a metabolic disorder, and treatment was begun in September 1977. After first filing an action in Oregon, which was later dismissed on procedural grounds, plaintiff filed a negligence action in Montana against the states of Montana and Oregon, alleging that the delay in treatment had caused his son permanent and irreparable brain and neuromuscular damage. The trial court dismissed the action against the state of Oregon on

jurisdictional grounds. The Supreme Court affirmed, ruling that although both subsections (b) and (e) of former Rule 4B, M.R.Civ.P. (now superseded), potentially confer jurisdiction over the state of Oregon in this case, it would be a denial of due process for the Montana state courts to exercise that jurisdiction. The court found that Oregon had not structured its activities in such a way as to purposely avail itself of the privilege of functioning in Montana. Further, the court ruled that an evaluation of the interests of sovereignty, efficiency of resolution, and provision of important interstate medical services compels the conclusion that it would be unreasonable in this case to exercise jurisdiction over the state of Oregon. Simmons v. St., 206 M 264, 670 P2d 1372, 40 St. Rep. 1650 (1983). See also Threlkeld v. Colo., 2000 MT 369, 303 M 432, 16 P3d 359, 57 St. Rep. 1578 (2000).

Imposition of Costs — Constitutionality: Defendant was convicted of deliberate homicide and was assessed costs and expenses as part of his sentence. Defendant contended that 46-18-232 was unconstitutional since it enhances punishment in retribution for a defendant's exercise of a fundamental constitutional right. Statutes that allow a discretionary imposition of costs have been upheld against due process arguments. The statute does no more than deprive a financially able defendant of available funds that, in fairness, should be remitted to the public coffers. St. v. Weinberger, 204 M 278, 665 P2d 202, 40 St. Rep. 844 (1983).

Parking Ordinance — Vicarious Criminal Responsibility: A city may, in the exercise of its police power, enact a parking ordinance that provides that the registered owner of a motor vehicle is vicariously criminally responsible for illegal parking by another unless it is shown that the vehicle was being used without the owner's consent. Such an ordinance does not violate due process restrictions (overruling a contrary holding in St. v. Jetty, 176 M 519, 579 P2d 1228 (1978)), but the ordinance must conform to the absolute liability requirements of 45-2-104. Missoula v. Shea, 202 M 286, 661 P2d 410, 40 St. Rep. 91 (1983).

Enforcement of Foreign Judgment a Violation of Federal Due Process — "Minimum Contacts" Insufficient: A default judgment was obtained in Colorado against defendants, Montana residents, in a case which arose from defendants' participation in a reciprocal interinsurance agreement. Some of the subscribers to the agreement were Colorado residents. The Supreme Court upheld the District Court's refusal to enforce the judgment in Montana, ruling that enforcement of the judgment would be a violation of the federal due process clause because the defendants had not had sufficient "minimum contacts" with the state of Colorado to warrant the exercise of personal jurisdiction over the defendants. The court stated that the provision of the Colorado long-arm statute that covered causes of action arising from "contracting to insure any person, property or risk residing or located within this state at the time of contracting" was not applicable because this was not the sort of "company" that was contemplated when the long-arm statutes were drafted. The court further stated that the defendants did not know the name of the insurance company which issued the policy and had not purposely availed themselves of the privilege of conducting activities within the state of Colorado. Benham v. Woltermann, 201 M 149, 653 P2d 135, 39 St. Rep. 2017 (1982).

Collective Bargaining Grievance Procedure to Be Utilized Prior to Court Action: An employee must use the contract grievance procedure contained in a collective bargaining agreement prior to seeking a remedy in District Court. Plaintiff argued that his constitutional right to due process was violated and that right cannot be waived by private contract, thereby allowing him to proceed directly to District Court. The court disagreed, holding that the grievance procedure contained in the collective bargaining agreement satisfied any due process requirement. Small v. McRae, 200 M 497, 651 P2d 982, 39 St. Rep. 1896 (1982), followed in Brinkman v. St., 224 M 238, 729 P2d 1301, 43 St. Rep. 2163 (1986), and Mackay v. St. Bd. of Regents, 2003 MT 274, 317 M 467, 79 P3d 236 (2003).

Jurisdiction of State Court Over Nonresident Federally Chartered Bank — Sufficiency of Evidence — Denial of Due Process and Equal Protection: Officers of the plaintiff corporation traveled to Reno, Nevada, to deposit money in the defendant branch bank in anticipation of business in Nevada and later brought an action in a Montana District Court against the defendant for unlawful dishonor of a check and associated charges. The District Court did not err in dismissing the action for lack of jurisdiction. Under the provisions of 12 U.S.C. § 94, a federally chartered bank may be sued, among other places, where it is "located". The U.S. Supreme Court in Citizens & S. Nat'l Bank v. Bougas, 434 US 35 (1977), construed the term "located" to mean wherever branch offices are found. Because there is no branch bank in Montana and there has been no business operation conducted by the defendant in Montana that would constitute a waiver of the protection of federal law, the District Court had no jurisdiction. There was, moreover, sufficient evidence before the District Court for it to make the determination that there was no

voluntary waiver, and the U.S. Supreme Court has held in Mercantile Nat'l Bank at Dallas v. Langdeau, 371 US 555 (1963), that Congress "unquestionably" has the authority to determine those situations in which national banks can be sued. Hamelly Int'l, Inc. v. First Nat'l Bank of Nev., 199 M 221, 648 P2d 282, 39 St. Rep. 1304 (1982).

Dangerous Offender Determination — Use of Defective Information: After defendant and his father kidnapped two minor girls and took them to the father's house, father told defendant to "go get the gun" and defendant did so and placed it between the two men on the couch where they were sitting. The girls were not threatened with the gun. The trial judge told defendant that "the reason you're designated a dangerous offender is that's about the fourth gun incident you were in". Review of the record on appeal showed: (1) a possible misapprehension of defendant's actual criminal background and apparent confusion as to the crimes involved; (2) no convincing evidence that this was defendant's fourth gun incident; and (3) an indication that one of the prior convictions considered by the judge was constitutionally defective because defendant did not have counsel. The sentencing court cannot rely upon a previous criminal record in sentencing if that record contains constitutionally infirm convictions. Defendant had a right to have his sentence based upon substantially correct information and was entitled to a rehearing on his designation as a dangerous offender. St. v. Herrera, 197 M 462, 643 P2d 588, 39 St. Rep. 731 (1982).

Due Process Issue Not Pleaded but Otherwise Raised: Due process issues were raised and thus could be considered on appeal in trial denying discharged county employee reinstatement and backpay. Where the issue of due process ran through the entire trial, there was a specific due process violation charge, and the issue was raised in employee's proposed findings of fact, the case was tried as a due process question even though the words "due process" did not appear in the pleadings or transcript. Lovell v. Wolf, 197 M 443, 643 P2d 569, 39 St. Rep. 710 (1982).

Preindictment Delay — Denial of Due Process: Speedy trial guarantees in criminal cases do not extend to the period prior to the formal accusation or arrest. Statutes of Limitations provide the primary guarantees against bringing overly stale criminal charges. If the delay causes actual prejudice or if the State intentionally delays to gain some tactical advantage over the accused or to harass him, the delay can be a denial of due process. However, see St. v. Taylor, 1998 MT 121, 289 M 63, 960 P2d 773, 55 St. Rep. 481 (1998), in which the issue is raised to a level of constitutional scrutiny for analysis of preindictment delay. St. v. Goltz, 197 M 361, 642 P2d 1079, 39 St. Rep. 613 (1982), followed in St. v. Bartnes, 234 M 522, 764 P2d 1271, 45 St. Rep. 2101 (1988).

Constitutionality of Mandatory Vehicle Insurance Law: Section 61-3-301 does not violate either due process or equal protection guarantees of the Constitution. St. v. Turk, 197 M 311, 643 P2d 224, 39 St. Rep. 584 (1982).

Disparity Between Sentence Offered in Plea Bargaining and Sentence Actually Rendered After Trial: Because of the difficulty of distinguishing between situations where leniency is offered in exchange for a plea and situations where the defendant is punished for exercising his right to trial by jury, a sentencing court that becomes involved in the plea bargaining process and imposes a harsher sentence after trial than was offered in exchange for a guilty plea must specifically point out the factors that justify the increased sentence. (Citing St. v. Baldwin, 192 M 521, 629 P2d 222 (1981).) St. v. Tate, 196 M 248, 639 P2d 1149, 39 St. Rep. 69 (1982).

Lobbying — Initiative 85 — Attorneys — Constitutionality: Initiative 85, as emended in Mont. Auto. Ass'n v. Greely, 193 M 378, 632 P2d 300, 38 St. Rep. 1174 (1981), is not so vague as to be unconstitutionally uncertain, nor does it intrude on the power of the Supreme Court to regulate the conduct of attorneys. The act applies equally to attorneys and nonattorneys acting in the nonlegislative lobbying field. The right of the court to supervise the conduct of the members of the bar is undiminished by any provision of the Initiative. St. Bar of Mont. v. Krivec, 193 M 477, 632 P2d 707, 38 St. Rep. 1322 (1981).

Revocation of Government-Controlled Business Right Not Held to Be Taking of Liberty Requiring Due Process: Where a portion of the plaintiffs' veterinary business was based on the use of brucellosis test kits, which were the exclusive property of the United States, any adverse reflection upon the plaintiffs' business competence caused by revocation of the kits did not constitute a taking of the plaintiffs' liberty within the meaning of the 5th and 14th amendments to the United States Constitution, as the plaintiffs' business reputation would not be injured unless the revocations were made public, which they were not. Doran v. Houle, 516 F. Supp. 1231, 38 St. Rep. 1086 (D.C. Mont. 1981).

Increased Sentence for Exercising Rights — Due Process Violation: Defendant was convicted of aggravated assault and sentenced to 15 years imprisonment with 5 years suspended. Defendant asserted that he received an increased sentence because he chose to exercise his constitutional

right to a jury trial. In order to determine whether leniency was offered to the defendant in plea bargaining and whether defendant was punished for exercising his right to a jury trial, the Supreme Court needed a record that it could objectively review. Increased sentencing for exercising a constitutional right is a basic due process violation. Because the Supreme Court was without assurance from the record that the trial court did not increase the sentence in retaliation for defendant's insistence on a jury trial, they remanded the case for resentencing. St. v. Baldwin, 192 M 521, 629 P2d 222, 38 St. Rep. 882 (1981), distinguished in St. v. Smith, 276 M 434, 916 P2d 773, 53 St. Rep. 459 (1996), St. v. Allen, 278 M 326, 925 P2d 470, 53 St. Rep. 935 (1996), in which it was held that a sentencing disparity did not equate to a due process violation because the District Court was not involved in the pretrial plea negotiations, and St. v. English, 2006 MT 177, 333 M 23, 140 P3d 454 (2006).

Statewide Vote Through Initiative as Demonstrating Compelling State Interest: The absence of factfinding capabilities in the initiative process is not proof of the absence of a compelling state interest in the enactment of Initiative 85. To so hold would result in the emasculation of the initiative process in Montana with a result that no initiative could withstand a first amendment challenge. The statewide vote on Initiative 85 is a demonstration of a compelling state interest in enactment of Initiative 85. Mont. Auto. Ass'n v. Greely, 193 M 378, 632 P2d 300, 38 St. Rep. 1174 (1981).

Absence During Peremptory Challenges Not Violative of Constitutional Rights: In a prosecution for theft by accountability, the defendant was not denied due process of law by her absence from the courtroom during peremptory challenges of jurors. Although the defendant's presence may be crucial during the voir dire questioning of the jury, the Supreme Court has previously held that a defendant's rights are not violated when the matters handled in his absence are purely legal, and the peremptory challenge of jurors is only a pro forma execution of the decisions formulated during voir dire. Her absence was therefore not injurious to either her right of due process or her right of confrontation. St. v. Hart, 191 M 375, 625 P2d 21, 38 St. Rep. 133 (1981).

Refusal to Suppress Second Admission Held Proper — Connection With First Admission Held Controlling: Where a police investigation subsequent to the suppression of a first confession by the defendant to a charge of homicide revealed that the defendant had made a second confession over the telephone to a friend, the court did not err in refusing to suppress the evidence of the second confession and transferring the case from Youth Court to District Court for trial. The facts surrounding the second confession showed that it was derived from an independent source and not so connected with the first confession as to be considered "fruit of the poisonous tree", under the principles announced in Silverthorne Lumber Co. v. U.S., 251 US 385 (1920), or inadmissible under "the cat out of the bag" doctrine pertaining to second confessions announced in St. v. Allies, 190 M 475, 621 P2d 1080, 37 St. Rep. 2089 (1980). In re R.P.S., 191 M 275, 623 P2d 964, 38 St. Rep. 231 (1981), followed in St. v. New, 276 M 529, 917 P2d 919, 53 St. Rep. 510 (1996).

Break in Chain of Evidence Alleged — Burdens of Proof: In a prosecution for deliberate homicide in which the defendant's fingerprints were found at the crime scene and the defendant objected to admission of the fingerprint evidence on the basis of an alleged break in the chain of evidence, which occurred because there could have been a master key that could have been used to gain access to the evidence, the court did not err in overruling the defendant's objection to the evidence. Once the State has shown prima facie that there has been no tampering or alteration of an exhibit, the burden of proving alteration shifts to the defendant. The speculation by the defendant is insufficient to meet the burden requiring proof of alteration. St. v. Close, 191 M 229, 623 P2d 940, 38 St. Rep. 177 (1981), cited in St. v. Grant, 221 M 122, 717 P2d 562, 43 St. Rep. 685 (1986).

Eviction Prior to Exhaustion of Administrative Remedies — Denial of Federal Due Process: The Bureau of Land Management (BLM) determined that drought conditions in Valley County combined with grazing on federal lands presented an imminent danger to the rangeland. BLM issued plaintiffs notice that their cattle were to be immediately removed from the range. The plaintiffs were given the right to appeal the decision pursuant to federal administrative law. The time for appeal exceeded the time for removal by 20 days, during which time the cattle would be held in trespass, subject to fines and/or impoundment. Plaintiffs brought this suit seeking an injunction against the order. Expert testimony was presented that the range was not in danger. The court held that to evict plaintiffs' cattle before plaintiffs' right to seek administrative remedy expired was a denial of federal due process (similar to Art. II, sec. 17, Mont. Const.). An injunction was granted until the administrative process was exhausted. Hinsdale Livestock Co. v. U.S., 501 F. Supp. 773, 37 St. Rep. 2103 (D.C. Mont. 1980).

Court Reporter Failing to File Trial Notes — Not a Denial of Trial Transcript: Petitioner was not denied due process on the grounds that he was denied a transcript of his criminal trial when the court reporter failed to file his notes with the clerk of court as required by 3-5-603. The defendant attempted to get a free transcript as provided by 3-5-604 but failed to allege anything to warrant moving any court's discretion to order one; therefore, he was not denied a transcript merely because the court reporter kept his notes. Spurlock v. Crist, 188 M 449, 614 P2d 498 (1980).

Information — Adequacy of Affidavit in Support — Probable Cause: Defendant, charged with mitigated deliberate homicide, argued that the affidavit in support of the application for leave to file an information was insufficient without statements which were suppressed on his motion being included. The court disagreed, saying that a prima facie case showing that defendant committed an offense was not necessary in the affidavit. A mere probability is sufficient for probable cause. Evidence to establish probable cause need not be as complete as evidence to establish guilt. Judges reviewing such affidavits should use their common sense in determining whether probable cause exists. There is no requirement that the affidavit claim that no other persons had access to the home where the deceased was found. The court concluded that a common-sense reading of the affidavit, with the parts objected to deleted, indicates that the statutory and decisional guidelines were more than adequately met by the affidavit. St. v. Hamilton, 185 M 522, 605 P2d 1121 (1980).

Sandstrom Instruction — Viewing Instructions as a Whole — Assurance of Effect on Jury: Petition for Writ of Habeas Corpus was filed in U.S. District Court. When the Sandstrom instruction (Sandstrom v. Mont., 442 US 510 (1979)) was given at a homicide trial, it may be that the defect can be cured by viewing all of the instructions as a whole; other instructions may be so "rhetorically inconsistent" with the Sandstrom instruction that they overcome its presumptive effect. The court may not speculate on the curative effects of the other instructions on the jury; it must be assured that the jury did not find the defendant guilty on the grounds that he merely acted voluntarily, rather than finding the necessary criminal intent. In examining the instructions given, the court was not so assured and the petition for a Writ of Habeas Corpus was granted. McGuinn v. Crist, 492 F. Supp. 478 (D.C. Mont. 1980). See also McKenzie v. Risley, 801 F2d 1519 (9th Cir. 1986).

Probable Cause: An affidavit in support of a motion for leave to file an information charging defendant with larceny by bailee under section 94-2701, R.C.M. 1947 (now repealed), which listed the alleged victims and set out three fact situations alleging the issuance of insurance settlement checks and that the victims had sometime thereafter received their portion of the settlement with or without an accounting from the defendant or had not received any portion of the settlement, was sufficient to establish probable cause given the improbability that the facts alleged resulted from innocent bookkeeping errors or clerical mistakes. St. v. Bretz, 185 M 253, 605 P2d 974 (1979).

Due Process — Change of Venue for Prejudicial Publicity — Affidavit: The District Court's denial of defendant's motion for change of venue or a continuance did not deprive him of due process since an affidavit supporting assertions of prejudice did not accompany the motion as required. Additionally, the facts do not indicate he was denied a fair trial. St. v. Williams, 185 M 140, 604 P2d 1224 (1979).

Concurrent Regulation by State and Municipality: Regulation of plumbers by the state and certain municipalities was not a denial of due process. Dual regulation of an activity is not prohibited as long as there is no conflict between state and municipal regulations. Billings Assoc. Plumbing, Heating, & Cooling Contractors v. Bd. of Plumbers, 184 M 249, 602 P2d 597 (1979).

Denial of Motion for Continuance: In a prosecution for attempted deliberate homicide, the court did not err in denying defendant's motion for a continuance in which defendant argued he was deprived of his right to effective counsel, due process, and time to prepare his case. Motions for continuance are directed to the sound discretion of the trial court, and the trial court will not be reversed absent a showing of prejudice to the movant, citing St. v. Paulson, 167 M 310, 538 P2d 339 (1975). As more than 2 months elapsed between the entry of defendant's plea and his motion for continuance and because he failed to show any prejudice, the motion was properly denied. St. v. Kirkland, 184 M 229, 602 P2d 586 (1979).

Alleged Punishment for Failure to Plead Guilty: Defendants did not demonstrate a similarity to the disparity between sentences the prosecutor was willing to recommend and the sentences actually given or the disparity in sentences between defendants themselves that was present in St. v. Sather, 172 M 428, 564 P2d 1306 (1977). Thus, the facts of this case did not justify an inference that defendants were punished for not pleading guilty. St. v. Gallaher, 177 M 150, 580 P2d 930 (1978).

Selective Prosecution Under Persistent Felony Offender Statute: Sections 46-18-501 and 46-18-502, which provide for increased sentences for persistent felony offenders, do not violate the equal protection and due process guarantees although only a minority of repeat felony offenders are prosecuted under them. St. v. Maldonado, 176 M 322, 578 P2d 296 (1978), followed in St. v. Stanko, 1998 MT 323, 292 M 214, 974 P2d 1139, 55 St. Rep. 1313 (1998).

Adoption of City Ordinance: The Supreme Court rejected plaintiff's contention that a formula for assessment of offstreet parking improvements was adopted in violation of due process and equal protection. Schumacher v. Bozeman, 174 M 519, 571 P2d 1135 (1977).

Adequate Representation in Neglect Case: County Department of Welfare adequately and properly represented children in neglect proceeding. Judge exercised discretion and did not err in failing to appoint counsel. Stubben v. Dept. of Public Welfare, 171 M 111, 556 P2d 904 (1976).

Election of Rights Constituting Denial of Due Process: When a hearing on revocation of a deferred sentence was conducted prior to trial on charges constituting the grounds for revocation, there was no denial of due process by being compelled to elect between exercising the right to remain silent or waiving the right against self-incrimination. St. v. Ryan, 166 M 419, 533 P2d 1076 (1975).

DEATH PENALTY

No Prejudice From Alleged Ineffective Assistance of Counsel During Pretrial Phase: Dawson was convicted of robbery, four counts of aggravated kidnapping, and three counts of deliberate homicide and sentenced to death for each of three counts of aggravated kidnapping that resulted in the death of the victim. His conviction was appealed and affirmed (St. v. Dawson, 233 M 345, 761 P2d 352 (1988)). Dawson filed for postconviction relief, alleging 30 separate grounds for relief, but all except one claim, ineffective assistance of counsel, were dismissed. Dawson's appellate counsel withdrew, and Dawson filed an amended petition adding a 31st ground for relief, which was ineffective assistance of appellate counsel, but that petition was also denied. On appeal, the Supreme Court considered Dawson's claim of ineffective assistance of counsel during the pretrial phase, applying the two-pronged test in Strickland v. Wash., 466 US 668 (1984). Dawson alleged that counsel was ineffective in failing to: (1) object to the procedure and use of Dawson's psychiatric evaluation; (2) advise him of his rights during the evaluation process; and (3) conduct an adequate pretrial investigation. On the first point, the procedure followed and the use of the psychiatric evaluation were consistent with the statutory procedure in effect at the time, and counsel had no reason to question it. On the second point, Dawson satisfied the deficiency prong of the Strickland test because he should have been informed of the potential consequences of participating in the evaluation; however, there was no evidence that Dawson was prejudiced at trial or sentencing. Dawson's version of the crimes was consistent with his defense theory, and at no time did he admit killing the victims, so counsel's failure to advise him of his Miranda rights was not prejudicial. On the third point, Dawson could not establish prejudice as a result of counsel's failure to obtain complete records and staff notes of the evaluation, to investigate Dawson's possible epilepsy, or to investigate or pursue Dawson's drug use—at trial or at sentencing as a mitigating factor. The District Court did not err when it found that Dawson did not receive ineffective assistance at the pretrial phase. Dawson v. St., 2000 MT 219, 301 M 135, 10 P3d 49, 57 St. Rep. 883 (2000). See also St. v. Armfield, 214 M 229, 693 P2d 1226 (1984), St. v. Smith, 217 M 453, 705 P2d 1110 (1985), and Hans v. St., 283 M 379, 942 P2d 674 (1997).

No Prejudice From Alleged Ineffective Assistance of Counsel During Trial Phase — Reasonable Trial Strategy: Dawson was convicted of robbery, four counts of aggravated kidnapping, and three counts of deliberate homicide and sentenced to death for each of three counts of aggravated kidnapping that resulted in the death of the victim. His conviction was appealed and affirmed (St. v. Dawson, 233 M 345, 761 P2d 352 (1988)). Dawson filed for postconviction relief, alleging 30 separate grounds for relief, but all except one claim, ineffective assistance of counsel, were dismissed. Dawson's appellate counsel withdrew, and Dawson filed an amended petition adding a 31st ground for relief, which was ineffective assistance of appellate counsel, but that petition was also denied. On appeal, the Supreme Court considered Dawson's claim of ineffective assistance of counsel during the trial phase. Dawson alleged that counsel was ineffective in: (1) agreeing to the procedure used to present the testimony of the state's key witness, which involved questioning of the witness by the guardian ad litem; (2) failing to corroborate the defense theory through examination of the witness; (3) failing to give an opening statement; (4) failing to object to guilt phase errors, including improper questions and comments by the state; (5) failing to obtain experts to testify regarding Dawson's drug ingestion, head injuries, and EEG tests; and (6) failing to give a closing argument. On the first point, counsel's decision to use a special procedure

to examine the fragile witness was reasonable, and Dawson agreed to the procedure. On the second point, counsel's decision not to subject the witness to further questioning after her very emotional testimony was also reasonable when counsel believed that further questioning would have been more damaging to the defense than helpful. Third, waiver of an opening statement was a reasonable trial tactic under the circumstances, and that decision could not form a basis for an ineffective assistance claim (see U.S. v. Rodrigues-Ramirez, 777 F2d 454 (9th Cir. 1985), and U.S. v. Nersesian, 824 F2d 1294 (2nd Cir. 1987)). Fourth, counsel's failure to object to certain prosecutorial questions and comments was reasonable and within the wide range of permissible professional legal conduct (see U.S. v. Necoechea, 986 F2d 1273 (9th Cir. 1993)). Fifth, counsel's decision not to call experts did not amount to ineffective assistance. Sixth, the decision not to give a closing statement did not constitute ineffective assistance per se and was a reasonable trial strategy that did not fall below the standard of what a minimally competent defense attorney would have done in the same circumstances (see St. v. Lee, 689 P2d 153 (Ariz. 1984)). The District Court did not err when it found that Dawson did not receive ineffective assistance at trial. Dawson v. St., 2000 MT 219, 301 M 135, 10 P3d 49, 57 St. Rep. 883 (2000).

Failure to Raise Every Possible Issue on Direct Appeal of Death Sentence Not Considered Ineffective Assistance of Counsel: Dawson was convicted of robbery, four counts of aggravated kidnapping, and three counts of deliberate homicide and sentenced to death for each of three counts of aggravated kidnapping that resulted in the death of the victim. His conviction was appealed and affirmed (St. v. Dawson, 233 M 345, 761 P2d 352 (1988)). Dawson filed for postconviction relief, alleging 30 separate grounds for relief, but all except one claim, ineffective assistance of counsel, were dismissed. Dawson's appellate counsel withdrew, and Dawson filed an amended petition adding a 31st ground for relief, which was ineffective assistance of appellate counsel, but that petition was also denied. On appeal, the Supreme Court considered Dawson's claim of ineffective assistance of counsel during the direct appeal phase, applying the two-pronged test in Strickland v. Wash., 466 US 668 (1984). Dawson argued that appellate counsel failed to raise all possible issues on direct appeal. However, appellate counsel was highly qualified, thoroughly prepared, and narrowed the issues to those felt to be most meritorious, and Dawson was unable to show any prejudice as a result of counsel's failure to raise other issues. Dawson received a trial with reliable results, there was no breakdown in the adversarial process, and the evidence of guilt was overwhelming. Dawson's criticism of appellate counsel used the distorting effects of hindsight to reconstruct the circumstances of counsel's conduct and did not evaluate the conduct from counsel's perspective at the time, which is prohibited by Strickland. The District Court did not err when it found that Dawson did not receive ineffective assistance at the direct appeal phase. Dawson v. St., 2000 MT 219, 301 M 135, 10 P3d 49, 57 St. Rep. 883 (2000).

No Prejudice From Alleged Ineffective Assistance of Counsel During Sentencing Phase: Dawson was convicted of robbery, four counts of aggravated kidnapping, and three counts of deliberate homicide and sentenced to death for each of three counts of aggravated kidnapping that resulted in the death of the victim. His conviction was appealed and affirmed (St. v. Dawson, 233 M 345, 761 P2d 352 (1988)). Dawson filed for postconviction relief, alleging 30 separate grounds for relief, but all except one claim, ineffective assistance of counsel, were dismissed. Dawson's appellate counsel withdrew, and Dawson filed an amended petition adding a 31st ground for relief, which was ineffective assistance of appellate counsel, but that petition was also denied. On appeal, the Supreme Court considered Dawson's claim of ineffective assistance of counsel during the sentencing phase. Dawson alleged that counsel was ineffective in failing to: (1) present crucial mitigating evidence to the sentencing court; (2) conduct an adequate sentencing investigation; and (3) move the sentencing court for reconsideration of its conclusion that Dawson posed a substantial and continuing threat and had no chance for rehabilitation. On the first point, Dawson contended that counsel should have offered the statement of the state's key witness regarding another man whom she saw near the crime scene, which Dawson maintained would have bolstered his defense theory that he acted under duress or coercion. However, the statement was vague, and Dawson never offered information concerning the involvement of others. Neither the jury nor the sentencing court accepted the defense theory, and Dawson could not demonstrate prejudice because of counsel's failure to offer the statement. Counsel's decision not to present or argue evidence of Dawson's drug use as a mitigating factor did not constitute ineffective assistance, given counsel's determination that evidence of drug use would have been inflammatory and prejudicial and would have been an aggravating rather than mitigating factor. Failure of counsel to present evidence at sentencing of Dawson's good behavior in jail also did not constitute ineffective assistance because that evidence was presented at the guilt phase and was thus considered at the sentencing phase as well. Second, Dawson's

assertion that counsel overlooked demonstrations of remorse found in the records of the staff that conducted his psychiatric examination, which would have served to rebut the findings by the sentencing court regarding his lack of remorse, did not constitute prejudice because the court's finding was based on the court's own observations of Dawson throughout the lengthy proceedings. It was also reasonable for counsel not to investigate Dawson's medical and school records, absent any evidence that further investigation would have been beneficial. Dawson's argument that counsel erred in failing to interview boyhood friends to develop or determine the existence of mitigating evidence also failed. Counsel did present letters from Dawson's mother, sister, and former spouses, and the failure to further investigate boyhood friends did not constitute ineffective assistance. Third, counsel's failure to move the sentencing court for reconsideration of its conclusion that Dawson posed a substantial and continuing threat and had no chance for rehabilitation was not ineffective assistance given the findings in St. v. Dawson, 233 M 345, 761 P2d 352 (1988), that evidence supported the sentencing court's finding of aggravating factors and that the death sentence was appropriate. The District Court did not err when it found that Dawson did not receive ineffective assistance at sentencing. Dawson v. St., 2000 MT 219, 301 M 135, 10 P3d 49, 57 St. Rep. 883 (2000).

Death Row Not Considered Cruel and Unusual Punishment — Delay Attributed to Defendant's Appeals: Citing Lackey v. Tex., 514 US 1045, 131 L Ed 2d 304, 115 S Ct 1421 (1995), Gollehon claimed that his right to be free from cruel and unusual punishment was violated by the amount of time that he spent on death row and by the number of sentencing hearings in his capital murder case,. The Supreme Court declined to apply Lackey because the majority of the delay in Gollehon's case was caused by his own pursuit of constitutional and statutory rights in state and federal courts and was not caused by the state. Gollehon's claim for relief was denied. Gollehon v. St., 1999 MT 210, 296 M 6, 986 P2d 395, 56 St. Rep. 811 (1999). See also St. v. Smith, 280 M 158, 931 P2d 1272, 53 St. Rep. 1345 (1996).

Deletion of Hanging as Form of Capital Punishment Not Denial of Ability to Present Argument Regarding Cruel and Unusual Punishment: Pursuant to the version of 46-19-103 that was in effect at the time that Langford was sentenced for execution, he affirmatively elected that death be imposed by hanging rather than lethal injection. Langford appealed to the District Court for a declaration that execution by hanging was cruel and unusual punishment that violated the eighth amendment to the U.S. Constitution. The District Court denied the motion, holding that Langford's choice of hanging rendered the cruel and unusual punishment argument moot. Langford appealed to the appropriate federal courts for a writ of habeas corpus, applying the same argument. During the pendency of Langford's federal habeas corpus proceedings, the Montana Legislature met and amended 46-19-103 by removing the hanging option, rendering the federal proceedings moot and nonjusticiable. Langford asserted that the amendment to 46-19-103 violated numerous constitutional provisions by denying him the ability to present the cruel and unusual punishment argument to the federal courts. The Supreme Court found no merit in Langford's argument that the state Attorney General advised the Legislature to amend 46-19-103 in order to deny Langford the grounds for appeal, because the Attorney General supported but did not initiate the legislation. Further, the court did not agree with Langford's assertion that the amendment rendered the time that Langford spent in pursuing the cruel and unusual punishment argument retroactively useless and chargeable to the state as a form of cruel and unusual punishment in itself, because the eighth amendment argument was not the only claim that Langford pursued. Therefore, the entire time could not be charged to the state as being related to the amendment to 46-19-103. Having concluded that Langford failed to establish any constitutional violations, his petition for writ of injunction staying his execution was denied. Langford v. St., 287 M 107, 951 P2d 1357, 54 St. Rep. 1522 (1997).

No Right to Second Psychiatric Examination: Defendant was convicted of aggravated kidnapping and deliberate homicide, pursuant to pleas of guilty, and was sentenced to death. Judgment was affirmed by the Supreme Court. Subsequently, defendant filed a motion for an additional psychiatric evaluation based on the case of Ake v. Okla., 470 US 68, 84 L Ed 2d 53, 105 S Ct 1087 (1985), which was decided after arguments in defendant's case. The Supreme Court distinguished the facts of defendant's case from the facts in Ake and denied defendant's motion. The Supreme Court found that defendant had already been afforded his right to access to a competent psychiatrist for the preparation of a defense based on his mental condition and was not entitled to an additional psychiatric examination. The Ake decision lacks direct application to Montana's capital sentencing proceedings and defendant's case. St. v. Smith, 217 M 453, 705 P2d 1110, 42 St. Rep. 1348 (1985). See also St. v. Hill, 2000 MT 308, 302 M 415, 14 P3d 1237, 57 St. Rep. 1301 (2000), holding that defendant's reliance on Ake regarding defendant's right to a

psychological examination was misplaced because the right does not apply when defendant failed to place his mental state at issue by alleging existence of mental disease or defect.

Capital Sentence Requested by Defendant — No Basis for Resentencing: Defendant pleaded guilty to two counts of aggravated kidnapping and two counts of deliberate homicide. Defendant requested the death penalty. After sentencing, defendant had second thoughts and on appeal sought a resentencing. The Supreme Court held there was no basis for resentencing because: (1) sentencing was not tainted by reliance on prior Canadian convictions obtained without counsel; (2) inclusion of juvenile offenses as adult offenses in presentence report was not error; (3) a court-ordered presentence interview was not violative of the fifth amendment; (4) recommendation for the death penalty in the presentence report was not improper; (5) no judicial error was committed in the extent of review of mitigating factors and no unconstitutional limit was placed on the court's consideration of mitigating circumstances; (6) no error was found in the court's denial of defendant's motion for additional psychiatric evaluation; (7) defendant was not required to be present at proceedings occurring after the verdict; (8) jury participation is not constitutionally required in capital sentencing procedures; (9) no indication was found that the trial court imposed the death penalty out of passion or prejudice; and (10) the sentence was not excessive or disproportionate. St. v. Smith, 217 M 461, 705 P2d 1087, 42 St. Rep. 463 (1985) (Smith I). A habeas corpus petition was conditionally granted in Smith v. McCormick, 914 F2d 1153 (9th Cir. 1990), a subsequent resentencing to death was reversed and remanded for preparation of a new presentence investigation in St. v. Smith, 261 M 419, 863 P2d 1000 (1993) (Smith II), and following automatic appeal and review, the death sentence was affirmed in St. v. Smith, 280 M 158, 931 P2d 1272, 53 St. Rep. 1345 (1996) (Smith III), certiorari denied, 522 US 965 (1997), with the dismissal of postconviction relief claims alleging the judge's postsentencing bias affirmed in Smith v. St., 2000 MT 327, 303 M 47, 15 P3d 395, 57 St. Rep. 1387 (2000).

Jury Not Involved in Sentencing — Different Factors Required: Petitioner claimed he was denied constitutional rights because the jury was not involved in the sentencing determination; he was sentenced to hang. The factor of overriding importance in sentencing schemes is that the trial and sentencing must be bifurcated, with different factors considered at each. The factors considered by a judge in imposing the death penalty are not elements of the crime. There is no constitutional requirement that a jury make the determination to impose the death penalty. Petitioner's claim was properly dismissed. Fitzpatrick v. St., 194 M 310, 638 P2d 1002, 38 St. Rep. 1448 (1981).

Increase of Sentence After New Trial — Due Process: The defendant, who had been sentenced to 100 years imprisonment for deliberate homicide, was not denied due process of law when, after a new trial on the same charge, he was sentenced to death. The Due Process Clause is not offended by all possibilities of increased punishment upon retrial after appeal but only those that pose a realistic likelihood of vindictiveness. When the District Court Judge was replaced for the new trial and sentencing and the new Judge stated his reasons for imposing the death penalty with clarity, the threat of vindictiveness was not a realistic likelihood. St. v. Fitzpatrick, 186 M 187, 606 P2d 1343 (1980).

Hanging Not Cruel and Unusual Punishment: There is no evidence that shows that death from hanging, when properly carried out, is anything other than swift and immediate or that hanging results in any more suffering than that associated with other modes of execution. The Supreme Court has no power to change the legislatively settled provisions of the sentence in the absence of constitutional violation. St. v. Coleman, 185 M 299, 605 P2d 1000 (1979).

Review of Death Sentence — Disproportionate Application: The Supreme Court, in reviewing a death sentence to determine whether it is disproportionate, reviews the circumstances of the crime of which the defendant is accused and, in light of those circumstances, the judgment and the sentence thereupon imposed. It examines cases involving similar crimes to make certain that, as far as the defendant in this particular case is concerned, there has been no discriminatory action on the part of the sentencing judge, no abuse of discretion by the sentencing judge, and that the sentencing judge has considered and applied fairly and without discrimination the applicable law. The Supreme Court looks for the evenhanded application of death sentences without regard to sex, color, creed, or race or any other discriminating consideration. When this has occurred, as here, the death sentence must be upheld. St. v. Coleman, 185 M 299, 605 P2d 1000 (1979).

FAIR TRIAL

Denial of Summary Judgment Hearing — No Abuse of Discretion: The District Court did not abuse its discretion by denying a movant's request to hold a summary judgment hearing because

there was no indication that the movant's evidence would establish a genuine issue of material fact. RN & DB, LLC v. Stewart, 2015 MT 327, 381 Mont. 429, 362 P.3d 61.

State's Late Disclosure During Trial Not Prejudicial to Defense: The defendant was convicted of attempted deliberate homicide stemming from a stabbing incident involving three people. During the trial, the state disclosed to the defendant a recorded interview of one of its witnesses. The defendant moved for dismissal of the charges, and after the District Court denied the motion the defendant called the witness to testify. On appeal, the defendant argued that the late disclosure prejudiced his case. The Supreme Court disagreed with the defendant, holding that the late disclosure was not prejudicial to the defendant's case. St. v. Root, 2015 MT 310, 381 Mont. 314, 359 P.3d 1088.

Defendant's Convictions Upheld — Potentially Tainted Police Interview Not Contributing to Convictions: The defendant was questioned by police after he was arrested and charged with deliberate homicide for the death of his ex-wife and tampering with evidence. During the questioning, the defendant was advised of his Miranda rights, he declined to waive his rights, and at times he indicated that he did not need an attorney, while at other times he indicated that he had an attorney. The defendant also said he would not answer questions, but he continued to do so and never told the police to stop. At trial, the defendant filed a motion to suppress, arguing that the interview violated his right to counsel. The District Court denied the motion, and after deliberations the jury convicted the defendant of both charges. On appeal, the defendant argued that his convictions must be reversed based upon the denial of his motion to suppress. The Supreme Court evaluated if the ruling on the motion was prejudicial under 46-20-701. Additionally, the court evaluated whether the state could demonstrate that there was no reasonable possibility that the inadmissible evidence might have contributed to the conviction and whether under the cumulative evidence test, evidence existed that provided the same facts as the tainted evidence. Based on all the other evidence in the case, the court held that there was no reasonable possibility that the admission of the interview contributed to the convictions, and the convictions were affirmed. St. v. Larson, 2015 MT 271, 381 Mont. 94, 356 P.3d 488.

Entry of Trial Court Judge Into Jury Room Without Defendant — No Reversible Error Based Defendant's Right to Be Present — Brief Interaction Not Structural — Harmless Error Analysis Applied: The defendant moved for a new trial after a jury convicted him of three counts of assault on a police officer. One issue asserted by the defendant was that he was deprived of his right to right to be present when the District Court Judge approached the jury room while the jury was deliberating, briefly addressed the jury regarding whether it would finish that night, and then left. The District Court held a hearing regarding the interaction with the jury outside the defendant's presence and denied the defendant's motion for a new trial. On appeal, the Supreme Court determined that although the defendant's right to be present was violated when the judge spoke to the jury outside his presence during a critical stage of the proceedings, the brief interaction between the judge and the jury was not structural in nature. As such, the court considered the issue under the harmless error standard, which required the state to demonstrate that there was no reasonable possibility that the violation prejudiced the defendant. Under this standard, the testimony of the witnesses showed that the interaction was very brief, and the evidence failed to show that the judge instructed the jury to finish early or consider other issues. Consequently, the violation of the defendant's right to presence was not reversible error, and the District Court was affirmed. St. v. Northcutt, 2015 MT 267, 381 Mont. 81, 358 P.3d 179. See also St. v. Tapson, 2001 MT 292, 307 Mont. 428, 41 P.3d 305.

Improper Prejudicial Comments by Defense Counsel — New Trial Warranted: The plaintiff filed claims against the defendant railroad, his longtime employer, under the Federal Employers' Liability Act for cumulative trauma injury. Before trial, the plaintiff filed motions in limine to preclude defense counsel from making improper personalization, opinion, or commentary on him or his attorneys. Although the motions in limine were granted, defense counsel made a number of remarks in violation of the motions that implied that the plaintiff's claims were bogus and driven by greed. After a jury found in favor of the defendant, the plaintiff filed a motion for a new trial, which the District Court denied. On appeal, the Supreme Court overturned the jury's verdict and remanded the matter for a new trial, finding that the cumulative effect of the defense's comments could have improperly prejudiced the jury. Anderson v. BNSF Ry., 2015 MT 240, 380 Mont. 319, 354 P.3d 1248.

Posttrial Delay of 241 Days — Not Unduly Purposeful or Oppressive: A defendant waited 241 days after pleading guilty before being sentenced. Although 241 days was excessive, the delay was due to the preparation of a presentence investigation report, not intentional delay or delay due to bad faith. Although the defendant claimed the delay prejudiced him by preventing

him from participating in specific mental health programs while imprisoned for another offense and that the delay increased his anxiety and concern, it did not rise to the level of substantial and demonstrative prejudice. Thus, the postconviction, presentence delay did not violate the defendant's due process rights. St. v. Maloney, 2015 MT 227, 380 Mont. 244, 354 P.3d 611, following St. v. Betterman, 2015 MT 39, 378 Mont. 182, 342 P.3d 971.

Speedy Trial Applies to Delay Before Disposition of Case — Due Process Applies to Delay Between Disposition and Sentencing: The right to a speedy trial applies from arrest to the date the case is disposed of by either the date of the beginning of a trial or a plea. The right to a speedy trial does not apply to sentencing; rather, due process protects a defendant from unreasonable delay in sentencing. St. v. Maloney, 2015 MT 227, 380 Mont. 244, 354 P.3d 611, following St. v. Betterman, 2015 MT 39, 378 Mont. 182, 342 P.3d 971.

Request for Recusal of Judge Not Timely: The defendant was charged with failure to register as a sex offender and theft. The judge in the matter had previously represented the defendant's daughter in a proceeding in which the defendant was accused of incest with the daughter and the judge was presiding over the defendant's divorce proceeding. The judge did not allow the defendant to make a statement on his own behalf and sentenced the defendant to prison. On appeal, the defendant argued that the judge should have recused himself. Analyzing the Rules of Judicial Conduct, the Supreme Court found that the defendant did not raise the claim for disqualification of the judge within a reasonable time. St. v. Dunsmore, 2015 MT 108, 378 Mont. 514, 347 P.3d 1220.

Reasonably Foreseeable Misuse of Liquid Nail Product by Skin Contact — Erroneous Jury Instructions — Cumulative Error: Before a products liability case concerning an ingredient in a liquid nail product commenced, the District Court properly ruled for the plaintiff on a partial summary judgment motion, holding that the defendant could not argue affirmative defenses, including unreasonable misuse because the skin contact by the liquid nail product was reasonably foreseeable or assumption of the risk because the plaintiff did not subjectively know that the product would cause her injuries. However, the District Court then abused its discretion by allowing the product distributor to present expert testimony that its product was "safe as used" when skin contact was avoided, which erroneously introduced the concept of misuse by skin contact. The District Court compounded the problem by subsequently denying the plaintiff's request to cross-examine the expert witnesses who offered the evidence that the product was "safe as used", instructed the jury as to the meaning of "safe as used" without authority to support the court's definition, and refused to instruct the jury that skin contact is common in the nail industry. Due to cumulative error, the Supreme Court reversed and remanded the case. Kenser v. Premium Nail Concepts, Inc., 2014 MT 280, 376 Mont. 482, 338 P.3d 37.

Improper Appeal by Prosecutor to Rely on Factors Other Than Law and Evidence: During closing arguments, by urging the jurors to rely on "your own center, your own soul, your own heart" and the essence of what they considered right and true in making their decision, the state improperly urged the jury to base its verdict on factors other than the law and the evidence. St. v. Chafee, 2014 MT 226, 376 Mont. 267, 332 P.3d 240.

Single, Harmless Error — No Cumulative Error: The defendant argued that the District Court committed so many errors that he was deprived of due process. However, in this case, the District Court committed only a single, harmless error. There was no cumulative error. St. v. Zlahn, 2014 MT 224, 376 Mont. 245, 332 P.3d 247.

Defendant Absent From Deposition of State Witness — Right to Presence Raised for First Time on Appeal — Procedural Requirement for Preserving Right Clarified: The defendant's counsel, but not the defendant, attended the deposition of a witness for the state. Portions of the deposition were later introduced at trial. Following his conviction, the defendant appealed and argued that his absence from the deposition violated his right to be present at all critical stages of his trial. The state argued that the defendant could not raise the issue for the first time on appeal. The Supreme Court clarified the procedural requirement for preserving a right to presence claim for appellate review, holding that a right to presence claim not presented to the trial court is not considered unless plain error review is warranted or ineffective assistance of counsel is claimed. In this case, the Supreme Court concluded that the defendant's argument was not sufficient to warrant plain error review and declined to consider it. St. v. Reim, 2014 MT 108, 374 Mont. 487, 323 P.3d 880.

Prosecutor's Comments About Rising Insurance Rates During Closing Not Prejudicial in Context of Evidence Presented: During the state's closing argument at a trial for felony theft by insurance fraud, the prosecutor referred to rising insurance rates as a result of insurance fraud. The defendant did not object at the time, but on appeal he asked the Supreme Court to

exercise plain error review of the remarks. The Supreme Court declined, holding that because of other evidence in the record regarding the fraud, the defendant could not demonstrate that the prosecutor's reference to rising rates was prejudicial in this context. St. v. Schaeffer, 2014 MT 47, 374 Mont. 93, 321 P.3d 809.

Inapplicability of Requirement for Independent Evidence to Corroborate Offender's Confession in Revocation Hearings: At a defendant's revocation hearing, a probation officer testified that the defendant's mother had seen the defendant violate the terms of his probation by using alcohol and that the defendant had admitted to being treated for alcohol poisoning, and the court revoked the defendant's suspended sentence. The defendant subsequently argued that the state had failed to present evidence of the defendant's admission showing that he had violated the terms of his probation. The Supreme Court noted that a bond revocation hearing is a civil proceeding and that the Montana Rules of Evidence do not apply to it. The Supreme Court held that the requirement in 46-16-215 does not apply to revocation hearings, and due process also does not require the state to produce independent evidence to corroborate an offender's admission of a violation of the conditions of his supervision. St. v. Macker, 2014 MT 3, 373 Mont. 199, 317 P.3d 150.

Sufficient Latitude Provided for Cross-Examination of Informant's Bias or Motivation to Testify: Following a conviction for vehicular homicide while under the influence, the defendant argued that the District Court improperly limited her ability to inquire about an informant's bias or motivation to testify falsely by prohibiting her from cross-examining the informant about a potential persistent felony offender designation. The Supreme Court held that the defendant had sufficient latitude to cross-examine the informant about his bias and motivation to testify falsely and that there was insufficient evidence that the informant's plea agreement was motivated by a potential persistent felony offender designation. St. v. Garding, 2013 MT 355, 373 Mont. 16, 315 P.3d 912.

"Channeling" Baby Victim by Prosecutor in Closing Argument — Not Plain Error: During closing arguments in the defendant's trial on charges of aggravated assault on an 8-month-old, the prosecutor "channeled" the victim for several minutes, which included telling the jury that "I can't tell my mom I love her". Although the defendant did not object at trial, on appeal to the Supreme Court, the defendant argued that the closing remarks constituted prosecutorial misconduct and that she was therefore entitled to a new trial. However, the court concluded that because the remarks did not rise to the level of plain error, the defendant had waived her right to raise the matter on appeal by not objecting at trial. St. v. Ugalde, 2013 MT 308, 372 Mont. 234, 311 P.3d 772.

Prosecutor's Statements During Closing Argument — Plain Error Review Declined: During closing arguments the prosecutor made remarks regarding three defense witnesses, including statements that the witnesses were liars from a different social stratum, that they were unemployed and collecting unemployment or workers' compensation, and that they played video games all day. On appeal, the defendant claimed reversible error based on prosecutorial misconduct, despite his failure to object in District Court. The Supreme Court reviewed the trial transcripts and considered the comments in the context of the entire argument and held that a failure to review the defendant's claims for plain error review would not result in a manifest miscarriage of justice, leave unsettled the fundamental fairness of his trial, or compromise the integrity of the judicial process. St. v. Aker, 2013 MT 253, 371 Mont. 491, 310 P.3d 506. See also St. v. Lindberg, 2008 MT 389, 347 Mont. 76, 196 P.3d 1252, and St. v. Hayden, 2008 MT 274, 345 Mont. 252, 190 P.3d 1091.

Failure to Preserve Issue for Appeal — Expert Testimony on Standard of Care Not Subject to Appellate Review: In a suit against the state for negligent firefighting techniques, the state failed to object to the testimony of the plaintiffs' expert on fire suppression techniques. Additionally, the state did not move for judgment as a matter of law by arguing that the plaintiffs failed to present evidence of breach of the applicable standard of care. On appeal, the state claimed that the plaintiffs failed to establish the standard of care for wildfire suppression, breach, and causation through expert testimony, but the Supreme Court held that the state waived the opportunity to raise this issue when it failed to object in District Court. Weaver v. St., 2013 MT 247, 371 Mont. 476, 310 P.3d 495.

Failure to Renew Venue Objection During Voir Dire — Fatal on Appeal: During the District Court's jury selection proceeding in a civil trial, the state failed to renew a motion for change of venue, and it ultimately agreed to the 12 empaneled jurors. On appeal, the state claimed that the District Court abused its discretion by denying the state's original motion to change venue, as there were reports in a local newspaper that were allegedly biased in favor of the plaintiffs. The Supreme Court applied St. v. Kingman, 2011 MT 269, 362 Mont. 330, 264 P.3d 1104, even

though it was a criminal case, and held that the state waived the opportunity to object to venue when it failed to give the District Court an opportunity to revisit the venue ruling during the jury selection process. Weaver v. St., 2013 MT 247, 371 Mont. 476, 310 P.3d 495.

Inquiry Into Pretrial Complaints Concerning Counsel — Deference Regarding Trial Strategy: Before trial, the defendant sent a letter to the District Court stating that he was unhappy with his counsel over a potential witness. The morning of the trial, the judge held a meeting to discuss the letters. During the meeting, the defendant noted that he was satisfied with his counsel and was no longer raising the concern about the witness. After the trial, the defendant argued that the pretrial discussion did not address the substance of his complaint, but the Supreme Court held that the initial inquiry was adequate. Further, the District Court did not abuse its discretion by declining to consider the defendant's complaints in a hearing because, in the absence of a substantial complaint, the courts grant great deference to counsel to determine trial strategy. St. v. Hammer, 2013 MT 203, 371 Mont. 121, 305 P.3d 843.

Claim of Denial of Access to Counsel to Be Raised During Direct Appeal: The defendant's attorney was directed by jail staff to end her meeting with the defendant and leave the facility around 10:30 at night during an overnight recess. The defendant argued that requiring his attorney to leave had denied him access to counsel at a critical stage of the trial. The Supreme Court held that under the statute, when a petitioner has been afforded the opportunity for a direct appeal of the petitioner's conviction, grounds for relief that could have been raised on direct appeal may not be raised in a proceeding brought under postconviction statutes. Rose v. St., 2013 MT 161, 370 Mont. 398, 304 P.3d 387.

Failure to Inform Defendant of Illegal Plea Bargain Offer — No Ineffective Assistance of Counsel: The prosecutor contacted the defendant's attorney with a plea bargain offer that imposed a separate sentence for both the defendant's persistent offender status and the underlying crime. The defendant's attorney refused the offer on the basis that it was illegal and did not inform the defendant of the offer. The defendant argued that his attorney's actions constituted ineffective assistance of counsel and that he would have accepted the offer and received a lesser sentence. The Supreme Court held that the remedy with respect to the plea offer if there had been ineffective assistance of counsel would be to have the state re-offer the plea bargain, but in this case that was not possible since the sentence under the offer would have been illegal. Rose v. St., 2013 MT 161, 370 Mont. 398, 304 P.3d 387.

Jury Instructions Properly Reflecting Law — Plain Error Review Declined: The Supreme Court declined to invoke plain error review of the District Court's jury instructions when the Supreme Court had already concluded the jury instructions properly reflected the law regarding the requisite mental state for partner or family member assault in violation of 45-5-206, and thus there was no error. St. v. Birthmark, 2013 MT 86, 369 Mont. 413, 300 P.3d 1140.

Connection Between Causal Theory and Facts of Case Required — Expert Testimony on Seizures Properly Excluded: After the defendant drove on the wrong side of the interstate, forcing vehicles off of the road before colliding with a vehicle and killing its occupants, the state charged the defendant with negligent homicide and negligent endangerment on the basis that the defendant was under the influence of alcohol at the time of the incident. At trial, the District Court excluded the defendant from presenting expert testimony about the typical symptoms of partial seizures and the difficulty in diagnosing them, without giving the jury an opinion as to whether the defendant actually suffered from a partial seizure while driving. On appeal, the Supreme Court affirmed, concluding that the defendant failed to establish a connection between partial seizures and his driving and that testimony about a causal theory that was not factually connected to the case was irrelevant and would confuse the jury. The Supreme Court also concluded that excluding the testimony did not abridge the defendant's constitutional right to present a defense because Rule 702, M.R.Ev., is rationally related to the important goal of admitting only expert testimony that is logically related to the central issues of a case. St. v. Jay, 2013 MT 79, 369 Mont. 332, 298 P.3d 396.

Application of Rape Shield Statute Not Dependent on Victim's Age — Defendant Not Denied Fair Trial: The defendant was convicted of two counts of sexual intercourse without consent and one count of felony sexual assault, involving three victims. One of the victims, an 11-year old girl, was wearing a shirt that had a DNA stain on it. DNA testing excluded the defendant as a possible DNA contributor. At trial, the District Court excluded the shirt from evidence under the rape shield law. On appeal, the defendant argued that excluding the shirt deprived him of his constitutional right to a fair trial and asserted that the victim's privacy was not an issue because any sexual conduct with an 11-year old girl would be illegal. The Supreme Court disagreed, noting that neither of the two types of admissible sexual conduct on the part of the victim was

applicable in this case, and held that the evidence was properly excluded and the defendant was not denied a fair trial because of that exclusion. St. v. Patterson, 2012 MT 282, 367 Mont. 186, 291 P.3d 556.

Attempted Sexual Intercourse Without Consent — Evidence of Conversations Leading up to Violation Properly Excluded — Photos of Other Women Sent by Victim to Defendant Irrelevant and Prejudicial: After the defendant was convicted of attempted sexual intercourse without consent, he claimed that his due process rights were violated based on the District Court's exclusion of evidence that included alleged sexual conversations between the defendant and the victim in the days leading up to the violation and photos of semiclothed women that were allegedly sent from the victim's cell phone to the defendant. The Supreme Court determined that the rape shield law exception in 45-5-511 does not extend to alleged conversations leading up to the date of the violation. Moreover, the Supreme Court held that the exclusions were proper on the basis that the alleged conversations and photos were irrelevant or more prejudicial than probative under Rules 401 through 403, M.R.Ev. (Title 26, ch. 10). The District Court struck the appropriate balance between the defendant's right to develop his case and the rules of evidence. St. v. Bishop, 2012 MT 259, 367 Mont. 10, 291 P.3d 538.

Petition for Judicial Review — Notice of Nonparticipation — Failure to Preserve Evidentiary Argument on Appeal: The Board of Labor Appeals (now Unemployment Insurance Appeals Board) determined that a fired employee did not engage in misconduct and therefore was entitled to unemployment benefits. The employer filed a petition for judicial review and the Board filed a notice of nonparticipation. After the District Court reversed the determination, the Board filed a motion to alter or amend the judgment, claiming that the District Court had improperly considered inadmissible hearsay. Because the Board had not raised the issue with the District Court before its ruling, the Supreme Court concluded that it had not preserved the argument on appeal. Gary & Leo's Fresh Foods, Inc. v. St., 2012 MT 219, 366 Mont. 313, 286 P.3d 1218.

Award of Restitution When Causation Not Element of Offense — No Constitutional Violation: The defendant was involved in a collision between her vehicle and the victim's bicycle, but because she apparently was unaware of the collision, she drove away from the scene of the accident. After the jury found the defendant guilty of failure to remain at the scene of an accident in violation of 61-7-103 and failure to notify authorities of an accident in violation of 61-7-108, the defendant's sentence included an order to pay the victim $4,148.60 in restitution. The defendant argued that her constitutional rights to procedural and substantive due process were violated because the jury did not determine causation as an element of either offense and the restitution was not adjusted to account for the victim's comparative negligence. The Supreme Court disagreed and affirmed, concluding that the jury was not required to determine causation or comparative negligence, but only to decide whether the victim's losses resulted from the defendant's commission of the offenses. Additionally, the court found that the defendant had failed to properly preserve a comparative negligence defense because she raised it for the first time on appeal. Billings v. Edward, 2012 MT 186, 366 Mont. 107, 285 P.3d 523.

District Court's Failure to Follow Sentencing Statute Not Critical — Sentence Not Illegal: The District Court failed to provide specific reasons for imposing a parole restriction pursuant to 46-18-202. However, the sentence restriction was not illegal and did not exceed statutory mandates. Consequently, the Supreme Court declined to apply the exception enunciated in St. v. Lenihan, 184 Mont. 338, 602 P.2d 997 (1979), that would permit review of an issue that was not raised in District Court. St. v. Lewis, 2012 MT 157, 365 Mont. 431, 282 P.3d 679, following St. v. Nelson, 274 Mont. 11, 906 P.2d 663 (1995), St. v. Swoboda, 276 Mont. 479, 918 P.2d 296 (1996), and St. v. Kotwicki, 2007 MT 17, 335 Mont. 344, 151 P.3d 892, and distinguishing St. v. Garrymore, 2006 MT 245, 334 Mont. 1, 145 P.3d 946, and St. v. Olivares-Coster, 2011 MT 196, 361 Mont. 380, 259 P.3d 760.

Sentence Not Reviewed — Failure to Timely Raise Issue — No Error Regarding Fundamental Constitutional Rights: On appeal, the defendant asserted that the prosecutor breached a plea agreement at the District Court level during sentencing. The Supreme Court declined to consider the claimed error because it was not advanced in District Court and raised no question concerning fundamental fairness of the trial court proceeding; a party may not change its theory on appeal from that advanced in the trial court or raise an argument for the first time on appeal. St. v. Lewis, 2012 MT 157, 365 Mont. 431, 282 P.3d 679.

Evidence of Victim Being a "Cutter" Inadmissable — Right to Present Defense Not Infringed: Following the defendant's convictions on charges stemming from altercations between the defendant and his girlfriend, the defendant appealed, arguing that the District Court erred when it prohibited the defendant from testifying that an altercation was caused by the defendant walking

in on his girlfriend purposely cutting herself, thereby denying the defendant his constitutional right to present a defense. The Supreme Court affirmed, concluding that the girlfriend's "cutting" constituted character evidence that was inadmissible under the facts of the case. Because the defendant's justifiable-use-of-force defense was that after he entered a room, his girlfriend came at him with the knife, the reason the knife was in his girlfriend's possession was irrelevant. St. v. Hauer, 2012 MT 120, 365 Mont. 184, 279 P.3d 149.

No Presumption of Prejudice From Pretrial Publicity — Motion for Change of Venue Correctly Denied: Defendant was acquitted of attempted deliberate homicide and convicted of aggravated assault related to a bar fight that left the victim with extensive facial fractures requiring reconstructive surgeries. Media coverage following the altercation included the dissemination of portions of a voice message the defendant had left for a friend shortly after the fight, and various fundraising events occurred in Gallatin County on behalf of the victim. Prior to trial, the defendant filed a motion to change venue, alleging he would not receive an impartial trial in Gallatin County due to the "inflammatory nature" of publicity that presumed his guilt. The court held a hearing on the motion and decided to base its ruling, in part, on the results of a questionnaire sent to 150 prospective jurors, which showed that while the majority of the prospective jurors had heard about the case, they retained their ability to serve as impartial jurors. Based on these results, the District Court denied the motion for a change of venue, and the defendant was convicted of aggravated assault. The defendant appealed, contending that the facts demonstrated a presumption of prejudice that required his motion to change venue be granted. The Supreme Court outlined several relevant factors in evaluating whether pretrial publicity warrants a presumption that an impartial jury cannot be drawn, including the size and diversity of the jury pool, community sentiment, the nature of the pretrial publicity, the amount of time between the alleged crime and the trial, and, in a posttrial scenario, whether the jury's decision on guilt is contrary to a presumption of guilt (i.e., whether the defendant was convicted of the original charge or of a lesser offense). The court concluded that the District Court did not abuse its discretion in denying the defendant's motion because he did not demonstrate that the pretrial publicity had displaced the judicial process and because he was acquitted of attempted deliberate homicide. St. v. Kingman, 2011 MT 269, 362 Mont. 330, 264 P.3d 1104.

Prosecutor's Comments to Prospective Jurors and Closing Argument Not Improper: The defendant appealed his convictions of failure to wear a seatbelt and DUI on the basis that the prosecutor's comments during voir dire and closing argument deprived the defendant of a fair trial before an impartial jury. The Supreme Court declined to invoke plain error review, concluding no reversible error was committed during the defendant's trial. The record did not indicate that the prosecutor's reference to different levels of intoxication and discussion with a prospective juror regarding the DUI-related death of the juror's friend's daughter inflamed or prejudiced the jury against the defendant. In addition, the prosecutor's statement during closing argument, which implied that because the defendant was an impaired driver, he would not have been able to brake properly had a child been playing in the road, fell within the latitude afforded to attorneys' closing arguments. Billings v. Staebler, 2011 MT 254, 362 Mont. 231, 262 P.3d 1101.

Shackling of Defendant — Modification of Herrick Test — Remanded for Evidentiary Hearing: Immediately prior to his trial, and in front of the venire, the defendant refused to take his seat after repeated requests by the judge. The District Court found him in contempt and instructed the sheriff to arrest him. After a brief break, the trial commenced with the defendant being shackled in his chair while the state conducted voir dire. The defendant then asked to be released from his shackles to represent himself and remained unshackled for the remainder of the trial. The jury found the defendant guilty of two of the four counts against him and the defendant appealed. In considering whether the District Court abused its discretion in having the defendant shackled, the Supreme Court considered the two-step test in St. v. Herrick, 2004 MT 323, 324 Mont. 76, 101 P.3d 755: whether the restraint was needed to maintain security and whether the court utilized less restrictive methods prior to restraint. Because the record was silent with regard to whether the District Court utilized less restrictive means first, the Supreme Court concluded that the second prong of Herrick had not been satisfied. The Supreme Court, given the silent record, could not properly determine whether the violation was harmless and remanded the case to the District Court to determine whether the violation was harmless in light of the defendant's right to remain free of physical restraints. St. v. Hartsoe, 2011 MT 188, 361 Mont. 305, 258 P.3d 428.

Jury Instruction on Previous Conviction of "Sexual Offense" Under Washington Law Proper — No Violation of Due Process — District Court Affirmed: The defendant had previously been convicted of "second degree assault with sexual motivation" in Washington. Sometime after moving to Montana, he failed to inform local officials of his change of address. The defendant was

located and was charged with failure to provide notice of address change under Montana's Sexual or Violent Offender Registration Act (SVORA), a felony. At trial, the District Court instructed the jury that the defendant's conviction under Washington law constituted a sexual offense that triggered the notification provisions of SVORA. Following his conviction, the defendant appealed to the Supreme Court, arguing that the jury instruction violated his due process rights by usurping the jury's role to determine whether his conviction in Washington constituted an offense under SVORA, thereby lowering the state's burden of proof. In affirming the District Court, the Supreme Court agreed that the court had properly instructed the jury on the law of the case and had not violated the defendant's due process rights. St. v. DaSilva, 2011 MT 183, 361 Mont. 288, 258 P.3d 419.

Ineffective Assistance — Factual Basis in Record Required: In reviewing allegations of ineffective assistance of counsel, the Supreme Court will not make presumptions without any support in the record. To show that counsel rendered ineffective assistance, the defendant must demonstrate that the counsel's representation was deficient — the Supreme Court will not indulge in presumptions on the existence of evidence or the effect of possible evidence to assess effectiveness of counsel. Rogers v. St., 2011 MT 105, 360 Mont. 334, 253 P.3d 889.

No Appeal of Inadmissible Evidence — Not Ineffective Assistance — Better Appeal Issues Addressed: Although defense counsel objected at trial to inadmissible evidence that was admitted anyway, it was not ineffective assistance of counsel to fail to appeal on that ground when defense counsel felt that four other issues provided better grounds for reversal. The Supreme Court found that admission of the evidence was improper but did not constitute reversible error and that including the objection would not have changed the outcome of the appeal. Rogers v. St., 2011 MT 105, 360 Mont. 334, 253 P.3d 889.

Verifying Consistency Not Vouching for Credibility — No Ineffective Assistance of Counsel: When the defense based its case on the allegation that children were coached to accuse the defendant, statements by the children's mother, their former counselor, and the prosecutor verifying the consistency of their testimony over time were properly admitted. The statements did not vouch for the credibility of the testimony, and defense counsel did not perform ineffectively by choosing not to object to admissible statements. Rogers v. St., 2011 MT 105, 360 Mont. 334, 253 P.3d 889.

Argument of Prosecutor and Confusing DNA Testimony Held Not Due Process Violation: The defendant was convicted of sexual intercourse without consent and appealed his conviction, arguing that the testimony of the forensic scientist and the prosecutor's argument were so false as to constitute a due process violation. The Supreme Court held, citing Hayes v. Brown, 399 F.3d 972 (9th Cir., 2005), that in order for these matters to rise to the level of a due process violation, the defendant must show that the testimony was actually false, that the prosecutor knew or should have known it was false, and that the false testimony was material. The court held that, in light of all of the evidence and argument, the defendant had failed to meet this burden of proof. St. v. Wright, 2011 MT 92, 360 Mont. 246, 253 P.3d 838.

No Violation of Due Process Right to Be Free From Bodily Restraints in Civil Commitment Hearing When Record Demonstrates Restraints Are Needed: The District Court did not err in requiring T.J.F. to appear before it at a bench trial without a jury, during a civil commitment proceeding, in full restraints. Testimony regarding T.J.F.'s verbal outbursts and violent physical behavior established the need for restraints in order to maintain orderly conduct of the court's proceedings. In re Mental Health of T.J.F., 2011 MT 28, 359 Mont. 213, 248 P.3d 804.

Plea-Bargained Sentence Actually Recommended — Plea Agreement Not Undermined by Prosecutor's Other Conduct: Upon reviewing the prosecutor's conduct in response to the defendant's claim that the prosecutor undermined the plea agreement, the Supreme Court held: (1) introducing the testimony of the defendant's victim was allowable because she had a right to testify under 46-18-115(4)(a); (2) the recommendation by the probation officer for a $5,000 fine was allowable because he had prepared the presentence investigation; (3) the prosecutor's summation did not undercut the plea agreement just because the prosecutor argued against the defendant's suggestion for a 5-year sentence. The defendant had agreed to a sentence of 30 years, 20 suspended, as part of the plea agreement, and the prosecutor recommended a sentence of exactly that length. St. v. McDowell, 2011 MT 75, 360 Mont. 83, 253 P.3d 812.

Involuntary Commitment and Medication — No Plain Error Found: After D.K.D. was found to be dangerous to himself and others, he was involuntarily committed under a District Court order stating that the staff at the Montana Developmental Center "shall have the authority to administer medication to D.K.D. on an involuntary basis, pursuant to their policy." The Supreme Court held that the District Court's order authorized the Center to do no more than its policies

already authorized it to do and that the language of the order, although gratuitous, was not plain error under the common-law plain error doctrine. The Supreme Court would therefore not interfere with the District Court order, inasmuch as D.K.D.'s counsel failed to object to the order. In re D.K.D., 2011 MT 74, 360 Mont. 76, 250 P.3d 856.

State's Failure to Provide Defendant With Interview Transcripts Obtained After Both Sides Rested Not Grounds for New Trial: After both sides had rested in a deliberate homicide case, three persons claiming to have information pertaining to the crime came forward and were interviewed by the police. The prosecution did not provide transcripts of the interviews to the defendant until after the defendant's conviction. The defendant argued that the state's failure to provide the transcripts violated his rights and was grounds for a new trial. The state countered that it had no duty to disclose the interviews because both sides had rested and that the evidence was not exculpatory, material, or willfully suppressed. The Supreme Court held that the District Court had not wrongfully denied the motion when the record showed that physical evidence unequivocally placed the defendant at the scene of the crime, the defendant admitted beating the victim, and the defendant confessed in a phone call to beating the victim knowing that all phone conversations at the detention center were recorded. St. v. St. Dennis, 2010 MT 229, 358 Mont. 88, 244 P.3d 292.

Other Acts Under Modified Just Rule Limited to Acts of Defendant: In a trial in which the defendant was charged with felony assault with a weapon, the District Court erred in admitting evidence that the defendant's wife had abused one of the couple's sons as evidence of other crimes, wrongs, or acts pursuant to the modified Just rule. All four criteria of the modified Just rule must be satisfied in order to admit evidence of other crimes, wrongs, or acts, and unless the defendant is attempting to inculpate another person for the crime, the acts must be the acts of the defendant and not the acts of a third party. The assault with a weapon conviction was reversed and remanded. St. v. Knowles, 2010 MT 186, 357 Mont. 272, 239 P.3d 129.

Prosecutor's Cross-Examination and Closing Argument on Defendant's Inconsistent Stories Not Violation of Doyle: During the defendant's trial, the prosecutor cross-examined the defendant on his inconsistent stories of how a woman he assaulted was injured and then commented on those inconsistencies in his closing argument. The Supreme Court held that the cross-examination and closing argument did not violate the U.S. Supreme Court's holding in Doyle v. Ohio, 426 U.S. 610 (1976), which dealt only with comment on a defendant's silence after the defendant was given Miranda warnings. St. v. Tadewaldt, 2010 MT 177, 357 Mont. 208, 237 P.3d 1273.

No Abuse of Discretion in Denial of Mistrial Based on Single Brief Incident During Closing Arguments: During closing arguments in Taylor's trial for sexual intercourse without consent, a group of people dressed in black and blue uniforms entered the courtroom and stood at the back on the prosecution side of the room. Taylor contended that the act was an intimidation tactic warranting a mistrial. The trial court denied Taylor's mistrial motion, and on appeal, the Supreme Court affirmed. Once the trial judge was made aware of the group's presence in the courtroom, the judge ordered the group to be seated, but the group left the courtroom and the court proceeded with closing arguments. The judge acted within his discretion in declining to grant a mistrial based on this single brief incident, and the Supreme Court affirmed. St. v. Taylor, 2010 MT 94, 356 Mont. 167, 231 P.3d 79. See also St. v. Wing, 2008 MT 218, 344 Mont. 243, 188 P.3d 999.

Counsel Preference for Cautionary Instruction Rather Than Motion for Mistrial — No Fair Trial Infringement: A question arose regarding whether the prosecutor impermissibly vouched for the complaining witness, to the detriment of Thorp's right to a fair trial. The Supreme Court noted that at the end of the state's closing argument, Thorp's counsel told the trial court that Thorp did not wish to move for a mistrial but rather preferred a cautionary instruction to the jury and also noted that Thorp had been actively involved with counsel in making the tactical decision to request a curative instruction instead of a mistrial. A cautionary instruction is generally considered sufficient if a defendant does not object further or move for a mistrial. Thus, the cautionary instruction was sufficient under the circumstances to remedy any alleged infringement of Thorp's right to a fair trial. St. v. Thorp, 2010 MT 92, 356 Mont. 150, 231 P.3d 1096. See also St. v. Wing, 2008 MT 218, 344 Mont. 243, 188 P.3d 999.

Award for Damages for Breach of Letter of Agreement Improper Absent Valid Contractual Interest — Remand for New Trial: Plaintiff was awarded $2.5 million based on defendant's alleged breach of a letter of agreement to grant plaintiff an option to develop certain oil and gas interests after the jury found that the letter of agreement was not a contract. The Supreme Court reversed the award. Although there was sufficient evidence for the jury to conclude that plaintiff suffered $2.5 million in damages from the sale of the development rights, plaintiff was

entitled to damages only if the letter created some right or interest in the development rights. However, because there was no extant contractual obligation running from defendant to plaintiff with respect to the development property, there was no legal basis for the damage award. The jury was confused about available remedies and rendered an inconsistent verdict that could not be reconciled with the evidence, argument, and legal theories presented at trial, which violated the constitutional rights of the litigants to a fair trial. Therefore, the case was reversed and remanded to the District Court for a new trial. D.R. Four Beat Alliance, LLC v. Sierra Prod. Co, 2009 MT 319, 352 M 435, 218 P3d 827 (2009).

Defendant's Exclusion From Individual Voir Dire — Structural Error Warranting New Trial: Berosik was not present during in-chambers voir dire in his incest trial. This error in jury selection affected the fairness of the trial, and absent an express waiver on the record, the error was structural and Berosik was entitled to a new trial. The case was reversed and remanded. St. v. Berosik, 2009 MT 260, 352 M 16, 214 P3d 776 (2009).

Prosecutor's Repeated and Deliberate Use of Defendant's Invocation of Right to Silence — New Trial Warranted: During Wagner's trial for attempted deliberate homicide, the prosecutor repeatedly and deliberately used Wagner's invocation of the right to silence as evidence of Wagner's guilt. The prosecutor also referenced Wagner's failure to tell his version of events until trial and raised as further evidence of Wagner's guilt the fact that Wagner had requested to speak with an attorney and, after invoking his Miranda rights, had commented that he didn't want to dig himself a deeper hole. The Supreme Court found that Wagner's request to speak with an attorney and the comment that Wagner didn't want to dig himself a deeper hole were in fact an invocation of Wagner's right to remain silent. The prosecutor's conduct raised questions regarding the fundamental fairness of the trial by violating Wagner's right to due process and privilege against self-incrimination, constituting plain error, and the Supreme Court concluded that the constitutional violations entitled Wagner to a new trial. The case was reversed. St. v. Wagner, 2009 MT 256, 352 M 1, 215 P3d 20 (2009), following Doyle v. Ohio, 426 US 610 (1976). See also St. v. Sullivan, 280 M 25, 927 P2d 1033 (1996).

Right to Fair Trial Not Materially Affected by Claimed Trial Irregularities — Motion for New Trial Properly Denied: White claimed that a new trial was warranted based on defense counsel's misconduct during trial, failure of the trial court to sanction defendant because of counsel's misconduct, and failure of the trial court to give White's proposed limiting jury instruction. The Supreme Court examined each of the underlying claims and concluded that defense counsel did not engage in misconduct, that sanctions were properly denied, and that the trial court did not abuse its discretion in refusing to give White's proposed jury instruction. In light of these rulings, White's right to a fair trial was not materially affected by any claimed irregularities in the proceedings, so White's motion for a new trial was properly denied. White v. Johnson, 2009 MT 254, 351 M 534, 215 P3d 11 (2009).

Status as Taxpayer Not Disqualifying Interest for Ability to Serve as Juror: Plaintiff contended that he could not seat a fair jury in Wheatland County because potential jurors knew that, as taxpayers, they would be responsible to pay for a verdict against the county. Based on this reasoning, plaintiff asserted that 3-15-302, which presumes that local residents are competent jurors, was therefore unconstitutional. The Supreme Court disagreed. Plaintiff cited no authority to support the proposition, and the court declined to adopt the position that simply being a taxpayer constitutes a disqualifying interest. Section 3-15-302 is presumed to be constitutional, and plaintiff failed to establish otherwise beyond a reasonable doubt. Eklund v. Wheatland County, 2009 MT 231, 351 M 370, 212 P3d 297 (2009).

Harmless Error for Detective Nonexpert to Testify Regarding Genuineness of Handwriting: The District Court allowed a detective to testify in Dewitz's trial regarding handwriting samples that the detective believed were from Dewitz. However, the detective was not a handwriting expert and was not familiar with Dewitz's writing outside the litigation, so the testimony was improperly admitted. Nevertheless, the Supreme Court concluded that the error was harmless, based on the existence of other admissible evidence that proved the same facts. Thus, Dewitz's right to a fair trial was not prejudiced. St. v. Dewitz, 2009 MT 202, 351 M 182, 212 P3d 1040 (2009).

Prosecutor's Closing Comments Not Improper or Prejudicial — No Prosecutorial Misconduct in Referencing Defendant's Evidence: Dewitz contended that the prosecutor committed misconduct in closing arguments by referencing a plea agreement entered by an alleged accomplice. However, the plea agreement was entered into evidence by defense counsel in an effort to show that the alleged accomplice was not credible, so Dewitz could not complain of the prosecutor's reference to evidence that Dewitz introduced. Nor did Dewitz demonstrate how the comments could be

considered improper or prejudicial. The prosecutor's comments were not so egregious as to deprive Dewitz of a fair trial, so no misconduct occurred. St. v. Dewitz, 2009 MT 202, 351 M 182, 212 P3d 1040 (2009). See also St. v. Ugalde, 2013 MT 308, 372 Mont. 234, 311 P.3d 772.

Defendant's Absence From In-Chambers Trial Conferences Not Considered Prejudicial — No New Trial Based on Lack of Fair Trial: At Price's trial for sexual intercourse without consent, Price was excluded from 11 in-chambers conferences. Price contended that his absence from the conferences violated his right to be present at all criminal proceedings against him and that he was therefore denied a fair trial. The Supreme Court assumed for purposes of analysis that the conferences constituted critical stages of the trial and that Price did not validly waive the right to be present at the conferences. Nevertheless, the court concluded that failure to include Price in the conferences at worst constituted trial error, rather than structural error that would require automatic reversal, so the court examined the record to determine whether Price was prejudiced and concluded that he was not. The record was not ambiguous as to what occurred at the conferences, and nothing that occurred at the conferences concerned or affected the framework within which Price's trial proceeded or necessarily rendered the trial fundamentally unfair. The one conference at which Price particularly contended that his presence should have been required was one in which a juror expressed concern regarding possible bias toward Price. However, Price's concern was irrelevant when the juror was removed from the jury. After review of the complete trial record, the court concluded that Price's absence from the conferences did not cause any conceivable prejudice depriving Price of a fair trial. Absent reversible error, the District Court was affirmed. St. v. Price, 2009 MT 129, 350 M 272, 207 P3d 298 (2009). See also St. v. Kennedy, 2004 MT 53, 320 M 161, 85 P3d 1279 (2004), St. v. Mann, 2006 MT 160, 332 M 476, 139 P3d 159 (2006), and St. v. Matt, 2008 MT 444, 347 M 530, 199 P3d 244 (2008).

Dismissal for Loss of Exculpatory Taped Evidence Not Warranted When Witness Available to Testify in Person: The prosecution lost a videotape of a witness's interview with the sheriff on the night of a stabbing for which Herman was accused. Herman moved to dismiss the case for loss of the tape, which Herman asserted contained exculpatory evidence. The District Court denied the motion and Herman appealed, but the Supreme Court affirmed. Nothing indicated that the state had deliberately or intentionally destroyed the evidence, which would have constituted a per se due process violation, but rather the state appeared to have lost the evidence because of negligence or lack of due diligence, which required Herman to show that the evidence was material, of substantial use, and exculpatory in order to have the case dismissed. Here, even though the tape was destroyed, the witness was available and testified in person regarding the same exculpatory matters contained on the tape. Therefore, Herman's due process rights were not violated because comparable evidence was available. St. v. Herman, 2009 MT 101, 350 M 109, 204 P3d 1254 (2009). See also St. v. Halter, 238 M 408, 777 P2d 1313 (1989), St. v. Seiffert, 2010 MT 169, 357 Mont. 188, 237 P.3d 669, and St. v. James, 2010 MT 175, 357 Mont. 193, 237 P.3d 672.

Prosecutor's Comments on Contradictions in Testimony and Suggestions on Inferences From Evidence: It is improper for a prosecutor to comment on evidence that is not in the record or to offer a personal opinion regarding the credibility of witnesses, but a prosecutor may comment on contradictions in testimony and on the evidence presented and may suggest inferences that the jury may draw from the evidence. St. v. Makarchuk, 2009 MT 82, 349 M 507, 204 P3d 1213 (2009), following St. v. Daniels, 2003 MT 247, 317 M 331, 77 P3d 224 (2003), and St. v. Roubideaux, 2005 MT 324, 329 M 521, 125 P3d 1114 (2005).

Videotape of Interview With Defendant Allowed Into Jury Room — No Error: The day after a murder, police interviewed Giddings twice. At trial, the District Court allowed an edited version of the tape into evidence, and the jury watched the tape aided by a corresponding transcript during the state's case. The court advised the jury that they would not have the transcript in the jury room, but the court did allow the tape to accompany the jury during deliberations after determining that the tape was not testimonial in nature and simply constituted Giddings' voluntary statements the day after the homicide. Following conviction, Giddings appealed on grounds that allowing the tape into the jury room violated due process by unduly emphasizing his demeanor and statements to the exclusion of other witness testimony. The Supreme Court disagreed. The tape had limited evidentiary value due to its poor quality, and any evidentiary value that the jury derived from the tape came from watching the tape with the aid of the transcript during trial. Giddings was not prejudiced because his statements and demeanor on the tape did not conflict with testimony given by other witnesses at trial, nor was the tape critical to the state's case. Under the totality of the circumstances, the tape was at worst cumulative of other evidence, and the District Court did not abuse its discretion by allowing the tape into the

jury room. St. v. Giddings, 2009 MT 61, 349 M 347, 208 P3d 363 (2009). See also St. v. Bales, 1999 MT 334, 297 M 402, 994 P2d 17 (1999).

Limit of Defendant's Cross-Examination of Witness to Elicit Propensity Evidence Proper: At Giddings' homicide trial, he sought to introduce character evidence of a witness by raising issues related to the witness's criminal history and drug activity. The District Court disallowed the cross-examination, and following conviction Giddings appealed on grounds that his due process rights were violated. The Supreme Court disagreed and affirmed. A defendant may introduce "reverse 404(b)" evidence to inculpate another person, thus exculpating defendant, but defendant must clearly articulate which of the prior bad acts evidence fits into a chain of logical inferences, and no link of the chain may be the inference that defendant has a propensity to commit the crime charged. Additionally, the evidence may not be introduced if it lacks connection with the crime, is speculative or remote, or does not tend to prove or disprove a material fact in issue at defendant's trial. In this case, the type of character evidence Giddings sought to introduce regarding the witness was speculative, inadmissible propensity evidence that was not related to the homicide, and the District Court did not err in disallowing the cross-examination. St. v. Giddings, 2009 MT 61, 349 M 347, 208 P3d 363 (2009), following St. v. Clifford, 2005 MT 219, 328 M 300, 121 P3d 489 (2005), and Holmes v. S. C., 547 US 319 (2006).

No Showing That Allegedly Withheld State Evidence Constituted Brady Violation — Due Process Not Violated: Giddings moved that the state's case should be dismissed because the state withheld evidence in a homicide trial, which prohibited defense counsel from having sufficient time to analyze scientific evidence to find exculpatory evidence and from having the necessary information to effectively impeach the state witnesses, resulting in a due process violation. The District Court denied the motion, and Giddings appealed. The Supreme Court held that Giddings failed to meet the criteria for showing an improper withholding of information under Brady v. Maryland, 373 US 83 (1963), by failing to prove that any of the information was exculpatory or to demonstrate a reasonable possibility that the evidence would have changed the outcome. Instead, Giddings offered only sweeping generalizations and broad accusations rather than the specific elements necessary to prove a Brady violation. Giddings also failed to establish that the state's actions denied the right to effective assistance of counsel or the right to confront the accusers. Denial of Giddings' motion to dismiss was affirmed. St. v. Giddings, 2009 MT 61, 349 M 347, 208 P3d 363 (2009), followed in Taylor v. St., 2014 MT 142, 375 Mont. 234, 335 P.3d 1218.

No Error in Failure to Hold Hearing on Effective Representation Absent Seemingly Substantial Complaint: Rose alleged that the trial court erred by failing to hold a hearing on Rose's complaints regarding effectiveness of counsel. The Supreme Court noted that under St. v. Weaver, 276 M 505, 917 P2d 437 (1996), and Billings v. Smith, 281 M 133, 932 P2d 1058 (1997), a defendant is entitled to a hearing on the issue of ineffective assistance of counsel if the defendant presents a seemingly substantial complaint about effective assistance. In this case, Rose voiced no seemingly substantial complaint. In fact, when the District Court appointed another attorney to inquire into Rose's complaints about counsel, Rose stated that he did not want counsel replaced. Absent any seemingly substantial complaint, the District Court did not err by failing to hold a hearing on effective assistance. St. v. Rose, 2009 MT 4, 348 M 291, 202 P3d 749 (2009). See also St. v. Gallagher, 1998 MT 70, 288 M 180, 955 P2d 1371 (1998), and St. v. MacGregor, 2013 MT 297, 372 Mont. 142, 311 P.3d 428.

Defendant's Right to Be Present at In-Chambers Conference on Evidentiary Issues — Reversal Granted Absent Waiver of Right: At the close of the state's case-in-chief during Matt's deliberate homicide trial, the trial judge, prosecutor, and defense counsel met in the judge's chambers to discuss evidentiary matters and Matt's motion to dismiss for lack of evidence. Matt was not present during the conference, and defense counsel stated that Matt's presence was unnecessary because the issues were legal and Matt "doesn't get any of this anyway". Following conviction, Matt appealed on grounds that he had the right to be present at the conference because it was a critical stage of the trial. The Supreme Court agreed and reversed. The in-chambers conference was a critical stage of the trial, so Matt's right to be present applied. Defense counsel's statement that Matt did not need to be present was not a valid waiver of Matt's right to be present because there was no on-the-record personal waiver, so Matt did not knowingly and intelligently waive the right. Once it was established that Matt's fundamental right to be present was violated, prejudice was presumed. Although not all constitutional violations amount to reversible error, if the violation contaminates the framework within which the trial proceeds or if the constitutional right is so basic that its infraction cannot be treated as harmless, the violation is considered a structural error and reversal is automatic. If the violation does not fall within this category, the question is whether the violation was harmless, and the burden is on the state to demonstrate

that there is no possibility that violation of the right to be present prejudiced the defendant. In this case, nothing discussed at the conference and ruled on by the District Court concerned or affected the framework within which Matt's trial proceeded or necessarily rendered the trial unfair, so the violation was not considered structural and subject to automatic reversal. Thus, the burden fell to the state to show that the violation was harmless and not prejudicial. The state did not provide a harmless error analysis on appeal and therefore did not meet its burden. The case was remanded for a new trial. St. v. Matt, 2008 MT 444, 347 M 530, 199 P3d 244 (2008), following Chapman v. Calif., 386 US 18 (1967), Ranta v. St., 1998 MT 95, 288 M 391, 958 P2d 670 (1998), St. v. Tapson, 2001 MT 292, 307 M 428, 41 P3d 305 (2001), St. v. Bird, 2002 MT 2, 308 M 75, 43 P3d 266 (2002), and St. v. McCarthy, 2004 MT 312, 324 M 1, 101 P3d 288 (2004), and followed in St. v. Godfrey, 2009 MT 60, 349 M 335, 203 P3d 834 (2009), regarding determination of trial error rather than structural error.

Prosecutor's Comments on Credibility of Witnesses and Defendant's Failure to Present Evidence — Plain Error Review Declined: Lindberg claimed reversible error because the prosecutor, in closing arguments during Lindberg's trial on sex crimes, made personal comments regarding the credibility of witnesses and evidence presented by the defense, which Lindberg asserted shifted the burden to Lindberg to prove his innocence and violated the right to a fair trial. Because defense counsel did not object to the comments, Lindberg contended that the rights violation was reviewable under the plain error doctrine. Although not condoning the prosecutor's comments, the Supreme Court nevertheless declined to apply the plain error doctrine because, given the totality of the circumstances, the comments did not rise to a level sufficient to invoke plain error. The comments did not unconstitutionally shift the burden of proof to Lindberg. Failure to review Lindberg's claims would not have resulted in a manifest miscarriage of justice, so plain error review was unwarranted. St. v. Lindberg, 2008 MT 389, 347 M 76, 196 P3d 1252 (2008).

No Prosecututorial Misconduct During Closing Argument in Trial of Sexual Intercourse Without Consent Charge: There was no violation of Rule 3.4(e), Montana Rules of Professional Conduct, by the county attorney's comment that the jury should "send a message" and by her statement of her confidence that jurors would do what was "just". St. v. Longfellow, 2008 MT 343, 346 M 286, 194 P3d 694, (2008).

Improper Admission of Horizontal Gaze Nystagmus Test Results: Michaud appealed his DUI conviction on grounds that the trial court improperly admitted evidence regarding how a horizontal gaze nystagmus (HGN) test was administered by the arresting officer and the officer's results or inferences from the test because the state did not establish a proper foundation upon which the nonexpert officer could offer the evidence. The state conceded that a proper foundation was not laid, but contended that the evidence was admissible as cumulative evidence of Michaud's guilt. The Supreme Court, citing Hulse v. St., 1998 MT 108, 289 M 1, 961 P2d 75 (1998), agreed that there was an insufficient foundation for the admission of the HGN evidence and that the trial court abused its discretion by allowing the officer to testify regarding the test results. To determine whether the error prejudiced Michaud's rights to a fair trial, warranting reversal, the court applied the test in St. v. Van Kirk, 2001 MT 184, 306 M 215, 32 P3d 735 (2001). The error here was trial error and thus not automatically reversible, but contrary to the state's argument that the evidence was cumulative and the state's offer of proof of Michaud's failing several other sobriety tests, the state failed to meet its burden of proving that admission of the HGN evidence was harmless because the HGN test was scientific and likely to be accorded more weight by the jury than more subjective evidence, such as the officer's testimony and less scientific field sobriety tests. The jury verdict was reversed and remanded for retrial. St. v. Michaud, 2008 MT 88, 342 M 244, 180 P3d 636 (2008). However, see St. v. Chavez-Villa, 2012 MT 250, 366 Mont. 519, 289 P.3d 113 (ruling that although implication of HGN results was improperly admitted, the cumulative evidence of the defendant's intoxication rendered the introduction of the implied results harmless).

No Error in Imposition of Time Limit for Voir Dire: Prior to voir dire in Michaud's misdemeanor DUI trial, the District Court imposed a 15-minute limit on each counsel's voir dire questioning. Prior to counsels' questioning, the court engaged in its own comprehensive voir dire of the panel, addressing in advance many areas of inquiry that counsel would normally explore. Counsel then had the opportunity to engage in a colloquy with jurors regarding potential bias and prejudice, as well as the jurors' understanding of the concepts of reasonable doubt, innocence until proved guilty, and burden of proof. Michaud's counsel's time expired, and following two additional questions, counsel passed the panel for cause. Following conviction, Michaud appealed on grounds that the time limit on voir dire interfered with his right to a fair trial. The Supreme Court noted that time limits on voir dire in the name of expedience are not encouraged, but

that under these circumstances, the District Court's imposition of a time limit, coupled with the court's own extensive voir dire, was not an abuse of discretion. St. v. Michaud, 2008 MT 88, 342 M 244, 180 P3d 636 (2008).

Prosecutor's Improper Statement of Elements of Mitigated Deliberate Homicide — No Prejudice: Sanchez contended that the prosecutor's misstatement of the law during closing arguments and rebuttal concerning the elements of mitigated deliberate homicide deprived Sanchez of a fair trial. The prosecutor stated that in order for deliberate homicide to be mitigated, the jury had to find that Sanchez's response to extreme emotional distress was reasonable, rather than that a reasonable explanation existed for the emotional distress. The Supreme Court agreed that the prosecutor misstated the law. However, because the jury was additionally provided with defense counsel's correct interpretation, because the trial court provided a correct and unambiguous interpretation in oral and written jury instructions, and because the jury was presumed to have followed the law, Sanchez could not show that the error was prejudicial, so the fair trial argument failed. St. v. Sanchez, 2008 MT 27, 341 M 240, 177 P3d 444 (2008).

Appointment of Complaining Witness as Friend of Respondent Reversible Error — Conflict of Interest — Issue Not Moot: In deciding the disposition of D.V.'s commitment proceedings, the District Court appointed D.V.'s mother as the friend of respondent, even though the mother was also the complaining witness who began the proceedings against D.V. following D.V.'s arrest for family member assault after D.V. allegedly threatened his mother. D.V. was subsequently involuntarily committed to the state mental hospital for 90 days. D.V. later appealed the District Court's order. Because D.V.'s commitment had already been served, the Supreme Court first considered whether the issue was moot. In this case, the involuntary commitment was too short to allow the issues to be fully litigated prior to D.V.'s release, and there was a reasonable expectation that D.V. could be subjected to the same action again in the future. The issues were capable of repetition while evading review, so the issue was not moot, and the Supreme Court thus considered the dispositive issue of the fairness of D.V.'s commitment proceedings. It was error for the District Court to appoint the victim of the crime that precipitated the proceedings to be the friend of respondent. The appointment was a conflict of interest and prejudiced D.V.'s right to a fair trial. The case was reversed with instructions to vacate the order of commitment. In re Mental Health of D.V., 2007 MT 351, 340 M 319, 174 P3d 503 (2007), followed as to lack of mootness in In re D.K.D., 2011 MT 74, 360 Mont. 76, 250 P.3d 856.

Trial Error in Admitting Written Witness Statements Based on Failure to Show That Prior Statements Made Before Alleged Motive to Fabricate — Error Harmless: At McOmber's trial for felony solicitation to issue a bad check, the trial court admitted a written statement and a police interview transcript made by a testifying witness. Admission of the evidence as a prior consistent statement was error because the state failed to show that the statements were made before the witness's alleged motive to fabricate occurred. However, pursuant to the test in St. v. Van Kirk, 2001 MT 184, 306 M 215, 32 P3d 735 (2001), the error was trial error rather than structural error and was therefore subject to harmless error review. Upon review, the Supreme Court concluded that the state had demonstrated, qualitatively and in comparison with the witness's testimony, that there was no possibility that the erroneously admitted prior consistent statements contributed to McOmber's conviction, so the error was harmless, and the conviction was affirmed. St. v. McOmber, 2007 MT 340, 340 M 262, 173 P3d 690 (2007).

Failure of Counsel to Raise Issue of Defendant's Absence at In-Chambers Meetings as Ineffective Assistance — Failure to Raise Issue on Direct Appeal Prejudicial: During Price's trial for sexual intercourse without consent, there were 12 in-chambers conferences between the trial judge and counsels at which various subjects were discussed, including jury selection, presentation of witnesses, witness testimony, exclusion of evidence, removal of certain jurors after trial began, basic scheduling matters, and others. Price was present for only one conference. Price's trial counsel claimed that he had informed Price of the right to be present, but that Price declined to participate, and trial counsel waived Price's right to be present at 8 of the 11 conferences. Price attained new counsel for his appeal, and even though Price claimed that he never waived the right to be present at the conferences, appellate counsel failed to raise the issue of Price's absence, despite the holding in St. v. Bird, 2002 MT 2, 308 M 75, 43 P3d 266 (2002), that a defendant has the right to be present during critical stages of a trial. The District Court held that Price was not prejudiced because, taking into account the three meetings that counsel did not waive Price's right to be present, the outcome would not have changed had Price been there. Price appealed on grounds that the failure of appellate counsel to raise the issue constituted ineffective assistance. The Supreme Court agreed and reversed. There was a legitimate legal basis upon which to raise the issue that was sufficient to undermine confidence in the outcome of the appeal, and appellate

counsel's failure to raise the issue constituted prejudicial error. The case was remanded to allow Price a new appeal on the issue. Price v. St., 2007 MT 307, 340 M 109, 172 P3d 1236 (2007). See also St. v. Riggs, 2005 MT 124, 327 M 196, 113 P3d 281 (2005).

Failure to Preserve Issue for Appeal by Failure to Object at Trial — Plain Error Review Inappropriate Absent Implication of Defendant's Fundamental Rights: At Price's trial for assault with a weapon, a stun gun, the trial court allowed evidence of Price's prior conviction for intimidation. Following conviction, Price appealed on grounds that the evidence was improperly introduced because the state failed to give notice of the intent to introduce other crimes evidence in violation of Price's due process rights. The state contended that Price waived the right to appeal the issue by failing to object to introduction of the evidence and by actively participating in its introduction. The Supreme Court declined to review the issue because Price failed to object to the evidence at trial and thus did not preserve the issue for appeal. Further, plain error review was inappropriate because Price's fundamental constitutional rights were not implicated by introduction of the evidence. St. v. Price, 2007 MT 269, 339 M 399, 171 P3d 293 (2007).

Trial Court's Comment on Defense Objection at Trial Not Compromising of Judicial Integrity — Plain Error Review Inappropriate: When the trial court sustained the state's objection to a prior hearsay statement of a witness, defense counsel objected and asked to put the objection on the record. The court replied, "Fine. So noted. You've asked the question, I've overruled it. You don't have to say anything more. The Supremes can read it." On appeal, defendant sought plain error review because the comment compromised the trial court's impartiality in front of the jury by assuming defendant's guilt and eventual conviction. The Supreme Court noted that trial courts should refrain from such comments in front of jurors but held that in this case, in context the comment was simply an explanation that no additional objection was necessary to preserve the objection for potential appellate review and did not compromise the integrity of the judicial process, so plain error review was not invoked. St. v. Skinner, 2007 MT 175, 338 M 197, 163 P3d 399 (2007).

Failure of Defense Counsel to Question Jurors Regarding Ethnic and Racial Bias Not Considered Ineffective Assistance Warranting New Trial: Defendant was convicted of distribution of dangerous drugs and appealed on grounds that because of defendant's ethnicity, defense counsel's failure to question potential jurors regarding ethnic or racial bias constituted ineffective assistance of counsel and deprived defendant of a fair trial. The Supreme Court found no indication that: (1) ethnic or racial issues were intertwined with the drug offense; (2) the offense was racially motivated; (3) an ethnic issue was connected with the trial in any way; and (4) any witness, an attorney, the trial judge, a member of the court staff, or any member of the venire panel was ethnically or racially biased. Thus, defendant was not denied the right to an impartial jury. Defense counsel's performance did not fall below the range of competence required of attorneys in criminal cases simply because jurors were not questioned about ethnic or racial bias, so defendant was not denied effective assistance of counsel. St. v. Ibarra-Salas, 2007 MT 173, 338 M 191, 164 P3d 898 (2007). See also Rosales-Lopez v. U.S., 451 US 182 (1981).

No Abuse of Discretion in Denying Mistrial for Ordering Continued Jury Deliberations: Doyle moved for a mistrial after the trial court ordered the jury to continue deliberating after the jurors notified the court that they were at an impasse. Doyle contended that the trial court improperly pressured the jury to reach a decision and created the impression that the jury could return only a unanimous verdict rather than a hung jury and that the court failed to explain to the jurors that they should never give up their honest opinion concerning Doyle's guilt or innocence. The motion was denied. On appeal, the Supreme Court affirmed. The transcript showed that the jury was in fact instructed that it should not surrender an honest opinion as to the weight or effect of the evidence or the guilt or innocence of the defendant. The court sent the jury home the first day after 10 hours of deliberations when the jury informed the court that it could not reach a decision. At the end of the second day, the jury sent a note to the court informing the judge that the jury was at an impasse. The court asked the jury if it wished to go home or continue deliberations, and the jury opted to go home. The third day, the jury returned a unanimous guilty verdict. Based on the transcript, the trial court never forced deliberations, and the court did not abuse its discretion in denying Doyle's mistrial motion. St. v. Doyle, 2007 MT 125, 337 M 308, 160 P3d 516 (2007).

Counsel Ready for Trial — Motion for Continuance Properly Denied: Molder asserted that a motion to continue trial should have been granted because his substitute counsel was unprepared for trial. The Supreme Court applied the factors in St. v. Sotelo, 209 M 86, 679 P2d 779 (1984), to determine whether the trial court abused its discretion in denying a continuance, including: (1) the length of the requested delay; (2) whether the state's case would be prejudiced; (3) reasons for the requested continuance; (4) whether defense counsel was diligent in preparing for trial;

(5) whether defendant's right to a speedy trial would be violated; and (6) defendant's right to effective assistance of counsel. Despite Molder's assertion to the contrary, his counsel stated that a trial strategy was in place and that counsel was prepared for trial. The Supreme Court held that the trial strategy was reasonable, that Molder suffered no prejudice, and that Molder's substantial rights were not affected. Denial of the motion for continuance was affirmed. St. v. Molder, 2007 MT 41, 336 M 91, 152 P3d 722 (2007).

Consideration of Irrelevant Information at Trial Violative of Fair Trial Guarantee — Failure to Request Exclusion of Irrelevant Information or Object at Trial — Review of Issue for First Time on Appeal Precluding Review: Prior to trial, defendant requested review of a state case file containing information concerning a witness. The trial court reviewed the file in camera, determined that there was nothing relevant to the defense, and denied defendant's request for review. At trial, the court mentioned the file to the witness and questioned the witness regarding the contents of the file. Defendant did not object to the reference at trial, but later appealed on grounds that the court committed reversible error after finding the file irrelevant and refusing defendant access to it when it contained information on the witness that might have led defendant to formulate a different defense. The Supreme Court held that the trial court's actions indeed denied defendant a fair trial. However, because defendant did not specifically request that the file be excluded at trial and failed to object when the trial court referred to the file, defendant was not allowed to raise the issue for the first time on appeal. St. v. Ramsey, 2007 MT 31, 336 M 44, 152 P3d 710 (2007).

No Clear Comment on or Infringement of Defendant's Right to Remain Silent — Plain Error Doctrine Not Invoked: Upshaw claimed that the testimony of a detective at trial regarding Upshaw's decision to exercise the right to remain silent violated the right to due process and the privilege against self-incrimination and that pursuant to Doyle v. Ohio, 426 US 610 (1976), the Supreme Court should invoke the plain error doctrine and reverse the conviction. The state asserted that the prosecutor did not commit a Doyle error by eliciting testimony of Upshaw's post-Miranda silence, but rather that the evidence came from a nonresponsive answer by the detective and that the prosecution did not deliberately seek to put the evidence before the jury or use the evidence to impeach Upshaw. The Supreme Court examined the record and determined that the brief comment on Upshaw's silence was confined to a minor portion of the detective's testimony and that the prosecutor did not pursue the issue, use the testimony to impeach Upshaw, or refer to the testimony in cross-examination or closing. To be plain, an error should firmly convince a person that the prosecutor's comments created an inference for the jury that, by remaining silent, Upshaw must be guilty. However, in this case, there was no such firm conviction. Thus, the court declined to invoke the plain error doctrine because there was no clear comment on or infringement of Upshaw's right to remain silent. St. v. Upshaw, 2006 MT 341, 335 M 162, 153 P3d 579 (2006), following St. v. Godfrey, 2004 MT 197, 322 M 254, 95 P3d 166 (2004).

Improper Extrinsic Evidence Delivered to Jury — Evidentiary Error Violative of Right to Confront Witnesses Warranting New Trial: At Parker's trial for assault with a weapon, the state introduced a tape of interviews with Parker's children containing the children's observations of the events in question. Unbeknownst to Parker, the tape also contained an interview with another party that implicated Parker. The tape was submitted to the jury during deliberations. Following conviction, Parker contended on appeal that the jury's exposure to the extrinsic evidence, which was never entered into evidence, violated Parker's right to confrontation. The Supreme Court agreed. The interview was of sufficient quality to prejudice Parker's defense and contribute to the conviction, so Parker's right to confront the witness against him was violated when the tape was delivered to the jury. The court remanded for a new trial. St. v. Parker, 2006 MT 258, 334 M 129, 144 P3d 831 (2006).

Defendant's Batson Challenge of Prosecution's Race-Based Use of Peremptory Challenges During Voir Dire Properly Dismissed: During voir dire in Barnaby's trial on drug charges, the state used two peremptory challenges to dismiss jurors who were tribal members. Defense counsel used one peremptory challenge to remove a tribal member. Barnaby objected to the state's use of challenges to remove members from the venire based solely on their race, citing Batson v. Ky., 476 US 79 (1986), but the objection was overruled. On appeal, the Supreme Court applied the three-part Batson test to determine whether the state exercised its peremptory challenges in a discriminatory manner. First, defendant must establish a prima facie case for discrimination based on the fact that defendant belongs to a cognizable racial group and then must raise an inference that the state used peremptory challenges to exclude members of the venire on account of their race. If defendant makes that case, the state must provide a race-neutral explanation for its use of peremptory strikes, and the trial court then determines whether the defendant

has established purposeful discrimination. Here, the trial court did not rule whether Barnaby presented a prima facie case for discrimination. Nevertheless, the state provided its explanation for striking the jurors. One of the jurors was related to Barnaby, and the other was a close friend of Barnaby's attorney. The trial court also noted that the third strike was made by Barnaby, not the state. Although the trial court did not develop a complete record by providing a full explanation of the rationale for denying Barnaby's Batson challenge (subsequently required under St. v. Parrish, 2005 MT 112, 327 M 88, 111 P3d 671 (2005)), the Supreme Court affirmed because the state provided highly credible race-neutral explanations for its peremptory strikes. St. v. Barnaby, 2006 MT 203, 333 M 220, 142 P3d 809 (2006). See also St. v. James, 2010 MT 175, 357 Mont. 193, 237 P.3d 672.

Lack of Proximate Cause Instruction Not Violative of Right to Fair Trial: In Dubois' deliberate homicide trial, defense counsel did not request a jury instruction on proximate cause. Dubois argued on appeal that without a proximate cause instruction, the jury lacked the means to make a factual finding regarding the central defense theory, which was that the victim died of morphine intoxication in the hospital following the assault rather than from the massive head injuries inflicted by Dubois that put the victim in the hospital, and that defense counsel offered ineffective assistance by failing to request a proximate cause instruction. The Supreme Court disagreed on both issues. The jury was properly and fully instructed that it did not need to find that Dubois intended to kill the victim, but only that Dubois caused the death. The lack of a proximate cause instruction thus did not result in a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of the trial or proceedings, or compromise the integrity of the judicial process. In addition, because a proximate cause instruction was not required for Dubois to have a fair trial, defense counsel was not ineffective for failing to offer the instruction. St. v. Dubois, 2006 MT 89, 332 M 44, 134 P3d 82 (2006).

Weight and Credibility of Victim Testimony Jury Question: Hicks asserted that because the victim at a sexual intercourse without consent trial had testified falsely at trial, Hicks's due process rights were violated, necessitating a new trial. However, even though Hicks pointed to inconsistencies between the victim's trial testimony and earlier statements to law enforcement officers, Hicks could not actually establish that the trial testimony was false and thus failed to establish a due process violation. The Supreme Court noted that the trial court properly determined that the testimonial inconsistencies went to the weight and credibility of the victim's testimony and were properly left to the jury. The jury was correctly instructed regarding witness testimony, so Hicks's motion to dismiss was properly denied. St. v. Hicks, 2006 MT 71, 331 M 471, 133 P3d 206 (2006).

Prosecutor's Improper Reference to Hearsay Statement in Opening Cured by Court's Instruction: Defendant contended that the prosecutor's reference to a hearsay statement by a person who did not testify at trial was prejudicial. Defendant did not move for mistrial based on the statement, but asserted on appeal that the improper reference should warrant reversal. The Supreme Court noted that a lawyer's statements are not evidence and held that it would be inappropriate to apply the abuse of discretion standard to an action or lack of action that defendant never requested the trial court to take. In this case, the quoting of hearsay was cured by the trial court's instruction that the jury disregard the prosecutor's statement, and the Supreme Court declined to reverse the conviction. St. v. High Elk, 2006 MT 6, 330 M 259, 127 P3d 432 (2006), distinguishing St. v. Van Kirk, 2001 MT 184, 306 M 215, 32 P3d 735 (2001), and St. v. Runs Above, 2003 MT 181, 316 M 421, 73 P3d 161 (2003).

Only Error Curable by Resentencing — Cumulative Error Doctrine Inapplicable: Although Ferguson asserted many errors in his trial and sentencing, the only error found by the Supreme Court was that Ferguson was sentenced as a violent offender, and that error was cured by remand for resentencing Ferguson as a nonviolent offender. Therefore, because Ferguson was not prejudiced, the court declined to apply the cumulative error doctrine. St. v. Ferguson, 2005 MT 343, 330 M 103, 126 P3d 463 (2005).

Failure of Counsel to Request Unanimity Instructions on Two Counts of Criminal Endangerment Not Considered Ineffective Assistance: Gallagher was convicted of two counts of criminal endangerment and asserted on appeal that failure of defense counsel to request specific unanimity instructions on the two charges constituted ineffective assistance and denied Gallagher the right to a fair trial. Based on the record, the Supreme Court disagreed. Both defense and prosecution counsel argued each count to the jury in closing arguments, linking appropriate facts and specific victims to each count, so juror confusion was extremely unlikely, nor could the court conclude that the trial outcome was prejudiced by the lack of a specific unanimity instruction

on the endangerment charges that denied Gallagher a fair trial. Gallagher's convictions were affirmed. St. v. Gallagher, 2005 MT 336, 330 M 65, 125 P3d 1141 (2005).

Elimination of Prospective Jury Members Based on Alphabetized Jury List Not Violative of Random Jury Selection: The Clerk of the District Court was instructed to prepare a jury pool of 80 prospective jurors for Azure's trial. The clerk had three smaller pools available and combined two entire pools plus the first 21 names from the other pool. Because the names had been chosen and alphabetized by computer, only people with names beginning with A through K were chosen from the 21 names in the third pool. Azure contended that eliminating persons from a jury pool based on the first letter of their names did not constitute a random sample of prospective jurors and violated his right to a fair trial. The Supreme Court disagreed. Mere alphabetization of a randomly selected list of names and the elimination of some of those names based exclusively on where they fell in the alphabet did not constitute a systematic exclusion of a distinct identifiable class of the community and did not taint the random jury selection process. Because Azure could not establish that the selection method constituted a substantial failure to comply with jury procurement statutes, the trial court's decision to deny Azure's challenge to the venire was correct, and the Supreme Court affirmed. St. v. Azure, 2005 MT 328, 329 M 536, 125 P3d 1116 (2005), following St. v. Taylor, 168 M 142, 542 P2d 100 (1975), and distinguishing St. v. Lamere, 2000 MT 45, 298 M 358, 2 P3d 204 (2000).

Prosecutor's Closing Statement Considered in Context — Burden of Proof Not Shifted: In closing argument, the prosecutor told the jury that this was a case in which the jury had to decide between two conflicting stories, rather than a case in which a defendant chose to remain silent and the jury had to decide whether the prosecution met its burden of proof. Defense counsel immediately objected based on the prosecutor's implication that the state did not have to prove the elements of the crime. The prosecutor then reiterated that the state did have the burden of proving the elements of the crime. Taken in context, the closing statement did not impermissibly shift the burden of proof and deny defendant a fair trial, and the conviction was affirmed. St. v. Roubideaux, 2005 MT 324, 329 M 521, 125 P3d 1114 (2005), followed in St. v. Kolb, 2009 MT 9, 349 M 10, 200 P3d 504 (2009), and following St. v. Hart, 191 M 375, 625 P2d 21 (1981).

Ineffective Counsel Claims Insufficient to Invoke Plain Error Doctrine on Direct Appeal: On direct appeal, Novak contended that his counsel's failure to object to certain prejudicial, inadmissible evidence compromised his right to a fair trial and asserted that the Supreme Court should apply the plain error doctrine to review counsel's failure. The Supreme Court held that all of the alleged errors were encompassed in Novak's effective assistance of counsel claim, which could be raised in postconviction proceedings, but were insufficient to invoke the plain error doctrine on direct appeal. St. v. Novak, 2005 MT 294, 329 M 309, 124 P3d 182 (2005).

Inadmissibility of Reverse 404(b) Evidence — No Prejudice to State Prosecution: Defendant contended that the trial court improperly excluded character evidence regarding another person, which could have been introduced under the seldom used "reverse 404(b) evidence" theory to identify the other person as the author of various threatening letters. Defendant claimed that exclusion of the evidence violated the right to present a defense and the right to confront witnesses. Even though there was little risk that admitting the reverse 404(b) evidence would prejudice the state, most of the evidence was propensity evidence, and the evidence in question did not meet the modified Just test for admissibility of character evidence, so the District Court did not err in refusing to admit the reverse 404(b) evidence. St. v. Clifford, 2005 MT 219, 328 M 300, 121 P3d 489 (2005).

Defendant's Voluntary Absence From Trial — Trial in Absentia Affirmed: Following arraignment in City Court on numerous misdemeanor charges, Clark was informed of a trial date. Clark's motion for a continuance because of gout was denied when the state objected on grounds that Clark had a history of continuing trials on the basis of a physical ailment. The morning of trial, Clark checked into the hospital complaining of chest pains, but the hospital was unable to verify Clark's physical complaints and released him. The court informed Clark through the nurse that the trial would progress, but Clark never appeared. Clark was tried in absentia and convicted on all but two charges. The District Court affirmed the City Court decision to try Clark in absentia, and on appeal, the Supreme Court affirmed as well. Clark knew of the trial date and was voluntarily absent from trial, thereby waiving the fundamental right to be present at trial. St. v. Clark, 2005 MT 169, 327 M 474, 115 P3d 208 (2005).

No Assurance of Witness's Availability to Testify or Aid Defense — Motion for Continuance Properly Denied: After presenting his case at trial, Toulouse requested a continuance in order to allow his sister, who was sick with cancer, to testify the following day. The trial court granted a 15-minute recess to inquire whether the sister would be able to testify, but Toulouse could

give no reasonable assurance that she would, so the continuance motion was denied. Following conviction, Toulouse appealed on grounds that he was denied a fair trial when the motion for continuance was denied, but the Supreme Court affirmed. A defendant moving for a continuance to secure an absent witness must demonstrate that a reasonable expectation or prospect of obtaining the presence of the witness exists, that the witness would testify, and that the witness's testimony would help the defense, and Toulouse did not meet this burden. Additionally, under 25-4-501, when a party moves to postpone a trial on the grounds of absence of evidence, such as an absent witness, the motion may be made only upon an affidavit showing the materiality of the evidence expected to be obtained and that due diligence has been used to procure it. Toulouse failed to file an affidavit or to meet the other statutory criteria, so the District Court did not abuse its discretion in denying the motion for continuance. St. v. Toulouse, 2005 MT 166, 327 M 467, 115 P3d 197 (2005), following St. v. Fields, 2002 MT 84, 309 M 300, 46 P3d 612 (2002), and distinguished in St. v. Gleed, 2014 MT 151, 375 Mont. 286, 326 P.3d 1095, on the grounds that an affidavit is not required to be attached to a motion for a continuance in a criminal case unless specifically required by the court.

Consultation Between Judge and Jurors Outside Presence of Defendant Not Violative of Defendant's Right to Be Present at All Stages of Trial: After consulting defense counsel, the judge in Riggs's criminal trial met with two jurors outside Riggs's presence to address the jurors' concerns. One juror was concerned because he recognized a witness, and the other was concerned that he would have to forfeit a nonrefundable airline ticket because of the length of the trial. The judge addressed each concern off the record and concluded the matters. Riggs contended on appeal that the meetings violated his constitutional right to be present at all stages of trial. The Supreme Court agreed that a defendant's right to appear and defend in person is a fundamental right and that a defendant must be present throughout the entire trial. However, the court relied on U.S. v. Gagnon, 470 US 522 (1985), for the holding that a defendant has a right to be present at a given proceeding whenever the defendant's presence has a reasonably substantial relation to the fullness of the opportunity to defend against the charges. In this case, both interactions were brief interludes in a complex trial, Riggs had no role to play at either meeting, defense counsel consented to the trial court's approach, and Riggs made no persuasive claim of prejudice arising out of the episodes, so the Supreme Court concluded that Riggs's constitutional rights were not infringed. St. v. Riggs, 2005 MT 124, 327 M 196, 113 P3d 281 (2005).

Failure of Counsel to Ensure Impartial Jury During Voir Dire Constituting Ineffective Assistance — Reversible Structural Error: A potential juror disclosed in a juror questionnaire that her daughter was a paralegal at the County Attorney's office. Defense counsel failed to take note of the disclosure, to question the juror regarding any potential bias during voir dire, or to challenge the juror for cause. Defense counsel acknowledged the error on the record. The juror was picked for the panel, and Lamere was convicted. On appeal, the Supreme Court applied the two-pronged Strickland test for ineffective assistance, and because the error was on the record, the court reviewed the ineffective assistance claim de novo on direct appeal. The court concluded that counsel failed to ensure that Lamere received a fair trial by an impartial jury and that counsel's performance fell below the reasonably required level, satisfying the first Strickland prong. In addition, counsel's deficient performance constituted a structural error that undermined the fairness of the entire trial and thus was presumed to be prejudicial, satisfying the second Strickland prong. Lamere did not receive effective assistance during voir dire, the verdict was reversed, and the case was remanded for a new trial. St. v. Lamere, 2005 MT 118, 327 M 115, 112 P3d 1005 (2005). See also St. v. Good, 2002 MT 59, 309 M 113, 43 P3d 948 (2002).

Error in Excusing Juror for Cause Before Voir Dire — Error Harmless Absent Showing of Prejudice: Prior to voir dire in defendant's trial for sexual intercourse without consent and incest, the prosecutor requested that juror no. 43 be excused. The juror had recently worked in the County Attorney's office and had access to a wide range of information relating to issues that defendant had been involved in, and the prosecutor had recently fired the juror for unsatisfactory performance. The trial judge dismissed the juror because of concerns that the juror might have feelings or predilections for one side or the other and because of the possibility of the juror communicating with other prospective jurors. Following conviction, defendant appealed the decision to excuse the juror for cause prior to voir dire. The Supreme Court concluded that the trial court erred in excusing the juror without an in-court examination to determine actual bias; however, the error was not a material failure to substantially comply with statutes governing procurement of a trial jury, so the dismissal was subject to harmless error review. Defendant could not demonstrate prejudice because even if juror no. 43 had not been dismissed, the juror would not have been on the jury because the last juror empaneled was juror no. 36. The Supreme

Court affirmed. St. v. Bearchild, 2004 MT 355, 324 M 435, 103 P3d 1006 (2004), distinguishing St. v. Lamere, 2000 MT 45, 298 M 358, 2 P3d 204 (2000), and St. v. Blem, 610 NW 2d 803 (S. Dak. 2000).

No Prejudice Warranting New Trial on Grounds of Cumulative Error: Larson contended that he was denied a fair trial and was entitled to a new trial because of the cumulative errors argued in his appeal. The doctrine of cumulative error requires reversal of a conviction when a number of errors taken together prejudice a defendant's right to a fair trial. However, in this case, the Supreme Court declined to apply the doctrine after reviewing all the issues on appeal. There was no prejudice shown, there was no abuse of judicial discretion, none of the evidentiary rulings were erroneous, and there was sufficient evidence to support the conviction. Larson's mere allegations of error without proof of prejudice were insufficient to satisfy the doctrine, and Larson's conviction was affirmed. St. v. Larson, 2004 MT 345, 324 M 310, 103 P3d 524 (2004).

Shackling of Defendant at Trial to Ensure Security of Courtroom — No Due Process Violation: At Herrick's attempted deliberate homicide trial, the trial court agreed to provide additional security measures, including leg shackles, reasoning that the jury was not likely to see the shackles while Herrick was seated. Following conviction, Herrick appealed on grounds that the use of shackles violated his due process right to a fair trial. The Supreme Court noted that the due process clause of the U.S. Constitution entitles a criminal defendant to appear before a jury free of shackles and other physical restraints and concluded that the Montana Constitution does not provide more protection with regard to shackling than the U.S. Constitution. However, that right is not absolute, and a trial judge's decision to shackle a defendant is not unconstitutional per se (see Morgan v. Bunnell, 24 F3d 49 (9th Cir. 1994)). The Supreme Court adopted the two-part test in Morgan for determining whether a trial court has abused its discretion in restraining a defendant at trial. Under that test, the trial court must be persuaded by compelling circumstances that some measure is needed to maintain the security of the courtroom and must pursue less restrictive alternatives before imposing physical restraints. In this case, the trial court satisfied both parts of the test. The facts presented compelling circumstances to support the court's exercise of its broad discretion in determining that additional security was necessary, and the court took great care to prevent the jury from being aware that Herrick's ankles were shackled. Nothing indicated that the jury saw the leg restraints at any time, so Herrick's rights to individual dignity, a fair trial, and due process were not violated. St. v. Herrick, 2004 MT 323, 324 M 76, 101 P3d 755 (2004), distinguishing St. v. Finch, 975 P2d 967 (Wash. 1999), and followed in St. v. Merrill, 2008 MT 143, 343 M 130, 183 P3d 56 (2008), to the extent that keeping a defendant shackled during trial without establishing compelling circumstances for security measures constitutes a violation of the defendant's constitutional due process rights. See St. v. Hartsoe, 2011 MT 188, 361 Mont. 305, 258 P.3d 428. See also Ill. v. Allen, 397 US 337 (1970).

Written Voluntary Waiver of Right to Be Present at Trial Properly Accepted: Rather than be present at the second day of trial, McCarthy signed a waiver of that fundamental right that was presented by his attorney. McCarthy later complained that the trial court erred by accepting the waiver without conducting a competency hearing and without determining whether the waiver was voluntary and whether McCarthy understood the consequences of the waiver. The Supreme Court found no error. McCarthy was informed through counsel of his right to be present, was afforded an opportunity to waive his rights, and made a knowing, intelligent, and voluntary waiver of the right to be present that was witnessed by the attorney and properly presented to the trial court for the record. There was no substantial evidence that McCarthy was incompetent to waive his right and thus no reason for the trial court to conduct a competency hearing prior to accepting the waiver. St. v. McCarthy, 2004 MT 312, 324 M 1, 101 P3d 288 (2004), distinguishing and following St. v. Tapson, 2001 MT 292, 307 M 428, 41 P3d 305 (2001), and St. v. Bird, 2002 MT 2, 308 M 75, 43 P3d 266 (2002).

Bailiff's Instructions to Split Jury to Continue Deliberations Not Reversible Error: Steele was charged with eight offenses and conceded guilt on all but one charge. During deliberations on the remaining charge, the jury became deadlocked and notified the bailiff. Outside the presence of the parties and without the court's approval, the bailiff told the jury that they needed to keep working on it and needed to find common ground. Steele contended that the bailiff's action denied the parties and counsel the opportunity to consult with the court in violation of 46-16-503 and moved for mistrial. The motion was denied, and Steele appealed. It is not the prerogative of any court officer except the trial judge to give instructions to the jury regarding deliberations. However, without condoning the bailiff's actions, the Supreme Court held that the bailiff's instructions did not misadvise the jury but merely asked the jury to continue deliberating, the same instruction that the District Court would have offered, so a mistrial was not warranted

on those grounds. Further, the jury did not disagree as to any testimony received or desire any information regarding the law, so 46-16-503 was not triggered. Although not given or condoned by the trial judge, the bailiff's instructions did not attempt to pressure the jurors into reaching a verdict or assert to the minority jurors that their positions should change, as was the case in St. v. Randall, 137 M 534, 353 P2d 1054 (1960), so denial of the mistrial motion was proper. St. v. Steele, 2004 MT 275, 323 M 204, 99 P3d 210 (2004), distinguishing St. v. Herron, 169 M 193, 545 P2d 678 (1976). See also St. v. George, 219 M 377, 711 P2d 1379 (1986).

No Violation of Defendant's Substantial Rights by Filing Amended Information on Day of Trial to Include Reference to Statutorily Mandated Sentencing Range for Repeat Offender: Gardipee was charged by information with misdemeanor partner abuse. On the morning of trial, the District Court granted the state's request to amend the information to include a reference to the statutorily mandated sentencing range for repeat offenders in 45-5-206(3) because of Gardipee's prior domestic abuse convictions. Following conviction, Gardipee appealed on grounds that allowing the amended information on the day of trial violated his substantial rights. The Supreme Court disagreed. The elements of the charged crime were not changed, and the only difference between the informations was the recognition that pursuant to the statute, a persistent offender was subject to an enhanced sentence for a third or subsequent conviction, so the amendment did not violate Gardipee's substantial rights. St. v. Gardipee, 2004 MT 250, 323 M 59, 98 P3d 305 (2004).

Defendant Excluded From Trial — Defendant to Be Allowed to Reclaim Right to Be Present — Violation of Fundamental Right to Be Present Absent on-the-Record Personal Waiver: At Aceto's criminal trial, he initially represented himself with counsel on standby but became agitated and frustrated when questioning a witness, cursed the court and the witness, threw files at the witness, and was removed from the courtroom. The next day, outside the presence of the jury, Aceto apologized to the court and objected to his removal. The court ordered standby counsel to take over the defense and ordered that Aceto would not be allowed in the courtroom, but would be allowed to view the proceedings from the county detention center. Following conviction, Aceto appealed on grounds that his fundamental rights were violated because he was neither warned prior to removal from the courtroom nor allowed to return after he apologized. The Supreme Court agreed and reversed. The right to appear and defend in person is a fundamental right, and waiver of the right must be informed, intelligent, specific, voluntary, knowing, personal, and on the record. Once Aceto was ejected from the courtroom, he was not accorded the right to be physically present as an option that could be waived. Thus, the District Court violated Aceto's right to be present, as well as the letter of 46-16-122, in excluding Aceto from the courtroom without warning and refusing to allow him to return. St. v. Aceto, 2004 MT 247, 323 M 24, 100 P3d 629 (2004), following St. v. Bird, 2002 MT 2, 308 M 75, 43 P3d 266 (2002). See also Ill. v. Allen, 397 US 337 (1970), and Badger v. Cardwell, 587 F2d 968 (9th Cir. 1978).

Respondent Allowed to Remain in Court Following Outbursts During Voir Dire — No Prejudice: Respondent's counsel was concerned that respondent might be unruly during an involuntary commitment trial, which might prejudice respondent to the jury, and informed the court that respondent might have to be removed from the courtroom. At the beginning of voir dire, respondent made several relatively innocuous outbursts, and respondent's counsel requested that respondent be removed. The court was concerned with violating respondent's fundamental right to be present and explained the situation to respondent, who agreed not to be disruptive and made no further outbursts. On appeal, the Supreme Court held that respondent's behavior during voir dire was not so prejudicial that the jury could not objectively consider the evidence and that the District Court did not abuse its discretion in allowing respondent to remain in the courtroom. In re Mental Health of T.M., 2004 MT 221, 322 M 394, 96 P3d 1147 (2004).

Error for Prosecutor to Comment on Defendant's Post-Miranda Silence Regardless When Warning Given: Following arrest on sexual assault and attempted sexual intercourse without consent charges, Godfrey received an acknowledgment of rights form from his attorney. Godfrey initialed the form and subsequently went over the form with the District Court during his initial appearance. Godfrey later complained that the state prosecutor violated Godfrey's due process rights by commenting at trial on Godfrey's silence, in violation of Doyle v. Ohio, 426 US 610 (1976). The state contended that because Godfrey did not have his Miranda rights read to him by a police officer at the time of arrest, Doyle did not apply. The Supreme Court found the state's argument to be without merit and declined to distinguish between a situation when a defendant is advised of the right to remain silent by an arresting officer and a situation when a defendant is advised of the right by a court, or to distinguish between an oral warning and a written form. However, in this case, Godfrey's counsel did not object to the prosecutor's comments at trial, so

the court had to decide whether the trial error was sufficiently prejudicial to trigger plain error review. After reviewing the record, the court concluded that it was not plain that the prosecutor's comments had created an inference for the jury that by remaining silent, Godfrey must have been guilty. Absent a clear comment on or infringement of Godfrey's fundamental right to remain silent and absent a contemporaneous objection by Godfrey's counsel to the prosecutor's comments, the conviction was affirmed. St. v. Godfrey, 2004 MT 197, 322 M 254, 95 P3d 166 (2004). See also St. v. Finley, 276 M 126, 915 P2d 208 (1996), and St. v. Sullivan, 280 M 25, 927 P2d 1033 (1996).

Criteria of Effective Assistance of Defense Counsel — Prejudice From Ineffective Counsel Warranting Withdrawal of Alford Plea: In a petition for postconviction relief from a drug conviction, Henderson contended that he received ineffective assistance of counsel and should be allowed to withdraw his Alford plea, but the District Court denied the petition. On appeal, the Supreme Court applied the Strickland test to determine whether Henderson's counsel was ineffective. The first part of the test requires that defendant show that counsel's performance was deficient. The overarching duty of a criminal defense counsel is to advocate on behalf of the defendant and to meet, test, and refute the prosecution's case. Henderson met the first Strickland requirement by showing that counsel performed no investigation, research, or analysis, filed no pretrial motions, and spent only 4 hours on the case, which included clerical work, appearing in court with Henderson on two occasions, and an hour persuading Henderson to plead guilty. The sum of counsel's actual legal work was asking the County Attorney to propose a plea bargain and then signing the prosecution's first offer. Counsel's utter failure to advocate for Henderson in a meaningful way constituted deficient performance. The second Strickland requirement is a showing by defendant of a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. Henderson also met this test by showing that the decision to enter the Alford plea was clearly influenced by counsel's lack of effective assistance and that, but for the ineffective assistance, he would not have entered the plea. Thus, the lack of effective assistance in this case constituted sufficient good cause to authorize Henderson to withdraw the Alford plea and proceed to trial. The Supreme Court granted the petition for postconviction relief and remanded for trial. St. v. Henderson, 2004 MT 173, 322 M 69, 93 P3d 1231 (2004).

Admission of Allegedly Erroneous Evidence Regarding Charge for Which Defendant Acquitted — Harmless Error: Teters was charged with sexual intercourse without consent and with intimidation. The trial court allowed Teters' wife to testify that Teters was abusive, and Teters asserted on appeal that admitting the testimony was erroneous. The Supreme Court applied the test in St. v. Van Kirk, 2001 MT 184, 306 M 215, 32 P3d 735 (2001), to determine whether the alleged error was fundamental and automatically reversible or trial error and reversible if found to be prejudicial. The alleged error here was trial error. Part two of the Van Kirk test requires a showing of a reasonable possibility that the erroneously admitted evidence contributed to the conviction. In this case, the wife's testimony related only to the intimidation charge, and Teters was acquitted of intimidation, so any error in allowing the testimony was harmless. St. v. Teters, 2004 MT 137, 321 M 379, 91 P3d 559 (2004).

Counsel's Comments on Employee Handbook Implying Employment At Will Cured by Court Admonishment — No Grounds for New Trial: During closing arguments, defense counsel showed the jury a page from defendant's employee handbook that implied that plaintiff could be fired at will. Plaintiff contended that counsel's comments deprived her of a fair trial because Montana is not an at-will employment state. The Supreme Court disagreed. The handbook was entered into evidence by stipulation, and the jury had been shown the page during both direct and cross-examination without objection. Further, when plaintiff objected to presentation of the page during closing, the trial court cured any error by admonishing the jury to disregard the paragraph in question because it did not reflect Montana law. Denial of plaintiff's motion for a new trial based on counsel's comments was therefore not an abuse of discretion. Bailey v. Beartooth Communications Co., 2004 MT 128, 321 M 305, 92 P3d 1 (2004), distinguishing Lopez v. Josephson, 2001 MT 133, 305 M 446, 30 P3d 326 (2001).

Failure of Juror to Relate Prior Meeting of Plaintiff's Husband Not Sufficiently Adversarial to Constitute Juror Misconduct to Warrant New Trial: During voir dire, counsel for both parties asked potential jurors if they knew any of the parties or witnesses but received no affirmative response. Plaintiff's husband was not in the courtroom during voir dire, but was present during trial. After plaintiff had rested, a juror informed the court that she recognized plaintiff's husband from a brief meeting 8 or 10 years earlier when he had borrowed some tools from the juror's husband but reaffirmed her belief that she could be impartial. Without objection, the judge ruled that the juror's statement did not require removal from the panel. After the jury found

for defendant, plaintiff moved for a new trial on grounds that the juror had not revealed past contact with plaintiff, including the parties' participation on opposite sides of a subdivision legal dispute. The motion was denied, and on appeal, the Supreme Court affirmed. Plaintiff failed to establish a prior relationship that rose to the level of adversarial, and the trial court did not abuse its discretion in denying a new trial on grounds of juror misconduct. Bailey v. Beartooth Communications Co., 2004 MT 128, 321 M 305, 92 P3d 1 (2004).

No Violation of Pretrial Order Precluding Evidence of Negligence by Plaintiff's Employer — New Trial Properly Denied: Plaintiff was employed by a vocational day-care program that took developmentally disabled persons on day outings. Plaintiff was assaulted by a developmentally disabled person from a group home managed by defendant corporation and sued the corporation for negligence for failing to control the assailant. Before trial, the District Court granted plaintiffs' motion to exclude any evidence of negligence by plaintiff's employer and ruled that defendant had a special relationship of custody and control over the disabled person and thus had a legal duty of care to those placed within the foreseeable zone of risk created by any breach of that duty. Nevertheless, the jury found for defendant, and plaintiffs' motion for a new trial was denied. On appeal, plaintiffs contended that when defense counsel repeatedly referred to the individual planning process for the assailant, in which plaintiff's employer was a partner, blame for the injury was thereby shifted to plaintiff's employer in violation of the pretrial order and prevented plaintiffs from receiving a fair trial. The Supreme Court disagreed, pointing out that plaintiffs opened the door by presenting evidence regarding the individual planning process in questioning plaintiffs' first witness and that both parties subsequently presented evidence about the process. Further, evidence regarding the individual planning process was relevant to a limit on defendant's ability to monitor the assailant and did not equate to evidence of negligence by plaintiff's employer, nor did defense counsel ever attempt to establish that any breach of legal duty by the employer led to plaintiff's injury. Thus, the District Court did not manifestly abuse its discretion in denying plaintiffs' motion for a new trial, and the verdict was affirmed. Papich v. Quality Life Concepts, Inc., 2004 MT 116, 321 M 156, 91 P3d 553 (2004), distinguishing Cech v. St., 183 M 75, 598 P2d 584 (1979), Durden v. Hydro Flame Corp., 1998 MT 47, 288 M 1, 955 P2d 160 (1998), St. v. Ingraham, 1998 MT 156, 290 M 18, 966 P2d 103 (1998), Unmack v. Deaconess Medical Center, 1998 MT 262, 291 M 280, 967 P2d 783 (1998), and Lopez v. Josephson, 2001 MT 133, 305 M 446, 30 P3d 326 (2001).

Absence of Defendant From Critical Trial Proceeding Violative of Fundamental Right to Appear and Defend in Person — No Error Given Curative Action of Trial Court: During Kennedy's criminal trial, a juror communicated with one of the state's witnesses. The trial judge then met with the juror in chambers without Kennedy or any counsel present, and the juror admitted the conversation, but denied mentioning anything about it to the jury. The court then met with counsel in chambers, replaced the juror with an alternate, excluded the witness from testifying, and went on with the trial. Defense counsel moved for mistrial and dismissal with prejudice, but the motion was denied. On appeal, the Supreme Court held that excluding Kennedy from the conversation with the juror violated Kennedy's fundamental right to be present at all critical stages of trial to defend in person. Further, any waiver by defense counsel by failing to object was ineffective because Kennedy was never told that he had a right to be present or that the juror questioning was about to occur. However, Kennedy was not prejudiced or deprived of a fair trial by the error in light of the District Court's corrective actions. Thus, denial of a mistrial was not an abuse of discretion. St. v. Kennedy, 2004 MT 53, 320 M 161, 85 P3d 1279 (2004), followed in St. v. Godfrey, 2009 MT 60, 349 M 335, 203 P3d 834 (2009).

Allowing Investigating Officer Witness to Remain in Courtroom — Harmless Error: Defendant requested that all witnesses be excluded from the courtroom during trial, but the trial court allowed a police officer who investigated the crime and who was a state witness to remain in the room when all other witnesses were excluded. Although it was error to allow the officer to remain and hear the testimony of the other witnesses, the Supreme Court applied St. v. Van Kirk, 2001 MT 184, 306 M 215, 32 P3d 735 (2001), in determining that the trial error in this instance was harmless because the officer's presence did not prejudice defendant's case. St. v. Flowers, 2004 MT 37, 320 M 49, 86 P3d 3 (2004).

Use of Peremptory Challenge Rather Than Challenge for Cause to Remove Juror Not Considered Ineffective Assistance of Counsel: Deschon contended that he was deprived of a fair trial through defense counsel's failure to exercise challenges for cause to remove a juror who previously served on a jury that convicted a defendant on the same charge that Deschon was facing and another juror with a long involvement in law enforcement whose impartiality could be questioned. However, evidence in a voir dire reconstruction hearing revealed why counsel used

peremptory challenges to remove the jurors instead. Counsel was prohibited from challenging the first juror for cause under St. v. Russell, 73 M 240, 235 P 712 (1925), because the juror would have had to serve on a jury trying a related offense to the offense that Deschon was charged with. Regarding the second juror, the mere fact that the juror was connected with law enforcement did not necessitate a finding of impartiality, and because the juror maintained that he could be impartial, a peremptory challenge was the only available method of removing the juror from the panel. Deschon did not meet the first prong of the Strickland test for ineffective assistance of counsel, and the conviction was affirmed. St. v. Deschon, 2004 MT 32, 320 M 1, 85 P3d 756 (2004).

Adequate Advisement of Danger of Self-Representation — Voluntary Waiver of Counsel Affirmed: The Supreme Court's inquiry regarding a defendant's waiver of the right to counsel focuses not on what the defendant was told concerning the dangers of self-representation, but rather on a determination of whether the defendant understood the decision and proceeded voluntarily. Instead of requiring a trial court to recite a litany of the dangers associated with a waiver of the right to counsel, the test requires that the trial court receive sufficient evidence to find that the waiver is made voluntarily, knowingly, and intelligently. In this case, defendant was generally familiar with the criminal trial process, had personally experienced a criminal trial, had participated in jury selection, was present during suppression hearings, took law enforcement in college, understood the role of an attorney, and was cautioned that acting as a trial lawyer was not something that a person could just walk into. The trial court's questioning and defendant's responses indicated that defendant understood the decision to waive counsel and made the decision knowingly and voluntarily. The trial court's decision to allow defendant to proceed pro se was affirmed. St. v. Insua, 2004 MT 14, 319 M 254, 84 P3d 11 (2004), following St. v. Colt, 255 M 399, 843 P2d 747 (1992). See also Faretta v. Calif., 422 US 806 (1975), and St. v. MacGregor, 2013 MT 297, 372 Mont. 142, 311 P.3d 428.

Character Evidence Improperly Admitted — Harmless Error: Defendant was charged with manufacture of dangerous drugs and sex crimes. The drug charge was severed, and defendant was convicted. When the sex crimes came to trial, the District Court allowed evidence of defendant's drug use. Defendant contended that the evidence was improperly admitted as bad character evidence because the state failed to meet the procedural requirements of the modified Just rule. The state asserted that the evidence was not admitted as character evidence, but rather admitted pursuant to the transaction rule because the drug use explained the circumstances surrounding the alleged sex offenses. The Supreme Court held that although the challenged evidence may have been relevant to explain the transaction, the evidence was improperly admitted in this case because the District Court had earlier determined that the charges were sufficiently distinct to warrant separate trials, so admission of drug use evidence in the sex crimes trial somewhat undermined the benefit that defendant gained from the earlier granting of the request for severance. Having defended against the drug charges in the first trial, defendant was faced with the evidence again. However, the Supreme Court then went on to apply the test in St. v. Van Kirk, 2001 MT 184, 306 M 215, 32 P3d 735 (2001), to determine if admission of the evidence prejudiced defendant's right to a fair trial and found that the error was harmless. The evidence of drug use did not go to the proof of an element of the sex crimes, and only brief mention was made of drug use in closing arguments and then only in conjunction with other admissible evidence related to the transaction. Thus, the impact of the tainted evidence was minimal, and given other ample evidence upon which the state could develop its case, there was no reasonable possibility that the tainted evidence contributed to the conviction, which was therefore affirmed. St. v. Insua, 2004 MT 14, 319 M 254, 84 P3d 11 (2004).

No Abuse of Discretion in Denial of Motion for Substitute Counsel Absent Substantial Complaints: Minez's first trial on drug charges ended in mistrial when a juror became sick and there were no alternates. Just before a subsequent trial, Minez moved for substitution of counsel. The District Court held a hearing to allow Minez to explain the motion. Minez contended that his court-appointed counsel had not provided effective assistance in several instances in the first trial. The court noted that it had observed counsel during the first trial and had seen nothing to indicate ineffective assistance or inadequate preparation. There was every indication that counsel was acting in Minez's best interests, and the court found that Minez presented no substantial complaints and denied the motion. On appeal, the Supreme Court affirmed. The District Court made an adequate initial inquiry into Minez's claims and properly exercised discretion in determining that Minez failed to present seemingly substantial complaints and in declining to hold an additional hearing on the motion for substitution of counsel. St. v. Minez, 2003 MT 344, 318 M 478, 82 P3d 1 (2003).

Actual Innocence Standard Applied to Postconviction Claim Based on Incomplete DNA Results at Trial — Burden of Postconviction Statute of Limitations Met: Pope's petition for postconviction relief was denied by the District Court as barred by the 5-year statute of limitations in the 1993 version of 46-21-102 (now 1 year) and because the issues were not raised on direct appeal. The court concluded that the jurisdictional bar could be overcome only by a clear miscarriage of justice and that the exception did not apply unless Pope did not commit the offense. The court relied on an inadmissible confession that Pope committed the crime, reasoning that even if the confession was not admissible at trial, it could be considered in a postconviction proceeding because it refuted Pope's claim of innocence. Pope contended that the exception applied because newly available DNA evidence tended to show that he did not commit the crime. The Supreme Court reversed. Based on Murray v. Carrier, 477 US 478 (1986), a petitioner must demonstrate that a constitutional violation at trial has probably resulted in conviction of an individual who is actually innocent and the claim must be supported by new evidence that indicates that the individual is innocent. Montana case law provides that the miscarriage of justice must be so obvious that the judgment is rendered a complete nullity and that the exception does not apply unless the defendant did not commit the crime from which relief is sought. Further, under Schlup v. Delo, 513 US 298 (1995), actual innocence requires that no reasonable, properly instructed juror would have found the defendant guilty. Schlup also allows review only of the record and new evidence to determine what a reasonable juror would find, so the District Court improperly relied on the failed plea confession to determine that Pope was not actually innocent. Pope correctly pointed out that the use of "and/or" language in the jury instructions made it impossible to determine whether Pope was convicted of raping one or two women. Thus, Pope satisfied the Schlup actual innocence burden in light of the complete DNA report, and when coupled with the error of using "and/or" language in the alternative charge, the jury instructions, and the verdict, waiver of the time bar in 46-21-102 was required by the clear miscarriage of justice, warranting reversal. St. v. Pope, 2003 MT 330, 318 M 383, 80 P3d 1232 (2003). See also St. v. Beach, 2013 MT 130, 370 Mont. 163, 302 P.3d 47.

Nonprejudicial Preclusion of Expert Witness Not Violative of Right to Fair Trial or Effective Counsel: DeMary contended that the District Court's denial of a motion to endorse an expert witness 5 days before trial constituted ineffective assistance of counsel and denied DeMary's right to a fair trial. Under the Strickland test, a defendant must show that counsel's performance was deficient and that the performance prejudiced the defendant and deprived the defendant of a fair trial. However, DeMary failed to comply with 46-15-323 and failed to demonstrate prejudice in the disallowance of his expert's testimony because the state never called the witness that DeMary's proposed expert was to refute. Absent a showing of sufficient prejudice, DeMary could not show that the trial was unfair, and the assertion of ineffective assistance of counsel failed. St. v. DeMary, 2003 MT 307, 318 M 200, 79 P3d 817 (2003).

Misinterpretation of Suppressed Confession Order Not Considered Ineffective Assistance of Counsel: Harris alleged ineffective assistance based on defense counsel's cross-examination of Harris at trial concerning a time-of-arrest confession that had been suppressed for purposes of the state's case in chief. The District Court found that counsel misinterpreted the suppression order in assuming that the order suppressing the confession for purposes of the case in chief amounted to a ruling that the confession could be used on cross-examination. In postconviction proceedings, the court reviewed the law on use of suppressed confessions for impeachment and concluded that it would have allowed use of the confession for impeachment. Harris appealed, but the Supreme Court affirmed. Because the confession was suppressed only for purposes of the case in chief, its use by defense counsel on cross-examination did not amount to a due process violation. Harris v. St., 2003 MT 258, 317 M 406, 77 P3d 272 (2003).

Claim of Juror to Be Psychic Not Violative of Due Process Rights: On the second day of jury deliberations, two jurors brought forward concerns that another juror with strong opinions in the case claimed to be a psychic. With counsel present, the trial court questioned the jury foreman as to whether that particular juror would be able to base a decision on the law and the evidence. The court and counsel ultimately determined that no problem existed, and deliberations continued. On appeal, DuBray argued that allowing a psychic juror constituted a due process violation. The Supreme Court noted that DuBray's counsel helped formulate the response to the situation and, finding nothing in the record to indicate that the juror's strong opinions were based on psychic powers or that the juror would not be able to lay aside the opinions and render a fair verdict, held that DuBray's right to a fair and impartial jury was not violated. St. v. DuBray, 2003 MT 255, 317 M 377, 77 P3d 247 (2003). See also St. v. McMahon, 271 M 75, 894 P2d 313 (1995).

Failure to Disclose Incidental Benefits Provided to Prosecution Witness Not Grounds for Mistrial: DuBray contended that his motion for mistrial should have been granted because the state failed to disclose benefits provided to a prosecution witness, constituting the withholding of exculpatory evidence in violation of Brady v. Md., 373 US 83 (1963). The Supreme Court disagreed. Suppression of material evidence favorable to a defendant, such as evidence that a witness was granted benefits in the form of relief from prosecution in exchange for testimony, violates a defendant's due process rights. However, in this case, no evidence existed that benefits were given in exchange for the witness's testimony and any benefits to the witness were incidental, so no Brady violation occurred, and DuBray's mistrial motion was properly denied. St. v. DuBray, 2003 MT 255, 317 M 377, 77 P3d 247 (2003).

Exceptions as to Admissibility of Juror Affidavit Inapplicable — New Trial Denied: In a letter written by a juror following Hoffman's aggravated assault trial, the juror stated an initial desire to acquit Hoffman, but returned a guilty plea to avoid a hung jury. The juror indicated that Hoffman would have been convicted of a lesser offense if a lesser included offense instruction had been given. Hoffman contended on appeal that in light of the juror's statement, the guilty verdict was not unanimous, resulting in a denial of due process. The Supreme Court noted that under Rule 606, M.R.Ev. (Title 26, ch. 10), juror testimony is generally inadmissible except if the evidence is used to determine whether the jury was influenced by extraneous, prejudicial information or outside influence or whether a particular juror reached a specific determination by chance. In this case, none of the exceptions applied, and the District Court did not err in denying Hoffman's motion for a new trial. St. v. Hoffman, 2003 MT 26, 314 M 155, 64 P3d 1013 (2003). See also Sandman v. Farmers Ins. Exch., 1998 MT 286, 291 M 456, 969 P2d 277 (1998).

Voluntariness of Confession — Totality of Circumstances: When a defendant moves to suppress a confession or admission on grounds that it was given involuntarily, the prosecution must prove by a preponderance of the evidence that it was voluntary. On appeal, the Supreme Court will review denial of a suppression motion to determine whether findings of fact were clearly erroneous and correctly applied as a matter of law. A finding of fact is clearly erroneous if: (1) it is not supported by substantial evidence, which must be more than a scintilla of evidence but may be less than a preponderance of the evidence; (2) the trial court misapprehended the effect of the evidence; or (3) the Supreme Court has a definite or firm conviction that a mistake was made. When a determination of voluntariness depends on the credibility of witnesses, the Supreme Court will defer to the trial court. The emphasis in determining voluntariness is on whether the confession was the product of free choice or compulsion, which must take into account the totality of the circumstances, including the defendant's age and education, whether the defendant was advised of Miranda rights, the defendant's prior experience with the criminal justice system and police interrogation, the defendant's background, experience, demeanor, coherence, articulateness, and capacity to make full use of faculties, the length and method of interrogation, and whether the confession or admission was extracted through force, violence, or improper influence or by direct or implied promises. If the confession or admission was involuntary, its use violates self-incrimination and due process. Here, the Supreme Court considered the totality of the circumstances and found substantial credible evidence that Hoffman's confession was voluntary. St. v. Hoffman, 2003 MT 26, 314 M 155, 64 P3d 1013 (2003). The standard of review of denial of a motion to suppress was also applied in St. v. Munson, 2007 MT 222, 339 M 68, 169 P3d 364 (2007).

Sufficient Circumstantial Evidence That Infant Born Alive to Substantiate Deliberate Homicide Verdict — Burden Not Shifted to Defendant: Elliott was convicted of killing her newborn infant, but the only evidence as to whether the infant was born alive or stillborn was circumstantial. Absent conclusive evidence, Elliott argued that the closest that the state could come would be to have the jury presume that the baby was alive and then provide the jury with the theory that the life was terminated by Elliott, which impermissibly shifted the burden of proof to Elliott to show that the baby was stillborn. The state contended that it had the burden of proving all elements of deliberate homicide beyond a reasonable doubt and that nothing changed or diminished the burden in this case, and the Supreme Court agreed. The state was required to prove that the baby was born alive and the jury was so instructed. Evidence showed that the baby was of viable gestational age and had sustained multiple skull fractures. Testimony also established that Elliott hid her pregnancy, told a friend that she had food poisoning before giving birth, delivered the baby in the bathroom of her home without calling for assistance, wrapped the baby in a towel and put it in a garbage bag on a shelf in her basement, and continued to deny the pregnancy even after undergoing an emergency hysterectomy. It was the jury's function to weigh the evidence, judge the credibility of the witnesses, and decide the factual issue of whether

the baby was born alive, and there was sufficient evidence to support a deliberate homicide conviction. St. v. Elliott, 2002 MT 26, 308 M 227, 43 P3d 279 (2002).

Entry of Trial Court Judge Into Jury Room Without Counsel, Defendant, and Court Reporter — Automatic Reversible Error Absent Recorded Waiver by Defendant of Constitutional Rights: On the second full day of jury deliberations in Tapson's trial on charges of sexual intercourse without consent, aggravated kidnapping, and attempted deliberate homicide, the trial judge met with counsel, on the record, to notify them that the jury had a verdict on one of the three counts, but was unable to reach a verdict on the other two counts. With Tapson present, the state suggested substituting the existing verdict form, which listed all three charges, with six verdict forms—one "guilty" form and one "not guilty" form for each of the three charges—to avoid the problem of the jury switching its current verdict on one charge for some sort of last minute compromise. The state also suggested that the judge take the forms into the jury room, rather than moving the jury and handling the matter in open court. Tapson's counsel stated that the defense did not have any objection to the proposition, so the judge took the forms into the jury room, without counsel or Tapson present, and returned 11 minutes later. There was no record of whether the judge spent the entire time with the jury, what the judge told the jury, whether the jury had any questions, or whether the judge gave any responses. Tapson was subsequently convicted of attempted deliberate homicide, although the jury could not reach a verdict on the other charges. Tapson was sentenced to life imprisonment, but appealed the conviction and sentence. The Supreme Court noted Tapson's fundamental constitutional right to be present and defend in person and by counsel, and the fundamental right to a public trial, which extends to the entire trial, including the judge's instructions to the jury. The state contended that defense counsel waived Tapson's right to be present, but the Supreme Court declined to engage in presumptions of waiver, holding that if a defendant chooses to waive these constitutional rights, the trial court must obtain an on-the-record personal waiver, by the defendant, acknowledging that the defendant voluntarily, intelligently, and knowingly waives the rights. Thus, when there is some circumstance arguably making it necessary for a trial judge to enter the jury room while the jury is present, the court must contemporaneously explain to the defendant, on the record, the constitutional right to be present at all critical stages of the trial and the right to a public trial. The defendant may then choose to waive those rights. However, absent a contemporaneous, personal, knowing, voluntary, intelligent, on-the-record waiver by the defendant, if a judge enters a jury room while the jury is present and without counsel, the defendant, and the court reporter, reversal will be automatic. Tapson's constitutional rights were violated, so the case was reversed and remanded for further proceedings. St. v. Tapson, 2001 MT 292, 307 M 428, 41 P3d 305 (2001), following St. v. Reed, 65 M 51, 210 P 756 (1922), St. v. Allison, 116 M 352, 153 P2d 141 (1944), U.S. v. U.S. Gypsum Co., 438 US 422 (1978), and Commonwealth v. Patry, 722 NE 2d 979 (Mass. App. Ct. 2000), and distinguishing St. v. Harris, 1999 MT 115, 294 M 397, 983 P2d 881 (1999), and St. v. LaDue, 2001 MT 47, 304 M 288, 20 P3d 775 (2001).

Peremptory Challenges to Prospective Jurors — Factors Necessary to Show Purposeful Discrimination in Jury Selection — Waiver of Batson Challenge When Not Timely Raised: Ford contended that the state violated his due process rights by improperly exercising all of its peremptory challenges at trial to exclude women from the jury panel, citing J.E.B. v. Ala. ex rel. T.B., 511 US 127 (1994), as a prohibition against gender discrimination during jury selection. In a case of first impression, the Supreme Court applied a de novo review to the trial court's application of the law, deferring to the trial court's findings of fact unless clearly erroneous. The Supreme Court then reviewed the history of the discriminatory use of peremptory challenges as addressed in Batson v. Ky., 476 US 79 (1986), and its progeny, noting that the rules regarding challenges to jury selection no longer apply exclusively to prosecutors striking members of the venire who are the same race as the defendant, but that any racially motivated reason for striking a prospective juror is prohibited whether the juror shares the racial identity of the defendant or not (see Powers v. Ohio, 499 US 400 (1991)). Further, the challenge is no longer limited to the government in criminal actions but has been extended to prevent a defendant in a criminal action from using peremptory challenges to exclude jurors based on race (see Ga. v. McCollum, 505 US 42 (1992)), has been applied to private litigants in civil cases (see Edmonson v. Leesville Concrete Co., 500 US 614 (1991)), and has been used to prohibit gender discrimination in jury selection, as in J.E.B. In order to establish a prima facie case of purposeful discrimination, a defendant must show that: (1) the defendant is a member of a cognizable racial group; (2) the prosecutor exercised peremptory challenges to remove members of the defendant's race from the venire; and (3) these facts and other relevant circumstances raise an inference that the prosecutor used the peremptory jury selection practice to exclude members of the venire from the petit jury on

account of their race. In addition, numerous courts have held that the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria must be exercised in a timely manner, and failure to raise a Batson challenge before the jury is sworn and before the venire is dismissed results in waiver of the challenge. In Ford's case, his counsel waited until after the jury was sworn and the venire dismissed before raising the Batson challenge. Because the motion was untimely, and therefore waived, the Supreme Court declined to address the merits of Ford's claim of discriminatory use of peremptory challenges. St. v. Ford, 2001 MT 230, 306 M 517, 39 P3d 108 (2001), followed in Casiano v. Greenway Enterprises, Inc., 2002 MT 93, 309 M 358, 47 P3d 432 (2002), St. v. Parrish, 2005 MT 112, 327 M 88, 111 P3d 671 (2005), and Ford v. St., 2005 MT 151, 327 M 378, 114 P3d 244 (2005).

Clarification of Harmless Error Analysis in Determining Whether Trial Court Error Resulted in Prejudice — Structural Error Versus Trial Error — Cumulative Evidence Test Versus Overwhelming Weight of Evidence Test: When determining whether trial court error has prejudiced a defendant, the Supreme Court has applied slightly different standards in various cases, resulting in some inconsistency and confusion over the proper test to be applied in a harmless error analysis. Over time, the "overwhelming weight of the evidence" test expressed in St. v. McKenzie, 186 M 481, 608 P2d 428 (1980) (affirmed in In re Petition of Brodniak v. St., 239 M 110, 779 P2d 71 (1989), and St. v. Fuhrmann, 278 M 396, 925 P2d 1162 (1996)), eclipsed the more substantive inquiry of whether erroneously admitted evidence might have contributed to a conviction, resulting in an inclination to simply tally the quantity of the admissible evidence of guilt instead of evaluating the qualitative impact that the inadmissible evidence might have had on the finder of fact—an approach that the court found unacceptable. In order to preserve the substantial rights of the accused and the fundamental fairness of the criminal trial and to provide consistent guidance to practitioners, the Supreme Court found it appropriate to formally adopt an approach to harmless error issues that first defined the type of error in question and that second, depending on the type of error, set a uniform standard against which the error must be analyzed to determine if the error was sufficiently prejudicial to warrant reversal, completing the analysis begun in St. v. Lamere, 2000 MT 45, 298 M 358, 2 P3d 204 (2000). The first step is to analyze whether the claimed error is structural error or trial error. Structural error is the type that affects the framework within which the trial proceeds, such as errors in jury selection, total deprivation of the right to counsel, and lack of an impartial judge, and is automatically reversible without additional analysis or review. Trial error is the type that typically occurs during presentation of the case to a jury. It is not presumptively prejudicial and is thus subject to harmless error review pursuant to 46-20-701. Once a convicted person raises and establishes that evidence was erroneously admitted and has alleged that there is a reasonable possibility that the evidence might have contributed to a conviction, the state must demonstrate that the error was not prejudicial. To determine whether that reasonable possibility exists, the Supreme Court abandoned the "overwhelming weight of the evidence" test in McKenzie, Brodniak, and Fuhrmann in favor of the "cumulative evidence" test set out in Harrington v. Calif., 395 US 250 (1969). In making its proof under the cumulative evidence standard, the state must show admissible evidence that proved the same facts as the tainted evidence and demonstrate that the quality of the tainted evidence was such that there was no possibility that it might have contributed to the conviction. If the only evidence tending to prove an element of the crime is tainted, then reversal will be compelled. If the tainted evidence does not go to the proof of an element of the crime and there is no other evidence that proves the same facts as the tainted evidence, then the tainted evidence will be considered harmless only if there is no possibility that it might have contributed to the conviction. In the present case, the trial court erred in admitting evidence related to Van Kirk's performance on a horizontal gaze nystagmus test; however, there was other admissible cumulative evidence that proved that same fact of Van Kirk's DUI as the tainted evidence, so Van Kirk's right to a fair trial was not prejudiced and the DUI conviction was affirmed. St. v. Van Kirk, 2001 MT 184, 306 M 215, 32 P3d 735 (2001), followed in St. v. Peplow, 2001 MT 253, 307 M 172, 36 P3d 922 (2001), St. v. Spang, 2002 MT 120, 310 M 52, 48 P3d 727 (2002), St. v. Weldele, 2003 MT 117, 315 M 452, 69 P3d 1162 (2003), St. v. Crawford, 2003 MT 118, 315 M 480, 68 P3d 848 (2003), St. v. Slavin, 2004 MT 76, 320 M 425, 87 P3d 495 (2004), St. v. Paoni, 2006 MT 26, 331 M 86, 128 P3d 1040 (2006), and St. v. Russette, 2008 MT 413, 347 M 285, 198 P3d 791 (2008). See also Swan v. St., 2006 MT 39, 331 M 188, 130 P3d 606 (2006), and St. v. Chavez-Villa, 2012 MT 250, 366 Mont. 519, 289 P.3d 113.

Pervasive Misconduct of Plaintiffs' Counsel Preventing Fair Trial on Merits: At Josephson's trial for assault, plaintiffs' counsel attempted to put inadmissible matters before the jury by repeatedly asking objectionable questions and raising impermissible inferences. Although the

trial court repeatedly admonished plaintiffs' counsel not to bolster with inadmissible evidence, attempt to introduce inadmissible hearsay, and ignore the court's rulings on certain issues, plaintiff's counsel blithely proceeded to do what he knew he should not. As set out in St. v. Eklund, 264 M 420, 872 P2d 323 (1994), the repeated asking of questions that are clearly intended to keep the assumption of damaging facts that cannot be proved before the jury, in order to impress upon their minds the probability of the existence of the assumed facts upon which the questions are based, constitutes gross misconduct. In this case, despite the trial court's attempts to eliminate the prejudicial impact of the conduct with admonitions and curative instructions, the conduct of plaintiffs' counsel was so pervasive that it prevented Josephson from receiving a fair trial on the merits, raising the presumption of prejudice and warranting reversal of Josephson's conviction and a new trial. Lopez v. Josephson, 2001 MT 133, 305 M 446, 30 P3d 326 (2001). See also Durden v. Hydro Flame Corp., 1998 MT 47, 288 M 1, 955 P2d 160 (1998).

Improper for Prosecutor to Inform Jury of Potential Sentences During Closing Argument — Prejudice Because of Prosecutorial Misconduct Not Established: In closing arguments, the prosecutor commented to the jury that because Martin did not face a death penalty, he could argue that the judge could give him whatever sentence falls within the judge's power, ranging from probation to life in prison. The Supreme Court has held that it is improper to instruct the jury on possible sentences (see St. v. Zuidema, 157 M 367, 485 P2d 952 (1971)), and it is likewise considered misconduct for a prosecutor to inform a jury regarding possible sentences in closing arguments. However, the court will not presume prejudice from charges of prosecutorial misconduct, but will also consider whether the misconduct prejudiced the defendant's substantial rights. Martin asserted that the prosecutor raised the subject of the judge's sentencing discretion in order to influence the jury to find Martin guilty of all the greater offenses rather than any of the lesser included offenses, making a light sentence unlikely. Here, the Supreme Court reviewed the evidence and found it sufficient to support the jury's verdicts. In light of the surrounding circumstances, including the context in which the comments were made, Martin failed to establish prejudice from the sentencing-related remark by the prosecutor during rebuttal closing arguments. St. v. Martin, 2001 MT 83, 305 M 123, 23 P3d 216 (2001), followed in St. v. Roubideaux, 2005 MT 324, 329 M 521, 125 P3d 1114 (2005).

Failure to Object at Trial to Refusal to Allow Testimony of Additional Witnesses After Trial Commenced — No Interference With Constitutional Right to Present Defense: LaDue contended that failure to allow the testimony of two additional witnesses after the start of his trial on charges of attempted deliberate homicide interfered with his constitutional right to present a defense. However, LaDue did not raise the constitutional question at trial, thus failing to preserve the issue for appeal. Failure to raise the issue at trial constituted waiver of the right to appeal it. St. v. LaDue, 2001 MT 47, 304 M 288, 20 P3d 775 (2001).

Claims of Ineffective Assistance of Counsel Because of Prejudicial Error and Conflicts of Interest Not Proved — Request for New Trial Properly Denied: Petitioner failed to prove that the defense attorney's failure to use available impeachment evidence was so deficient that the attorney was not functioning as the counsel guaranteed the defendant by the sixth amendment to the U.S. Constitution. When there was an overwhelming abundance of accomplice testimony and corroborative evidence of petitioner's involvement in the crime, petitioner was not prejudiced by any alleged error of the defense counsel to fully challenge a witness's testimony or to fully investigate the witness's background. The fact that the defense attorney was a candidate for District Court Judge and County Attorney during the attorney's representation of petitioner does not establish an actual conflict without further support in the record. Petitioner's allegation that the defense counsel's publication of a book about an earlier murder prosecution reveals the counsel's bias against criminal defendants as a class and hostility to the use of legal technicalities in their defense was insufficient to establish the existence of an actual conflict of interest through a factual showing on the record. Petitioner's request for a new trial was properly denied. Kills On Top v. St., 2000 MT 340, 303 M 164, 15 P3d 422, 57 St. Rep. 1444 (2000). See also St. v. Ugalde, 2013 MT 308, 372 Mont. 234, 311 P.3d 772.

Prosecutorial Comments During Closing Not Violative of Defendant's Right to Fair Trial: Raugust argued on appeal that the prosecutor's comments during closing arguments deprived Raugust of a fair trial, notwithstanding the failure of Raugust's attorney to object, which Raugust characterized as ineffective assistance of counsel. Under 46-20-104, review is barred of any alleged errors not objected to at trial, unless the error falls within the exceptions in 46-20-701(2), but Raugust nevertheless urged review under the plain error doctrine. The Supreme Court held that this case did not present the requisite exceptional case to invoke the plain error doctrine because the alleged errors were either misstatements of fact, taken out of context of the

prosecutor's argument, constituted the state's analysis of the evidence, or were later cured by the jury instructions. Raugust's claim of ineffective assistance of counsel also failed because Raugust did not meet the first prong of the Strickland test by showing that his counsel's performance was deficient. St. v. Raugust, 2000 MT 146, 300 M 54, 3 P3d 115, 57 St. Rep. 570 (2000). See also St. v. Gladue, 1999 MT 1, 293 M 1, 972 P2d 827 (1999), St. v. Daniels, 2003 MT 247, 317 M 331, 77 P3d 224 (2003), and St. v. Wing, 2008 MT 218, 344 M 243, 188 P3d 999 (2008).

Presumption of Ineffective Counsel — Irreconcilable Conflict — Error in Failure to Investigate Timely Request for Substitution of Counsel: Generally, a defendant must establish both parts of the two-part test in Strickland v. Wash., 466 US 668, 80 L Ed 2d 674, 104 S Ct 2052 (1984), to prevail in showing ineffectiveness of counsel: (1) that counsel made errors so serious that counsel was not functioning as the counsel guaranteed by the constitution; and (2) that counsel's deficient performance prejudiced the defense and deprived defendant of a fair trial. However, in some cases, counsel's performance is so deficient that a presumption of ineffectiveness arises and the second part of the test becomes unnecessary. Only when surrounding circumstances justify a presumption of ineffectiveness can a constitutional claim of ineffective counsel be sufficient without inquiry into counsel's actual performance at trial. Here, a presumption of ineffectiveness could have arisen by an actual conflict of interest or by an irreconcilable conflict, but in either case, once the presumption was established, the second part of the test did not need to be satisfied. To establish an irreconcilable conflict, defendant must show a complete collapse of the attorney-client relationship. New counsel should be appointed if defendant shows by material facts that there is a total lack of communication or ineffective assistance of counsel, but bare unsupported allegations are insufficient to justify appointment of new counsel. In the present case, Wilson filed a pro se petition for postconviction relief, alleging ineffective assistance of counsel. The District Court found that it had erred by denying a hearing when Wilson requested substitution of counsel but denied the petition on grounds that Wilson had received a fair trial. On appeal, the Supreme Court applied St. v. Vessey, 967 P2d 960 (Utah Ct. App. 1998), holding that when reviewing an error in failing to investigate a defendant's timely request for substitution, the question is not whether the defendant received effective assistance of counsel at a subsequent trial, but whether the conflict with counsel was sufficient that it required substitution of counsel at the time that the request was made. In Wilson's case, it could not be determined whether the District Court gave adequate consideration to the merits of Wilson's substitution request based on the facts at the time that the request was made or whether denial of the petition for postconviction relief was based simply on the court's observation of counsel at the time of trial. The order denying the petition was vacated and the case remanded for further proceedings. Wilson v. St., 1999 MT 271, 296 M 465, 989 P2d 813, 56 St. Rep. 1096 (1999). See also St. v. Zackuse, 250 M 385, 833 P2d 142 (1991), St. v. Jones, 278 M 121, 923 P2d 560, 53 St. Rep. 864 (1996), St. v. Gallagher, 1998 MT 70, 288 M 180, 955 P2d 1371, 55 St. Rep. 284 (1998), and St. v. Molder, 2007 MT 41, 336 M 91, 152 P3d 722 (2007), in which it was held that because no request for new counsel was made, a separate hearing to consider a continuance motion was unnecessary. Molder was followed in St. v. Racz, 2007 MT 244, 339 M 218, 168 P3d 685 (2007).

Admission of Inadmissible Hearsay — Denial of Due Process Right: Allowing an employer to submit hearsay statements of witnesses with personal knowledge of alleged work misconduct without requiring that the witnesses testify in person at the eligibility hearing denied claimant of the right to confront and cross-examine the witnesses and was a violation of the constitutional right to due process, warranting reversal and remand. Bean v. Bd. of Labor Appeals, 1998 MT 222, 270 M 253, 891 P2d 516, 55 St. Rep. 927 (1998), distinguishing Richardson v. Perales, 402 US 389 (1971). See also In re Marriage of Bonamarte, 263 M 170, 866 P2d 1132 (1994).

Voir Dire Question Unrelated to Defense Properly Disallowed: Sattler contended that his right to voir dire on his defense of self-defense was infringed by the District Court's refusal to allow inquiry as to whether there must be a cause or reason to commit a homicide in jail. Generally, when notice of a defense is given, the refusal to allow defendant's voir dire on the defense constitutes prejudicial error. However, in this instance, Sattler was allowed to ask two questions directly related to jurors' opinions regarding self-defense, but a third question, regarding the cause or reason to commit a homicide in jail, was properly disallowed because it went beyond the self-defense theory in suggesting to prospective jurors that the state was required to prove motive, which was not the case. St. v. Sattler, 1998 MT 57, 288 M 79, 956 P2d 54, 55 St. Rep. 230 (1998), distinguishing St. v. Olson, 156 M 339, 480 P2d 822 (1971), and St. v. McKenzie, 186 M 481, 608 P2d 428 (1980).

Evidence of Habit Disallowed — No Denial of Due Process and Right to Defense — Unspecific Objection — No Impairment of Substantial Rights by Comment of District Court on Merits of

Defense: Huerta was tried on charges of felony assault (now assault with a weapon) of a juvenile and attempted to present evidence that it was the habit of the juvenile's mother to punish him severely. The District Court prevented the evidence from going to the jury. Huerta claimed that the District Court had prevented Huerta from presenting his only defense and thereby prevented him from obtaining a fair trial, in violation of his right to due process under the fifth amendment to the U.S. Constitution and his right to a defense under the sixth amendment. The Supreme Court noted that the claim of denial of a constitutional right was made for the first time on appeal and, citing St. v. Weeks, 270 M 63, 891 P2d 477 (1995), and St. v. Loh, 275 M 460, 914 P2d 592 (1996), held that Huerta had not made a specific enough objection when he objected at trial to a "miscarriage of justice". The Supreme Court also held that the District Court erred when it commented before the jury that "Brenda . . . is not on trial here". However, the Supreme Court held, as it noted that it had in St. v. Cassill, 71 M 274, 229 P 716 (1924), that under the circumstances, Huerta had received a fair trial and that his substantial rights were not prejudiced by the remark of the District Court. St. v. Huerta, 285 M 245, 947 P2d 283, 54 St. Rep. 1133 (1997).

Alleged Error Part of Defense Strategy — Trial Not Constitutionally Defective — Plain Error and Cumulative Error Doctrines Held Inapplicable: Hanson was charged with sexual assault of and deviate sexual conduct with his former girlfriend's son, Aaron. Hanson alleged that the testimony of his victim and certain witnesses was unreliable, that certain testimony was incorrectly presented on rebuttal, that the state introduced evidence of other acts in violation of both Rule 404(b), M.R.Ev. (Title 26, ch. 10), and his constitutional right to due process, that the state's cross-examination of him went too far, that he was improperly impeached by certain state evidence, and that the prosecutor incorrectly commented on the veracity of a witness. For these reasons, Hanson argued that he was deprived of a fair trial in violation of the constitutional guaranty of a fair trial and that the doctrines of plain error and cumulative error applied so as to require a new trial even though he had not objected to the evidence before the District Court. The Supreme Court reviewed the trial record and pointed out that Hanson either failed to object to testimony by Aaron, Aaron's therapist, and a Deputy Sheriff or he actually solicited their testimony himself in an effort to show their lack of credibility. The Supreme Court held, citing St. v. Campbell, 241 M 323, 787 P2d 329 (1990), and St. v. Finley, 276 M 126, 915 P2d 208 (1996), that the alleged errors did not rise to the level of a manifest miscarriage of justice, did not leave unsettled the question of the fundamental fairness of the trial, and did not compromise the integrity of the judicial system. Therefore, the court refused to invoke the plain or cumulative error doctrine to review issues raised for the first time on appeal. St. v. Hanson, 283 M 316, 940 P2d 1166, 54 St. Rep. 678 (1997).

Prosecutor's Comments on Defendant's Post-Miranda Silence — Violation of Right to Due Process and Privilege Against Self-Incrimination Reviewable Under Plain Error Doctrine: At trial for deliberate homicide, the prosecutor commented on the defendant's post-*Miranda* silence in the opening statement, introduced testimony regarding the defendant's refusal to make a statement, and commented twice during the closing statement about the defendant's silence. The defense counsel did not comment or object at trial. The defendant did not testify at trial. The Supreme Court held that the defendant's due process rights and the privilege against self-incrimination were violated by the prosecutor's comments and that the issue was reviewable under the common-law plain error doctrine. The Supreme Court reversed and remanded. St. v. Sullivan, 280 M 25, 927 P2d 1033, 53 St. Rep. 1282 (1996), distinguished in St. v. Baker, 2000 MT 307, 302 M 408, 15 P3d 379, 57 St. Rep. 1297 (2000).

Attorney's Disclosure of Information Without Client's Consent — Presumption of Prejudice: Prior to defendant's trial for felony assault (now assault with a weapon), a court-appointed attorney moved to withdraw as counsel based on Rule 1.16, Montana Rules of Professional Conduct, which requires an attorney to withdraw when continued representation would result in a violation of the rules of professional conduct. The attorney informed the court that the defendant, against the advice of counsel, had communicated an intent to testify falsely at trial. The District Court denied the attorney's motion to withdraw, and the defendant was subsequently convicted of assault. On appeal, the Supreme Court reversed and remanded, ruling that the attorney's disclosure of confidential information implicated the attorney's duty of loyalty and the defendant's constitutional right to effective assistance of counsel. St. v. Jones, 278 M 121, 923 P2d 560, 53 St. Rep. 864 (1996).

Failure to Inquire Into Claims of Ineffective Assistance of Counsel as Reversible Error: Weaver entered a guilty plea to charges of misdemeanor assault, issuing bad checks, and domestic abuse. Weaver subsequently filed a pro se motion to change his plea and a "motion to relieve counsel". At

a sentencing hearing, the District Court Judge stated that she had reviewed "most of the motions that have been filed in these matters" but did not "see where they will have anything to do with the sentencing in this matter". The state argued as if the motion to relieve counsel was denied, but the Supreme Court noted that the record was devoid of any indication that the District Court had made even a cursory inquiry into Weaver's complaints about his counsel's representation. Citing St. v. Finley, 276 M 126, 915 P2d 208, 53 St. Rep. 310 (1996), overruled, to the extent that it stands for the proposition that a criminal defendant has a right to a "meaningful attorney-client relationship", in St. v. Gallagher, 2001 MT 39, 304 M 215, 19 P3d 817A (2001), the Supreme Court held that when a defendant files a motion to remove the defendant's attorney because of claims of ineffective assistance of counsel, the District Court must make a critical analysis of the defendant's complaints and, if the defendant has presented seemingly substantial complaints, must hold a hearing to determine the validity of the defendant's claims. Therefore, the Supreme Court held that the District Court erred in failing to take these steps regarding Weaver's claims. St. v. Weaver, 276 M 505, 917 P2d 437, 53 St. Rep. 495 (1996), overruled, to the extent that it stands for the proposition that a criminal defendant has a right to a "meaningful attorney-client relationship", in St. v. Gallagher, 2001 MT 39, 304 M 215, 19 P3d 817A (2001).

Claims of Abuse of Process and Outrageous Governmental Conduct — No Basis for Postconviction Relief: In a petition for postconviction relief, defendant claimed abuse of process and outrageous governmental conduct that could have been addressed or remedied at the trial level, including: (1) manipulation of jurisdiction and witnesses to ensure the possible application of the death penalty; (2) use of an out-of-state crime lab; (3) mishandling of evidence; and (4) use of facially invalid witness testimony. The Supreme Court addressed each allegation as follows and found no abuse or outrageous conduct: (1) As long as the state has jurisdiction over a crime, the decision to bring charges in state court rather than federal court or in one state's court rather than another's properly rests with the discretion of the prosecutor. The prosecution of other defendants in the case in federal court and the offering of plea bargains and use of other witnesses' testimony against defendant suited the degree of culpability of the witnesses. (2) Use of the crime lab of the state in which the crime was discovered and the sharing of resources between the states were proper. (3) The prosecution properly established the chain of evidence regarding the evidence allegedly mishandled and satisfactorily explained that the change in certain evidence between the time of the crime and the time of trial was due to laboratory testing. (4) There was no indication that the prosecutor knew that one witness's testimony was false, and the use of the testimony at trial was insufficient to warrant reversal of the conviction. Four other theories of abuse of process or outrageous governmental conduct were not properly raised and thus were not addressed by the Supreme Court. Kills On Top v. St., 273 M 32, 901 P2d 1368, 52 St. Rep. 608 (1995).

Constitutionality of "Death Qualified" Jury — Mention of Possibility of Death Sentence Not Prejudicial Per Se: Prior to voir dire, Gollehon requested the trial court to prohibit the state from asking jury panel members to declare their beliefs concerning the death penalty, arguing that: (1) questioning the members about a possible sentence was inappropriate because Montana juries do not participate in the sentencing portion of a trial; (2) social science evidence proves that when a jury is "death qualified", it is more prone to convict the defendant; and (3) if a jury knows that the death penalty could be imposed upon conviction, the error is prejudicial per se. In analyzing the death qualification of juries under 46-16-115, the Supreme Court cited Witherspoon v. Ill., 391 US 510, 20 L Ed 2d 776, 88 S Ct 1770 (1968), for the holding that excusing jurors simply because they voice general objections to the death penalty is insufficient and that only in instances when that belief prohibits the juror from applying the law that the judge has provided may a juror be excused for cause. Addressing the question of social science evidence seeming to indicate prejudice to a defendant when a jury is death qualified, the Supreme Court rejected the studies, noting that in Lockhart v. McCree, 476 US 162, 90 L Ed 2d 137, 106 S Ct 1758 (1986), the U.S. Supreme Court had seriously questioned the validity of similar studies, ruling that even if the studies were valid, it did not prove that death qualification was unconstitutional. Further, death qualification is a procedure to ensure that a jury is committed to its task and is therefore not per se an unconstitutional due process violation. St. v. Gollehon, 262 M 1, 864 P2d 249, 50 St. Rep. 1250 (1993).

Delay of One Hundred Seven Days Before Filing Information — No Due Process Violation: On June 6, 1990, Beatty reported to the Sheriff and County Attorney that he had been kidnapped, beaten, and intimidated 2 days before. Following an investigation by the Sheriff, defendant Flesch was arrested on October 5, 1990. At a hearing on April 8, 1991, defendant's wife and a casino employee testified that although they could not be certain, both thought defendant was

in the Gold Nugget Casino the night of the kidnapping. At the hearing and later at trial, Flesch argued that he was deprived of due process because the delayed arrest meant that his witnesses could not positively testify about his whereabouts the night of the kidnapping. The Supreme Court stated, citing St. v. Krinitt, 251 M 28, 823 P2d 848, 48 St. Rep. 1088 (1991), that Flesch was not deprived of due process because he was not prejudiced by the 107-day delay; his alibi defense, including his wife's later definite statement that defendant was at home the night of the kidnapping, was submitted to the jury, and it failed. Even if defendant was prejudiced, any prejudice must be balanced with the necessity for a reasonable time to investigate the crime. Because the information was filed within the applicable statute of limitations and with less delay than found in Krinitt, the Supreme Court found no due process violation. St. v. Flesch, 254 M 529, 839 P2d 1270, 49 St. Rep. 813 (1992).

"Lucero" Reasonable Doubt Instruction Approved: The defendant Flesch was convicted of aggravated kidnapping and intimidation. At trial and on appeal, Flesch objected to the jury instruction on reasonable doubt, claiming that it was "strikingly" similar to an instruction disapproved in Cage v. La., 498 US 39, 112 L Ed 2d 339, 111 S Ct 328 (1990). The Supreme Court found that the instruction disapproved in Cage was considerably different from the one used in the case on appeal, which was identical to the instruction approved in St. v. Lucero, 214 M 334, 693 P2d 511 (1984). In that case, the Supreme Court stated that more complicated instructions on reasonable doubt tended to confuse the jury. St. v. Flesch, 254 M 529, 839 P2d 1270, 49 St. Rep. 813 (1992).

Lack of Notice of Changed Testimony — Continuance Proper: It was not revealed to defendant until trial that the initial story of an alleged sexual assault victim had changed. Prior to the victim's in-court testimony, defendant was unaware that the victim had made more than one statement to the investigating officer. Nevertheless, on the grounds that the court's calendar was full and defendant should have subpoenaed the witnesses before trial, the trial court denied defendant's motion for continuance until other witnesses could be subpoenaed to test the victim's credibility. The Supreme Court noted that the credibility of a witness is of utmost importance between a sexual abuse victim and a denying defendant, often constituting the only defense available, and that a change in testimony goes to the credibility of the victim. A reasonable continuance would have satisfied defendant's constitutional rights with regard to compulsory process, due process, and fair trial, and denial of the motion was an abuse of discretion warranting reversal and a new trial. St. v. Timblin, 254 M 48, 834 P2d 927, 49 St. Rep. 617 (1992).

No Denial of Due Process for Alleged Court Failure to Inform Defendant of Probable Required Attendance in Sex Offender Program: Defendant convicted of felony sexual assaults contended he was denied due process by the trial court's failure to inform him that to admit the offenses under an Alford plea would probably require him to attend an inpatient sex offender treatment program at the state prison and that his continued assertion of innocence would prevent him from completing the program. The Supreme Court disagreed, finding no evidence to establish that the trial court's acceptance of defendant's Alford plea misled the defendant in any way sufficient to constitute a due process violation. St. v. Cameron, 253 M 95, 830 P2d 1284, 49 St. Rep. 150 (1992).

Mandatory Presumption of Intoxication — Jury Instruction — Unconstitutional Shifting of Burden: Following an accident in which defendant struck and killed a pedestrian, defendant was charged with negligent homicide after a breath test registered his blood alcohol content at 0.12. Defendant appealed his conviction, alleging that the jury instruction that a blood alcohol level greater than 0.10 raised a mandatory rebuttable presumption that he was under the influence of alcohol. The Supreme Court reversed the conviction, stating that the instruction requiring the jury to find intoxication "unless and until evidence is introduced which would support a finding of its nonexistence" may have led the jury to believe that defendant not only had to introduce contrary evidence but had an affirmative duty to convince the jury that he was not intoxicated. A mandatory rebuttable presumption that shifts the burden of persuasion to the defendant violates due process. The instruction was not harmless, and the court remanded for new trial. St. v. Leverett, 245 M 124, 799 P2d 119, 47 St. Rep. 1753 (1990).

No Evidence Offered on Subject in Opening Statement: In her opening statement, the prosecutor referred to mental damages suffered by the victim, but because of a midtrial agreement by counsel, she did not introduce any evidence on the subject. The defendant argued that the opening remarks were prejudicial. The Supreme Court held that there was no indication that the prosecuting attorney lacked good faith in making her remarks. Hawkins v. St., 242 M 348, 790 P2d 990, 47 St. Rep. 783 (1990).

Retroactive Application of Law Not Improper: The defendant claimed that he had been denied due process by the trial court's retroactive application of a U.S. Supreme Court decision on warrantless searches of a probationer's residence. The Montana Supreme Court held that the retroactive application of the decision was not violative of the defendant's due process rights because the decision only affected the defendant's procedural rights rather than his substantive rights. Hawkins v. St., 242 M 348, 790 P2d 990, 47 St. Rep. 783 (1990).

Reconstruction of Nonrecorded Portions Adequate: The failure to record voir dire, opening statements, closing arguments, bench conferences, the jury charge, and the jury poll during a robbery trial did not deny due process. The reconstruction of the nonrecorded portions of the trial at the evidentiary hearing on a habeas corpus petition was adequate to satisfy due process requirements. Madera v. Risley, 885 F2d 646 (9th Cir. 1989).

Examination of Social Worker's File Not Allowed — No Violation of Constitutional Rights: Defendant in a child abuse case claimed his constitutional rights were violated by the District Court's refusal to allow him to examine the file of the social worker assigned to his case. The Supreme Court relied on Pa. v. Ritchie, 480 US 39, 94 L Ed 2d 40, 107 S Ct 989 (1987), in holding that Montana's child abuse confidentiality statute, 41-3-205, as it applies to file review, does not violate a defendant's right to confront his accusers. Further, as long as the trial court has the statutory authority to review the file in camera and to release material information from the file to the accused, defendant's right to a fair trial is fully protected. St. v. Thiel, 236 M 63, 768 P2d 343, 46 St. Rep. 182 (1989), followed in St. v. Reynolds, 243 M 1, 792 P2d 1111, 47 St. Rep. 1143 (1990), in St. v. Donnelly, 244 M 371, 798 P2d 89, 47 St. Rep. 1600 (1990), and in St. v. Glick, 2009 MT 44, 349 M 277, 203 P3d 796 (2009), with regard to a trial court's in camera review of a defendant's access to confidential presentence investigation reports on witnesses. See also St. v. Imlay, 249 M 82, 813 P2d 979, 48 St. Rep. 588 (1991), which overruled Donnelly with regard to augmentation of sentence for failure to admit guilt.

Claim of Bias Against Defense Counsel — Right to Fair Trial Not Affected: Defendant claimed he was denied a fair trial because of judicial bias against defense counsel. However, his right to a fair trial was not adversely affected when: (1) the trial court acted within its statutory power under 46-15-329; (2) comments made by the judge were done outside the presence of the jury; and (3) adverse rulings against defense counsel were simply proper compliance with Montana law. St. v. Shaver, 233 M 438, 760 P2d 1230, 45 St. Rep. 1617 (1988).

Failure to Hold Hearing Regarding Effective Assistance of Counsel — Reversible Error: Defendant represented herself after requesting removal of counsel and being denied appointment of substitute counsel. The trial court determined defendant was competent to represent and that she had made a knowing and voluntary waiver of counsel. However, it was error for the court to fail to hold an independent hearing to establish whether defendant had received effective representation and to determine the validity of her complaints concerning counsel. Failure to make such determination deprived defendant of the opportunity to make a meaningful choice to proceed pro se, infringing the right to effective assistance of counsel and the right to a fair trial, and constituted reversible error. St. v. Enright, 233 M 225, 758 P2d 779, 45 St. Rep. 1442 (1988), distinguished in St. v. Craig, 274 M 140, 906 P2d 683, 52 St. Rep. 1158 (1995), followed in St. v. Weaver, 276 M 505, 917 P2d 437, 53 St. Rep. 495 (1996), and overruled, to the extent that it stands for the proposition that a criminal defendant has a right to a "meaningful attorney-client relationship", in St. v. Gallagher, 2001 MT 39, 304 M 215, 19 P3d 817A (2001).

Attorney's Voluntary Disclosure of Confidential Statements — No Waiver of Attorney-Client Privilege: Defendant's court-appointed attorney called himself to the stand to testify about defendant's inconsistent statements. Based on the District Court's acceptance of the testimony, the Supreme Court found the following factors prejudiced defendant's right to a fair trial: (1) the attorney's testimony of defendant's statements was extremely prejudicial and had limited probative value; (2) the state presented no evidence that defendant intended to waive his right not to divulge this privileged information; and (3) given defendant's unfamiliarity with courtroom procedure, defendant's right against self-incrimination need not be surrendered in order to assert a statutory right. Conviction was reversed. St. v. Statczar, 228 M 446, 743 P2d 606, 44 St. Rep. 1668 (1987).

Destruction of Potentially Exculpatory Evidence — Reversal Not Required: Defendant contended that potentially exculpatory evidence from a fire site was destroyed negligently by state fire experts and that the condition of the fire scene prevented his expert from examining the evidence, thereby robbing defendant of his right to present a complete defense. The Supreme Court found that defendant was not entitled to a reversal due to suppression of evidence because: (1) the deputy fire marshal carefully preserved any burned material with evidentiary value while

removing nonevidentiary material from the site; (2) a front-end loader used to clean up the scene removed only irrelevant and nonexculpatory debris and never disrupted evidentiary material; (3) all evidentiary material was available at all times for inspection by defendant's expert; and (4) defendant presented no factual basis that the debris was exculpatory or was vital to his defense. St. v. Atlas, 224 M 92, 728 P2d 421, 43 St. Rep. 2042 (1986).

Careless Handling of Blood Sample — Deprivation of Due Process and Fair Trial: Defendant was taken to a hospital where a blood sample was drawn; then he was transported back to the Sheriff's office where he was booked and his personal property, including the blood sample, was taken from him. The blood sample was left on the counter in the dispatch room rather than being refrigerated and was not given to defendant upon his release. The Supreme Court held that once the sample was taken from defendant, the authorities had a duty to properly care for it. Since this duty was not performed, the careless handling of the sample deprived defendant of his due process right to gather possible exculpatory evidence, precluding a fair trial. St. v. Swanson, 222 M 357, 722 P2d 1155, 43 St. Rep. 1329 (1986).

No Right of Defendant to Attend Pretrial Meeting of Prosecutor and Witnesses at Crime Scene: It was not a violation of due process of law or any other federal or state constitutional provision for the prosecutor to meet with witnesses to a shooting at the place of the shooting for the purpose of going over what the witnesses saw on the night of the shooting. St. v. Sage, 221 M 192, 717 P2d 1096, 43 St. Rep. 738 (1986).

Information Additional to That in Presentence Report Presented at Sentencing Hearing — No Due Process Violation: The presentence investigation report submitted to the District Court showed that defendant had had his parole on another conviction revoked for carrying a concealed weapon. At the sentencing hearing the court, over defendant's objection, received into evidence a written report and additional testimony by defendant's former parole officer about the reasons that parole was revoked. Defendant's due process rights were not violated by this procedure. He was represented by a lawyer at the sentencing hearing, had the opportunity to cross-examine the witness regarding the new material, had the opportunity to rebut the new material, and could have called for a continuance in order to call his own rebuttal witnesses. St. v. Elliott, 221 M 174, 717 P2d 572, 43 St. Rep. 723 (1986).

Mere Allegations of Prejudice Insufficient to Satisfy Cumulative Error Doctrine: Defendant contended that the overall demeanor of the prosecution and the District Court, together with other alleged errors, required a reversal of his conviction; however, he articulated no particular comments or remarks and alleged no prejudice to his substantial rights. The Supreme Court has acknowledged the cumulative error doctrine, which is the accumulation of errors which prejudice a defendant's right to a fair trial, but noted that mere allegations of error without proof of prejudice are insufficient to satisfy the doctrine. The resolution of the alleged errors indicated no error meriting reversal of this case, and the court held that defendant failed to carry his burden of showing prejudice and declined to reverse his conviction on grounds of cumulative error. St. v. Grant, 221 M 122, 717 P2d 562, 43 St. Rep. 685 (1986). See also St. v. Hildreth, 267 M 423, 884 P2d 771, 51 St. Rep. 1086 (1994), St. v. Flowers, 2004 MT 37, 320 M 49, 86 P3d 3 (2004), and St. v. Kearney, 2005 MT 171, 327 M 485, 115 P3d 214 (2005).

Mere Presence of Hearsay Evidence in Court File Not Reversible Error: The presence in the court file of statements not supported by testimony is not a violation of due process or error when: (1) the authors of the reports did testify and were subject to cross-examination; (2) no evidence was presented to rebut the presumption that any hearsay within the reports themselves was disregarded by the District Court; and (3) the court explicitly based its findings upon the testimony of the witnesses and upon the reports of only those who testified. In re M.L.H., H.M.H., & R.H., 220 M 288, 715 P2d 32, 43 St. Rep. 375 (1986).

Misleading Jury as to Effect of Acquittal of Defendant: In his closing argument in a trial on the charge of sexual intercourse without consent, the prosecutor told the jury that in order to find the defendant not guilty, the jury would have to tell the alleged victim that she was a drug pusher, slut, and liar. On appeal, the Supreme Court rejected defendant's claim that the statements were so inflammatory and prejudicial that he had been denied his right to a fair trial, ruling that the prosecutor's error did not affect defendant's substantial rights. St. v. Sanderson, 214 M 437, 692 P2d 479, 42 St. Rep. 94 (1985).

Instruction Defining "Reasonable Doubt": The instruction given in the present case was misleading because the jury was instructed that a reasonable doubt could only be surmised from the evidence or testimony presented at trial and not from any other source. A lawyer or one trained in the law may recognize that a lack of evidence or an insufficiency of evidence presented at trial may give rise to a reasonable doubt, but a juror relying on the letter of this instruction

may not. The effect of a jury instruction is determined by the way in which a reasonable juror could have interpreted it, not by the state courts' interpretation of its legal import. The jury could reasonably interpret the instruction to mean that affirmative evidence supporting the appellant's innocence was required as the basis for a reasonable doubt. The effect is to shift the burden of proof to the appellant, which is not constitutionally permissible. St. v. Lucero, 214 M 334, 693 P2d 511, 41 St. Rep. 2509 (1984).

Judge's Discussion of Trial Process and Length of Service With Jurors Outside Presence of Prosecution, Defense, or Defendant: Prior to trial, the judge brought the 55 prospective jurors into court, explained the trial process, asked them if they could serve 2 weeks, and discharged two of them after the discussion. The prosecutors, defendant, and defense counsel were not present, and no record was kept of the proceeding. There was no prejudice to defendant, but the Supreme Court stated that a record should have been kept and that it was not suggesting that such an examination should be adopted by other judges or that the method of examination was the best one. St. v. Stroud, 210 M 58, 683 P2d 459, 41 St. Rep. 919 (1984).

Denial of Continuance When Attorney Informed of Appointment 25 Days Before Homicide Trial — Fair Trial and Effective Assistance Rights Denied: Attorney for defendant charged with deliberate homicide was relieved of his duty on December 14, and the new attorney learned of his appointment on December 30. On January 3, trial was set for January 24, and the new attorney was notified of the trial date on January 5. He spoke with the trial Judge on January 10 about a continuance, and on January 17 a motion for continuance was heard and denied. In the 7 days before trial, the attorney was able to interview only 8 of the state's 12 witnesses and could not locate possible defense witnesses or interview the state's pathologist. Refusal of the continuance was an abuse of discretion and reversible error requiring a new trial. The attorney's diligence was unquestioned, and though the state had a right to a speedy trial, the defendant's right to a fair trial must take precedence, particularly since defendant waived his speedy trial right. Defendant's rights to a fair trial and effective assistance of counsel were denied. St. v. Sotelo, 209 M 86, 679 P2d 779, 41 St. Rep. 568 (1984).

Bias of Juror — New Trial Ordered: According to the affidavit of another juror, juror Stillings, during the jury deliberations: (1) advocated a position of disregarding the law and instructions of the judge in favor of punishing the defendant for his drinking and drunk driving; and (2) passed out written materials which advocated that jurors usurp the power of the judge and Legislature and which encouraged people to serve on juries to effect this policy. Juror Stillings did not deny the challenge that he must have perjured himself to sit on the jury. The Supreme Court held that these instances of Stillings' speech and conduct strongly tended to establish his predeliberative bias and that they were sufficient to establish denial of the right to trial before a fair and impartial jury. St. v. Stafford, 208 M 324, 678 P2d 644, 41 St. Rep. 377 (1984).

Allegedly Exculpatory Evidence Not Produced by State — No Error: Defendant was convicted of felony theft and felony criminal mischief for the unauthorized cutting of Christmas trees on a section of land, section 35, owned by a paper company. Defendant did have permission to cut trees on an adjacent section, section 36, owned by the state of Montana. Defendant moved to dismiss the case on the grounds that the State had suppressed material or exculpatory evidence by selling most of the trees shortly after the incident. Defendant claimed that as a result of this sale, he had no evidence with which to prove that he had cut trees not on section 35, but rather on section 36. The District Court denied the dismissal motion, and the Supreme Court affirmed. The Supreme Court reasoned that defendant had not filed a motion to produce the trees until 5 months after the incident, long after the trees had been disposed of, that defendant had not shown that the evidence was exculpatory, and that, in any event, the paper company had had possession and control of the trees, not the State. St. v. Palmer, 207 M 152, 673 P2d 1234, 40 St. Rep. 1957 (1983).

Failure to Record Voir Dire and Opening and Closing Statements: Defendant contended that the failure to record the voir dire, opening statements, bench conferences, closing statements, jury charge, and jury poll denied him due process as no record was available for appeal. Defendant's trial counsel, who was not the same as his appellate counsel, waived the portions of the record not recorded. The Supreme Court found nothing to indicate that prejudice occurred during the unreported portions of the trial. Automatic reversal was inappropriate upon specific waiver of defense counsel. St. v. Madera, 206 M 140, 670 P2d 552, 40 St. Rep. 1558 (1983).

Failure to Reveal Alibi — Undisclosed Witnesses Allowed: Defendant was convicted of robbery and felony theft. On appeal, he contended that he was denied due process when the State was allowed to use rebuttal witnesses on the last day of trial without giving notice of the witnesses as required by statute. The State contended that because defendant refused to inform the State

of the nature of his alibi, the State did not know prior to trial if the information possessed by the rebuttal witnesses was relevant. The District Court allowed defense counsel to talk to the witnesses. No motion for a continuance was made. The statute allows the District Court to permit additions to the witness list for good cause. Defendant's failure to reveal the substance of his alibi was sufficient cause. St. v. Madera, 206 M 140, 670 P2d 552, 40 St. Rep. 1558 (1983). See also LaMere v. Risley, 827 F2d 622 (9th Cir. 1987).

Use of Jury Forms for Principal in Case of Accomplice: Defendant contended that he was denied due process because he was charged as an accomplice in aiding and abetting the crimes of robbery and theft, while he was tried as a principal and the jury verdict forms were those for a principal. The court found 45-2-301 to be dispositive. Under the instructions of the case, defendant was charged, tried, and convicted of being responsible or accountable for robbery and theft. The fact that the word "accountable" was not used on the verdict forms had no bearing on the case. St. v. Madera, 206 M 140, 670 P2d 552, 40 St. Rep. 1558 (1983).

Suppression of Material Evidence — Denial of Due Process: Defendant was a suspect in a rape case. He was interviewed by a police officer and told the officer he was having problems with smoking and the devil. They discussed his mental problems. Defendant was later charged with the crime. A standard omnibus order of discovery was granted. During the trial, the prosecution learned that the police interview was much more extensive than reported. Defense counsel was notified immediately. His motion in limine was denied, and defendant was convicted. On appeal, the Supreme Court held that only intentional or deliberate suppression of evidence is a per se violation of due process sufficient to reverse or nullify a conviction. Negligent or passive suppression will overturn a conviction if prejudice is shown. Generally, suppressed evidence must be material to either guilt or punishment. In order to obtain a new trial, the accused must show the materiality of the evidence. The Supreme Court remanded the case for a new trial because the suppressed evidence was indicative of mental illness. The evidence was material and exculpatory, and its suppression was prejudicial to defendant. St. v. Patterson, 203 M 509, 662 P2d 291, 40 St. Rep. 600 (1983). See also St. v. Licht, 266 M 123, 879 P2d 670, 51 St. Rep. 686 (1994).

Sandstrom Instruction With Statement — Presumption Disputable: Reversal of a mitigated deliberate homicide conviction was required where the court gave the following Sandstrom instruction: "The law also presumes that a person intends the ordinary consequences of any voluntary act committed by him. This presumption, however, is termed a disputable presumption and may be controverted by other evidence." The error was not harmless. The instruction obviously permitted the jury to presume intent without proof beyond a reasonable doubt. Intent was hotly contested and an important element of the crime charged, and because of the instruction the jury could disregard the defendant's claim that he intended only to fire a warning shot. Then, with the presumption of intent, the jury could have concluded that defendant used deadly force to intentionally kill the victim. St. v. Musgrove, 202 M 59, 655 P2d 982, 39 St. Rep. 2327 (1982).

Test to Be Employed — Fair Trial Versus Right to Know: The defendant, charged with deliberate homicide, sought to exclude the public from a pretrial suppression hearing. The trial court denied defendant's motion, and he appealed. The public's right to know and a criminal defendant's right to a fair trial may conflict. The right to a fair trial is paramount to the public's right to know. In weighing these two rights, the court adopts Standard 8-3.2 of the American Bar Association Standards for Criminal Justice (2nd Ed. 1978) as the appropriate test. State ex rel. Smith v. District Court, 201 M 376, 654 P2d 982, 39 St. Rep. 2176 (1982).

Imputing Criminal Record — Unrelated to Relevant Character — Denial of Fair Trial: Defendant was convicted of the felony theft of an air compressor. On appeal, defendant contended that the suggestion by the prosecution on cross-examination that he had an FBI criminal record was prejudicial. The Supreme Court held that imputing to a defendant by implication a criminal record unrelated to any trait of character involved in the offense charged denied the defendant a fair trial. St. v. Kramp, 200 M 383, 651 P2d 614, 39 St. Rep. 1819 (1982).

Ineffective Assistance of Counsel — Failure to Pursue Appeal: In 1972, the defendant was convicted of assault and rape. A Sandstrom-type instruction was given at his trial. After conviction, his counsel told him that a notice of appeal had been filed when no notice had been filed. The defendant wrote to a Justice of the Montana Supreme Court seeking a transcript and aid in appealing his conviction. Over the next few years, the defendant made several pro se attempts to get a transcript, which he believed was necessary in order to perfect an appeal. In 1981, a federal court ordered the Montana Supreme Court to review the defendant's conviction and to provide him with counsel. On appeal, the Montana Supreme Court found that use of the Sandstrom-type instruction rendered his trial unfair and his right to counsel was denied by the

informal and summary disposition of his appeal. A new trial was ordered. St. v. Swan, 199 M 459, 649 P2d 1297, 39 St. Rep. 1522 (1982).

Bias of Hearing Officer Alleged to Deny Fair Hearing — No Prejudice Shown: The Board of Natural Resources and Conservation (now Board of Environmental Review) issued a certificate of environmental compatibility and public need under the Montana Utility Siting Act of 1973 (now the Montana Major Facility Siting Act of 1975). The plaintiff environmental association alleged the denial of its constitutional right to fair hearing as a result of the alleged prejudice of attorney Sabol, hearing officer and member of the Board. The Supreme Court found no denial of the plaintiff's constitutional right because: (1) Sabol's connection with another ski resort that might seek a certificate in the future was such as to make the plaintiff's claim of prejudice no more than tenuous; (2) any bias reflected in Sabol's comments to a newspaper reporter about the tactics of the plaintiff was not reflected at a hearing almost 2 months later; (3) directions to the defendant's counsel from Sabol to limit the scope of cross-examination were consistent with the fact that the parties took similar positions on the issue then in question; (4) even if Sabol was prejudiced he had either relinquished his position as hearing officer or was no longer serving on the Board itself when a decision was recommended to the Board and the Board acted on that recommendation; and (5) 75-20-220 (now repealed) specifying that a hearing officer may not be a member of the Board is inapplicable to this case because that section was enacted in 1975 and this case was tried under the law as passed in 1973. Mont. Wilderness Ass'n v. Bd. of Natural Resources and Conserv., 200 M 11, 648 P2d 734, 39 St. Rep. 1238 (1982).

Due Process Challenge to In-Court Identification — Two-Pronged Test: When a due process challenge is made to an in-court identification in a criminal case, on the asserted ground of improper procedure in prior identification(s), a two-pronged test is applied: first, was the identification procedure impermissibly suggestive; and second, if it was, did it under the totality of the circumstances have such a tendency to give rise to a substantial likelihood of irreparable misidentification that to allow the witness to make an in-court identification would violate due process. The factors to be considered in evaluating the likelihood of misidentification include opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. St. v. Herrera, 197 M 462, 643 P2d 588, 39 St. Rep. 731 (1982).

Youth in Need of Care Proceeding — Spouse May Testify — Section Constitutional: The Department of Social and Rehabilitation Services (now Department of Public Health and Human Services) filed a petition in District Court alleging that J. H. was a youth in need of care. The boy, his mother, and a social worker all testified that the father sexually abused the boy. The father contended that the wife's testimony was a violation of the spousal privilege. The Supreme Court held the wife could testify. The purpose of the spousal privilege is to protect the sanctity of the marriage and home. However, once a family member has been sexually abused, the sanctity of the home and the reason for the rule have been destroyed. Sexual abuse of the son by the father is also a special wrong to the wife and has particularly and directly affected her in a manner other than that suffered by the public in general. Thus, the wrong against the child is nothing more nor less than a wrong against the other spouse. As such it falls into one of the exceptions to the spousal privilege. The father claimed that it was unclear whether 41-3-404 (renumbered 41-3-437) allows parents to testify in youth in need of care proceedings and therefore the section was unconstitutionally vague. The court, having found that the wife could testify against the husband, determined that the statute was not void due to vagueness. In re J. H., 196 M 482, 640 P2d 445, 39 St. Rep. 267 (1982).

Instruction — Charge of Rape Easily Made: The defendant, convicted of sexual intercourse without consent and sexual assault, alleged error on appeal in the refusal of the trial court to give some of his offered jury instructions. One refused instruction was that the charge against the defendant was one easily made and difficult to defend against. The Supreme Court indicated that the instruction was incorrect as offered because, as to two of the witnesses against the defendant, there was no evidence showing any personal enmity toward the defendant. As to a third witness, there was sufficient basis in the evidence for this type of instruction under the Smith case, but the defendant failed to limit the instruction to advising the jury to look with caution only at the testimony of the third witness, whose enmity toward the defendant was in evidence. Accordingly, the instruction was correctly refused in its offered form. St. v. Camitsch, 192 M 124, 626 P2d 1250, 38 St. Rep. 563 (1981), affirmed in Camitsch v. Risley, 705 F2d 351 (9th Cir. 1983), holding it was not a denial of due process for the retroactive application of state decisional law on theory that the trial court's refusal to give the "easily proven/difficult to disprove" instruction should

have led to defendant being granted a new trial on appeal but that the Montana Supreme Court reviewed the instruction under state law as it existed at the time of appeal rather than the time of trial.

Due Process — New Trial Orders — Improper Information Amendment: A defendant was convicted of aiding and abetting another in witness tampering and aggravated assault. The conviction was reversed. The defendant was rearraigned on the original charges and convicted of lesser included offenses. On appeal, the defendant alleged denial of due process and claimed the court did not have the authority to order him rearraigned under the original charges in the absence of a new trial order in the Supreme Court's original opinion. The Supreme Court said that language in its opinion did grant a new trial. Accordingly, 46-20-707 was inapplicable. The defendant further alleged the filing of an amended information left the original information of no effect. He argued that when the amended information was dismissed there was no information then existing and that he was thereafter illegally detained. The Supreme Court disagreed, saying when an unauthorized or otherwise improper amended information is quashed or dismissed, further proceedings may be had on the original information. St. v. Cardwell, 191 M 539, 625 P2d 553, 38 St. Rep. 451 (1981), following St. v. Thompson, 392 SW2d 617 (Mo. 1965).

Comment on Defendant's Failure to Testify — Fair Trial Not Denied: In a prosecution for theft in which the defendant refused to testify during trial, the statement by the prosecutor that "the defendant knows what the date [of the offense] was" was not improper comment on the defendant's refusal to testify. The statement, read in the context of the prosecutor's entire closing statement, merely stressed the fact that the date of the theft and the date of defendant's presence in the store had already been proven. Any possible taint caused by the prosecutor's comments was cured by the cautionary instruction from the court. St. v. Hart, 191 M 375, 625 P2d 21, 38 St. Rep. 133 (1981).

Impeachment Evidence Held Relevant — Fair Trial Not Denied: In a prosecution for theft in which the defendant first gave the prosecutor notice of intent to rely on an alibi and later withdrew the notice and obtained a pretrial order limiting the prosecutor's cross-examination to the scope of direct examination, the court did not err in allowing the prosecutor to ask a defense witness, who previously testified about defendant's physical condition during the time the theft was committed, whether she had previously made any statements that she was with the defendant at the time of the offense. The ruling of the trial court was in accordance with the holding in Kipp v. Silverman, 25 M 296, 64 P 884 (1901), in which it was held that cross-examination should be allowed an extended range rather than a limited one. In the present case, the prosecution only attempted to determine if the witness's testimony related to the defendant's condition on the day of the theft. St. v. Hart, 191 M 375, 625 P2d 21, 38 St. Rep. 133 (1981).

Witness Properly Called by the Court — Fair Trial Not Denied: In a prosecution for theft, the court did not err in itself calling a witness to verify the testimony of a prosecution witness. The authority of the court to call a witness is expressly granted to the District Court by the rules of evidence. This procedure avoids the possibility that the witness will be associated with one party or the other, and absent a showing of abused discretion or manifest prejudice, the trial court's decision should not be reversed. No abuse or prejudice was found. St. v. Hart, 191 M 375, 625 P2d 21, 38 St. Rep. 133 (1981).

Right to Due Process and Speedy Trial Denied — When Defendant Becomes "Accused" — Insufficient Reason for Delay — Prejudice to Defendant: Where 376 days elapsed between the filing of a complaint in Justice's Court charging the defendant with arson and the filing of an information in District Court and 423 days elapsed between the defendant's arrest and the defendant's scheduled trial, the court did not err in dismissing with prejudice for lack of a speedy trial the information charging the defendant with arson. Because the defendant became an "accused" on the day the complaint was filed against him in Justice's Court, because the state failed without good reason to diligently pursue the charges against the defendant, and because the defendant had asserted the denial of his right to a speedy trial and shown prejudice in his plausible claims that he was no longer able to recall facts constituting an alibi and was no longer able to discover physical evidence for use in his defense independently of that evidence found by the prosecution, the defendant satisfied the requirements to prove a violation of his constitutional right to a speedy trial. St. v. Larson, 191 M 257, 623 P2d 954, 38 St. Rep. 213 (1981).

Impeachment of Party's Own Witness Allowed — Fair Trial Not Denied: In a prosecution of the defendant for theft, the court did not err in overruling the defendant's objection to prosecution attempts to elicit more cogent testimony from an uncooperative witness, made on the basis that the prosecutor was attempting to impeach his own witness. Under Rule 607, Montana Rules of Evidence, a party does not vouch for his witness, except for expert and character witnesses,

because a party's witnesses are not chosen but are those persons who happen to be present and see the events that give rise to the case. St. v. Hart, 191 M 375, 625 P2d 21, 38 St. Rep. 133 (1981).

Psychiatric Testimony on Intent Element — Permissible for Rebuttal: Defendant Fish had an argument with Miller at the bar where Miller worked over money Miller owed Fish. A fight ensued, which was broken up by patrons. Fish left saying he would settle with Miller. Fish recruited some friends and went to Miller's trailer park. Miller had already arrived and had friends with him. Fish, upon discovering that Miller was at home, began knocking and pounding on the door. Fish's friends, Hubbard and Lodge, were with him. Lodge began kicking the door. Miller got a gun and shot through the door, killing Lodge. Hubbard got in his truck, and Miller put the gun through the truck window. Hubbard took the gun away from Miller, who ran from the truck. Hubbard shot and killed Miller. Fish was convicted of attempted burglary, and Hubbard was convicted of mitigated deliberate homicide. Hubbard contends the trial court erred by refusal to allow a psychiatrist to testify as to his mental state at the time Miller was shot. With respect to either deliberate homicide or mitigated deliberate homicide, the State must prove that the defendant "purposely or knowingly" caused the death of another human being. "Purposely or knowingly" are statutory descriptions of various states of the human mind. They are particular elements included in the definition of the offense. No element of an offense can be presumed, and thus the requisite state of mind must be established by the prosecution and believed by the jury beyond a reasonable doubt. The offered testimony included a conclusion that Hubbard, under the surrounding circumstances, more than likely did not intend to kill Miller when he shot but only intended to stop or apprehend him. The testimony would have gone to support a general rebuttal of the intent requirement. This was a proper subject for expert psychiatric testimony. To exclude testimony offered by Hubbard as rebuttal to an essential element of the crime denied him a full evidentiary hearing and deprived him of a fair trial. St. v. Fish, 190 M 461, 621 P2d 1072, 37 St. Rep. 2065 (1980).

Aiding and Abetting Instruction — United States Constitution: The giving of an aiding and abetting instruction does not violate due process under the United States Constitution (similar to Art. II, sec. 17, Mont. Const.) if the State has abolished the distinction between principals and accessories and there is evidence before the jury to support the instruction. Quigg v. Crist, 616 F2d 1107 (9th Cir. 1980).

Prosecutor's Remarks on Lack of Defense Case Held Permissible: The defendant appealed his conviction for theft and alleged that the prosecution's closing statement included impermissible remarks. The reviewing court rejected this argument stating that while it was true that the County Attorney often asked rhetorical questions which amounted to comments that there was no evidence or no testimony to rebut the inferences raised by the State's evidence, nowhere did it appear that these comments would necessarily imply that the defendant was the only source that could negate the State's evidence. The most that could be said of the County Attorney's comments was that they referred to the fact that the defense presented no case at all. Certainly the prosecution, as an adversary for the State, cannot be prohibited from arguing the strength of its case to the jury. The manifest fact that the defense presented no testimony of its own may be detrimental to the defendant, but that fact cannot deny the prosecution its right to stress the strength of its own evidence. St. v. Dolan, 190 M 195, 620 P2d 355, 37 St. Rep. 1860 (1980).

Discovery Limited by Court — Witness's Bias a Jury Question: The defendant, convicted of theft in a holdup of a truckstop, appealed that the trial court had erred in refusing to allow discovery of the "rap sheet" of a suspected accomplice. Defendant argued on appeal that he was denied due process. The reviewing court disagreed, saying that unlike the defendant in the case this defendant relied upon, who was unable to make a record from which to argue the witness's bias or lack of impartiality because the witness's criminal record could not be presented to the jury, this defendant was permitted to fully present evidence of the criminal character and bias of the suspected accomplice. The jury was aware of the immunity bargain between the witness and the prosecution and of the witness's complicity in the truckstop theft. The trial court's denial of the defendant's motion was well within its discretion to control cross-examination. St. v. Dolan, 190 M 195, 620 P2d 355, 37 St. Rep. 1860 (1980).

Sandstrom Instruction — Harmless Error Doctrine Correct Test — Plain Error Rule Not Applicable — Petition for a Writ of Habeas Corpus in U.S. District Court: In rejecting the State's contention that the giving of the Sandstrom instruction (Sandstrom v. Mont., 442 US 510 (1979)) constituted harmless error, the court stated that in applying the "harmless constitutional error" doctrine, as set out in Chapman v. Calif., 386 US 18 (1967), it must be shown that the constitutional right affected is not a right basic to a fair trial and the error must be found harmless beyond a reasonable doubt. For conviction the Due Process Clause requires that each element of a crime

be proven beyond a reasonable doubt, this being basic to a fair trial. The Sandstrom instruction by shifting the burden of proof of intent, an element of the crime of homicide, to the defendant denies him due process, and thus the court cannot consider the instruction as harmless error. The "plain error" doctrine is not applicable because it only sets a standard of "highly probable" that the instruction error "materially affected the verdict", the wrong standard by which to measure the effect of constitutional error. McGuinn v. Crist, 492 F. Supp. 478 (D.C. Mont. 1980). See McKenzie v. Risley, 801 F2d 1519 (9th Cir. 1986).

Sandstrom Jury Instruction — Presumptions of Intent of Consequence of Acts — Harmless Error: Defendant charged with mitigated deliberate homicide alleged as error the giving of the jury instruction, "The law presumes that a person intends the ordinary consequences of his voluntary acts." Under Montana law, causing the death of another becomes deliberate homicide only when it is committed purposely or knowingly. These elements are necessary to the proof of this particular crime and must be proved beyond a reasonable doubt by the prosecution. Intent is a difficult element to prove. The evidence normally must be in the nature of outward manifestations of the defendant's state of mind, but when a telephone line to the police station from the scene of the murder happened to be open and the defendant was overheard at length, the court knew what he was thinking from his own words. It is difficult to conceive of a better indication as to defendant's intent. Also, the officer heard the fight at the time these words were spoken, and another officer found the defendant and the victim's body minutes later. The only contested element here was intent, and the evidence on it was overwhelming. Basing the court's holding on the probable impact of the instructions upon the minds of the average jury, in the light of the evidence, the impact of the instruction upon the jury could not reasonably have contributed to the verdict. The error in giving the contested instruction was harmless. St. v. Hamilton, 185 M 522, 605 P2d 1121 (1980), reversed, In re Hamilton, 721 F2d 1189 (9th Cir. 1983), overruled, McKenzie v. Risley, 801 F2d 1519 (9th Cir. 1986).

Jury Instruction — Shifting Burden of Persuasion — United States Constitution: The U.S. Supreme Court held that because the jury, which was instructed that the law presumes a person intends the ordinary consequences of his voluntary acts, may have interpreted the presumption as conclusive or as shifting the burden of persuasion and because either interpretation would have violated the 14th amendment to the United States Constitution's requirement that the State prove every element of a criminal offense (similar to Art. II, sec. 17, Mont. Const.), the instruction given was unconstitutional. Sandstrom v. St., 442 US 510, 99 S Ct 2450 (1979), overruling St. v. Sandstrom, 176 M 492, 580 P2d 106 (1978).

Jury Instructions — Reversible Error to Deny Instruction on Presumption of Innocence: In a criminal prosecution for theft of an automobile in which the defendant timely requested and was twice denied an instruction on the presumption of innocence, an instruction on the State's burden of proof could not supplant an instruction on the presumption of innocence. The standard for prejudicial effect of the lack of the instruction was established in St. v. Harrison, 23 M 79, 57 P 647 (1899), and is stricter than that used by the U.S. Supreme Court. It is per se reversible error to deny the instruction. St. v. Williams, 184 M 111, 601 P2d 1194 (1979).

Sandstrom Instruction — Presumption of Intent — Constitutionality — Harmless Error: The jury in a deliberate homicide case was instructed that the law presumes that a person intends the ordinary consequences of his voluntary acts. The U.S. Supreme Court determined that this instruction denied a defendant the constitutional right to a jury determination of proof beyond a reasonable doubt of all elements of the offense. The case was remanded to the Montana Supreme Court to determine if the instruction constituted harmless error. To find harmless error, the court must be able to assert that the offensive instruction could not reasonably have contributed to the jury verdict. The court cannot make this assertion. The case is remanded to the District Court for retrial. St. v. Sandstrom, 184 M 391, 603 P2d 244 (1979). Error may be harmless. See McKenzie v. Risley, 801 F2d 1519 (9th Cir. 1986).

Premature Trial Termination: Defendants were not given an adequate opportunity to present their case, since trial was prematurely terminated, and thus were denied due process. Nygard v. Hillstead, 180 M 524, 591 P2d 643 (1979), distinguished in Federated Mut. Ins. Co. v. Anderson, 1999 MT 288, 297 M 33, 991 P2d 915, 56 St. Rep. 1152 (1999).

Burden of Proof of Mental Disease or Defect: On remand from the U.S. Supreme Court to decide the issue of whether the trial court's instruction on mental disease or defect unconstitutionally shifted the burden of proof of state of mind to defendant, the Supreme Court concluded that not only did the instructions not shift to defendant the burden of disproving any element of the offenses charged but the instructions, when read together, also required defendant to establish his

diminished capacity merely by raising a reasonable doubt, rather than proof by a preponderance of the evidence. St. v. McKenzie, 177 M 280, 581 P2d 1205 (1978).

Instruction as to Intent: The instruction to the jury that "the law presumes that a person intends the ordinary consequences of his voluntary acts" did not violate due process standards as defined by the United States or Montana Constitution and as interpreted by relevant case authority and thus did not constitute reversible error. St. v. Sandstrom, 176 M 492, 580 P2d 106 (1978), overruled in Sandstrom v. St., 442 US 510, 99 S Ct 2450 (1979). See, however, McKenzie v. Risley, 801 F2d 1519 (9th Cir. 1986).

Access to Potential Defense Witnesses: Defendant was not deprived of due process or a fair trial by the State's investigatory procedure utilized in the questioning of potential defense witnesses who were initial criminal suspects. St. v. Baugh, 174 M 456, 571 P2d 779 (1977).

Right to Fair Trial: When jury deliberations were tainted by reading nonadmitted police report to the material prejudice of defendant's right to an impartial jury, to confront witnesses, and to assistance of counsel at every critical stage of trial, a new trial was required. St. v. Davison, 173 M 510, 568 P2d 159 (1977).

Prejudicial Pretrial Publicity: A news conference held by the Attorney General 9 months prior to trial, which the defendant did not show caused actual prejudice or any specific difficulty in choosing a jury and which was not shown to have been within the knowledge of a member of the jury or prospective juror, did not constitute prejudicial pretrial publicity denying the defendant due process. St. v. Cline, 170 M 520, 555 P2d 724 (1976).

Negligent Suppression: Failure of State to produce court-ordered physical evidence, due to negligent loss, which if produced would not have tended to clear the accused of guilt, is not a denial of the accused's right to a fair trial or due process of law as negligent suppression requires a reversal of a conviction only where the result would have been different had the evidence been disclosed. St. v. Craig, 169 M 150, 545 P2d 649 (1976).

PROPERTY RIGHTS

Crow Compact Upheld — Compact Held Reasonable — Public Property and Water Rights Reasonable Under Compact — Public Comment Satisfied Due Process: Individual objectors to the Crow Water Compact appealed to the Supreme Court following the Water Court's determination that the Compact was valid. This action was subsequent to In re Crow Water Compact, 2015 MT 217, 380 Mont 168, 354 P.3d 1217. The objectors, who were not parties to the Compact but who owned land and water rights near the reservation, argued that the Water Court did not apply the proper legal standard, that they sustained injury because the Compact was unreasonable, and that their due process rights were violated during the Compact negotiation process. The Supreme Court disagreed with the objectors, holding that the Water Court correctly applied the correct standard articulated in Crow I, that the Compact was reasonable and had reasonable protection of state water and property rights, that the objectors' argument of future potential problems was beyond the scope of its review, that reservation of water for public recreation, wildlife, and aquatic life was for the benefit of the public, and that the record demonstrated sufficient opportunities for public comment during the Compact approval process. In re Crow Water Compact, 2015 MT 353, 382 Mont. 46, 364 P.3d 584.

Failure to File Affidavit — Declaration of Voidness Overruled: The plaintiff purchased real property at a tax sale after the owners had not paid property taxes for several years. Following the purchase, the plaintiff filed a quiet title action to the property and the owners opposed it. The owners claimed that the county treasurer had not timely filed an affidavit as required under the tax sale laws, and the tax deed was therefore void. The District Court agreed and declared the tax deed void. The plaintiff appealed to the Supreme Court, which reversed and remanded the case to the District Court for entry of judgment in favor of the plaintiff. In distinguishing Isern v. Summerfield, 1998 MT 45, 287 Mont. 461, 956 P.2d 28, the Supreme Court noted that unlike the owners in Isern, the owners in this case had constructive notice of the sale and the requirement to publish notice was therefore superfluous. Zinvest, LLC v. Hudgins, 2014 MT 201, 376 Mont. 72, 330 P.3d 1135.

No Interest in Land When Predecessor Granted Public Right-of-Way — No Unconstitutional Taking: Plaintiff association sued the county because a property owner had erected a fence along the county road where it intersected the Ruby River. The property owner intervened and argued that the public could not access the river from the county road even though the county had previously purchased an easement from the property owner's predecessor in interest that expressly granted a public right-of-way without limiting its uses. The District Court granted summary judgment to the plaintiff, declaring that the public could access the river via the right-

of-way. The property owner appealed and argued that the ruling amounted to an unconstitutional taking of his property. The Supreme Court affirmed the District Court and concluded that because the property owner's predecessor in interest had already granted to the county a right-of-way encompassing parts of the river bed, no property right had been taken. Pub. Lands Access Ass'n, Inc. v. Madison County Bd. of Comm'rs, 2014 MT 10, 373 Mont. 277, 321 P.3d 38.

Application for Mining Permit Not Protected Entitlement When Department Retains Discretion to Deny Application — Compensation May be Required for Certain Zoning Regulations: Helena Sand and Gravel, Inc., (HSG) received a gravel mining permit from the Department of Environmental Quality (DEQ) that applied to 110 of its approximately 421 acres located north of East Helena. Subsequently, the Lewis and Clark County Board of Commissioners adopted a special district based on a citizens' petition that included all of HSG's property and prohibited sand and gravel mining within the district's boundaries. HSG brought suit alleging that the county had improperly prohibited HSG from mining sand and gravel on its property. The District Court granted summary judgment to the county and concluded that HSG failed to show a protected entitlement to a mining permit, but the court did not separately consider HSG's ownership interest in the real property. On appeal, HSG first asserted that DEQ would have been required by statute to issue HSG a permit or permit amendment for the remaining 311 acres, and thus the regulations adopted by the Board amounted to a taking of private property. The Supreme Court disagreed and held that the statutory language gave DEQ leeway to withhold its approval of a permit application unless the application satisfied 14 separate requirements outlined in 82-4-434. Because DEQ retained discretion to deny unacceptable applications, HSG did not have a constitutionally protected property interest in its right to apply for a mining permit. Additionally, HSG asserted that the impact of the zoning regulations on the value of its property was a taking. The court concluded that under its decision in Kafka v. Mont. Dept. of Fish, Wildlife & Parks, 2008 MT 460, 348 Mont. 80, 201 P.3d 8, because justice and fairness may require that a person deprived of an established property interest be compensated for the loss even when that compensable property interest retains some economic value, the case had to be remanded for the District Court to consider the magnitude of the economic impact of the county's regulations and the degree to which those regulations interfered with HSG's legitimate property interests. Helena Sand & Gravel, Inc. v. Lewis & Clark County Planning & Zoning Comm'n, 2012 MT 272, 367 Mont. 130, 290 P.3d 691.

Dismissal of Due Process Claim Justified — Court Not Obligated to Develop Arguments or Legal Analysis: The planning and zoning commission determined that a partially constructed barn that was outside the designated building site violated applicable zoning regulations and covenants and must be removed. On appeal, the District Court dismissed the petitioners' constitutional takings claim without a trial, reasoning that the petitioners failed to present a legal argument or legal authority to support the claim. The Supreme Court affirmed the District Court's dismissal, reasoning that it is not obligated to develop arguments on behalf of parties to an appeal, guess a party's precise position, or develop a legal analysis that may lend support to a position. Botz v. Bridger Canyon Planning & Zoning Comm'n, 2012 MT 262, 367 Mont. 47, 289 P.3d 180, following In re Estate of Bayers, 1999 MT 154, 295 Mont. 89, 983 P.2d 339.

Res Judicata Applicable to Action Regarding County's Failure to Transfer Conditional Use Permit: Plaintiff filed an 18-count complaint for damages contending that Flathead County did not follow zoning regulations and violated plaintiff's due process and property rights when the County Board of Adjustment failed to transfer a conditional use permit to plaintiff to allow a gravel pit on property plaintiff purchased. However, plaintiff's petition for a writ of mandamus to compel the Board to transfer the conditional use permit was properly dismissed (see Beasley v. Flathead County Bd. of Adjustment, 2009 MT 120, 350 M 171, 205 P3d 812 (2009)), so the County argued that the damage complaint was res judicata. Plaintiff had appealed the Board's decision pursuant to 76-2-227 but moved to dismiss the appeal with prejudice after a local citizens' group intervened to defend the Board's decision. The District Court held that the damage complaint involved the same issues as the appeal of the decision to deny transfer of the conditional use permit, so the damage complaint was dismissed as res judicata. On appeal, the Supreme Court affirmed. Plaintiff failed to establish a protected property interest in obtaining the transfer of the permit, so the constitutional claims were properly dismissed. Likewise, plaintiff's purported tort claims involved the same subject matter and issues as the prior appeal, so res judicata applied. Plaintiff's opportunity to challenge the legality of the Board's decision to deny transfer of the permit ended when plaintiff elected to dismiss the appeal under 76-2-227 with prejudice. Section 76-2-227 remained an available remedy if plaintiff chose to apply for a conditional use permit in

his own right and the application was denied, but that remedy was no longer available for the current challenges. Beasley v. Flathead County, 2009 MT 121, 350 M 177, 206 P3d 915 (2009).

No Error in Appraising Fair Market Value of Electric Generation Assets Differently When Owned by Different Utilities — Equal Protection Constitutionality of Unit Method of Property Valuation Affirmed: Defendant utility company appealed a District Court decision regarding the equality of the state's tax assessments, claiming that the state deprived the utility of equal protection by failing to properly equalize defendant's property tax burden with other comparable electric generation facilities in Montana. The Department of Revenue explained that the relatively higher appraisal values of defendant's properties arose from the fact that the different companies had different total market values as a unit, so their individual properties also had different market values despite the fact that the individual properties might be physically similar. The Supreme Court noted that the unit method of valuation was held to pass constitutional equal protection scrutiny in W. Union Tel. Co. v. St. Bd. of Equalization, 91 M 310, 7 P2d 551 (1932), and the court declined to revisit the issue of the constitutionality of the method itself. The court held that there is nothing constitutionally significant in the bare fact that the Department of Revenue appraises the fair market value of the same electric generation assets differently when those assets are owned by different utilities. The basic rule of equal protection is that persons that are similarly situated with respect to a legitimate governmental purpose of law must receive like treatment. The first prerequisite of a meritorious equal protection claim is that the state had adopted a classification that affects two or more similarly situated groups in an unequal manner. Here, the District Court's determination that defendant failed to establish that the state's use of the unit method of valuation deprived defendant of equal protection was affirmed. Dept. of Revenue v. PPL Mont., LLC, 2007 MT 310, 340 M 124, 172 P3d 1241 (2007).

Renewal of Position as University Department Head Not Property Right Subject to Constitutional Protection: Ray argued that the nonrenewal of his position as department head at Montana Tech of the University of Montana deprived him of a de facto property right without due process. The Supreme Court held that Montana Tech had a specific written policy that stated that a department head position was not tenured and that department heads served at the discretion of the president. Therefore, the school's explicit, published policies expressly precluded any type of de facto tenure. Ray v. Mont. Tech of the Univ. of Mont., 2007 MT 21, 335 M 367, 152 P3d 122 (2007).

Showing of Constitutionally Protected Property Interest Required — Federal and State Claims: Plaintiff brought property interest claims against a city and city council members on several state and federal grounds after a state liquor license was denied. The city had enacted ordinances disallowing the sale of alcohol in the city without a conditional use permit and then denied plaintiff's application for a permit. The District Court held that plaintiff's property interest claims were invalid, and plaintiff appealed. The Supreme Court noted that to establish a viable claim under 42 U.S.C. 1983, a plaintiff must first establish that it possesses a protected liberty or property interest and has a legitimate claim of entitlement to that interest. Under state due process and takings law, a plaintiff must also establish a property interest, and a property interest exists only when the Legislature has so narrowly circumscribed the issuing agency's discretion that approval of the interest is virtually assured. Receipt of a liquor license is a privilege and not a right. Plaintiff had yet to obtain a state liquor license at the time that the ordinances were passed and thus had no property interest in operating a bar, nor could plaintiff assert ultimate entitlement to a liquor license. Therefore, plaintiff's inability to demonstrate a protected property interest in operating property as a bar precluded the establishment of federal or state property claims against the city and City Council members, nor did the city deprive plaintiff of a protected property interest by enacting the ordinances or denying a conditional use permit. The District Court was affirmed. Germann v. Stephens, 2006 MT 130, 332 M 303, 137 P3d 545 (2006), following ISC Distrib., Inc. v. Trevor, 273 M 185, 903 P2d 170 (1995), and Kiely Constr. v. Red Lodge, 2002 MT 241, 312 M 52, 57 P3d 836 (2002).

Initiative Banning Cyanide Mining Not Unconstitutional Taking or Impairment of Contract — Opportunity to Apply for Mining Permit Not Property Right: Plaintiffs had an operating permit pending for a cyanide leach pit gold mine when voters passed Initiative Measure No. 137 (I-137) that prohibited cyanide mining in Montana. Plaintiffs sued on grounds that I-137 interfered with their property right in the permit, constituted an unconstitutional regulatory taking for which they should be compensated, and violated the contract clause in Art. II, sec. 31, Mont. Const. The District Court found for the state on all issues, and plaintiffs appealed, but the Supreme Court affirmed. Plaintiffs' mere opportunity to seek a mining permit did not constitute a property right, given the state's wide discretion to reject the application even without the passage of I-137.

Further, I-137 did not constitute a taking because plaintiffs had not yet obtained a right to mine that the initiative took away. Moreover, even though the District Court incorrectly held that plaintiffs' corporate mining agreement was not substantially impaired by I-137, the court nonetheless correctly concluded that there was no contract clause violation because I-137 was reasonably related to the legitimate and significant public purpose of protecting the environment. Seven Up Pete Venture v. St., 2005 MT 146, 327 M 306, 114 P3d 1009 (2005).

Supervision and Enforcement of Pre-1973 Water Decree by District Court — No Due Process Violation: Plaintiff brought a contempt and injunction action in District Court to prevent defendant from interfering with plaintiff's appropriation rights under a 1940 water decree. Following a bench trial in District Court, plaintiff's petition was dismissed and plaintiff was enjoined from interfering with defendant's diversion works and conveyance system. Following a determination of the source and flow of the water, the District Court also ordered that defendant allow a specific amount of water through the diversion system to plaintiff. On appeal, plaintiff contended that the permanent modification of the 1940 decree by the District Court in a contempt and injunction action violated plaintiff's due process rights. The Supreme Court held that the District Court did not exceed its jurisdiction by supervising the distribution of previously adjudicated water, enforcing the 1940 decree, and filling in the pre-1973 decree with further delineations. Because the District Court did not permanently modify the 1940 decree, plaintiff's due process rights were not violated. Hidden Hollow Ranch v. Field, 2004 MT 153, 321 M 505, 92 P3d 1185 (2004).

Onsite Construction Zoning Regulation Violative of Substantive Due Process: The Yellowstone Board of County Commissioners created a zoning district wherein dwellings had to be single-family units with not less than 1,500 square feet of floor area, with a requirement for onsite construction with new materials and for completion within 1 year. Plaintiffs moved a new modular home onto their lot, and although the home conformed to required building standards, plaintiffs were informed that the modular home did not meet the onsite construction provision. The District Court held that plaintiffs' substantive due process rights were violated because the onsite construction provision did not have a substantial bearing on the public health, safety, morals, or general welfare and was not based on a legitimate government objective. The county appealed on grounds that the regulation did have a bearing on community welfare by preserving property values. The Supreme Court disagreed. Neither the city-county planner nor a County Commissioner was able to identify any health and only minimal safety concerns. Although a resident's ability to control the environment and the preservation of property values may implicate legitimate government concerns in some zoning situations, nothing in the record indicated that those concerns actually drove the formulation of these regulations. Absent a rational relationship to a legitimate governmental interest, the onsite construction requirement violated plaintiffs' substantive due process rights. Yurczyk v. Yellowstone County, 2004 MT 3, 319 M 169, 83 P3d 266 (2004), following Boland v. Great Falls, 275 M 128, 910 P2d 890 (1996).

No Constitutional Right to Privacy for Nonhuman Entities — Protection of Trade Secrets Under Other Constitutional and Statutory Schemes: Montana's constitutional individual privacy exception to the public's right to know is limited to natural human individuals only and does not apply to nonhuman entities such as corporations. However, nothing in Art. II, sec. 9, Mont. Const., requires disclosure of trade secrets and other confidential proprietary information when that data is protected from disclosure elsewhere in the state or federal constitution or by statute. Great Falls Tribune v. Mont. Pub. Serv. Comm'n, 2003 MT 359, 319 M 38, 82 P3d 876 (2003), overruling Mtn. States Tel. & Tel. v. Dept. of Public Service Regulation, 194 M 277, 634 P2d 181 (1981), and its progeny to the extent that those decisions relied on the constitutional balancing test of the right to individual privacy against the public's right to examine documents or observe governmental deliberations as a basis of protecting trade secrets and other confidential proprietary information of nonhuman entities.

Public Service Commission Rules Creating Impermissible Presumption of Confidentiality in Trade Secrets: Several media organizations sought access to power company documents filed with the Public Service Commission. Applying its administrative rules, the Commission evaluated the power company's claims of confidentiality against basic trade secret law, found that the company had met the initial burden of establishing trade secrets, and concluded that because the media had presented no evidence or argument to the contrary, the company information was entitled to constitutional protection as a matter of law. The Supreme Court disagreed. To the extent that the Commission's rules relied on mere company representations that the information contained trade secrets, the Commission unconstitutionally shifted the initial burden of proof to the public to challenge the confidentiality claims, creating a presumption of confidentiality that directly conflicted with the public's right to view public records and the Commission's duty to make

its records available to the public. The court held that a nonhuman entity seeking protective measures for alleged confidential materials filed with a governmental regulating agency must support its claim with a supporting affidavit making a prima facie showing that the materials constitute property rights that are protected by due process. Further, the showing must be more than conclusory and specific enough for the Commission, any objecting parties, and reviewing authorities to clearly understand the nature and basis of the confidentiality claim. The agency then must review the materials at the time of filing, in accordance with 30-14-402(4)(b) and supporting case law, and make an independent determination whether the materials are in fact property rights entitled to due process protection. To the extent that Commission rules required less, the court directed revision of Commission rules to comport with this holding. Great Falls Tribune v. Mont. Pub. Serv. Comm'n, 2003 MT 359, 319 M 38, 82 P3d 876 (2003).

Local Billboard Regulations Not Violative of Due Process Right to Notice and Opportunity to Be Heard: Plaintiff contended that city and county billboard regulations violated due process because they did not guarantee a hearing before deprivation of property. The Supreme Court disagreed. The Board of Adjustment was responsible for hearing appeals that allege an error related to enforcement of the ordinances. The Board was bound by known procedures and there was a right to appeal a Board decision to a court of record, so only under exceptional circumstances that did not apply to plaintiff could the city or county deprive someone of property without a hearing. The procedural safeguards provided for in the ordinances were sufficient and did not violate due process. Mont. Media, Inc. v. Flathead County, 2003 MT 23, 314 M 121, 63 P3d 1129 (2003).

Miscalculation of Amount Necessary to Redeem Tax Lien — No Violation of Assignee's Constitutionally Protected Property Rights — Section 1983 Claim Properly Dismissed: Shepherd held an assignment of the tax sale certificate on real property in Red Lodge. A few days before the redemption period was to expire, the owner of record redeemed the property by paying $4,407.28, but the County Treasurer unintentionally overlooked an additional $56.30 in interest that had accrued between the date that notice was given that a tax deed would be issued and the date of redemption. Shepherd then filed a complaint under 42 U.S.C. 1983, alleging that the county's failure to collect the statutorily required amount for redemption deprived Shepherd of a property interest without due process of law. Shepherd sought $250,000 in general damages, punitive damages, and attorney fees and costs. Shortly thereafter, the county tendered Shepherd $56.30 plus interest, but Shepherd rejected the money and added a negligence claim to the complaint. The District Court dismissed the section 1983 claim on grounds that Shepherd failed to state a claim upon which relief could be granted, and awarded summary judgment to the county on the negligence claim, subject to the payment of $60.73 of accumulated interest then owed to Shepherd. Shepherd appealed, but the Supreme Court affirmed. Without ruling on whether Shepherd had a property right, the Supreme Court concluded that the claim failed as a matter of law. To prevail on a section 1983 claim pursuant to Orozco v. Day, 281 M 341, 934 P2d 1009 (1997), plaintiff must establish a violation of federal constitutional or statutory rights proximately caused by the conduct of a person acting under color of state law. Shepherd alleged a violation of the federal constitutional right to due process, but the process due in this case pertained to the redemption of tax liens under Montana law, and except for the inadvertent miscalculation of interest due, that process was followed. The miscalculation was at most a ministerial error, and to equate the miscalculation with a denial of due process would trivialize the constitution and the important remedial purpose of section 1983. Because there was no denial of due process, there was no section 1983 claim, and the District Court properly dismissed Shepherd's claim pursuant to former Rule 12(b), M.R.Civ.P. (now superseded). Shepherd v. Carbon County Bd. of Comm'rs, 2002 MT 98, 309 M 391, 46 P3d 634 (2002).

Dismissal of Intervention Action Not Clear Error: A husband and wife owed about $6,000 in back taxes on their property, which was in jeopardy of being sold at a tax sale. The couple was unable to obtain a loan because of a prior bankruptcy, so they arranged to transfer the property to the husband's mother, who then took out a loan to pay the taxes, using the property as collateral. When the couple later sought to dissolve their marriage, their petition made no mention of any real property acquired during the marriage. The husband testified at the hearing, but the wife did not attend, and dissolution was granted without addressing the wife's interest in the property. The wife moved to set aside the judgment pursuant to 40-4-135. The District Court subsequently voided the deed transferring the property to the mother, subject to her right to intervene to assert her right to the property. Following a hearing, the court dismissed the mother's motion to intervene, issued a court deed naming the mother as grantor and the husband and wife as grantees to hold the property as tenants in common, and included the property in

the marital estate. The mother contended that dismissal of her intervention action constituted a denial of her constitutional rights under section 16 of this article and this section because she was not properly joined as a party. The Supreme Court noted that the mother was served with a summons and a copy of motions to set aside the dissolution decree and was directed to appear at the initial show cause hearing. Her constitutional rights were not violated despite dismissal of her motion to intervene. In re Marriage of Bell, 2000 MT 88, 299 M 219, 998 P2d 1163, 57 St. Rep. 381 (2000).

Vested Interest Not Gained by Mere Submission of Beer and Wine Application — Retroactive Application of General Rule on Denial of Building Permit: Town Pump, Inc. (Town Pump) was required to obtain subdivision approval in order to complete a property conveyance for the building of a convenience store, gas station, and casino wherein beer and wine would be sold. After Town Pump had submitted an application for a beer and wine license, the property was rezoned as a commercial highway, and the city subsequently adopted a development code requiring a conditional use permit for the property in order for beer and wine to be sold on premises. Town Pump's application was denied based on the provisions of the new development code. Applying the rationale in Femling v. Mont. St. Univ., 220 M 133, 713 P2d 996 (1986), and Wallace v. Dept. of Fish, Wildlife, & Parks, 269 M 364, 889 P2d 817 (1995), the Supreme Court held that Town Pump did not gain a vested interest in the beer and wine application merely because the application was submitted before the adoption of the development plan. The general rule is that the denial of an application for a building permit may be based on a zoning regulation enacted or becoming effective after the application was made; therefore, a zoning regulation may be retroactively applied to deny an application for a building permit, even though the permit could have been lawfully issued at the time of application. The court concluded that the development code was neither arbitrary nor unreasonable in its effects, that it did not impair or burden any vested interest or passed transaction held by Town Pump, and that retroactive application of the development code did not deny Town Pump's constitutional right to due process. Town Pump, Inc. v. Bd. of Adjustment of Red Lodge, 1998 MT 294, 292 M 6, 971 P2d 349, 55 St. Rep. 1205 (1998).

Strict Compliance With Tax Sale Statutes Required — Noncompliance Held Violation of Due Process — Insufficient Reasons to Justify Deviation From Statutes — County Deprived of Jurisdiction to Issue Tax Deed: After Isern's property was sold for taxes by Missoula County, Isern attempted to redeem the property, but the county refused to accept payment. Isern challenged the sale of his property, but the District Court upheld the sale, explaining that irregularities in the county's sale process were "minor clerical errors" or "nonsubstantive deviations" from statutory requirements. The Supreme Court held that failure to prepare a list of delinquent properties in accordance with 15-16-301, failure to publish or post a notice of the sale in compliance with 15-17-122, failure to prepare a tax sale certificate in accordance with 15-17-212 or to follow the alternative procedure under 15-17-214, failure to give notice of the pending issue of a tax deed to interested parties at their addresses of record in the office of the County Clerk in accordance with 15-18-212, and failure to give the full legal description of the property on the tax deed, as required by 15-18-211, violated Isern's right to due process and voided the tax deed. In making its ruling, the Supreme Court held that the facts that the offices of County Treasurer and Clerk and Recorder had been combined in Missoula County and that there had been electronic advances in recordkeeping were insufficient reasons to justify deviation from the statutory requirements for property tax sales and issuance of tax sale deeds. The Supreme Court also noted that Isern's new address in Spokane, Washington, had been received by the County Assessor's office several months before the tax sale and that Isern's new address could therefore easily have been obtained by the County Clerk and Recorder by simply walking across the hall to the County Assessor's office. Isern v. Summerfield, 1998 MT 45, 287 M 461, 956 P2d 28, 55 St. Rep. 177 (1998). However, see Zinvest, LLC v. Hudgins, 2014 MT 201, 376 Mont. 72, 330 P.3d 1135, in which the Supreme Court held that failure to comply with a tax lien statute did not render the tax deed void.

Grant of Petition to Dispose of Evidence Held No Denial of Constitutional Rights — Inclusion of Additional Property for Restitution — Order to Dispose of Property Held Not to Impose Restitution Obligation: Woods was convicted of writing a bad check for $3,830. However, Woods continued to write other bad checks totaling over $30,000, even as of the time that his probation officer was preparing his presentence investigation. The investigation showed that the bad checks had been used to purchase merchandise and to obtain cash. After sentencing, which included a requirement for restitution, the state filed a petition for destruction of evidence, requesting that it be allowed to return the merchandise to the rightful owners, to apply the value of that property to satisfy Woods's obligation to make restitution, and to destroy other property that had been seized as

evidence. The District Court granted the petition but stayed enforcement pending appeal. Woods contended that the District Court order granting the petition violated his rights under Art. II, sec. 3, 4, 15, and 22, Mont. Const., and this section and under the 5th, 8th, and 14th amendments to the United States Constitution. The Supreme Court held that Woods had waived his right to object to restitution, even restitution in an amount greater than $3,830, because Woods promised to make restitution in response to the recommendation of his probation officer that Woods make restitution in an amount in the "tens of thousands of dollars". The Supreme Court held, contrary to Woods's claim that the state misinterpreted the District Court order as to the amount of restitution, that the District Court had ordered Woods to make "full restitution" and that the order included the amounts over and above the $3,830 involved in the underlying conviction for writing a bad check. Woods also objected to the timing of the state's petition, arguing that he was not required to make restitution until he was released from jail. In response, the Supreme Court pointed out that Woods misconstrued the purpose of the state's petition; all the state wanted to do was receive permission from the District Court to return the merchandise to its rightful owners and apply the value to Woods's obligation for restitution. For this reason, the Supreme Court held that the District Court did not err when it granted the state's petition. St. v. Woods, 286 M 355, 951 P2d 981, 54 St. Rep. 1445 (1997).

Pretermination Hearing Need Not Be Full Evidentiary Hearing: Mysse argued that her right to due process had been violated by the way in which she had been terminated by the county. The Supreme Court noted that she had been informed of the reasons for her pending discharge and had appeared before the Board of Commissioners to discuss the situation. At that time, she refused to comply with the Board's directives for continued employment and stated that she would quit. Subsequently, the Board sent her a letter asking her to reconsider. She did not respond. Thereafter, the Board held a full evidentiary hearing at which Mysse had the opportunity to call witnesses on her behalf. The Supreme Court held that the pretermination hearing did not have to rise to the level of a full evidentiary hearing, only that it be designed to avoid mistaken decisions and to ascertain whether the complaints against the employee were true. The Supreme Court affirmed the lower court's decision dismissing Mysse's claim that her rights to due process had been violated. Mysse v. Martens, 279 M 253, 926 P2d 765, 53 St. Rep. 1139 (1996).

Failure to Renew One-Year Teaching Contract — Covenant of Good Faith and Fair Dealing and Due Process Property Right Not Violated: Failure to renew a professor's teaching contract was not a breach of the covenant of good faith and fair dealing and did not violate due process by depriving the professor of a property interest in employment. The contract stated that it was for 1 year and had a specific ending date, and there was no evidence of a justifiable expectation of employment after the year ended. Schaal v. Flathead Valley Community College, 272 M 443, 901 P2d 541, 52 St. Rep. 905 (1995).

Misapplication of State Law Not Basis for Claim of Denial of Equal Protection: ISC argued that its allegations that the Department of Administration had applied the Montana Procurement Act in a discriminatory fashion in not awarding ISC a contract supported its claim that it had been denied equal protection. The Supreme Court held that ISC's claim failed because at most, it amounted to an allegation that state law was misapplied in an individual case and did not constitute invidious discrimination in violation of the equal protection clause. ISC Distrib., Inc. v. Trevor, 273 M 185, 903 P2d 170, 52 St. Rep. 894 (1995).

Eminent Domain — Highway Interchange and Visitor Center Public Use — Chamber of Commerce Building Not: The state attempted to condemn an 8.72-acre parcel to build a highway interchange and visitor center. Forty percent of the proposed building was to be used by the local Chamber of Commerce, a private, nonprofit organization. The District Court held that the highway interchange and visitor center are public purposes and that the state had lawfully exercised its power of eminent domain as to the entire 8.72-acre parcel but that the Chamber of Commerce could not be a part of the planned highway interchange building complex. Property owners appealed on the grounds that by including the Chamber in the plans, the entire taking is unlawful. The Supreme Court held that the District Court did not err in severing the Chamber's participation in the building plan and granting the condemnation order because the Chamber's presence was not a part of the request for condemnation. Bozeman v. Vaniman, 271 M 514, 898 P2d 1208, 52 St. Rep. 543 (1995).

Criminal Defendant Entitled to Interest Earned on Cash Deposited as Bail Bond — Constitutional Issues: Richland County sought to retain the interest earned on a defendant's $50,000 cash bail bond that had been deposited with the court in an interest-bearing account and to apply the money to the county's general fund. Applying the general rule in Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 US 155, 66 L Ed 2d 358, 101 S Ct 446 (1980), the Supreme

Court held that, absent a statutory provision allowing retention of the interest, the county is no more entitled to retain interest on a cash bail bond than it would be to retain accruing dividends on a deposit of stocks or bonds or the appreciated value on a pledge of real estate under 46-9-401. Retention of interest by the county would also violate several constitutional provisions as well, including: (1) the guarantee in this section that a citizen cannot be deprived of property without due process of law; (2) the guarantee in Art. II, sec. 29, Mont. Const., that property cannot be taken for public use without just compensation; and (3) a potential thwarting of Art. II, sec. 24, Mont. Const., which guarantees a speedy trial, through the incentive by the county to prolong a criminal prosecution as long as possible in order to earn more interest on a bond deposit. Therefore, if the Clerk of Court deposits bond money in an interest-bearing account, then interest earned on the deposit belongs to the owner of the funds that generated the interest. Siroky v. Richland County, 271 M 67, 894 P2d 309, 52 St. Rep. 343 (1995), distinguishing Fresno Firefighters' Local 753 v. Jernagan, 222 Cal. Rep. 886, 177 Cal. App. 3d 403 (Cal. Ct. App. 5th Dist. 1986).

Property Interest in Continuation of Employment — Due Process Required Before Discharge: Plaintiff sued, alleging constructive discharge from state employment. The District Court dismissed the complaint for failure to state a claim on which relief can be granted. The Supreme Court reversed, holding that the state's adoption of administrative rules that limit discharge of an employee without a showing of "just cause" confer upon employees a specified term of employment and create a property interest in the continuation of that employment. Adoption of the rules abrogated the "at will" employment relationship. The property interest in continued employment is protected by the due process provisions of the state and federal constitutions. Boreen v. Christensen, 267 M 405, 884 P2d 761, 51 St. Rep. 1014 (1994), followed in Mysse v. Martens, 279 M 253, 926 P2d 765, 53 St. Rep. 1139 (1996), and Wolny v. Bozeman, 2001 MT 166, 306 M 137, 30 P3d 1085 (2001).

No Statutory or Regulatory Authority Mandating Certified Financial Examiner Status: In either 1974 or 1990, Scanlon could have obtained certified financial examiner (CFE) status with the Society of Financial Examiners, Inc. (SOFE), but he did not meet the requirements for certification and thus failed to obtain it. Scanlon later contended that SOFE was required to grant certification by virtue of his senior examiner status. The District Court dismissed the claim by summary judgment because Scanlon had failed to meet his burden of raising a genuine issue of material fact. The Supreme Court concurred, finding no specific statutory or regulatory authority mandating that SOFE confer CFE status on senior examiners. Further, Scanlon's contention that he was deprived of a property right was merely a subjective expectancy. State ex rel. Scanlon v. Nat'l Ass'n of Ins. Comm'rs, 265 M 184, 875 P2d 340, 51 St. Rep. 480 (1994).

Hearing Not Affecting Defendant's Property Interests — Lack of Notice Not Violation of Due Process Rights: The Department of Health and Environmental Sciences (now Department of Environmental Quality) moved for a review hearing on the issue of the District Court's previous order that Reese remove junk vehicles from his property, but Reese was not provided with notice of the hearing and later contended that his due process rights were violated by the lack of notice. However, the hearing was for the purpose of informing Reese of the legal effect of the court order and did not affect his property interest or contemplate any of his substantive rights. Therefore, lack of notice of the hearing was not a due process violation. State ex rel. Dept. of Health and Environmental Sciences v. Reese, 260 M 24, 858 P2d 357, 50 St. Rep. 925 (1993).

Constitutional Validity of Conclusive Presumption of Water Right Abandonment: The legislative definition of water right abandonment set out in 85-2-226, based on failure to file a timely claim of an existing right, does not require any individualized determinations but rather applies to all persons who filed after the deadline. Water Court hearings were available to make the individual determination as to whether the deadline was met. As established in U.S. v. Locke, 471 US 84, 85 L Ed 2d 64, 105 S Ct 1785 (1985), a Legislature can enact substantive rules of law that treat property as forfeited under conditions that the common law would not consider sufficient to indicate abandonment. The legislative choice to make the presumption of abandonment conclusive rather than rebuttable is constitutionally permissible. In re Adjudication of Existing Yellowstone River Water Rights, 253 M 167, 832 P2d 1210, 49 St. Rep. 413 (1992), distinguishing Vlandis v. Kline, 412 US 441, 37 L Ed 2d 63, 93 S Ct 2230 (1973).

Duty to File Water Rights — Due Process Satisfied: The objective of the Legislature in enacting 85-2-226 was to meet the mandate of Art. IX, sec. 3, Mont. Const., to establish a system of centralized records for the administration of water rights. Before water rights could be adjudicated statewide, it was essential that existing rights be firmly established. Section 85-2-226 provides a reasonable means of compelling comprehensive participation, extinguishing

duplicative and exaggerated rights, and ridding local records of stale, unused water claims. The filing duty was not burdensome, unreasonable, or unrelated to the legitimate and proper legislative objective. Procedural due process considerations were sufficiently addressed through: (1) ample published and personal notice over a 4-year period; (2) an expanded opportunity to file a claim through an extension of the filing deadline; (3) an adequate opportunity for each claimant to show that he did not intend to abandon or forfeit water rights; and (4) an opportunity for all late claimants to request an evidentiary hearing with the Water Court to determine whether the deadline had in fact been missed. In re Adjudication of Existing Yellowstone River Water Rights, 253 M 167, 832 P2d 1210, 49 St. Rep. 413 (1992).

Stratified Sales Assessment Ratio — Unconstitutional: On October 12, 1990, the court issued its written order explaining that the use of 1990 tax values derived from the stratified sales assessment ratio study and the subsequent application of a percentage factor to certain residential properties, which in 1989 were assessed or appraised at or above their true market values, resulted in unfair discrimination by requiring those property owners to bear a disproportionate share of the state tax burden in violation of the equal protection and due process requirements of both the U.S. and Montana Constitutions. The court further found that application of the ratio violated statutory appraisal provisions requiring general and uniform appraisal, assessment, and equalization of all taxable property in the state. Dept. of Revenue v. Barron, 245 M 100, 799 P2d 533, 47 St. Rep. 1869 (1990), followed, with regard to the unconstitutionality of a 2% phasein of changes in real property value (revised Ch. 584, L. 1999) on equal protection grounds, in Roosevelt v. Dept. of Revenue, 1999 MT 30, 293 M 240, 975 P2d 295, 56 St. Rep. 125 (1999).

Deposit Required of Defendant in Tax Deed Proceeding Unconstitutional When Applied to Indigents: The defendant in a tax deed proceeding was an inmate in an out-of-state prison. He was financially unable to make the statutorily required deposit and was therefore barred by law from defending the taking of his property in the court proceeding. The Supreme Court held that the deposit had a rational basis in that it helped relieve the congested court system, but when applied to indigents, it deprived them of their right to a hearing and was therefore an unconstitutional denial of due process. Ball v. Gee, 243 M 406, 795 P2d 82, 47 St. Rep. 1196 (1990).

Arbitrary Failure to Issue Building Permit — Violation of Due Process Rights: A citizens group sought to have the building permit for a Salvation Army warehouse revoked on the grounds that the warehouse adversely impacted the character of the neighborhood. The Supreme Court upheld the city's issuance of the permit, stating that the proposed building was in compliance with all building codes and any denial of the permit would have violated the property owner's substantive due process rights. Westside Neighborhood Betterment Comm. v. Great Falls, 242 M 58, 788 P2d 335, 47 St. Rep. 542 (1990).

Independent Eminent Domain Proceeding by Joint Airport Board Member — No Due Process Violation: It was not a violation of due process for a member municipality of a joint airport board to pursue independent eminent domain proceedings as long as the procedures in Title 70, ch. 30, were complied with. Lake v. Lake County, 233 M 126, 759 P2d 161, 45 St. Rep. 1354 (1988).

Grant of Easement Intended — No Deprivation of Property: After appellant testified that he intended to grant an easement and his attorney drafted the easement, appellant could not later claim he had been unconstitutionally deprived of his property. Searight v. Cimino, 230 M 96, 748 P2d 948, 45 St. Rep. 46 (1988).

"Means End Test" — Owner Consent Statute Violative of Due Process, Impairment of Obligation of Contract, and Eminent Domain: Applying the "means end test" adopted in Lawton v. Steele, 152 US 133, 38 L Ed 385, 14 S Ct 499 (1894), wherein the state's authority on behalf of the public is balanced against the constitutional due process requirement in the protection of private property, the Supreme Court declared 82-4-224 (now repealed), the owner consent statute of the Montana Strip and Underground Mine Reclamation Act, to be unconstitutional. The court concluded that the denial of just compensation placed an unreasonable burden on mineral owners, in violation of due process, and that the statute does not bear the requisite relation to the public health, safety, morals, or general welfare. The statute does not address reclamation, conservation, or any other policy goal; does not prevent strip mining operations; does not regulate how mining or reclamation is performed; does not conserve agricultural land; and is inapplicable unless the surface rights have been severed from the mineral rights or the mineral estate is owned in fee by the federal government or in trust for an Indian tribe. W. Energy Co. v. Genie Land Co., 227 M 74, 737 P2d 478, 44 St. Rep. 904 (1987), distinguishing Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 US 470, 94 L Ed 2d 472, 107 S Ct 1232 (1987).

No Retroactive Application of Lump-Sum Conversion of Biweekly Workers' Compensation Benefits or Discount to Present Value Conversions — Prospective Application Not Violative of Equal Protection: The lump-sum conversion of biweekly workers' compensation benefits and discounting to present value conversions added to 39-71-741 by 1985 amendment may not be constitutionally applied retroactively to injuries that occurred prior to April 15, 1985, the effective date of the amendment. However, prospective application of the procedure set out in 39-71-741(2) is not violative of the constitutional equal protection guaranties because the amendments merely codified in detailed form prior case law allowing a conversion and represented no significant change from the law as it existed prior to April 15, 1985. Buckman v. Mont. Deaconess Hosp., 224 M 318, 730 P2d 380, 43 St. Rep. 2216 (1986), followed in Komeotis v. Williamson Fencing, 225 M 356, 736 P2d 93, 44 St. Rep. 298 (1987).

Repeal of Veterans' Preference — Due Process: Plaintiff applied for a position with the Montana University System, claiming entitlement to the then statutory veterans' preference in employment. He was not interviewed for the job; a nonveteran was hired. Plaintiff petitioned the District Court for an order to show cause why he should not have been employed. Before a hearing was held, the veterans' preference was repealed. Plaintiff's cause of action did not become a vested property right upon the filing of his complaint. The filing of a claim to what was a government gratuity does not change that gratuity into a vested right. Repeal of the preference gratuity did not violate the Due Process Clause of the state or federal constitution. Femling v. Mont. St. Univ., 220 M 133, 713 P2d 996, 43 St. Rep. 235 (1986).

Claimed Veterans' Preference Not Protected by This Section: A claimed veterans' preference is not property within the meaning of this section or the 14th amendment to the United States Constitution. A veterans' preference is a gratuity, not a contractual right, nor may a reliance interest in a veterans' preference be obtained before the preference is actually received. Nick v. Dept. of Highways, 219 M 168, 711 P2d 795, 42 St. Rep. 1926 (1985).

Defective Notice of Property Forfeiture — Relation Back of Curative Amendment — Due Process Violated: Notice of seizure of automobile and intent to institute forfeiture proceedings under Title 44, ch. 12, was in violation of due process and deprived the court of jurisdiction to enter a default judgment against the owner, who did not answer the allegations, when the notice did not inform the owner that he must answer within 20 days or face default judgment. After the 45 days for filing the notice had passed, the notice could not be amended to cure the defect. The amendment could not relate back to the original timely filing so as to make the amendment timely, because: (1) the forfeiture statute is an exception to the rule that property may not be seized without a prior factfinding hearing and the statute's safeguards should thus be rigidly adhered to and strictly construed; and (2) allowing an amendment as requested by the State under former Rule 4D(7), M.R.Civ.P. (now superseded), which provides for amendment of process in the court's discretion unless it clearly appears that the person served would suffer material prejudice to his substantial rights, would (assuming the Rule is applicable to this forfeiture proceeding) significantly prejudice the owner's rights. St. v. 1978 LTD II, 216 M 401, 701 P2d 1365, 42 St. Rep. 901 (1985).

Property Interest in Position as Firefighter — Constitutional Right to Hearing Before Termination for Physical Disability: Plaintiff, who was undisputably physically unable to continue working as a firefighter, sued for wrongful discharge when his employment was terminated without a hearing. In reversing the District Court's judgment denying all relief, the Supreme Court held that 7-33-4122 creates a property interest in a position such as that of firefighter once the probationary period is satisfied and, although statutory hearing requirements do not apply to cases of termination for physical disability, plaintiff was entitled to a pretermination hearing under the Due Process Clause of the Montana Constitution. Termination without a hearing was improper and void, and plaintiff was entitled to full pay and benefits from the time of his termination until the final disposition of the case. Welsh v. Great Falls, 212 M 403, 690 P2d 406, 41 St. Rep. 1826 (1984).

Public Recreational Use of Dearborn River — No Inverse Condemnation: Landowner along Dearborn River was sued by parties seeking a determination of the public's right to use the river for recreational uses. Landowner counterclaimed for inverse condemnation, basing the counterclaim on his claim to ownership of the riverbed. The Supreme Court held that the question of title to the bed was irrelevant to determining navigability for use by the public; that landowner had no claim to the waters; that since there was no claim to the waters, nothing was taken and thus there was no ground for an inverse condemnation claim; and that, consequently, the District Court did not err in dismissing the counterclaim. Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984).

No Retroactive Application of Workers' Compensation Social Security Disability Offset Statute: At the time that claimant suffered the injury which rendered him totally permanently disabled, in May 1974, Montana law provided for a 100% offset of social security disability benefits. Shortly afterward, the Legislature reduced the offset to 50%. In 1980, in McClanathan v. Smith, 186 M 56, 606 P2d 507, the Supreme Court ruled that the 100% offset statute was constitutionally unenforceable. Therefore, application of a 50% offset to claimant was error. The statutes in effect at the time of injury set the standards by which the benefits for the claimant are computed, and since the offset statute in effect at the time of claimant's injury was void under the McClanathan decision, no offset can be made of claimant's benefits. Neither can the 50% offset statute be applied retroactively to claimant because this would be an impairment of his vested rights. Trusty v. Consol. Freightways, 210 M 148, 681 P2d 1085, 41 St. Rep. 973 (1984). See also Boehm v. Alanon Club, 222 M 373, 722 P2d 1160, 43 St. Rep. 1341 (1986).

Misapplication of or Failure to Apply State or Local Law — Rights Under Federal Constitution: Plaintiff landowners claimed that the county and its officials violated plaintiffs' federal constitutional due process and equal protection rights by misapplying, misinterpreting, and failing to apply local health regulations adopted under state law and by applying them discriminatively against plaintiffs. The District Court ruled that the right to have state laws strictly obeyed is not a federal right protected by the Civil Rights Act (42 U.S.C. § 1983) or the federal constitution, but rather is a state right. A mere violation of a state law does not violate the federal constitution. A violation of federal equal protection is shown by proving intentional discrimination in applying state regulations. H O H Bar S Land & Cattle v. Ravalli County, 41 St. Rep. 271 (D.C. Mont. 1984) (apparently not reported in Federal Supplement).

Zoning Variance Based Solely on Neighbors' Consent: A zoning ordinance provided that a variance to place a mobile home in a residential district would be granted only if at least 80% of the landowners residing within 300 feet of the proposed location of the mobile home agreed and if all adjoining landowners also agreed. To be a lawful delegation of legislative power, a consent ordinance such as this must not be arbitrary or capricious and must contain standards or guidelines that can be used by the zoning authority to judge the propriety of a withholding of consent. This ordinance fails on both counts and is an unconstitutional delegation of legislative authority and an unwarranted application of the police power. Shannon v. Forsyth, 205 M 111, 666 P2d 750, 40 St. Rep. 1129 (1983).

Water Rights Decree Limited to Parties Before the Court — No Due Process Violation: Appellant owns water rights in Clear Creek dating to 1910. Petitioners have water rights in Rock Creek dating to 1896. Clear Creek is a tributary of Rock Creek. In 1970, appellant obtained a court order directing the Rock Creek Water Commissioner to "carry out" the Clear Creek water rights of appellant. Following the District Court order, the Water Commissioner honored in full the requests of appellant for water, without regard to any priority in the relationship of the creeks' water rights. As a result, at times of water shortage, senior Rock Creek decreed waters are cut off. In 1977, petitioners filed this action to rescind the 1970 order and to direct the Water Commissioner to subject the Clear Creek water rights to the priorities of Rock Creek water rights. The District Court ruled that the 1970 court order, applied by the Water Commissioner to fulfill junior appropriations ahead of prior decreed rights, was improper. The Supreme Court affirmed the District Court's order and further stated that the order did not violate due process. The Supreme Court reasoned that the only rights affected by the District Court order were the rights of the parties before the court. Granite Ditch Co. v. Anderson, 204 M 10, 662 P2d 1312, 40 St. Rep. 630 (1983).

City Ordinance Prohibiting Door-to-Door Solicitation — No Denial of Due Process: The city of Billings enacted an ordinance declaring uninvited door-to-door solicitation a nuisance punishable as a misdemeanor. Following Breard v. City of Alexandria, 341 US 622 (1951), the Montana Supreme Court found that the ordinance did not violate Montana's Due Process Clause. Tipco Corp. v. Billings, 197 M 339, 642 P2d 1074, 39 St. Rep. 600 (1982).

Denial of Teacher Tenure — Burden of Proof: The question of whether due process protections of teacher denied tenure were violated would not be considered unless he established the existence of a property right or liberty interest that is accorded due process protection. That tenure was denied would not benefit teacher in his pursuit of other employment, but it did not place such a stigma on him as to deprive him of a liberty interest. A vested property right protected by due process did not accrue to teacher upon his meeting the eligibility for tenure standards of requisite number of years of teaching and the rank of assistant professor, for beyond that, teacher was required by college policy to present evidence showing excellence in teaching, research, and public service. Akhtar v. Van De Wetering, 197 M 205, 642 P2d 149, 39 St. Rep. 470 (1982). See

also State ex rel. Scanlon v. Nat'l Ass'n of Ins. Comm'rs, 265 M 184, 875 P2d 340, 51 St. Rep. 480 (1994).

Property Interest in Employment Benefit — Attributes: To have a property right or interest in an employment benefit that is entitled to due process protection, one must have more than an abstract need for it and more than a unilateral expectation of it. He must have a legitimate claim of entitlement to it founded, for example, in state law or in rules and understandings between the individual and his employer, and the right or interest must have become vested. Akhtar v. Van De Wetering, 197 M 205, 642 P2d 149, 39 St. Rep. 470 (1982), followed in State ex rel. Scanlon v. Nat'l Ass'n of Ins. Comm'rs, 265 M 184, 875 P2d 340, 51 St. Rep. 480 (1994), and, with respect to award of a public contract, ISC Distrib., Inc. v. Trevor, 273 M 185, 903 P2d 170, 52 St. Rep. 894 (1995). The attributes of a property interest were also applied in Germann v. Stephens, 2006 MT 130, 332 M 303, 137 P3d 545 (2006).

Property Interest in Teacher Tenure — Proof — School's Codification of Tenure Matters: College's codification of rank and tenure matters, specifically drafted to clarify the faculty contract and a college handbook issued to the faculty, approved by a committee as not in conflict with the contract or with the handbook, stated to be an operating manual for the college rank and tenure committee, limited to reference and informational use, and subject to future contract negotiations, was by its nature a pseudoextension of the faculty contract but was not a part of the contract. Therefore, the codification could not be the source for a property interest in teacher tenure to which due process protection would attach. Akhtar v. Van De Wetering, 197 M 205, 642 P2d 149, 39 St. Rep. 470 (1982). See also State ex rel. Scanlon v. Nat'l Ass'n of Ins. Comm'rs, 265 M 184, 875 P2d 340, 51 St. Rep. 480 (1994).

Trade Secrets — When to Be Disclosed and to Whom — Protectable Property: A telephone utility was required to disclose trade secrets to the Public Service Commission (PSC) to aid in a decision on its rate increase request. The utility was entitled to a protective order preventing access to the secrets by the general public, but the Montana Consumer Counsel and any citizen whose interest related to the ratemaking function of the PSC could have access to the information. Use or disclosure of the trade secrets except for purposes of the ratemaking proceeding was prohibited. Mtn. States Tel. & Tel. v. Dept. of Public Service Regulation, 194 M 277, 634 P2d 181, 38 St. Rep. 1479 (1981). Mtn. States and its progeny were overruled to the extent that those decisions relied on the constitutional balancing test of the right to individual privacy against the public's right to examine documents or observe governmental deliberations as a basis of protecting trade secrets and other confidential proprietary information of nonhuman entities in Great Falls Tribune v. Mont. Pub. Serv. Comm'n, 2003 MT 359, 319 M 38, 82 P3d 876 (2003).

Revocation of Government-Controlled Business Right Held to Be Taking of Property Requiring Due Process: Where a portion of the plaintiffs' veterinary business was based on the use of brucellosis test kits, which were the exclusive property of the United States, and would be destroyed by the revocation of the right to use those kits, the court found that the plaintiffs had a right to rely on their continued use of the kits and that as such, the kits constituted "property" within the meaning of the Due Process Clause of the United States Constitution. The court therefore granted summary judgment to prevent the revocation of the right to use the kits unless the plaintiffs were first granted notice and hearing. Doran v. Houle, 516 F. Supp. 1231, 38 St. Rep. 1086 (D.C. Mont. 1981). (Vacated and remanded — government discretion over future enjoyment of right prevents interest from becoming constitutionally protected entitlement.) Doran v. Houle, 721 F2d 1182 (9th Cir. 1983).

"At Will" Employment — No Property Interest: Plaintiff, a custodian at the Yellowstone County courthouse for 18 years, was discharged. His employment was not covered by a written contract, collective bargaining agreement, or ordinance. Plaintiff claims that, based on the longevity of his service and the fact that he was a permanent employee, he had a property interest in continued employment and was therefore entitled to procedural due process prior to dismissal. Property interests are created and defined by state law. Section 39-2-503 (now repealed) creates no property interest in employment if there is no specified term. To have a property interest, a person must have a legitimate claim of entitlement to it. Plaintiff claimed an implied contract of employment with implied covenants of good faith and fair dealing. The argument on implied contracts cannot successfully circumvent the Montana statute which clearly denies plaintiff's claim of entitlement to continued employment. Reiter v. Yellowstone County, 192 M 194, 627 P2d 845, 38 St. Rep. 686 (1981), distinguished in Boreen v. Christensen, 267 M 405, 884 P2d 761, 51 St. Rep. 1014 (1994). See Nicholson v. United Pac. Ins. Co., 219 M 32, 710 P2d 1342, 42 St. Rep. 1822 (1985).

Improper State Court Decision — Not Violation of Federal Due Process: Plaintiff alleged a civil rights violation occurring over a decade of state court litigation. The original problems arose after plaintiff entered into a land exchange with defendant. At the time of the exchange, claims of numerous creditors were pending against defendant. Nine years of litigation represented the struggles of two banks to rescind the land exchange as fraudulent. Plaintiff alleged due process violations which may be summed up as a conspiracy to commit legal errors which ultimately resulted in a decision unfavorable to plaintiff. These errors did not violate due process. The fundamental requisite of due process is opportunity to be heard prior to deprivation of a significant property interest. A federal court cannot find a due process violation by a state court for deciding a legal issue improperly. Bouma v. Larry C. Iverson, Inc., 38 St. Rep. 765 (D.C. Mont. 1981) (apparently not reported in Federal Supplement).

Moving or Raising Utility Wires — Constitutional Exercise of Police Power: A police power regulation must be reasonably adapted to its purpose and must injure or impair property rights only to the extent reasonably necessary to preserve the public welfare. The standard of reasonableness is the constitutional measure of the proper exercise of the police power. As a general rule, acts conducted in the proper exercise of police power do not constitute a taking of property and do not entitle the owner of such property to compensation for the regulation or impairment thereof except in cases that exceed regulation or impairment and that entail an appropriation of property that amounts to a taking or deprivation of property for public use. The momentary raising of utility lines or their severing was under a statute which amounts to a regulation or impairment of utility property and not an actual taking or appropriation of property for the private use of another. The statute is a reasonable exercise of police power. Yellowstone Valley Elec. Co-op v. Ostermiller, 187 M 8, 608 P2d 491 (1980). The reasonableness standard was applied to enactment of septic regulations in McElwain v. Flathead County, 248 M 231, 811 P2d 1267, 48 St. Rep. 410 (1991).

Moving or Raising Utility Wires — Police Power, Not Eminent Domain: Under 69-4-603, a utility was required to move or raise utility wires so that oversized objects could be moved through public streets. The statute was determined to be an exercise of police power rather than sounding in eminent domain. Therefore, due process requirements of the 14th amendment may be met without compensation. Four factors were cited in the determination that the statute exercises police power: (1) public safety is concerned; (2) a public benefit is conferred; (3) a reasonable and necessary public use is allowed; and (4) the public's right to use the highways is recognized under the statute. Yellowstone Valley Elec. Co-op v. Ostermiller, 187 M 8, 608 P2d 491 (1980).

Due Process — Interests Protected — Exemption From Rulemaking Procedures — United States Constitution: An employer had no liberty or property interest affected by the promulgation of OSHA standards; therefore, the exemption of the promulgation of such regulations from the notice and hearing requirements of the federal Administrative Procedure Act did not deprive the employer of due process under the United States Constitution (similar to Art. II, sec. 17, Mont. Const.). Plum Creek Lumber Co. v. Hutton, 608 F2d 1283 (9th Cir. 1979).

Forced Relocation of Power Line Unconstitutional Taking: Section 69-4-404 is unconstitutional because it is a taking without just compensation. The relocation of the power line comes at the insistence of the landowner, and it is he who must bear the full cost of relocation. McTaggart v. Mont. Power Co., 184 M 329, 602 P2d 992 (1979).

State Not to Unreasonably Restrict Lawful Business: The right to carry on a business is a property right; due process requires that it not be unreasonably or unnecessarily restricted. Billings Assoc. Plumbing, Heating, & Cooling Contractors v. Bd. of Plumbers, 184 M 249, 602 P2d 597 (1979).

Prisoner Access to Civil Courts — United States Constitution: A state prison inmate brought a civil rights action. The trial court stayed all proceedings until the prisoner "is released from custody". This was tantamount to a denial of due process under the United States Constitution (similar to Art. II, sec. 17, Mont. Const.), and the appeals court struck that portion of the order. Simply because a person is incarcerated does not mean that he is stripped of free access to the courts and the use of the legal process to remedy civil wrongs. This right is governed by law and not discretion. Wimberly v. Rogers, 557 F2d 671 (9th Cir. 1977).

Restriction on Continuing Study of Law: The practices, policies, rules, and procedures under which the fitness of a student to continue the study of law is appraised, as applied to plaintiff, do not violate constitutional requirements of due process and equal protection or 37-61-204 (now repealed). Johnson v. Sullivan, 174 M 491, 571 P2d 798 (1977).

Discharge of Probationary State Employee Based Upon His Private Life: Dismissal of drug abuse consultant based upon his personal lifestyle is not an infringement upon his substantive

due process right of privacy as he was engaged in counseling people with personal problems, thus his own personal philosophies became relevant to his job performance. What an employee does in his private life should not be his employer's concern unless, as in this case, it can be shown to affect in some degree his efficiency in the performance of his duties. Storch v. Bd. of Directors, 169 M 176, 545 P2d 644 (1976).

School Foundation Program: Provisions of Ch. 355, L. 1973, requiring that tax proceeds in excess of those needed by a particular county be remitted to the state did not result in a taking of property without due process since tax was a state tax rather than a local tax and the state as a whole benefited from the tax. State ex rel. Woodahl v. Straub, 164 M 141, 520 P2d 776 (1974), certiorari denied, 419 US 845, 42 L Ed 2d 73, 95 S Ct 79 (1974).

NOTICE AND OPPORTUNITY TO BE HEARD

Crow Compact Upheld — Compact Held Reasonable — Public Property and Water Rights Reasonable Under Compact — Public Comment Satisfied Due Process: Individual objectors to the Crow Water Compact appealed to the Supreme Court following the Water Court's determination that the Compact was valid. This action was subsequent to In re Crow Water Compact, 2015 MT 217, 380 Mont 168, 354 P.3d 1217. The objectors, who were not parties to the Compact but who owned land and water rights near the reservation, argued that the Water Court did not apply the proper legal standard, that they sustained injury because the Compact was unreasonable, and that their due process rights were violated during the Compact negotiation process. The Supreme Court disagreed with the objectors, holding that the Water Court correctly applied the correct standard articulated in Crow I, that the Compact was reasonable and had reasonable protection of state water and property rights, that the objectors' argument of future potential problems was beyond the scope of its review, that reservation of water for public recreation, wildlife, and aquatic life was for the benefit of the public, and that the record demonstrated sufficient opportunities for public comment during the Compact approval process. In re Crow Water Compact, 2015 MT 353, 382 Mont. 46, 364 P.3d 584.

Reliance on Document Not Admitted — Court Required to Balance Privacy Interests Against Disclosure: After the defendant's conviction for negligent endangerment, a hearing was held on the amount of restitution to be awarded to the Department of Justice's crime victims compensation program, which had provided counseling services to the defendant's victim. The Municipal Court denied the defendant's request to examine the form based on the victim's right of privacy in the information that the form contained and subsequently awarded restitution to the program. Because the defendant had a right to receive and rebut the treatment plan form because it was relied on by witnesses to establish how much of the counseling costs were related to the defendant's offense and because the victim may have had a protectable expectation of privacy regarding some of the contents, the Municipal Court erred by not determining the contents of the document and balancing the competing interests of privacy and disclosure. St. v. McClelland, 2015 MT 281, 381 Mont. 164, 357 P.3d 906.

District Court Decision Regarding Lack of Subject Matter Jurisdiction Appropriate — Oral Hearing Not Required — No Due Process Concerns for Failure to Provide Hearing: In a child custody dispute, the District Court did not abuse its discretion by dismissing the case for lack of subject matter jurisdiction without providing for the opportunity for an oral hearing. The Supreme Court determined that Rule 2(c), M.U.D.C.R., and Rule 12(i), M.R.Civ.P., do not require the District Court to hold an oral hearing. As applied to the facts, there was ample evidence, based on affidavits and other filings of the parties, upon which the District Court could base its subject matter jurisdiction decision. Moreover, the District Court did not fail to afford due process by refusing to hold a hearing, as a decision was not issued regarding the child custody issue, and the petitioning parent was not deprived of a liberty interest. In re Marriage of Sampley, 2015 MT 121, 379 Mont. 131, 347 P.3d 1281.

Amendment of Parenting Plan Based Solely on Party's Absence From Mediation — Violation of Due Process: After the father failed to attend a court-ordered mediation concerning the mother's motion to amend the parties' parenting plan, the District Court, without holding a hearing, amended the parenting plan, citing the father's failure to appear at the mediation as the sole reason for the amendment. On appeal, the Supreme Court reversed, concluding that the order violated due process of law, which required that the father be heard to show cause why the amendment to the parenting plan should not be granted and required that the court consider the best interest of the child. In re Marriage of Wendt, 2014 MT 174, 375 Mont. 388, 329 P.3d 567.

Arrearage Not Delinquent Child Support — No Violation of Due Process: The plaintiff, a uniformed service member, regularly sent child support. While the plaintiff was serving

abroad, the child's mother requested an increase in the support amount, and the Child Support Enforcement Division (CSED) subsequently raised the amount retroactively, resulting in an administrative arrearage that the plaintiff agreed to pay in installments, in accordance with 40-5-309. Although he faithfully paid his child support debts, CSED reported him to the consumer credit reporting agencies because of the administrative arrearage. He was later denied employment because of the notation on his credit report. The Montana child support enforcement program is based on federal law, which provides that states are required to periodically report the names of noncustodial parents who are delinquent in their support payments. The Supreme Court found that not all past due child support constitutes "delinquency", finding a functional difference between delinquent support and arrearage. However, because the plaintiff received written notice from CSED and an opportunity to be heard while on active duty but failed to timely respond, the plaintiff did not avail himself of the administrative process to challenge CSED's actions, and there was no constitutional violation. Kenck v. St., 2013 MT 380, 373 Mont. 168, 315 P.3d 957.

No Error in Not Holding Separate Reunification Hearing or Permanency Hearing: A court terminated the parental rights of a mother to her two children in Colorado in 2009. In 2012, the Department of Public Health and Human Services petitioned to forgo reasonable efforts to reunify the mother with her child and to terminate her parental rights because her parenting behavior had not changed since her parental rights to her other two children had been terminated. The Supreme Court found that although the lower court did not hold a separate "pre-hearing" to determine if reunification with the child was possible, the mother was on notice from the petition that the Department was requesting that reasonable efforts be abandoned and she had the opportunity to be heard at the termination hearing. In addition, the Supreme Court found that although the District Court did not conduct a permanency hearing, the Department's actions, including working with the father on a treatment plan in hopes of reunifying him with the child, were consistent with the purposes of such a hearing, and the failure to hold a permanency hearing was not a per se violation of parental rights. In re J.W., 2013 MT 201, 371 Mont. 98, 307 P.3d 274.

Respondent Not Required to Attend Involuntary Commitment Hearing to Waive Right to Be Present — Record to Show Respondent Was Capable and Waiver Was Knowing and Intentional: A person who is the subject of a petition for involuntary commitment may waive the statutory right to be present at any hearing. However, the record must show that the absent person is capable of waiving his rights and that the person made an intentional and knowing waiver of the right to be present at a hearing. In re P.A.C., 2013 MT 84, 369 Mont. 407, 298 P.3d 1166.

Fundamental Right to Testify: J.S.W. asked to testify at her involuntary commitment hearing. The District Court stated that it would allow her to testify for 3 minutes but subsequently did not cut her off and encouraged additional questioning. The Supreme Court acknowledged a fundamental right to testify in one's own behalf but declined to apply plain error review in this case, since J.S.W. could show no error to review. In re J.S.W., 2013 MT 34, 369 Mont. 12, 303 P.3d 741, following Rock v. Ark., 483 US 44 (1987).

Partition Hearing Required if Party Submits Substantiated Claim of Factual or Legal Error: In a partition action concerning real property on Flathead Lake owned by two sisters, the District Court entered a final partition judgment adopting recommendations by the partition referees and one of the parties. The District Court entered the judgment although the other party objected to the referees' final report, requested a hearing on the partition action, and filed affidavits attacking conclusions in the referees' report. The Supreme Court found that if a party makes a substantiated claim of factual or legal error in the referees' report, due process and equitable concerns require that a court hold a hearing before confirming, changing, or modifying the report pursuant to 70-29-212. Britton v. Brown, 2013 MT 30, 368 Mont. 379, 300 P.3d 667.

Petitioner's Appeal Not Waived When MPERA Failed to Inform Claimant of Right to Appeal: The Montana Public Employee Retirement Administration (MPERA) denied the petitioner's initial claim for benefits but failed to inform her of her right to appeal the denial to the Montana Public Employees' Retirement Board, and the District Court affirmed. On appeal to the Supreme Court, the Board argued that the petitioner had waived her claim by applying for and accepting benefits on behalf of her minor children, the remaining beneficiaries. The Supreme Court disagreed, holding that MPERA was obligated to inform the petitioner of her right to appeal the denial and of the applicable procedures. The court concluded that MPERA's failure to provide notice meant the petitioner did not voluntarily and intentionally relinquish her known right to appeal by applying for benefits on behalf of her children. Thus, the petitioner had not waived her right. Briese v. Mont. Pub. Employees' Retirement Bd., 2012 MT 192, 366 Mont. 148, 285 P.3d 550.

Security Hearing — Exception to Right to Be Present at Any Hearing Regarding Involuntary Commitment: T.J.F. was not present at the security hearing held by the District Court to determine whether T.J.F. should be required to appear in full restraints during a bench trial. The District Court did not violate T.J.F.'s right to be present at the security hearing because a security hearing is simply an administrative proceeding to ensure the orderly conduct of the bench trial pursuant to 3-1-111. In re Mental Health of T.J.F., 2011 MT 28, 359 Mont. 213, 248 P.3d 804.

Defendant Excluded from Hearing — Harmless Error Analysis — Matt Clarified and Overruled to Limited Extent: After having been excluded from a quickly called telephonic hearing before the District Court at which videotape evidence was discussed, Charlie argued on appeal that because the exclusion occurred at a critical stage of the proceedings, about 1 week before trial, his fundamental right to be present was violated and his conviction should be overturned. The Supreme Court held, based upon U.S. Supreme Court precedent, that although a harmless error analysis should be applied, Charlie's conviction should be overturned only if there was a "reasonable possibility" that he was prejudiced by the exclusion. To the extent that St. v. Matt, 2008 MT 444, 347 Mont. 530, 199 P.3d 244, imposed a presumption of prejudice when the defendant is excluded from a critical stage of the proceedings and imposed a burden of proof on the state, the Supreme Court overruled Matt but held that in Charlie's case the exclusion was harmless error because there was no reasonable possibility that Charlie was prejudiced by the exclusion. St. v. Charlie, 2010 MT 195, 357 Mont. 355, 239 P.3d 934.

Lack of Adequate Notice for Change of Residential Parent Custodian — Violation of Due Process: Mother was denied due process of law when she was not given notice, prior to a parenting plan change hearing, that her status as primary residential parent was going to be challenged. Steab v. Luna, 2010 MT 125, 356 Mont. 372, 233 P.3d 351.

Failure of Commission on Practice to Notify Attorney of Charge — Due Process Violation: The Commission on Practice attempted to discipline attorney Best with a private admonition without notifying Best of the rule that was allegedly violated. The Supreme Court, following In re Ruffalo, 390 US 544 (1968), held that punishing Best for a violation of that rule without giving Best an opportunity to respond to the charge would be a violation of Best's right to fair and due process. The disciplinary proceeding was dismissed with prejudice. In re Best, 2010 MT 59, 355 Mont. 365, 229 P.3d 1201.

Offender Entitled to Opportunity to Contest Sex Offender Designation — Liberty Interest at Stake: Samples contended that his due process rights were violated when the Department of Corrections assigned him a level 3 offender designation without notice, a hearing, or an opportunity to contest the designation. The Supreme Court agreed. In the context of a criminal sentence in Montana, it is not the duration or severity of a sentence that might render it unconstitutional, it is the imposition of a sentence based on a foundation that might be extensively and materially false and that a prisoner has no opportunity to correct that can result in a due process violation. There is a liberty interest at stake when a person is designated as a particular risk level for registration purposes because the level of designation places varying requirements on an offender to update the registration or face criminal sanctions. Therefore, Samples was denied due process in this case because he did not have the opportunity to know what information was used to designate the risk level, nor was he given the right to contest that information or the chance to argue for a different designation. The court remanded to allow Samples an opportunity to explain, argue, and rebut any information used in the designation of his sexual offender risk level. St. v. Samples, 2008 MT 416, 347 M 292, 198 P3d 803 (2008).

Due Process in Probation Revocation Process Considered Constitutionally Adequate: The following procedures in 46-23-1012 provide adequate due process to an alleged probation violator: (1) the probation officer must file a report of violation within 10 days of the probationer's arrest; (2) the state must bring the probationer before a judge for a hearing on the charges without unnecessary delay after the report of violation is filed; and (3) the state must notify the probationer at the hearing of the alleged probation violations. St. v. Johnston, 2008 MT 318, 346 M 93, 193 P3d 925 (2008), overruled in part in St. v. Maynard, 2010 MT 115, 356 Mont. 333, 233 P.3d 331. See also St. v. Swan, 220 M 162, 713 P2d 1003 (1986), and St. v. Evans, 2012 MT 115, 365 Mont. 163, 280 P.3d 871.

Involuntary Commitment — Probable Cause Hearing at Initial Appearance Not Required — Immediate Commitment Hearing Available: After discussing the due process factors set out in Mathews v. Eldridge, 424 US 319, 96 SCt 893 (1976), the Supreme Court determined that the inability to have a hearing on probable cause for a mental health commitment at a person's initial appearance hearing under 53-21-122 does not deny the person due process of law because

any person subject to commitment and detention pending an initial appearance has the right to an immediate hearing on the detention, including probable cause, under the provisions of 53-21-124. In re Mental Health of E.T., 2008 MT 299, 345 M 497, 191 P3d 470 (2008).

Immediate Notice Requirements Inapplicable When Person Detained on Emergency Basis: After being detained on an emergency basis, L.K. was advised of her due process rights the next day. On appeal, L.K. asserted that the provisions of 53-21-114 required that she be advised of her constitutional rights at the time of detainment, and that failure to do so violated due process. The Supreme Court disagreed. Emergency mental health commitments are treated differently from other mental health commitments, and the immediate notice of constitutional rights is not required when a person is detained in an emergency situation pursuant to 53-21-129. L.K. was advised of her constitutional rights in a reasonably timely manner, and due process was satisfied. In re Mental Health of L.K., 2008 MT 169, 343 M 366, 184 P3d 353 (2008), distinguishing In re Shennum, 210 M 442, 684 P2d 1073 (1984).

Muting of Respondent's Microphone at Commitment Hearing in Order to Prevent Disruptive Behavior Not Violative of Right to Be Heard: When L.K. did not respond to the District Court's warning to abstain from disrupting emergency commitment proceedings conducted via two-way electronic audio-video communication from the state hospital, the court muted L.K.'s microphone until permission was granted for L.K. to speak. On appeal, L.K. asserted that muting the microphone violated her right to be heard at the hearing. The Supreme Court disagreed. Although a person who is involuntarily detained has the right to be present, to offer evidence, to present witnesses, and to receive assistance of counsel, the person does not have the right to disrupt proceedings. In this case, the District Court afforded L.K. due process by consistently giving L.K. the opportunity to conform her behavior to the requirements of an orderly hearing, to hear witness testimony and observe the entire proceeding, and to consult with counsel at any time. In re Mental Health of L.K., 2008 MT 169, 343 M 366, 184 P3d 353 (2008).

Improper Use of Secretary of State to Serve Nonresident Defendant — Default Judgment Void: Plaintiffs' business was destroyed by a fire allegedly caused by a defective light ballast manufactured by defendant corporation located in Illinois. Although plaintiffs had contact with defendant's counsel, experts, and insurer in demanding payment for the loss, plaintiffs never attempted to use former Rule 4D(2)(e) or former Rule 4D(3), M.R.Civ.P. (now superseded), to personally serve defendant with notice that a suit had been filed in Montana, but instead relied on former Rule 4D(2)(f), M.R.Civ.P. (now superseded), to complete service of process by service on the Montana Secretary of State. Not having been notified of the suit, defendant failed to answer the complaint and prepared no defense, and default judgment was entered for plaintiffs. When notified of the default judgment, defendant immediately retained counsel and moved to set aside the judgment on grounds that service was inadequate because no one in authority at defendant's corporation ever received the summons and complaint. The District Court failed to act on the motion, so the motion was considered to be denied, and defendant appealed. The Supreme Court reversed. In order to use former Rule 4D(2)(f) to complete service of process by service on the Montana Secretary of State, plaintiff was first required to exercise reasonable diligence to serve notice on a representative of defendant in Montana or, if a representative was not available, to exercise reasonable diligence to ascertain defendant's address (of which plaintiff's counsel in this case was aware) and serve notice at that address. Because plaintiff's counsel did not exercise reasonable diligence and attempt to directly serve defendant before affecting service through the Montana Secretary of State, service was improper and deprived the District Court of personal jurisdiction over defendant, rendering the default judgment void as a matter of law. Nikolaisen v. Advance Transformer Co., 2007 MT 352, 340 M 332, 174 P3d 940 (2007), distinguished in Ptarmigan Owner's Ass'n, Inc. v. Alton, 2013 MT 69, 369 Mont. 274, 298 P.3d 1140.

Collateral Estoppel Not Bar to Challenge of Marital Property Disposition by Titleholder Not Party to Dissolution: While defendant was married, her husband allegedly conspired with his sister to hide his interest in a parcel of real property in Lincoln County by placing the property in the sister and her husband's name. When the Flathead County District Court distributed the marital estate, the court ordered the sister and her husband to convey the property to the wife and ordered the wife to sell the property, with the proceeds to be equitably distributed between the husband and wife. The sister and her husband were never named as parties to the underlying dissolution action, nor were they served with a summons, and they argued that for these reasons, the District Court lacked jurisdiction over them and had no authority to order them to convey the property to the wife. The District Court disagreed, ruled that the court had jurisdiction over the property by virtue of its status as part of the marital estate, and held that the court had authority to terminate the sister and her husband's title in the property and to

order that it be transferred to the wife. The sister and her husband did not appeal the ruling, but 3 days after the Flathead County District Court directed the property to be transferred to the wife, the sister and her husband filed the present action in Lincoln County to quiet title in the property. The Lincoln County District Court held that the sister and her husband were barred by collateral estoppel from challenging the Flathead County District Court in Lincoln County, and the sister and her husband appealed. The Supreme Court noted that one element of the doctrine of collateral estoppel that must be satisfied requires that the party against whom preclusion is asserted must have been afforded a full and fair opportunity to litigate any issues that might be barred. Additionally, under Blonder-Tongue Laboratories, Inc. v. Univ. of Ill. Foundation, 402 US 313 (1971), when a court entertains litigation that could terminate the real estate interests of third parties, this element of collateral estoppel requires, at a minimum, that they be made parties to the proceedings and served with notice of the fact that their interests in the real property could be affected. In this case, the sister and her husband were never afforded an opportunity to litigate their property ownership, so the Lincoln County District Court erred in concluding that all elements of collateral estoppel were satisfied and that the doctrine precluded the sister and her husband's quiet title action. Without expressing an opinion as to the merits of the quiet title action, the Supreme Court reversed for further proceedings. Kubacki v. Molchan, 2007 MT 306, 340 M 100, 172 P3d 594 (2007), distinguishing In re Marriage of Heidema, 2007 MT 20, 335 M 362, 152 P3d 112 (2007).

Duty of Unsuccessful Intervenor to Monitor Litigation in Order to Perfect Appeal — No Due Process Violation in Failure to Notify Unsuccessful Intervenor of Final Judgment: The Department of Environmental Quality issued a pollution discharge elimination system permit to a silver mine company. Plaintiffs challenged the issuance of the permit, but the company was not named in the action. About 3 years after the suit was filed and while plaintiffs' motion for summary judgment was pending, the company sought to intervene as a defendant in the action, but the motion to intervene was dismissed as untimely. The company did not participate further in the litigation or seek supervisory control by the Supreme Court. Ultimately, final judgment was entered for the department, but no party served a notice of entry of judgment on the company. Plaintiffs appealed part of the final judgment, but the company sought to dismiss the appeal, arguing that the company was entitled to service of notice of entry of judgment as a matter of due process. The Supreme Court disagreed. As a nonparty, the company was not entitled to notice of judgment. Additionally, the company failed to exercise its right to seek supervisory control, but in the absence of supervisory control, the company could have monitored the litigation in order to take a timely appeal as an unsuccessful intervenor following final judgment. The company's obligation, in order to protect its claimed interests, was to monitor the litigation and file a timely appeal. The Supreme Court declined to apply due process as a remedy for irresponsibility or to relieve the company of the duty to superintend its own affairs. Clark Fork Coalition v. Dept. of Environmental Quality, 2007 MT 176, 338 M 205, 164 P3d 902 (2007).

No Right of Defendant to Be Present at Stage of Trial That Did Not Occur: On the second day of trial, with defendant present, defense counsel brought to the trial judge's attention in chambers that a juror had been seen speaking with defendant's father in the hallway next to the courtroom. The father was not a witness, but the prosecutor stated that he would inform the father not to speak to the jurors. The trial judge was satisfied with the suggestion, defense counsel did not object, and the trial proceeded. Defendant later argued that his constitutional right to be present at all critical stages of the trial was violated when the trial court did not advise him of the right to question the juror regarding the alleged conversation. The Supreme Court held that defendant's right was not violated. The questioning of the juror never took place, so defendant could not claim the right to be present at a stage of the trial that never occurred. St. v. St. Germain, 2007 MT 28, 336 M 17, 153 P3d 591 (2007).

Plenary Review of Defendant's Right to Be Present at Trial: Whether a criminal defendant's right to be present at critical stages of trial has been violated is a constitutional question, and the Supreme Court's review of that question is plenary. St. v. St. Germain, 2007 MT 28, 336 M 17, 153 P3d 591 (2007). See also St. v. McCarthy, 2004 MT 312, 324 M 1, 101 P3d 288 (2004).

Expedited Hearing on Validity of Ballot Measure Not Violative of Procedural Due Process: Opponents to a ballot measure timely filed a challenge, and the District Court expedited the hearing and denied the proponents additional time for discovery. On appeal, the proponents asserted that their due process rights were violated by the District Court's actions. The Supreme Court disagreed. The requirements for a procedural due process claim are notice and opportunity for a hearing appropriate to the nature of the case. The proponents could not claim lack of notice because: (1) the opponents' complaint was sufficiently specific to put the proponents on notice

that the opponents contested the validity of addresses listed by paid signature gatherers; (2) the proponents acknowledged that the Secretary of State notified them during the signature gathering process that complaints had been received related to address falsification; and (3) denial of additional time for discovery regarding address falsification did not prejudice the proponents because the signature gatherers were contacted, hired, and paid by the proponents, so any information regarding the true addresses was within the exclusive knowledge of the proponents. The due process claim of lack of a meaningful hearing was also denied by the Supreme Court. The record showed that the proponents failed to use the time allocated for discovery or to avail themselves of available procedural remedies. The proponents did not answer the opponents' complaint, request any discovery, move for a continuance, take any depositions, file a pretrial brief, attend depositions conducted by the opponents, file proposed findings of fact or conclusions of law, or object to the District Court's proposed expedited schedule. Thus, any deprivation of a meaningful hearing was more a construct of the proponents' own failure to act than it was a function of the District Court's denial of more time for trial preparation. The proponents' due process claim failed. Montanans for Justice: Vote No on CI-98 v. St., 2006 MT 277, 334 M 237, 146 P3d 759 (2006), distinguishing Wilson v. Dept. of Public Service Regulation, 260 M 167, 858 P2d 368 (1993).

Judgment on Pleadings — Pro Se Litigant Not Denied Opportunity to Be Heard or Access to Courts: Plaintiff filed an action for damages for breach of contract and nonpayment of an account. Defendant filed a pro se response, after which plaintiff moved for judgment on the pleadings. The District Court granted the motion based on defendant's failure to state a legal defense. Defendant appealed on grounds that he was denied the opportunity to be heard and denied access to the courts, but the Supreme Court affirmed. Although pro se litigants may be given a certain amount of latitude, that latitude cannot be so broad as to prejudice the other party, and it is reasonable to expect pro se litigants to adhere to procedural rules. Here, defendant's filing of an answer in response to the complaint demonstrated access to the courts, and defendant identified no impediment beyond the pro se status that prevented pleading a legal defense. Defendant was not denied the opportunity to be heard or access to the courts. Neil Consultants, Inc. v. Lindeman, 2006 MT 80, 331 M 514, 134 P3d 43 (2006).

Failure to Provide Notice of Child Abuse Substantiation Hearing Not Affecting Employment as Physical Therapy Assistant — No Prejudice to Substantial Rights: When Dowell applied to work at a day-care center, the Department of Public Health and Human Services (DPHHS) denied the request, without a substantiation hearing, based on Dowell's previous child abuse and neglect proceedings. The District Court affirmed. On appeal, Dowell contended that the DPHHS's failure to provide her with timely notice prejudiced her constitutional right to subsequent employment as a physical therapy assistant. Under 2-4-704, judicial review of an agency decision must be confined to the record that was brought before the agency. Implications on licensure as a physical therapist are determined by the Board of Physical Therapists, not the DPHHS, and Dowell provided no evidence that the substantiation determination by the DPHHS impacted employment as a physical therapist, so Dowell's substantial rights were not affected. The District Court was affirmed. Dowell v. Dept. of Public Health and Human Services, 2006 MT 55, 331 M 305, 132 P3d 520 (2006).

Previous Admission of Abuse and Neglect Allegations — No Evidentiary Hearing on Denial of Day-Care License Required: Dowell's license to work as a day-care provider was denied after it was learned that Dowell's parental rights had previously been terminated based on a substantiated record of child abuse and neglect. Dowell contended that her due process rights were violated through the state's failure to provide notice and an opportunity for a hearing before substantiating the child abuse and by failing to notify Dowell that substantiation of abuse would result in employment restrictions. The Supreme Court disagreed. Due process does not require development of facts through an evidentiary hearing when there are no material facts in dispute. Because Dowell had previously admitted to the facts underlying the substantiation determination in the previous child abuse case, no further evidentiary hearing was necessary on the day care issue, so no due process violation occurred. Dowell v. Dept. of Public Health and Human Services, 2006 MT 55, 331 M 305, 132 P3d 520 (2006).

Right to Substantiation Hearing on Licensing Issue Barred by Collateral Estoppel: When Dowell applied to work at a day-care center, the Department of Public Health and Human Services (DPHHS) denied the request, without a substantiation hearing, based on Dowell's previous child abuse and neglect proceedings. The District Court affirmed on grounds that Dowell's right to a substantiation hearing was barred by collateral estoppel, and Dowell appealed. The Supreme Court found that all the elements of collateral estoppel were met: (1) the issues in the child abuse

and neglect proceedings were the same as those in the substantiation decision; (2) there was a final adjudication on the merits in the prior child abuse and neglect proceedings; (3) Dowell was the same party in both proceedings; and (4) Dowell had a full and fair opportunity to litigate the issue at the prior hearing. Dowell's right to a substantiation hearing was barred by collateral estoppel, and Dowell was not allowed to relitigate the issue. Dowell v. Dept. of Public Health and Human Services, 2006 MT 55, 331 M 305, 132 P3d 520 (2006).

Party Required to Defend Against Discovery Abuses — Award of Attorney Fees and Costs as Sanctions: The District Court concluded that plaintiffs' discovery abuses warranted sanctions under former Rule 11, M.R.Civ.P. (now superseded), and awarded defendant costs and attorney fees without holding a hearing on the issue. Plaintiffs appealed, claiming that there was no adequate basis for the award and that it was error to grant sanctions without a hearing. The Supreme Court affirmed. The District Court had scheduled and rescheduled a hearing, but plaintiffs ultimately withdrew their objection to the award of attorney fees and stipulated that the hearing should be vacated, that the amount of attorney fees was reasonable, and that plaintiffs agreed to waive their right to object to the lack of a hearing regarding the award of fees and costs. Based upon the stipulation, plaintiffs waived the right to a hearing on the award. Additionally, the reasons stated by the court for sanctions were more than adequate to impose sanctions for discovery abuses, and it was not an abuse of discretion for the court to award sanctions against plaintiffs. Stipe v. First Interstate Bank of Polson, 2005 MT 295, 329 M 320, 125 P3d 591 (2005).

Reasonable Accommodation of Incarcerated Plaintiff's Opportunity to Prosecute Claim — Dismissal for Failure to Prosecute Affirmed: Following remand of Hauschulz v. Michael Law Firm, 2001 MT 160, 306 M 102, 30 P3d 357 (2001), the District Court gave Hauschulz, who was incarcerated out of state, about 1 1/2 years to obtain counsel and participate in the proceedings, but Hauschulz was unable to specify when he would be able to prosecute the claim. The District Court subsequently dismissed Hauschulz's claim for failure to prosecute, and Hauschulz appealed. The Supreme Court affirmed, holding that although incarceration undoubtedly restricts one's ability to exercise civil liberties, it does not give rise to a right to an indefinite postponement of civil proceedings, particularly over the objection of the other party. Applying the factors in Westland v. Weinmeister, 259 M 412, 856 P2d 1374 (1993), the Supreme Court found no abuse of the District Court's discretion in balancing the competing public policy interests when dismissing Hauschulz's claim with prejudice. Hauschulz v. Michael Law Firm, 2005 MT 189, 328 M 95, 117 P3d 908 (2005).

Challenge of Justice's Court Judgment as Void Not Allowed — No Recourse Under Justice's Court Rules Once Time for Applying for Relief Passes: The Justice's Court entered a default judgment in favor of plaintiff, and 64 days later, plaintiff executed judgment against defendant. Defendant moved to quash the judgment 14 days later on due process grounds of lack of notice, but the motion was denied. On appeal, the District Court affirmed, reasoning that defendant had only 30 days after judgment during which to apply for relief. On appeal to the Supreme Court, defendant essentially contended that the Justice's Court judgment was void because defendant was not given notice of the judgment. However, Justice's Court procedural rules do not allow a party to challenge a Justice's Court judgment as being void, so once the 30-day time for seeking relief from the judgment expired, defendant could not challenge the judgment. The Supreme Court did note that defendant could still file an independent action collaterally attacking the Justice's Court judgment for lack of personal jurisdiction. CBM Collections, Inc. v. Ferreira, 2005 MT 170, 327 M 479, 115 P3d 211 (2005).

Service Upon Limited Liability Company Not Constituting Service Upon Individual Company Members — No Joinder of Member Solely for Executing on Judgment Against Company: Plaintiff obtained a judgment against a limited liability company, but when plaintiff discovered that the company had no assets to levy against, plaintiff moved to levy judgment against defendant personally. The motion was dismissed without prejudice, and plaintiff appealed, but the Supreme Court affirmed. Although defendant knew of the lawsuit involving the company, defendant was not separately served, and service upon the company did not constitute service upon the individual members of the company. Further, the District Court did not err in refusing to join defendant after judgment was rendered solely for the purpose of executing judgment because doing so would have deprived defendant of the due process right to notice and the opportunity to be heard. Ioerger v. Reiner, 2005 MT 155, 327 M 424, 114 P3d 1028 (2005), following S-W Co. v. Schwenk, 173 M 481, 568 P2d 145 (1977), Hadford v. Credit Bureau of Havre, Inc., 1998 MT 179, 289 M 529, 962 P2d 1198 (1998), Mtn. W. Bank v. Mine & Mill Hydraulics, Inc., 2003 MT 35, 314 M 248, 64 P3d 1048 (2003), and Baltrusch v. Baltrusch, 2003 MT 357, 319 M 23, 83 P3d 256 (2003).

Two-Year Wait to Assert Parental Rights — Failure to Advise Parent of Right to Counsel Harmless Error: A father who was incarcerated waited more than 2 years to file for relief following termination of his parental rights, asserting that he was denied due process by not being provided notice of the right to counsel. The Supreme Court agreed that fairness requires that a parent be represented by counsel at parental termination proceedings, but in this case, the error was harmless because the lack of notice was not prejudicial to the father. There was adequate evidence to terminate the father's parental rights, and even if he had been notified and represented by counsel, there was no way that an attorney would have made a difference under the circumstances and the result would have been the same. Denial of the motion for relief was affirmed. In re P.D.L., 2004 MT 346, 324 M 327, 102 P3d 1225 (2004).

Abuse of Discretion to Issue Permanent Protective Orders in Light of Failure to Hold Show Cause Hearing: The District Court issued a temporary protective order to the wife and subsequently granted a permanent protective order, amending the permanent order the next day to include additional restraints on the husband. The court noted that the husband was not present at a show cause hearing. The husband appealed on grounds that he was not given notice and that no hearing was conducted. The Supreme Court noted that under 40-15-202, a show cause hearing must be held within 20 days after issuance of a temporary protection order, but the record did not indicate that a hearing was ever held. Thus, the District Court abused its discretion, and the Supreme Court reversed and directed that the permanent protective orders be vacated. In re Marriage of Coogler, 2004 MT 122, 321 M 243, 90 P3d 414 (2004).

Consideration at Sentencing of Alleged Crimes Dismissed by Plea Bargain Not Violative of Due Process: At sentencing, the District Court considered allegations of other crimes for which Mason had been initially charged but that had been dismissed by plea agreement. Mason contended that consideration of statements related to unproved conduct violated the right to due process. The Supreme Court noted that due process protects a defendant from being sentenced based on misinformation and requires that a defendant be given an opportunity to rebut any information that may lead to deprivation of life, liberty, or property, but does not protect against all misinformation unless the sentence is premised on materially false misinformation. The court also noted that St. v. Collier, 277 M 46, 919 P2d 376 (1996), allows a sentencing court to consider any evidence that has probative force, including other acts that have been dismissed by plea agreement, as in St. v. Baldwin, 192 M 521, 629 P2d 222 (1981). Nothing in Mason's plea agreement prevented the state from presenting the facts of the case during the sentencing hearing, and in fact, that inquiry is required as part of the presentence investigation report under 46-18-112. Mason failed to show that the sentencing court relied on misinformation and thus was not entitled to resentencing on due process grounds. Further, the plea agreement required relinquishment of Mason's parental rights, so the sentencing court properly considered evidence of the danger Mason posed to the other children in order to approve that portion of the agreement. St. v. Mason, 2003 MT 371, 319 M 117, 82 P3d 903 (2003).

Failure to Notify Defendant of State's Intent to Use Evidence of Alleged Violations at Probation Revocation Hearing Considered Due Process Violation — Harmless Error: At a hearing on the revocation of Pedersen's suspended sentence, the District Court allowed the state to introduce drug test results, even though drug use was not alleged prior to the hearing. Pedersen asserted that the failure to notify him that the drug test results would be used was a due process violation. The Supreme Court agreed. Even though a revocation hearing is not subject to the Montana Rules of Evidence, the hearing must be fundamentally fair, and minimum due process rights, including notice, extend to a revocation hearing. Thus, because Pedersen was not notified in advance, the District Court erred in admitting the drug test results. However, the error was harmless. The District Court's findings did not reference the drug test results, nor did the court rely on the results in revoking the suspended sentence, relying instead on the abundant evidence of Pedersen's violation of four other probation conditions. Therefore, the Supreme Court affirmed the sentence revocation. St. v. Pedersen, 2003 MT 315, 318 M 262, 80 P3d 79 (2003), distinguished in St. v. Sebastian, 2013 MT 347, 372 Mont. 522, 313 P.3d 198. See also St. v. Nelson, 225 M 215, 731 P2d 1299 (1987).

Local Billboard Regulations Not Violative of Due Process Right to Notice and Opportunity to Be Heard: Plaintiff contended that city and county billboard regulations violated due process because they did not guarantee a hearing before deprivation of property. The Supreme Court disagreed. The Board of Adjustment was responsible for hearing appeals that allege an error related to enforcement of the ordinances. The Board was bound by known procedures and there was a right to appeal a Board decision to a court of record, so only under exceptional circumstances that did not apply to plaintiff could the city or county deprive someone of property

without a hearing. The procedural safeguards provided for in the ordinances were sufficient and did not violate due process. Mont. Media, Inc. v. Flathead County, 2003 MT 23, 314 M 121, 63 P3d 1129 (2003).

Notice to Irrigation District Constitutionally Sufficient: The Legislature enacted legislation primarily directed at the Missoula Irrigation District (MID) allowing certain landowners to opt out of MID because they had no access to MID's water. MID challenged Geil's petition for removal from MID on grounds that the legislation was unconstitutional as a violation of due process because the notice contemplated by the statute was insufficient to provide a reasonable opportunity for MID and other individual members of MID to be heard. The Supreme Court held that because an individual was required to send a copy of the petition to withdraw from MID to MID prior to filing the petition with the lower court, the requirement for an opportunity to be heard was met and a due process violation did not exist. Geil v. Missoula Irrigation District, 2002 MT 269, 312 M 320, 59 P3d 398 (2002).

Failure of District Court to Review Entire Record on Petition for Postconviction Relief Not Violative of Due Process When Same Judge Presided at Trial: When considering Hagen's petition for postconviction relief, the District Court did not review the entire trial proceedings before making its conclusions of law. Hagen contended that failure to review the entire record deprived him of due process and resulted in erroneous findings and conclusions. A fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner; however, due process is a flexible concept that calls for such procedural protections as a particular situation demands. There is nothing in the postconviction relief statutes that explicitly requires that a District Court review the entire record, and the Supreme Court declined to impose a duty on District Courts to review the entire record in every situation. Rather, the scope of the duty is determined on a case-by-case basis. In this case, the District Court Judge who presided over the postconviction hearing was the same judge who presided at trial, so the duty to review relevant portions of the record at issue in the postconviction proceedings did not extend to the entire record because the same judge heard the trial testimony when it was presented. St. v. Hagen, 2002 MT 190, 311 M 117, 53 P3d 885 (2002).

Failure of Attorney to Inform Trial Court of Potential Conflict — Motion to Postpone Trial Properly Denied: A dissolution and child custody case was set for trial and continued twice. Four days prior to the final trial date, respondent's attorney moved for a continuance because of a federal trial set for the same day. The motion was denied. Neither respondent nor respondent's attorney appeared at the scheduled trial. At trial, the court attempted to reach respondent's attorney, but could not. The court stated that the motion to continue was untimely because it was unlikely that the attorney did not have advance notice of the federal trial and could have informed the court of the potential scheduling conflict at an earlier date. Respondent failed to establish prejudice based on denial of the continuance motion, nor were any due process rights affected because respondent received notice of the trial 2 months in advance and the trial was held as scheduled. In re Marriage of Fishbaugh, 2002 MT 175, 310 M 519, 52 P3d 395 (2002).

Sentence Allegedly Based on False Information Affirmed if Information Not Material: Allen contended that his due process rights were violated because he was sentenced based on false and prejudicial information regarding the number of his prior felony convictions and because a witness at his trial later recanted testimony that related directly to Allen's crime. The Supreme Court noted that a defendant is protected from being sentenced based on misinformation about the defendant's criminal history; however, due process does not protect against all misinformation, but rather against materially false information. Allen contended that a prior California conviction for car theft was actually a misdemeanor, rather than a felony, and was thus misapplied to his criminal history and that the actual case files and dockets had been destroyed. The court noted that grand theft auto in California was in fact a felony at the time that Allen was convicted, but that the sentencing court had not relied on the California conviction in sentencing anyway. There was other prior conviction information in Allen's record upon which to base the felony offender sentence, so even if the California information was incorrect, it was not material to Allen's sentence. As for the recanted witness testimony, the Supreme Court noted that the witness ultimately took back the recantation after revealing to law enforcement officers that the recantation was made when the witness was in the same cell block as Allen and was made as a result of intimidation and duress. The recanted testimony was not material to Allen's testimony, and his conviction was affirmed. St. v. Allen, 2001 MT 266, 307 M 253, 37 P3d 655 (2001).

Error in Allowing Amendment of Pleadings in Parental Rights Termination Case to Include New Theory — Lack of Notice Violative of Due Process Rights: During a parental rights termination hearing, the District Court allowed the state to amend the pleadings to include a

new theory that the mother had abandoned her children. The mother's counsel objected for lack of notice. The state asserted that although abandonment may not have been included in the original pleadings as a separate ground for termination, there were facts in the original petition that supported a claim for abandonment and that the mother was thus on notice that the state intended to present evidence that would support a theory of abandonment. The Supreme Court disagreed. The fundamental liberty interest associated with parental rights must be protected with fundamentally fair procedures, including the due process requirement that a parent receive notice and be allowed the opportunity to be heard. Generally, a District Court cannot grant leave to amend the pleadings arbitrarily or perfunctorily, and although there are cases when the Supreme Court will allow a party to amend pleadings in order for a case to proceed efficiently on the merits, this was not one of those cases. The termination petition as a whole did not provide the mother with sufficient notice on the charge of abandonment. Although some of the facts may have been applicable to abandonment, the mother should not have been required to glean from those facts which claims the state could bring. Rather, the state was required to articulate the claims that it expected to raise, and allowing amendment of the pleadings during the hearing to include a theory of abandonment was reversible error. In re T.C. & W.C., 2001 MT 264, 307 M 244, 37 P3d 70 (2001), followed in In re C.J., 2010 MT 179, 357 Mont. 219, 237 P.3d 1282, and distinguished in In re E.M.S. and C.A.S., 2011 MT 307, 363 Mont. 68, 265 P.3d 1258.

Denial of Writ of Habeas Corpus to Compel Attendance of Children in Abuse and Neglect Hearing Not Violative of Due Process Rights or Right to Confront Witnesses: The mother petitioned the District Court for a writ of habeas corpus demanding that her children be physically present for an abuse and neglect hearing because they were material witnesses and claiming that the writ was necessary to ensure her due process rights by having the children available to rebut allegations against her at the hearing. The petition was denied. On appeal, the Supreme Court affirmed. Although the mother was entitled to an opportunity for a meaningful hearing, that opportunity need not be provided at the expense of the children whose best interests were the paramount focus of the proceeding, and subjecting the children to direct and cross-examination could exacerbate the abuse that they had already experienced. Denial of the petition did not violate the mother's right to confront witnesses because the children were not her accusers and she had no right to confront them. Rather, the abuse and neglect case was brought by the state, and the mother had ample opportunity to confront and examine the state's witnesses and experts at the hearing, so her due process rights were met. In re B.P. & A.P., 2001 MT 219, 306 M 430, 35 P3d 291 (2001).

Termination of Police Officer Affirmed — Right of Employer to Compel Answers to Employment-Related Questions — Due Process: Wolny appealed his termination as a Bozeman police officer for inappropriate use of force, making inconsistent statements, and failing to orally answer followup questions. The Supreme Court noted that Wolny was entitled to fundamental due process rights, including notice, an explanation of the evidence against him, and an opportunity to respond. However the court found that the officer's due process rights were not violated. The Police Commission properly considered the testimony of witnesses, correctly held that Wolny was insubordinate for failing to orally answer questions that were reasonably related to Wolny's fitness to perform duties or to his job performance, properly excluded the disciplinary history of other police officers, and adequately complied with its progressive discipline policy despite the fact that Wolny's personnel file was not offered as evidence. Wolny v. Bozeman, 2001 MT 166, 306 M 137, 30 P3d 1085 (2001), following In re Raynes, 215 M 484, 698 P2d 856 (1985), Boreen v. Christensen, 267 M 405, 884 P2d 761 (1994), and In re Termination of Abbey v. Billings Police Comm'n, 268 M 354, 886 P2d 922 (1994).

Improper Grant of Motion to Dismiss Legal Malpractice Suit for Failure to State Claim Upon Which Relief Could Be Granted: Hauschulz faced criminal charges in Billings, and while awaiting trial, he was extradited to Idaho on unrelated charges and incarcerated. The Michael Law Firm was hired to represent Hauschulz in the Billings proceedings, which Hauschulz could not attend. Instead of moving for dismissal of the charges unless Montana extradited Hauschulz, the law firm professed not to know where Hauschulz was and negotiated an unauthorized plea agreement on behalf of Hauschulz. Upon learning of the law firm's actions, Hauschulz filed a legal malpractice complaint alleging constitutional violations and requesting damages. The District Court dismissed the action on grounds that Hauschulz had failed to state a claim upon which relief could be granted, reasoning that no damages could be awarded because Hauschulz's problems all stemmed from the failure to appear at trial. Hauschulz appealed, and the Supreme Court reversed. A complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that plaintiff can prove no set of facts in support of the claim that would entitle

the plaintiff to relief, and a dismissal will be affirmed by the Supreme Court only if plaintiff is not entitled to relief under any set of facts that would support the claim. As set out in Merzlak v. Purcell, 252 M 527, 830 P2d 1278 (1992), to recover damages in a legal malpractice claim, plaintiff must establish that: (1) the professional owed plaintiff a duty of care; (2) the professional breached the duty of care through failure to use reasonable care and skill; (3) plaintiff suffered an injury; and (4) the professional's conduct was the proximate cause of the injury. In this case, the Supreme Court found that each element was satisfied. Hauschulz might be able to prove a set of facts that would entitle him to relief and has stated a sufficient claim to survive a challenge under former Rule 12(b), M.R.Civ.P. (now superseded). Hauschulz v. Michael Law Firm, 2001 MT 160, 306 M 102, 30 P3d 357 (2001). See also Trankel v. St., 282 M 348, 938 P2d 614 (1997).

Authority to Condition Parole on Participation in Sexual Offender Program — Parole Considered Privilege, Not Right: McDermott pleaded guilty to four counts of assault and one count of bail-jumping in exchange for dismissal of four counts of incest and was sentenced to 30 years in prison. Because of the violent nature of the assaults and the fact that they were committed against young victims, the sentencing court found that McDermott was a substantial danger to society and designated him a dangerous offender for purposes of parole. When he began serving his sentence, an initial needs assessment concluded that he suffered from severe sexual problems and recommended participation in the prison sexual offender program (SOP). McDermott chose not to participate in the SOP, and the Board of Pardons and Parole later considered that fact during evaluations for placement in a prerelease center and for purposes of parole and inmate classification. The Board recommended that McDermott participate in the SOP to enhance success on parole. McDermott again declined to participate and, as a result, four points were added to his classification status for noncompliance with the Board's recommendation. McDermott then petitioned the Supreme Court for a writ of habeas corpus ordering his immediate release and rescinding the four points. McDermott argued that the Board did not have the authority to consider his lack of participation in the SOP as a basis for denying his early release on parole, citing St. v. Ommundson, 1999 MT 16, 293 M 133, 974 P2d 620 (1999), and St. v. Field, 2000 MT 268, 302 M 62, 11 P3d 1203 (2000). The Supreme Court distinguished both Ommundson and Field, noting that under Montana and federal precedents, parole is a privilege, not a right. Because parole is granted as a matter of grace rather than right, the state may offer that grace under and subject to conditions that are considered most conducive to accomplish the desired purpose. Rather than restricting the Board's authority to set conditions precedent to parole, 46-23-201 obligates the Board to ensure that no prisoner is released on parole who cannot meet the statutory criteria, and the Board may also consider factors that may not be considered by the District Court at trial and sentencing and evidence of offenses that were charged in dismissed counts. Even though McDermott was not a convicted sex offender, he did have four counts of incest dismissed and was identified as having severe sexual problems. Thus, his completion or lack of completion of the SOP was pertinent to his ability to be released without detriment to the community and to fulfill the obligations of a law-abiding citizen. The Board was well within its authority to consider McDermott's failure to enroll in the SOP when his petition for early release was denied. McDermott's petition for a writ of habeas corpus was denied. McDermott v. McDonald, 2001 MT 89, 305 M 166, 24 P3d 200 (2001). See also Christopher v. U.S. Bd. of Pardons, 589 F2d 924 (7th Cir. 1978), and Robinson v. Hadden, 723 F2d 59 (10th Cir. 1983).

Due Process Standard Applicable to Parole Release Determination: Having determined that McDermott had a protected liberty interest in parole, the Supreme Court set out to determine whether McDermott's due process rights were protected when his application for parole was denied. There is no absolute standard for what constitutes due process. The requirements are flexible so that they may be adapted to meet the procedural protections demanded by a particular situation. The process due in any given case varies according to the factual circumstances, the nature of the interests at stake, and the risk of making an erroneous decision. A parole release determination is not subject to all the due process protections required to convict or confine, nor must a parole release determination provide the same protections that are required in a parole revocation hearing, which presents a much greater risk of error than a parole release determination because incarceration, whether as a result of conviction or parole revocation, involves a loss of liberty. On the other hand, denial of parole involves the loss of the mere anticipation of freedom to which a lawfully convicted inmate is not otherwise entitled. Thus, in the case of a prisoner seeking parole, due process is satisfied when the prisoner is, at a minimum, provided with an opportunity to be heard and a written statement explaining why parole was denied. McDermott v. McDonald, 2001 MT 89, 305 M 166, 24 P3d 200 (2001), following Greenholtz v. Inmates of

Nebr. Penal & Correction Complex, 442 US 1 (1979), and Sage v. Gamble, 279 M 459, 929 P2d 822 (1996).

Due Process Rights of Inmate Regarding Preparole Interview — Presence of Sufficient Number of Board of Pardons and Parole Members Required: Under 46-23-107 (now repealed), decisions regarding an inmate's parole are to be made by a majority vote of the members of the Board of Pardons and Parole. As stated in Sage v. Gamble, 279 M 459, 929 P2d 822 (1996), to deny an inmate the opportunity to appear before those who will personally decide the merits of the parole application implicates the inmate's due process rights. In this case, only one member of the Board was present at West's parole hearing. West contended that he had a right to appear before the full Board and that a hearing before only one member violated his due process rights. The state argued that pursuant to the unpublished opinion of Radford v. Mahoney, No. 98-150 (July 1998) (unpublished), not all Board members are required to be present for the personal interview and that 46-23-104 allows the Board to delegate the responsibility for parole eligibility interviews to one of its members. The state contended that having only one Board member present was permissible because the full Board ultimately participated in the decision to deny West' parole. The Supreme Court was unpersuaded by the state's argument, noting that the copy of the case disposition attached to West's habeas corpus petition was signed by only one Board member. The court found its order in Radford inconsistent with the Sage decision, and therefore unpersuasive. West's due process rights were no less implicated because West had the right to appear before one Board member when a majority vote of the Board was required for a decision. The court remanded to the Board with instructions to provide West with an opportunity to appear before a sufficient number of Board members so that those who decide his case will have done so based on a personal interview. West v. Mahoney, 2001 MT 82, 305 M 117, 22 P3d 201 (2001).

Revocation of Suspended Sentence Based on Violation of Good Citizenship Probation Standard: A condition of Therriault's probation was that he "conduct himself as a good citizen at all times". When the District Court revoked Therriault's suspended sentence for violating this good citizenship standard, Therriault complained that the standard was too vague to sufficiently warn him of what would constitute a violation of his probation conditions, in violation of his due process rights. The Supreme Court was essentially called upon to determine if Therriault was acting as a good citizen at all times. The court affirmed the sentence revocation, noting that under any reasonable definition of the term, any "good citizen" who was truly concerned about the welfare of a 14-year-old girl from a troubled home would not suggest that, for her own safety, she should take up residence at the home of a convicted sex offender who was on probation and subject to random searches and that this should be accomplished without the supervising probation officer's knowledge and without entertaining the possibility of more suitable living arrangements. St. v. Therriault, 2000 MT 286, 302 M 189, 14 P3d 444, 57 St. Rep. 1185 (2000).

Wait of Thirteen Months to Question Whether Sanctions Should Be Imposed — Adequate Notice and Opportunity to Be Heard: Defendant sought sanctions against Palmer, plaintiff's attorney, under former Rules 11 and 37, M.R.Civ.P. (now superseded), for Palmer's defiance of scheduling and pretrial orders, and the District Court awarded sanctions under former Rule 37. Palmer alleged that his due process rights were violated because he did not receive notice and an opportunity to be heard, but the due process arguments were not supported in the record. The Supreme Court agreed that when a person is sanctioned with attorney fees and costs under former Rule 37, that person is entitled to notice and an opportunity to be heard before sanctions are imposed. However, in this case, Palmer waited more than 13 months after defendants moved for sanctions to question whether they should be imposed. Notice was adequate, and Palmer also was allowed to argue the appropriateness of sanctions at a hearing. Palmer's argument on appeal, that former Rule 37 did not apply to him because he was a nonparty deponent, was not addressed because the issue was raised for the first time on appeal. The Supreme Court noted that former Rule 16(f), M.R.Civ.P. (now superseded), clearly allows sanctions in cases like this one, in which an attorney defies a District Court's scheduling and pretrial orders. Dambrowski v. Champion Int'l Corp., 2000 MT 149, 300 M 76, 3 P3d 617, 57 St. Rep. 581 (2000).

No Due Process Right to Sentence Review — Actual Incarceration Required Before Sentence Subject to Review — Suspended Sentences Precluded From Review: Holt pleaded guilty to sexual assault, received a 10-year suspended sentence, and subsequently applied for sentence review. The Sentence Review Division denied the application on grounds that Holt did not qualify for sentence review because his sentence was suspended in its entirety and involved no actual incarceration. Holt appealed, alleging violation of his due process rights. After granting Holt's writ of supervisory control pursuant to Art. VII, sec. 2(2), Mont. Const., and former Rule 17(a), M.R.App.P. (now superseded), the Supreme Court held that sentence review is not

a constitutional right, but rather a system that the Legislature voluntarily created. Thus, the discretion to determine the circumstances and conditions under which sentence review will be allowed lies with the Legislature, and the state's discretion is not subject to due process concerns unless it offends some principle of justice so deeply rooted in the traditions and conscience of the people as to be ranked fundamental (see Mont. v. Egelhoff, 518 US 37, 135 L Ed 2d 361, 116 S Ct 2013 (1996)). The Sentence Review Division's interpretation of 46-18-903(1), excluding a person who is not incarcerated from sentence review, comports with the rules of statutory construction, is consistent with the sentence review statutes as a whole, reflects the intent of the Legislature, avoids absurd or unduly harsh results, and is entitled to deference because the Division is charged with administration of the sentence review statutes. Because sentence review is a statutory right of relatively recent origin, the due process clauses of the U.S. and Montana Constitutions do not demand that sentence review be available at all, nor do they limit the Legislature's restriction of sentence review to defendants who are actually incarcerated. State ex rel. Holt v. District Court, 2000 MT 142, 300 M 35, 3 P3d 608, 57 St. Rep. 560 (2000).

Abuse of Discretion in Failure to Reference Statutory Judicial Review Provisions in Administrative Order Addressing Child Support Enforcement — Due Process Violation Constituting Reversible Error: The mother filed a petition with the Child Support Enforcement Division (CSED) for assistance in obtaining child support from the father. CSED initiated an administrative action to determine the amount of support owing, and an administrative law judge conducted a contested case hearing on the issue and entered an order establishing the father's current and past-due child support obligation. The order included a paragraph notifying the parents of their statutory right to petition for judicial review of the administrative decision under Title 2, ch. 4, part 7 (MAPA), but did not reference 40-5-253, which contains more specific procedural requirements for appealing from an administrative decision in a child support enforcement case than the provisions in MAPA. The father filed a petition for judicial review and mailed copies to the mother and CSED but failed to properly serve the parties as required in 40-5-253. The District Court concluded that it lacked subject matter jurisdiction because the father failed to comply with 40-5-253. The court dismissed the petition. The father moved the court to amend or reconsider the petition, contending that the application of 40-5-253 violated his due process rights because he did not receive sufficient notice of the procedures by which to obtain judicial review of the administrative decision. The motion was denied, but the court nevertheless subsequently entered another order correcting the clerical error by adding a reference to 40-5-253 to the notice provision of the earlier order and then granted CSED's motion to dismiss. The father appealed. The Supreme Court noted that proper service of a petition for judicial review was a threshold requirement for the District Court to obtain jurisdiction in this case and that under Title 2, ch. 4, part 7, a petition for judicial review may be properly served by mailing copies to the agency and other parties, but there is no requirement that a summons be issued and served in conjunction with the petition. By filing the petition for judicial review and mailing copies to the mother and CSED, the father fulfilled the service requirements of MAPA and Hilands Golf Club v. Ashmore, 277 M 324, 922 P2d 469 (1996). However, specific statutory requirements prevail over general provisions such as those in MAPA, and the Supreme Court agreed that the portion of the notice informing the father that MAPA would govern the proceedings was misleading, absent any reference to the different, specific procedural requirements for CSED actions under 40-5-253. The Supreme Court adopted federal interpretations of the due process notice requirements in this regard, which provide that the opportunity to be heard is not meaningful if the notice provided does not accurately inform the person to whom it is given of how to take advantage of that opportunity. The notice provisions in the administrative order did not provide father with adequate notice to meet due process requirements, so application of 40-5-253 would violate the father's due process rights. Under these unique circumstances, it was required that the father's petition for judicial review must be governed by the service requirements of MAPA and Hilands. Those requirements were met, so the District Court did acquire subject matter jurisdiction and abused its discretion in dismissing the father's petition for judicial review based on his failure to comply with 40-5-253. The case was reversed for further proceedings under MAPA. Pickens v. Shelton-Thompson, 2000 MT 131, 300 M 16, 3 P3d 603, 57 St. Rep. 543 (2000), followed in In re Support Obligation of McGurran v. Dept. of Public Health and Human Services, 2003 MT 145, 316 M 188, 70 P3d 734 (2003). See also Mullane v. Central Hanover Bank & Trust Co., 339 US 306, 94 L Ed 2d 865, 70 S Ct 652 (1950), Gonzales v. Sullivan, 914 F2d 1197 (9th Cir. 1990), Walters v. Reno, 145 F3d 1032 (9th Cir. 1998), and City of W. Covina v. Perkins, 525 US 234, 142 L Ed 2d 636, 119 S Ct 678 (1999).

Constitutional Right to Due Process Not Violated by Confidentiality Provisions in Rule 13 Regulating Complaints Against Attorneys: Formal complaints against two attorneys were filed with the State Bar Commission on Practice, which recommended disciplinary actions against the attorneys. In their appeal, the attorneys contended that Rule 13 of the Rules on Lawyer Disciplinary Enforcement violated their rights to due process, based on their alleged inability to prepare for their cases before the Commission because of the prohibition against reviewing documents in the Commission's files that were filed prior to the filing of the formal complaints against them. Although agreeing that any exculpatory evidence obtained by the Commission prior to filing of the formal complaints that is related to the matters eventually included in the formal complaints must be disclosed to the respondent attorneys, the Supreme Court's examination of the files and records in the present case revealed no such exculpatory evidence. Thus, the attorneys failed to demonstrate any due process violation. In re Goldstein & Albers v. Comm'n on Practice, 2000 MT 8, 297 M 493, 995 P2d 923, 57 St. Rep. 31 (2000), following In re Wyse, 212 M 339, 688 P2d 758, 41 St. Rep. 1780 (1984).

No Error in Refusing to Dismiss Charges for Failure to Hold Timely Probable Cause Hearing: Brown was arrested on February 13, but no probable cause hearing was held until February 18. Brown moved for dismissal on due process grounds of failure to hold a probable cause hearing within 48 hours of arrest, citing County of Riverside v. McLaughlin, 500 US 44, 114 L Ed 2d 49, 111 S Ct 1161 (1991), but the dismissal motion was denied. Brown appealed. The Supreme Court pointed out that the question to be decided was not whether Brown was accorded a timely probable cause determination, but rather whether the District Court erred in refusing to dismiss the charges as a remedy for failure to hold a probable cause hearing. Dismissal of charges is not the correct remedy for failure to timely charge a person who was arrested without a warrant. Under St. v. Beach, 217 M 132, 705 P2d 94, 42 St. Rep. 1080 (1985), the proper remedy is the exclusion of evidence acquired as a result of the delay. The trial court did not err in refusing the motion to dismiss. St. v. Brown, 1999 MT 339, 297 M 427, 993 P2d 672, 56 St. Rep. 1346 (1999). See also St. v. Dieziger, 200 M 267, 650 P2d 800, 39 St. Rep. 1734 (1982).

When Summary Contempt Proceedings Appropriate — Entitlement to Due Process When Instant Action Not Necessary: Regardless of the type of contempt committed, direct or indirect, a court's primary consideration before subjecting a contemnor to summary contempt proceedings must be whether immediate corrective steps are necessary to restore order, maintain dignity and authority of the court, and prevent delay. However, in cases when it is not necessary for a court to take instant action, a contemnor is entitled to a full due process hearing traditionally associated with indirect contempt, a finding that the evidence establishes the contemnor's guilt beyond a reasonable doubt in instances when criminal punishment is a consequence, and a hearing in front of an unbiased court other than the court in which the misconduct occurred. In the present case, an attorney's conduct did not necessitate immediate District Court action, so the Supreme Court remanded the case for a hearing in front of a different judge to ensure the attorney's due process rights. Kauffman v. District Court, 1998 MT 239, 291 M 122, 966 P2d 715, 55 St. Rep. 1001 (1998), followed in Lee v. Lee, 2000 MT 67, 299 M 78, 996 P2d 389, 57 St. Rep. 308 (2000).

Inmates Right to Examine Parole Files Based on Public Right to Know, Not Due Process Right: The Supreme Court overturned a lower court decision denying inmates access to their parole files. The Supreme Court ruled that the Board of Pardons and Parole was a public agency, the inmates records were public documents, and the public right to know applied to the records. The Supreme Court further held that individual privacy concerns or legitimate penological interests could limit public access to the parole files but that any such limitation would have to be determined on a case-by-case basis by the Board of Pardons and Parole or the reviewing court by determining if privacy concerns or penological interests clearly exceed the merits of public disclosure. The Supreme Court stated that an inmate does not have a due process right to examine parole files and that the due process right extended only to the right to appear before the Board during the hearing. Worden v. Bd. of Pardons & Parole, 1998 MT 168, 289 M 459, 962 P2d 1157, 55 St. Rep. 677 (1998).

Factual Contentions of Both Sides of Dispute Required to Meet Due Process Requirements in Stewards' Decision: The portion of ARM 8.22.302 (renumbered ARM 32.28.302) providing that the Board of Horseracing may not substitute its judgment for that of the stewards as to the weight of the evidence on questions of fact is unconstitutional in situations in which the stewards make a factual determination without affording both sides an opportunity to be heard. Deference to the stewards' decision is appropriate only if the stewards have weighed the factual contentions of both sides of the dispute. The stewards' failure to contact one racing contestant on race day regarding their decision to disqualify a horserace winner constituted a violation

of that contestant's due process right to an opportunity to be heard. In these cases, the Board of Horseracing should not defer to the stewards' decision but rather should conduct a de novo administrative hearing and make its own findings of fact. Smith v. Bd. of Horseracing, 1998 MT 91, 288 M 249, 956 P2d 752, 55 St. Rep. 363 (1998).

Cancellation of State Agricultural Lease for Nonpayment — Hearing Not Required — District Court Jurisdiction to Review Cancellation: There is no provision in 77-6-506 requiring the Department to conduct a hearing when canceling a state land lease for nonpayment, nor is a hearing required pursuant to the due process clause of this section. The District Court thus has no jurisdiction to review a lease cancellation for nonpayment under contested case procedures because lease cancellation for nonpayment does not constitute a contested case. However, the District Court does retain inherent jurisdiction to review administrative decisions and erred in deciding that it did not have jurisdiction. The standard of review is whether the agency acted arbitrarily, capriciously, or unlawfully. Johansen v. St., 1998 MT 51, 288 M 39, 955 P2d 653, 55 St. Rep. 211 (1998), following N. Fork Preservation Ass'n v. Dept. of State Lands, 238 M 451, 778 P2d 862 (1989).

Motion to Modify Custody Considered at Hearing on Ex Parte Temporary Custody — Abuse of Discretion: Father filed two motions, one to modify custody pursuant to 40-4-219 and one to continue a temporary ex parte custody order pursuant to 40-4-220. At the hearing held for the sole purpose of determining whether the temporary custody order should be continued, the District Court also resolved father's motion to modify custody, concluding that the requirements for modification were not met. However well intentioned, the procedure used by the District Court in considering both motions at the same hearing was an abuse of discretion and deprived father of notice and the opportunity to be heard on the modification motion. The Supreme Court reversed and remanded for further proceedings on the motion to modify. In re Marriage of Huotari, 284 M 285, 943 P2d 1295, 54 St. Rep. 884 (1997).

Guardianship Proceeding — Failure of District Court to Make Record Held Violation of Statute — Ex Parte Hearing Held Violation of Due Process: A District Court twice appointed the same temporary guardians for Kathleen Klos pursuant to 72-5-317, once in writing and once by making an oral order with no documentation of the hearing or order except a minute entry made by the Clerk of Court. In the second proceeding, counsel representing the guardians had actual notice, in the form of two letters, that Klos was represented by an attorney for the Montana Advocacy Program but failed to serve that attorney with notice of the hearing. The Supreme Court held that: (1) in failing to make a record of the proceedings and to enter a written order with findings of fact, the District Court violated the plain language of 72-5-317; (2) although 72-5-317 does authorize an ex parte hearing, that authorization applies only in emergency circumstances that were not present in this case and the failure to provide notice therefore also violates 72-5-317; and (3) the failure of the guardians' counsel to serve notice on Klos's attorney violated Klos's right to due process of law provided by this section. In re Klos, 284 M 197, 943 P2d 1277, 54 St. Rep. 843 (1997).

Failure to Exercise Statutory Procedural Right Held Not to Violate Due Process: Grooms filed a workers' compensation claim with her insurer, the State Fund, alleging that she suffered from a skin allergy condition. The State Fund denied liability under the Workers' Compensation Act and requested the Department of Labor and Industry to process the claim under the Occupational Disease Act of Montana (now repealed and merged with Workers' Compensation Act). Subsequently, Grooms claimed that the decision to process her claim under the Occupational Disease Act (now repealed and merged with Workers' Compensation Act) rather than the Workers' Compensation Act denied her due process of law by denying her notice and an opportunity to be heard. The Workers' Compensation Court concluded that when her claim was denied under the Workers' Compensation Act, Grooms retained the statutory rights to have her claim resolved by mediation and to have her claim heard by the Workers' Compensation Court and, therefore, Grooms was not denied due process of law. The Supreme Court affirmed the Workers' Compensation Court, holding that Grooms still had available to her various statutory remedies that she chose not to pursue after her claim was denied by the State Fund. The Supreme Court held that her failure to pursue those remedies did not result in a denial of due process. Grooms v. Ponderosa Inn, 283 M 459, 942 P2d 699, 54 St. Rep. 725 (1997).

Amendment of Charge by Arguing Different, Similar Violation in Closing Argument: When the state, which charged defendant with violation of an August 4 restraining order, was allowed to argue in its closing argument that a September 18 restraining order was violated, a substantive amendment to the charge occurred. The court committed error because defendant has the due process right to know what to defend against. The charge of violating the August 4 restraining

order should have been dismissed. St. v. Asmundson, 283 M 141, 940 P2d 104, 54 St. Rep. 535 (1997).

Water Rights Decree "Updated" Without Notice or Hearing — No Violation of Right to Know Found — Possible Due Process Violation — Attorney Fees Denied: Jones discovered that her water right set forth in a 1902 court decree had been "updated" by the judges of the Fourth Judicial District and the terms of the 1902 decree had been changed in the process, all without notice and hearing for Jones. The Supreme Court, distinguishing Assoc. Press v. St., 250 M 299, 820 P2d 421 (1991), and noting that the methods used by the Fourth Judicial District Court may be a violation of due process rights, held that since there was no court order, statute, or other action preventing access to documents or observance of deliberations, there was no violation of the right to know and therefore no attorney fees were awardable pursuant to 2-3-221. State ex rel. Jones v. District Court, 283 M 1, 938 P2d 1312, 54 St. Rep. 460 (1997).

Personal Appearance Before Parole Board — Subject Matter Jurisdiction to Determine Due Process Violation: Sage maintained that he had a right to due process, based on a liberty interest in parole pursuant to 46-23-201, that was violated by the Board of Pardons (now Board of Pardons and Parole) when it did not allow him to personally appear before the Board at a parole hearing. Further, Sage maintained that the District Court had subject matter jurisdiction to decide by writ of habeas corpus whether his due process rights had been violated. The Board asserted that Sage's alleged due process violations fell outside the parameters of habeas corpus relief and that the District Court did not have subject matter jurisdiction to consider the issue. The Supreme Court held that the alleged deprivation of Sage's right to due process was directly related to whether the cause of his continued incarceration was legal, thus falling within the parameters of 46-22-101, and that the District Court therefore did have subject matter jurisdiction to determine whether the right to due process was violated. Pursuant to Greenholtz v. Inmates of Nebr. Penal & Correctional Complex, 442 US 1 (1979), the opportunity of a parole applicant to appear before those entrusted with the subjective responsibility of passing judgment on the application is an important element of the due process to which the applicant is entitled. Based on the plain language of 46-23-202 and ARM 20.25.401, an inmate who is eligible for parole is clearly provided the right to personally appear at an interview "before the parole board" prior to the Board's decision to grant or deny the application for parole. Sage v. Gamble, 279 M 459, 929 P2d 822, 53 St. Rep. 1234 (1996).

Petition for Reinstatement of Driver's License — No Due Process Right to Further Notice and Hearing After Recess of Original Hearing on Petition for Reinstatement: Following his arrest for DUI and refusal to take a blood-alcohol test, Seyferth received a letter from the Motor Vehicle Division informing him that his driving privileges were revoked for 1 year. Seyferth petitioned the District Court for reinstatement of his driving privileges and testified at the hearing. The District Court recessed the hearing for 2 weeks, giving Seyferth and the state explicit instructions to inform the court in 2 weeks on the availability of other evidence. Neither Seyferth nor the state had further contact with the court, and 1 year later the District Court denied the petition for reinstatement. The Supreme Court held that Seyferth was not entitled to additional notice and hearing before the District Court denied the petition. Seyferth v. St., 277 M 377, 922 P2d 494, 53 St. Rep. 698 (1996).

Criminal Endangerment Properly Charged in Arrest for Driving Under Influence — Constitutionality: Smaage had a history of seven DUI arrests when he was arrested again while driving with a blood alcohol level of 0.250. After review of his record of drinking and driving, Smaage was charged with criminal endangerment under 45-5-207, which Smaage contended was improper, rather than DUI under 61-8-401 or 61-8-722. Smaage also asserted that the criminal endangerment statute was unconstitutionally vague as applied to him because he was not given fair notice that driving after drinking was a felony crime. The Supreme Court found that the statutes were not conflicting, but rather were alternative charging statutes. The legislative history of the criminal endangerment statute indicated legislative intent in allowing use of that statute in prosecutions for DUI. Because the elements of criminal endangerment were present in this case due to Smaage's mental state of acting "knowingly", the conviction was affirmed. Further, with a history of DUI and negligent vehicular homicide, Smaage should have understood that his drunk driving created a substantial risk of bodily injury to others and was therefore proscribed. In light of Smaage's conduct, 45-5-207 is not unconstitutionally vague as applied to this case. St. v. Smaage, 276 M 94, 915 P2d 192, 53 St. Rep. 294 (1996), following U.S. v. Mazurie, 419 US 544, 42 L Ed 2d 706, 95 S Ct 710 (1975).

Right of Allocution in Summary Contempt Proceedings: Following the rationale in State ex rel. Smith v. District Court, 210 M 344, 677 P2d 589 (1984), the Supreme Court held that in cases

of direct contempt, the right to be heard, or right of allocution, should be afforded the accused contemnor in a summary contempt proceeding. The right of allocution is particularly strong when contempt is contained in a brief and the contemnor has no notice that the court considers the brief to be contemptuous prior to receiving the court's written order. Before being sentenced, the contemnor should be afforded the opportunity to explain or excuse the written filing. A trial is not required, but the contemnor should be allowed a reasonable opportunity to defend or explain the actions or present arguments in mitigation. Failure to provide for allocution constituted grounds for vacation of sentence and remand for the opportunity for allocution. Malee v. District Court, 275 M 72, 911 P2d 831, 53 St. Rep. 44 (1996), following Groppi v. Leslie, 404 US 496, 30 L Ed 2d 632, 92 S Ct 582 (1971), and U.S. v. Lumumba, 741 F2d 12 (2nd Cir. 1984), and followed in Kauffman v. District Court, 1998 MT 239, 291 M 122, 966 P2d 715, 55 St. Rep. 1001 (1998).

Due Process Violated by Entry of Judgment After Scheduling Hearing Without Scheduling Hearing to Determine Amount of Judgment: The parties had divorced in 1987. At that time, the husband was required to pay a total of $50,000 to his wife within a 2-year period. The parties remarried within 5 months of the dissolution and divorced again in 1993. Upon first hearing their case, the Supreme Court remanded the matter and instructed the District Court to reinstate the judgment against the husband from the first divorce. The lower court held a telephone conference to consider scheduling matters and at that time asked the wife to submit the amount that she believed her husband owed her. Subsequently, the District Court entered a judgment against the husband. The Supreme Court held that the husband's due process rights had been violated because the judgment was a lien against his property and he was not allowed a hearing in which to present evidence as to the amount that he believed he owed. The Supreme Court also rejected the wife's argument that a hearing was not required and that the amount owed could be determined just by looking at the record. In so doing, the Supreme Court distinguished the case before it from Young v. Flathead County, 241 M 223, 786 P2d 658 (1990). In re Marriage of Nordberg, 271 M 328, 896 P2d 447, 52 St. Rep. 468 (1995), followed in In re Marriage of Pospisil, 2000 MT 132, 299 M 527, 1 P3d 364, 57 St. Rep. 547 (2000).

Assumption of Sexual Assault as Lesser Included Offense of Sexual Intercourse Without Consent — No Due Process Violation: Black was charged with sexual intercourse without consent. The court found insufficient evidence to convict on that charge but instead found him guilty of felony sexual assault. Black appealed on the grounds that he was convicted of an offense with which he was not charged, relying on St. v. Copenhaver, 35 M 342, 89 P 61 (1907). Neither Black nor the state raised the issue of whether sexual assault was a lesser included offense of sexual intercourse without consent, either at trial or directly on appeal. Although the issue was not properly before the Supreme Court on appeal and the court specifically declined to address it, the court nevertheless assumed for purposes of this opinion that sexual assault is a lesser included offense of sexual intercourse without consent. In distinguishing Copenhaver, in which defendant was convicted of a separate, independent offense that was not a lesser included offense, in this case, pursuant to the court's assumption and 46-16-607(1), the court found that the charging document provided a sufficient basis for Black's conviction of sexual assault. Black's arguments that he was convicted of a crime with which he was not charged, that the charging document did not provide notice of the crime of which he was convicted, and that his due process rights were violated were thus rendered ineffective. St. v. Black, 270 M 329, 891 P2d 1162, 52 St. Rep. 215 (1995).

Pleadings Amended Without Prior Notice to Respondents — Remand Warranted: Petitioners sought a writ of mandate to compel compliance with restrictive covenants regarding respondents' residence and landscaping. Respondents presented no evidence at a hearing on the petition, but argued that a writ of mandate was not the appropriate remedy, based on the facts alleged and the private nature of the dispute. The District Court invited the parties to file briefs in connection with the question of the appropriateness of the writ, then subsequently signed its final judgment ordering that the pleadings be amended to state a claim for injunctive relief instead and requiring respondents to comply with the restrictive covenants. On appeal, the Supreme Court held that the District Court erred by forming an entirely new and dissimilar theory as a basis for its judgment without prior notice to respondents. The case was remanded for a hearing after proper notice to respondents regarding the nature of the relief being sought. Country Estates Homeowners Ass'n v. McMillan, 269 M 131, 887 P2d 249, 51 St. Rep. 1494 (1994), citing Shaw v. Kalispell, 135 M 284, 340 P2d 523 (1959), McJunkin v. Kaufman, 229 M 432, 748 P2d 910 (1987), and In re Custody of C.J.K., 258 M 525, 855 P2d 90 (1993), and cited in Baston v. Baston, 2010 MT 207, 357 Mont. 470, 240 P.3d 643.

Theory of Accountability Not Required by Due Process to Be Set Forth in Information: Tower was arrested for sale of a dangerous drug. Over Tower's objection at trial, the jury was instructed on the issue of accountability under 45-2-301 and 45-2-302. Tower contended that as a matter of due process of law, he must have been given additional notice that he was going to be charged with the crime by a theory of accountability. Tower also claimed that he was surprised by the jury instruction on accountability given at trial. The Supreme Court reviewed the development of the law of accountability and the requirements applicable to charging documents. The Supreme Court also reviewed the trial record and determined that Tower had every reason to anticipate an accountability theory. Because accountability is not a separate offense, the Supreme Court held that due process did not require the state to set forth the theory in the information. St. v. Tower, 267 M 63, 881 P2d 1317, 51 St. Rep. 946 (1994), followed in St. v. Abe, 1998 MT 206, 290 M 393, 965 P2d 882, 55 St. Rep. 876 (1998), and St. v. Tellegen, 2013 MT 337, 372 Mont. 454, 314 P.3d 902.

Dismissal for Failure to Charge Offense of Which Convicted — Reckless Driving Not Lesser Included Offense of DUI: Barker was charged with DUI but was convicted of reckless driving by the Ravalli County Justice of the Peace. Barker appealed to the District Court and filed a motion to dismiss, which the District Court granted. The Supreme Court affirmed, holding that the reckless driving charge and the DUI charge were inapposite charges and that reckless driving was not a lesser included offense of DUI. The Supreme Court also held that the conviction should be set aside because Barker did not have notice that he was charged with reckless driving, which violated Barker's constitutional right to due process. St. v. Barker, 260 M 85, 858 P2d 360, 50 St. Rep. 970 (1993).

Summary Judgment in Justice's Court as Bar to Litigation in District Court on Same Issue — Justice's Court as Court of Competent Jurisdiction for Res Judicata Purposes — No Due Process Violation: A bill collection agency brought an action in Justice's Court against Whirry for payment of a medical debt. Whirry filed a third-party complaint against Swanson, alleging that the medical debt was incurred as the result of injuries received in an automobile accident in which Swanson was negligent. Whirry moved for summary judgment against Swanson on the grounds that Swanson was solely liable for any judgment. Summary judgment was granted, and the Justice's Court entered final judgment in Whirry's favor, ordering Swanson to pay the medical debt. Whirry then filed in District Court to recover all damages incurred through Swanson's misconduct during the same accident. The District Court concluded that the Justice's Court necessarily determined Swanson's negligence in order to assign liability for Whirry's medical bills and that the matter had therefore already been litigated and was barred by res judicata. The Supreme Court agreed, holding that: (1) the four criteria for application of res judicata were met; (2) distinguishable from Boucher v. Dramstad, 522 F. Supp. 604 (D.C. Mont. 1981), the Justice's Court was a court of competent jurisdiction for determining Whirry's third-party claim; and (3) inapposite to Boyer v. Kargacin, 202 M 54, 656 P2d 197 (1982), foreclosure of the opportunity for a hearing on the merits of Whirry's case on res judicata grounds was not a violation of due process. Whirry v. Swanson, 254 M 248, 836 P2d 1227, 49 St. Rep. 764 (1992), followed in State ex rel. Harlem Irrigation District v. District Court, 271 M 129, 894 P2d 943, 52 St. Rep. 364 (1995), and overruled in Thornton v. Alpine Home Center, 2001 MT 310, 307 M 529, 38 P3d 855 (2001), to the extent that different claims in excess of $3,000 that could not have been raised and litigated in Small Claims Court are not barred by res judicata for subsequent consideration in District Court.

Guardian Parents Given Insufficient Notice of Personal Liability for Son's Paternity: Defendants were sued in their capacity as guardians of their minor son for the expenses incurred in connection with the birth of an illegitimate child fathered by their son. A default judgment was rendered against the defendants. The Supreme Court reversed and vacated the default judgment, holding that the guardians' duty to safeguard the rights of their son during the legal proceeding did not subject them to personal liability for their son's allegedly wrongful acts. The Supreme Court also held that because the title of the case, the allegations in the complaint, and all motions at trial addressed the defendants in their capacity as guardians, they had insufficient notice, as a matter of due process, of any likelihood of personal liability. Breuer v. Poe, 245 M 22, 797 P2d 944, 47 St. Rep. 1812 (1990).

Proof of Prejudice Occasioned by Delay Required to Raise Due Process Concern: Delay alone is not adequate to raise a due process concern absent some proof of prejudice occasioned by the delay. In alleging prejudice due to appellate delay, defendant must show that he: (1) is unable to present an adequate appeal because of the delay; or (2) will be unable to defend adequately in the event a retrial is ordered. St. v. Black, 245 M 39, 798 P2d 530, 47 St. Rep. 1677 (1990),

following U.S. v. Alston, 412 A2d 351 (D.C. 1980), St. v. Chapple, 660 P2d 1208 (Ariz. 1983), and St. v. Hall, 487 A2d 166 (Vt. 1984), and followed in Bone v. St., 284 M 293, 944 P2d 734, 54 St. Rep. 890 (1997).

Service on Party's Attorney Sufficient Notice: The trial court terminated the natural father's parental rights without his consent on the basis that he had not paid child support for a period of 1 year. The father argued that he had left the state prior to the finalization of the decree and never learned of his support obligation. The Supreme Court affirmed the termination and ruled that service on the father's attorney was sufficient notice, even though the attorney did not know of the father's whereabouts. In re Adoption of R.M., 241 M 111, 785 P2d 709, 47 St. Rep. 124 (1990).

Constitutionality of Claim and Delivery Procedures: When presented with a claim that 27-17-203(2) is unconstitutional because it allows a court-ordered seizure of property without requiring notice of or opportunity for an immediate postseizure hearing, the Supreme Court held that Montana's claim and delivery procedure provides constitutional safeguards required by the state and federal constitutions. The procedure balances and protects the interests of both parties in the following ways: (1) a prehearing seizure may be obtained only if plaintiff swears to facts and posts a bond appropriate to protect defendant; (2) a delivery order must be obtained through a judge or Justice of the Peace rather than a court or administrative officer; (3) defendant may file a bond to immediately regain possession of the property; (4) defendant may immediately apply for a motion to quash the order; (5) defendant may promptly seek Supreme Court review under former Rule 1, M.R.App.P. (now superseded); and (6) defendant may challenge the validity of the order at the final judicial determination of liability following seizure. First Bank W. Mont. Missoula v. Gregoroff, 236 M 345, 770 P2d 512, 46 St. Rep. 412 (1989). See also Mitchell v. W.T. Grant Co., 416 US 600, 40 L Ed 2d 406, 94 S Ct 1895 (1974).

Relitigation or Successive Claims Not Inherent in Right to Access to Courts: While the constitutional mandates of due process and the administration of justice guarantee every person access to the courts, such rights do not grant a person license to relitigate a cause or to burden the resources of the courts with successive claims that could have been brought in one action. St. v. Perry, 232 M 455, 758 P2d 268, 45 St. Rep. 1192 (1988).

Lack of Notice of Distraint Warrants and Accruing Support Debt as Deprivation of Due Process: Failure by the Department of Revenue to give notice of the filing of distraint warrants in District Court against a father for recoupment of money paid by the state as Aid to Families With Dependent Children (now Families Achieving Independence in Montana) to the mother and failure to give any notice of accruing support debt after the first notice had been served on him deprived the father of notice and opportunity for hearing, which would have accorded him due process. St. v. Frank, 226 M 283, 735 P2d 290, 44 St. Rep. 657 (1987).

Actual Notice of Agisters' Lien Sale: The notice in 71-3-1203 must be reasonably calculated to reach the owners of the livestock. Two written notices were mailed to plaintiffs 10 days before sale. Plaintiffs also received two telephone calls 1 week before the sale. Because plaintiffs received sufficient actual notice, the Supreme Court refused to consider due process arguments and directed the attention of the Montana Legislature to the notice provisions in 71-3-1203. Rose v. Myers, 223 M 13, 724 P2d 176, 43 St. Rep. 1493 (1986).

Unfair Labor Practices — Due Process — Collateral Estoppel: In an action charging unfair labor practices, an employee was collaterally estopped from relitigating the issue of whether his due process rights were violated by the 3-year delay between the filing of his charges and the administrative hearing on the charges. The issue was previously decided, a final judgment was rendered, and the party against whom the claim was advanced remained the same or was privy of the earlier party. Klundt v. St., 222 M 172, 720 P2d 1181, 43 St. Rep. 1148 (1986).

No Preliminary or Probable Cause Hearing Before Revocation of Suspended Sentence: The defendant was not denied due process for the state's failure to provide an appearance denominated as a preliminary or probable cause hearing prior to a probation revocation hearing. After a defendant is arrested for violation of probation, he is brought before the court without unnecessary delay for a hearing on the violations charged. No two-stage hearing process is necessary under the statutory system provided by 46-23-1012 and 46-23-1013 (now repealed) because the reasons for having a preliminary hearing are absent. Further, the filing in District Court of a petition and affidavit to revoke the defendant's probation did not deny him due process. This procedure afforded him the same judicial determination of probable cause that an unconvicted defendant receives in a criminal proceeding. There is no reason to afford a probationer any more due process than that guaranteed to an unconvicted defendant. St. v. Swan, 220 M 162, 713 P2d 1003, 43 St. Rep. 259 (1986).

Denial of Postponement: When the noncustodial parent was notified of a District Court hearing in a child custody and support matter 6 weeks prior to the hearing, no due process rights were violated and the District Court did not abuse its discretion in refusing to continue the hearing upon being notified 20 to 30 minutes before the hearing that neither the noncustodial parent nor an attorney representing him would be present. Notice was sufficient, and the hearing constituted an opportunity to be heard, even though he did not avail himself of the opportunity. In re Marriage of Robbins, 219 M 130, 711 P2d 1347, 42 St. Rep. 1897 (1985).

Commitment of Ward — Due Process Rights — Notice, Hearing, and Counsel: District Court order committing ward to Montana State Hospital for a 72-hour evaluation upon a request made by the ward's guardian was reversed where ward was not given notice of the impending commitment, an attorney, or a hearing prior to the commitment. The ward's statutory and constitutional due process rights were violated. Two days after the first order the County Attorney, at guardian's request, filed a petition for a 90-day commitment. The guardian consented and waived ward's rights to notice, counsel, and hearing prior to commitment. The petition was granted, which also violated ward's statutory and constitutional rights to due process. He had the right to notice, hearing, and counsel, and only the person to be committed, or if he is unable, his attorney and guardian acting in concert, may waive those rights. The ward had no attorney at the time of the guardian's waiver. In re Simons, 215 M 463, 698 P2d 850, 42 St. Rep. 544 (1985).

No Due Process Right to Presuspension Hearing: The defendant was arrested for driving under the influence of alcohol. The arresting officer initially seized the defendant's driver's license, then later returned it after the defendant refused to take the Breathalyzer test. The officer failed to issue a 72-hour temporary driving permit. The Motor Vehicle Division subsequently suspended the defendant's driver's license. The defendant then petitioned for a hearing on the suspension issue. Although 61-8-402 and 61-8-403 provide a mechanism for a hearing before suspension, in this case the defendant's license was suspended before he had a hearing. Following the decision in Mackey v. Montryn, 443 US 1, 61 L Ed 2d 321, 99 S Ct 2612 (1979), the Montana Supreme Court held that deprivation of a driver's license does not require a presuspension hearing. Due process is satisfied by a prompt postsuspension hearing. In re Vinberg, 216 M 29, 699 P2d 91, 42 St. Rep. 615 (1985).

Public Service Commission — Power to Issue Summary Injunction-Type Order: The Public Service Commission issued an order prohibiting Montana Power from proceeding with a proposed corporate reorganization until the P.S.C. could investigate the reorganization. The order was issued without notice or hearing. Section 69-3-110 shows the clear legislative intent that the Commission use the court system to seek enforcement by injunction, as distinguished from issuing the injunction-type order on its own part. Summary issuance of an injunction-type order without notice or hearing should be limited to situations where the public risk to be avoided outweighs the limitations placed on the constitutional rights of the parties. In this case the Commission has advanced no justification for its disregard of the due process rights of Montana Power. Mont. Power Co. v. P.S.C., 206 M 359, 671 P2d 604, 40 St. Rep. 1712 (1983).

Transfer of Child Proceeding From Montana Court to Tribal Court — Due Process Requirements: One of the purposes of the Indian Child Welfare Act, 25 U.S.C. § 1901, et seq., is to ensure due process for all those involved, which requires a Montana court, when entertaining a tribal court motion for transfer to the tribal court of jurisdiction of children who are the subject of a Montana court proceeding, to hold a hearing on the transfer request and give a parent who claims indigency an appointed counsel if the court finds indigency. In re G.L.O.C., Youth in Need of Care, 205 M 352, 668 P2d 235, 40 St. Rep. 1354 (1983). See also In re J.W.C., L.W.C., K.W.C., and C.W.C., 2011 MT 312, 363 Mont. 85, 265 P.3d 1265.

Failure to Hear Issue of Liability: A complaint for an injunction was filed, and a temporary restraining order was granted. On defendant's appeal of denial of his motion to quash, the order was upheld and the case remanded "with directions to expedite the trial of the cause for damages". Plaintiffs' motion for summary judgment based on the Supreme Court opinion was granted, the District Court stating that the Supreme Court had affirmed its judgment and directed the District Court to have a hearing on damages following remand. There was in fact never a hearing or trial on the merits of the issue of liability, and it is clear that the District Court misconstrued the language of the Supreme Court opinion, which had not decided the issue of liability but had merely decided it was proper to continue the temporary restraining order and had remanded for an expedited trial. The foreclosure of defendant's opportunity for a hearing denied him due process. The summary judgment was reversed and the case remanded for a trial on the merits. Boyer v. Kargacin, 202 M 54, 656 P2d 197, 39 St. Rep. 2323 (1982).

Arraignment — Waiver by Defending: Appellant, convicted of aggravated assault, contended on appeal that he was improperly arraigned. It appeared that at the time of his arraignment defendant was only informed of a deliberate homicide charge and the possible punishment for it. The court held that the purposes of arraignment, to call the defendant into court to answer the charges against him and to inform him of certain rights, were waived by the defendant when he proceeded to trial and defended against the aggravated assault charge. The court also held that arraignment may be waived without violating due process so long as the accused has sufficient notice of the accusation and an adequate opportunity to defend himself. St. v. Longneck, 201 M 367, 654 P2d 977, 39 St. Rep. 2170 (1982).

Appointed Counsel — Termination of Parental Rights — Factors Considered: The Department of Social and Rehabilitation Services (now Department of Public Health and Human Services) first had contact with the mother of three minor children in 1967. During the period from 1976 through 1981, SRS received numerous complaints alleging abuse and neglect of the children. In 1980, the Department filed a petition for temporary investigative authority regarding the children. In 1981, judgment was entered terminating the mother's parental rights. On appeal, the mother contended that the District Court erred in failing to appoint counsel for her at the time the application for temporary investigative authority was filed. The Supreme Court, relying on Lassiter v. Dept. of Social Services, 452 US 18 (1981), held that appointed counsel is required if the factors enumerated in Mathews v. Eldridge, 424 US 319, 47 L Ed 2d 18, 96 S Ct 893 (1976), outweigh the presumption against appointment of counsel. The factors to be considered are the private interests, the government's interest, and the risk of erroneous decision. The court found that the mother's due process rights were adequately protected by having counsel appointed prior to the hearings for termination of her parental rights and resting permanent custody in the Department. In re M.F., 201 M 277, 653 P2d 1205, 39 St. Rep. 2103 (1982), followed in In re A.B., 239 M 344, 780 P2d 622, 46 St. Rep. 1734 (1989).

County Employees — Demotion and Discharge — Hearing Under County Charter: The rights of County Clerk and Recorder under county charter were not recognized when she was demoted as to duties, though not specifically as to title, and when she was fired. Discharge of employee without the hearing provided for by the charter and without a showing of just cause for discharge was a violation of due process. The court reversed judgment below against employee and remanded with instructions that employee be reinstated to her original position as Clerk and Recorder and be paid backpay and that hearings be held to determine her future status. Lovell v. Wolf, 197 M 443, 643 P2d 569, 39 St. Rep. 710 (1982).

Res Judicata Not to Deprive Right to Petition for Postconviction Relief: Petitioner was convicted of deliberate homicide, aggravated kidnapping, and robbery and was sentenced to death. His sentence was automatically reviewed by the Supreme Court. Petitioner then filed for postconviction relief under Title 46, ch. 21, part 1, and the State moved to dismiss the issues raised as res judicata. The court held that res judicata cannot be invoked by the State so as to deprive a litigant of the right to file a petition for postconviction relief if the petitioner has a new basis or ground for coming before the court. Fitzpatrick v. St., 194 M 310, 638 P2d 1002, 38 St. Rep. 1448 (1981).

Postponing Sale by Public Proclamation — General Emergency: Where potential purchasers, subsequent lienholders, and the public in general are practically and legally prevented from traveling to and attending a sale at the time and place noticed for the sale, the giving of notice of a postponed sale only by "public proclamation at the time and place fixed in the notice of sale" is a futile act of no practical or legal significance. The provisions of 71-1-315(3) apply to normal situations where there is no state of general emergency (Mount St. Helens eruption) preventing potential purchasers, subsequent lienholders, and the public in general from attending at the time and place fixed in the notice of sale. Consol. Dairies of Lake County, Inc. v. Am. Abstract & Title Co., 193 M 1, 629 P2d 770, 38 St. Rep. 933 (1981).

Misinformation in Sentencing Report Alleged — Due Process of Law: Where the defendant was convicted of sexual intercourse without consent and requested a psychiatric examination and evaluation report prior to sentencing, the court did not err in utilizing a report based in part on unsubstantiated charges of other alleged rape victims with whom the defendant was involved. The use of these allegations, provided to the psychiatrist by the County Attorney, did not violate the defendant's right against imposition of sentence predicated on misinformation because the court was fully informed of the defendant's contention and the defendant had adequate notice and time to prepare for the sentencing hearing. Cross-examination of all those contributing to a presentence report rests in the discretion of the trial court. St. v. Mackie, 191 M 138, 622 P2d 673, 38 St. Rep. 818 (1981).

Affidavit Establishing Crime Required to Show Crime Charged: Petitioner was convicted of assault. Nothing contained in the affidavit filed with the original information related to assault. This is "plain error" of constitutional magnitude that requires reversal of petitioner's conviction of assault. Parker v. Crist, 190 M 376, 621 P2d 484, 37 St. Rep. 2048 (1980).

Sentencing — Restrictions on Parole and Furlough Permissible: Section 46-18-202 provides that whenever a sentence of imprisonment in the state prison for a term exceeding 1 year is given, the court may impose the restriction that the defendant be ineligible for parole and participation in the prisoner furlough program while serving his term. If the court finds the restriction necessary, it shall impose the restriction as part of the sentence and set forth its reasons for imposing the statute. It does not permit District Judges to add any time beyond the statutory maximum underlying the offense. Petitioners, who both pleaded guilty, were represented by counsel and were given presentence hearings. Parole and participation in the furlough program are privileges, not rights. Petitioners were not denied due process or equal protection in being sentenced under 46-18-202. Cavanaugh v. Crist, 189 M 274, 615 P2d 890, 37 St. Rep. 1461 (1980).

Prison Disciplinary Hearing: Since under 53-30-105 (now repealed) the imposition of a penalty may result in a loss of good time with its effect upon ultimate release, the accused is entitled to some measure, though not the full panoply, of due process safeguards. Witnesses whose testimony would be repetitive or irrelevant need not be called. However, whenever crucial evidence is presented in the form of a hearsay report by an officer and there are no overriding considerations, fairness requires the determination of how the hearsay was obtained, especially the suggestiveness of the photographic identification employed. Therefore, in this case it was an abuse of discretion not to call the officer. The court noted that, by virtue of Baxter v. Palmigiano, 425 US 308 (1976), it is not necessary to provide a written reason for not calling a witness. Brown v. Crist, 492 F. Supp. 965, 36 St. Rep. 1423 (D.C. Mont. 1979).

Sentencing Without Newly Prepared Presentence Investigation: Sentencing of defendant without a presentence investigation when the court was familiar with the defendant and his crimes and had before it, among other things, a presentence report prepared in another trial of the defendant and a letter written by a victim in the case to another judge in another matter did not constitute a denial of due process when the defendant had seen a copy of the presentence report and had been furnished with a copy of the letter and had the opportunity to mitigate their effect, if any, but did not. St. v. Bretz, 185 M 253, 605 P2d 974 (1979).

Unnecessary Delay: Justice Court entered judgment in favor of the plaintiff, and the defendant filed a notice of appeal. A year later, a motion was filed to dismiss the appeal for unnecessary delay. The defendant was served with notice and a memorandum of authority but did not file a response. The motion was granted, and now defendant wants the order set aside. Defendant was given sufficient notice and an opportunity to be heard and was not denied his right to due process of law. Byrd v. Columbia Falls Lions Club, 183 M 330, 599 P2d 366 (1979).

Probation Revocation — Lesser Standard Applies — United States Constitution: The necessity of waiving the United States Constitution's privilege against self-incrimination (similar to Art. II, sec. 25, Mont. Const.) in order to testify to matters going to guilt or innocence does not constitute an impermissible imposition on the policy allowing a criminal defendant to be heard in his own defense. The policies behind the United States Constitution's due process right to be heard (similar to Art. II, sec. 17, Mont. Const.) are not significantly impaired by a similar disability at a probation revocation and sentencing hearing, where less procedural protection is generally warranted. Ryan v. St., 580 F2d 988 (9th Cir. 1978).

Due Process Violations — Default Set Aside: On the basis of the total circumstances surrounding the proceedings, defendant tribe was denied a meaningful opportunity to appear and be heard. Late return of proof of service of summons could have contributed to the tribe's failure to appear and, coupled with other circumstances, was "good cause" to set aside a default. Big Spring v. Blackfeet Tribe of the Blackfeet Indian Reservation, 175 M 258, 573 P2d 655 (1978).

Prior Notice and Hearing — Nonpossessory Attachment: The nonpossessory attachment of a defendant's interest in real property does not deprive him of the use, possession, or alienation of his property. There is not such a significant taking of a property interest as to require prior notice and a hearing prior to attachment. Bustell v. Bustell, 170 M 457, 555 P2d 722 (1976).

Mayor's Discharge of Police Officer — Not a Denial of Due Process: Police officer's claim that his discharge by mayor during his period of probation without opportunity to dispute reasons for discharge violated due process of law is without merit because constitutional right of due process only comes into play when one's vested "property" or "liberty" interests are at stake. Schend v. Thorson, 170 M 5, 549 P2d 809 (1976).

Procedurally Defective Firing Cured by Subsequent Action: When police officer was denied right to answer preferred charges of misconduct, subsequent reinstatement and restitution of benefits "prior" to institution of former charges through proper channels cured procedural due process of law defect, especially where police officer enjoyed vacation with pay status pending outcome of hearing on formal charges, because the effects of any prior illegal procedure stand corrected and can have no influence on future procedural actions. Steer v. Missoula, 169 M 389, 547 P2d 843 (1976).

"Mini Hearing" by Public Service Commission Limited to "Pass Through Costs" of Purchased Gas and Royalty Expense Constitutional: Commission did not violate constitutional requirements of citizen participation, examination of documents, or due process when it limited the scope of subsequent hearing to cost of purchased gas and royalty expense adjustments and approved resulting rate schedule as just and reasonable where the company's application only sought authority to "pass through" increased gas purchase and royalty costs to consumers in order to maintain existing rate of return and annual net earnings previously approved by the Commission at prior full-scale hearing. Mont. Consumer Counsel, Brazier v. P.S.C. & Mont. Power Co., 168 M 180, 541 P2d 770 (1975).

Revocation of Probation: There is no constitutional requirement for a preliminary hearing prior to revocation of probation or suspended sentence, but all that is required of such a hearing is fundamental fairness. Petition of Meidinger, 168 M 7, 539 P2d 1185 (1975).

University Traffic Violations: When a university student received tickets for illegal parking and failing to register his vehicle and had the opportunity to appeal their propriety to a traffic appeals committee, there was notice and a hearing appropriate to the nature of the case which satisfied due process requirements. Mont. St. Univ. v. Ransier, 167 M 149, 536 P2d 187 (1975).

Disparity Between Relief Granted and Relief Sought: When the court granted the welfare department permanent custody of two children while the department's petition requested temporary custody, there was a denial of due process. Flathead County v. Endres, 166 M 379, 533 P2d 959 (1975).

STATUTORY CONCERNS

24/7 Sobriety and Drug Monitoring Program Fees Not Violation of Due Process — Individualized Assessment Required Prior to Participation in Program: After the defendant was charged with DUI, a second offense, he was ordered by the Justice's Court to participate in the 24/7 Sobriety and Drug Monitoring Program as a condition of his release on bond. While enrolled in the program, the defendant missed three tests and was charged with three counts of contempt for the missed tests. The District Court dismissed the contempt charges, concluding that the program fees constituted pretrial punishment in violation of the defendant's right to due process. On appeal, the Supreme Court concluded that fees required under the program do not have a punitive effect on pretrial criminal defendants and that the imposition of the program can be an appropriate condition of release. However, enrollment in the program is discretionary and prior to imposing the testing requirement, a court must conduct an individualized assessment of the defendant, including considering prior alcohol-related arrests, whether the defendant's history and circumstances suggest an increased risk to the community, and whether the defendant is financially able to pay the fees associated with testing. Because the Justice's Court did not conduct an individualized assessment of the defendant before imposing the testing requirement, it was proper to dismiss the defendant's contempt charges. St. v. Spady, 2015 MT 218, 380 Mont. 179, 354 P.3d 590.

Failure to Issue Written Report — No Prejudice to Respondent — No Plain Error: The respondent appealed her commitment to the state hospital, alleging for the first time on appeal that her due process rights were violated because the person who performed her mental health evaluation did not issue a written report as required under 53-21-123. Although the Supreme Court concluded that the failure to issue a written report implicated a fundamental right, it affirmed the District Court's decision, finding that the failure had not prejudiced the respondent's ability to defend against the allegations in the petition or by the person who performed her mental health evaluation. In re M.K.S., 2015 MT 146, 379 Mont. 293, 350 P.3d 27.

Initial Best Interest Standard Applicable to Nonparent Visitation Proceedings: Since a child's birth and until his father's death 5 years later, the child had been raised by his father and stepmother. Soon after the father's death, the biological mother took custody of the child and the stepmother filed a petition seeking visitation. The District Court granted visitation to the stepmother, and the biological mother appealed. The Supreme Court reversed, ruling that the analysis adopted in Polasek v. Omura, 2006 MT 103, 332 Mont. 157, 136 P.3d 519, which

considers grandparent-grandchild visitation, applies in any case involving nonparent visitation. Accordingly, the Supreme Court remanded the case for the District Court to apply the correct analysis. In re C.T.C., 2014 MT 306, 377 Mont. 106, 339 P.3d 54.

Failure to File Affidavit — Declaration of Voidness Overruled: The plaintiff purchased real property at a tax sale after the owners had not paid property taxes for several years. Following the purchase, the plaintiff filed a quiet title action to the property and the owners opposed it. The owners claimed that the county treasurer had not timely filed an affidavit as required under the tax sale laws, and the tax deed was therefore void. The District Court agreed and declared the tax deed void. The plaintiff appealed to the Supreme Court, which reversed and remanded the case to the District Court for entry of judgment in favor of the plaintiff. In distinguishing Isern v. Summerfield, 1998 MT 45, 287 Mont. 461, 956 P.2d 28, the Supreme Court noted that unlike the owners in Isern, the owners in this case had constructive notice of the sale and the requirement to publish notice was therefore superfluous. Zinvest, LLC v. Hudgins, 2014 MT 201, 376 Mont. 72, 330 P.3d 1135.

Failure to Notify Parents of Hearing to Transfer Jurisdiction to District Court — Statutory Notice Requirement Not Jurisdictional — Youth Court Jurisdiction: E.G. was found to be a delinquent youth by the Youth Court. The commitment order stated that the Youth Court would retain jurisdiction until E.G. was 21 and would consider transfer of the case to District Court. Shortly after E.G. turned 18, the state filed a motion to transfer supervisory control to the District Court. E.G. was represented by his attorney and expressly consented to the transfer. The parties discussed the parental notification requirements in 41-5-208, but E.G. consented to continue the hearing, regardless of whether his parents received notice. The Youth Court entered an order granting the motion to transfer supervision of E.G. to District Court until he was age 25, with potential release from supervision for good behavior. However, after E.G. violated conditions of his probation, the District Court sentenced him to the Department of Corrections until age 25, with no time suspended. On appeal, E.G. claimed that the District Court lacked jurisdiction to revoke probation because his parents did not receive notice of the Youth Court transfer hearing under 41-5-208. The Supreme Court affirmed the sentence and held that the parental notice requirement does not withdraw, circumscribe, limit, or affect the Youth Court's jurisdiction over the issue of transferring supervision to District Court. In re E.G., 2014 MT 148, 375 Mont. 252, 326 P.3d 1092.

Intoxication by Prescription Medication No Defense When Defendant Took Four Times Prescribed Amount: At his trial for incest, the defendant testified that he had been prescribed one hydrocodone pill per day and two naproxen twice a day. He also testified that on the night of the incident, he took four hydrocodone pills, three naproxen, and cold medication. On appeal, the defendant argued that the jury instruction that provided that intoxication from having ingested intoxicating substances is not a defense to the mental state element of a crime prevented the jury from fully considering his mental state. The defendant also argued that his case was distinguishable from other cases involving voluntary intoxication because he was following physician orders by taking medication that made him drowsy. The Supreme Court disagreed, noting that the defendant was not following physician orders by taking four times the prescribed amount of the hydrocodone in combination with other medications. The Supreme Court held that this case was not different from any other case in which a defendant chooses to become intoxicated, commits a crime, and then is held accountable for his conduct under 45-2-203. St. v. Ring, 2014 MT 49, 374 Mont. 109, 321 P.3d 800, following Mont. v. Egelhoff, 518 US 37 (1996).

Privacy in Communications Statute Not Violative of Due Process: Dugan called a victim services office for assistance with obtaining an order of protection. When informed by the officer that she could not assist him, he argued with the officer and called her a "fucking cunt" as he hung up the phone. Dugan argued that the privacy in communications statute under which he was charged, 45-8-213, was impermissibly vague and violated due process. The District Court found that the statute was neither facially vague nor vague as applied. On appeal, the Supreme Court affirmed this issue, noting that exhaustive definitions of every word in a statute are not necessary if the meaning of the statute is clear and provides sufficient notice of what conduct is proscribed. Here, statutorily undefined terms had commonly understood meanings, a mental state clarified the type of behavior prohibited, and Dugan's utterance clearly qualified as "obscene, lewd, or profane" conduct. St. v. Dugan, 2013 MT 38, 369 Mont. 39, 303 P.3d 755.

Burden on State in Justifiable Use of Force Case to Prove Absence of Justification: The enactment of 46-16-131 in 2009 abrogated St. v. Henson, 2010 MT 136, 356 Mont. 458, 235 P.3d 1274, St. v. Longstreth, 1999 MT 204, 295 Mont. 457, 984 P.2d 157, and other cases to the extent they held the burden of establishing justifiable use of force was the defendant's. Under 46-16-131,

a defendant has the initial burden of offering evidence of justifiable use of force; the burden then shifts to the state to prove the absence of justification beyond a reasonable doubt. St. v. Daniels, 2011 MT 278, 362 Mont. 426, 265 P.3d 623.

Untimely Youth Court Transfer Hearing — Failure to Move for Transfer to Youth Court Within Statutory Timeframe Not Ineffective Assistance of Counsel: Lindsey was charged with sexual intercourse without consent and sexual assault from incidents that occurred when he was 16 and 17 years old. A hearing to transfer the case to Youth Court was not held within 30 days, but Lindsey, who was 18 years old at the time he was charged, pleaded guilty to sexual assault in District Court and waived a Youth Court transfer. Prior to sentencing, Lindsey obtained new counsel and moved to withdraw his guilty plea. However, Lindsey waived his claim that he was denied due process by the lack of a timely transfer hearing. In addition, Lindsey did not receive ineffective assistance of counsel when his first counsel failed to move for dismissal of the charges on the ground that a timely transfer hearing was not held. Lindsey had time to prepare for the hearing, the District Court considered the transfer, and there was no evidence Lindsey was substantially prejudiced by the delay. St. v. Lindsey, 2011 MT 46, 359 Mont. 362, 249 P.3d 491.

Causation — Traditional Evidentiary Consideration Given to Rebuttal Evidence Establishing Preexisting Injuries: When a defendant seeks to submit evidence of other injuries to negate causation, traditional evidentiary considerations are applied as opposed to evidence establishing a reasonable medical probability that the injury is divisible. Cheff v. BNSF Ry. Co., 2010 MT 235, 358 Mont. 144, 243 P.3d 1115.

Fourfold Increase in Sentence Following Mistrial — Appearance and Reasonable Likelihood of Prosecutorial Vindictiveness: The defendant argued that the assault with a weapon charge that carries a maximum 20-year sentence should have been dismissed for prosecutorial vindictiveness when, during a previous trial that resulted in a mistrial, the defendant was charged with assault on a minor in violation of 45-5-212, which carries a maximum 5-year sentence. Following U.S. v. Goodwin, 457 U.S. 368, 102 S. Ct. 2485 (1982), the Supreme Court reversed and remanded. By rejecting the state's deal to plead guilty to the assault on a minor charge, the defendant exercised his right to proceed to trial. The threat of a fourfold increase in punishment for the assault with a weapon charge had the appearance of prosecutorial vindictiveness when after the mistrial the facts and witnesses were known, the state had discovered and assessed all of the information, and no new evidence or information came to light between the trials. St. v. Knowles, 2010 MT 186, 357 Mont. 272, 239 P.3d 129.

Preponderance of the Evidence Standard Used to Modify or Terminate Grandparent Visitation — Fit Parent's Views Given Deference: The District Court applied an incorrect standard of review in evaluating a parent's request to modify or terminate a stipulated court order for grandparent-grandchild contact. In order to adequately protect a parent's fundamental constitutional right to make decisions concerning the care, custody, and control of a child, a parent must be allowed to present any evidence that bears on those decisions as they relate to the nonparent. If the court finds that a parent is fit, then the parent's views on continued visitation and the best interest of the child must be given deference in the court's analysis. When a parent seeks to modify or terminate a previously issued contact order, the burden of proof is on the parent to make a showing by a preponderance of the evidence, rather than by clear and convincing evidence. In re Grandparent-Grandchild Contact of Snyder, 2010 MT 151, 357 Mont. 34, 235 P.3d 578.

State's Alleged Failure to Reveal Exculpatory Evidence Unfounded — New Trial Not Warranted: Jackson asserted that a new trial was warranted because the state committed a Brady violation by failing to disclose exculpatory statements made to a professional counselor by a deputy who was wounded during an altercation with Jackson in which another deputy was killed, in which the wounded deputy stated that he felt responsible for the other officer's death. The District Court denied Jackson's motion for a new trial, and on appeal the Supreme Court found no reversible error. The state disclosed the name of the counselor well before trial, identifying the counselor as a person with whom the deputy had discussed the shooting, and the jury heard evidence from other witnesses that the deputy felt guilty about the incident. Thus, the record did not support Jackson's claim that exculpatory evidence was withheld, and denial of Jackson's motion was not an abuse of discretion. St. v. Jackson, 2009 MT 427, 354 M 63, 221 P3d 1213 (2009).

Constitutionality of Statute Providing That Permanent Workers' Compensation Benefits Not Permanent — No Equal Protection or Due Process Violation in Termination of Permanent Benefits Based on Social Security Retirement Eligibility: Plaintiffs were granted permanent total disability benefits for work-related injuries, but the benefits were terminated pursuant to 39-71-710 when plaintiffs became eligible for Social Security retirement. Plaintiffs challenged

the constitutionality of 39-71-710 on equal protection and due process grounds. The Workers' Compensation Court granted summary judgment for State Fund and plaintiffs appealed, but the Supreme Court affirmed. First, the statute does not discriminate based on age. Although the two classes of claimants — those who receive or are eligible to receive Social Security benefits, and those who do not or are not eligible to receive Social Security benefits — are similarly situated with regard to their eligibility and reliance on workers' compensation benefits, under rational basis analysis the objective of 39-71-710 is legitimate and bears a rational relationship to a legitimate governmental interest. Section 39-71-710 provides a sufficiently rational means of ensuring that workers' compensation benefits do not become a lifetime benefit and rationally advances the governmental purpose of providing wage loss benefits that bear a reasonable relationship to actual wages lost. The Workers' Compensation Court also properly considered cost containment, inasmuch as cost containment is a legitimate governmental interest that may be constitutionally pursued by the Legislature, and as long as cost containment is not the sole reason for disparate treatment and is achieved by rational means, the Legislature may attempt to improve the viability of the workers' compensation system without offending equal protection. Second, the statute does not violate substantive due process, as plaintiff argued, based on the lack of a quid pro quo for benefits lost after age 65. This argument ignores the fundamental compromise in the Workers' Compensation Act, that in exchange for no-fault recovery, employers gained the predictability of consistent workers' compensation payments that would be capped in a way that personal tort injury claims were not, thus making sufficiently rational the enactment of 39-71-710. Without a limitation on the duration of permanent total disability benefits, the cap and predictability of payments that employers bargained for in the Act would be lost, thus denying employers the benefit of the quid pro quo. The Workers' Compensation Court's grant of summary judgment to State Fund was affirmed. Satterlee v. Lumberman's Mut. Cas. Co., 2009 MT 368, 353 M 265, 222 P3d 566 (2009), following Ingraham v. Champion Int'l, 243 M 42, 793 P2d 769 (1990), distinguishing Reesor v. Mont. St. Fund, 2004 MT 370, 325 M 1, 103 P3d 1019 (2004).

Statute Reasonably Related to Purposes of Youth Court Act — Constitutionality Affirmed: A consent adjustment without petition is an informal tool used by a probation officer when a youth is alleged to have violated the law but the officer does not believe it would be in the best interests of the youth, the family, and the public to file a formal petition. In this case, a youth contended that the provision of 41-5-1512 that allows a consent adjustment without petition violated due process by allowing the state and the Youth Court to proceed from an informal consent adjustment to formal revocation and disposition without requiring the filing of formal charges and without assurances that the youth's admission of violation was voluntary, knowing, and intelligent. The Supreme Court disagreed. Permitting the Youth Court to enforce the violation of informal consent adjustments without requiring a petition or finding that the youth is delinquent or in need of intervention has a reasonable and rational relationship to the express purposes of the Youth Court Act. The Act is designed to promote the welfare of the youth, and the disposition of a youth without going through formal proceedings is designed as a consistent, enforceable, and avoidable consequence of the youth's failure to comply with the terms of the agreement, rather than as a punitive measure. The youth failed to prove that 41-5-1512 was unconstitutional beyond a reasonable doubt, and the Supreme Court affirmed the statute's constitutionality. In re Cause No. CDJ 08-0133(A), 2009 MT 355, 353 M 194, 219 P3d 1255 (2009).

No State Prosecutorial Immunity for Actions of County Attorney: McDaniel was sentenced to 20 years for burglary, with the sentence suspended subject to several conditions. About 4 months after sentencing, McDaniel tested positive for drugs, and the probation officer elected to initiate an intervention hearing, where an agreement was entered into in lieu of a formal violation being filed. Upon learning of the intervention hearing, the County Attorney filed a petition to revoke McDaniel's suspended sentence based on McDaniel's drug use. McDaniel moved to dismiss on grounds that in filing the revocation petition, the state breached the agreement. The District Court granted McDaniel's motions, and the revocation petition was dismissed. McDaniel subsequently filed an action against the state for damages, claiming that the state breached the written agreement and deprived McDaniel of property in violation of due process. The state asserted that because the County Attorney was acting within the scope of his duties as an agent of the state when filing the revocation petition, the state was entitled to prosecutorial immunity. The District Court agreed and granted the state's motion for summary judgment. On appeal, the state contended that prosecutorial immunity should be extended to include county and state governments employing prosecutors who are named as defendants in tort actions. However, for the state to extend the County Attorney's immunity to itself, the state must establish that the

County Attorney could raise prosecutorial immunity as a defense if the claims were brought against the County Attorney rather than the state. Here, the County Attorney was not a party to the intervention agreement, so there was no factual or legal basis for McDaniel to bring a contract-based claim against the County Attorney, and absent a basis for the prosecutor to assert prosecutorial immunity, there was no basis for the state to extend immunity to itself. The Legislature intended to waive state immunity as to express contracts, so it was incongruous for the state to assert immunity as a defense to the alleged contract violation. The Supreme Court reversed. McDaniel v. St., 2009 MT 159, 350 M 422, 208 P3d 817 (2009).

Acquiescence to Involuntary Commitment Without Patient's Consent — Client Refusal to Cooperate With Counsel — No Ineffective Assistance Given Counsel's Ongoing Advocacy: C.R.C. asserted that she received ineffective assistance of counsel when her attorney acquiesced to involuntary commitment of C.R.C. without her consent. The Supreme Court examined the record and found that the statutory guidelines for a waiver of C.R.C.'s rights were followed. In addition, the record revealed numerous facts to rebut the presumption that counsel was ineffective. C.R.C. refused to: (1) participate in her own defense; (2) meet with counsel; (3) attend court appearances; or (4) meet with a doctor for an independent psychological evaluation requested by counsel on C.R.C.'s behalf. The record also demonstrated that C.R.C. posed a danger to herself and others, requiring commitment. Yet even without C.R.C.'s input or cooperation, counsel continued to advocate on C.R.C.'s behalf, and counsel followed the law in waiving C.R.C.'s right to an adjudicatory hearing. Therefore, the presumption of ineffective assistance of counsel, when counsel acquiesced to involuntary commitment without C.R.C.'s consent, was rebutted by the facts of the case, and the Supreme Court declined to hold that counsel's actions were ineffective. In re Mental Health of C.R.C., 2009 MT 125, 350 M 211, 207 P3d 289 (2009). See also In re K.G.F., 2001 MT 140, 306 M 1, 29 P3d 485 (2001), and In re Mental Health of T.J.F., 2011 MT 28, 359 Mont. 213, 248 P.3d 804.

Sentence Not Based on Materially Inaccurate Information Affirmed: Following conviction on a sexual assault charge, Hirt was sentenced as a level 3 sexual offender. Hirt contended that the sentence was erroneous because it was based in part on materially inaccurate information that Hirt had three prior felony convictions, when in fact Hirt had only one prior felony conviction. However, the sentencing judge knew at sentencing that Hirt had one prior felony conviction, not three as stated in the original presentence investigation (PSI) report, because the information had been corrected in a subsequent PSI report. The level 3 designation was based on a number of considerations besides Hirt's prior criminal history, including Hirt's drug and alcohol abuse, mental health history, misuse of prescription medication, credibility, and failure to assume responsibility for his actions. The sentencing judge was not bound by the level 3 recommendation and was required to and did make an independent decision on the issue after considering the range of relevant and material factors presented in the sentencing record. Thus, the sentencing court did not rely on misinformation, and the information in the PSI was true, so there was no error or violation of Hirt's due process rights Hirt v. St., 2009 MT 116, 350 M 162, 206 P3d 908 (2009).

Sanction for Unlawful Control of Retail Liquor License and Wholesale Distributor License Not Violative of Due Process: Williamson owned controlling interests in a wholesale beer and wine distribution company and also in an electronic gaming machine business that periodically made loans to alcohol retailers, for which Williamson had approval from the Department of Justice. Following an investigation by the Department of Revenue, Williamson was found to be in violation of the alcoholic beverage code because the distribution company had a prohibited indirect financial interest in a liquor retailer to which the gaming machine business had made a loan. The Department of Revenue ordered the distribution company to pay a $1,500 fine, and ordered Williamson either to divest himself of common ownership of the two companies or to cease making loans to alcohol retailers. The distribution company appealed the decision to District Court on grounds that its due process rights had been violated and that the Department of Revenue had misinterpreted the law, but the court affirmed the Department order. On appeal, plaintiff contended that due process was violated when one department sanctioned the loan activity that had been previously approved by another department. The Supreme Court disagreed. Each department controlled separate functions and each required separate licenses. The Department of Justice approval of loans did not unfairly mislead Williamson into believing that the distribution company was free from the constraints of state liquor control laws. Further, the sanction in this case, the major part of which was simply an order that the prohibited conduct must cease, did not constitute treatment that was so fundamentally unfair that it violated plaintiff's due process rights. The District Court was affirmed. Shelby Distrib., LLC v. Dept.

of Revenue, 2009 MT 80, 349 M 489, 206 P3d 899 (2009), distinguishing Seaman v. Dept. of Revenue, 2002 MT 34, 308 M 307, 42 P3d 790 (2002).

City Commission Denial of Application for Site Plan Not Violative of Due Process or Equal Protection — Summary Judgment Proper: Plaintiff sought to build several mini-stores in a Bozeman area that was zoned as a neighborhood business district, but the City Commission denied the building application. Plaintiff sued the city on grounds that the Commission violated plaintiff's constitutional right to due process by arbitrarily and capriciously deciding to consider the application rather than allowing the decision to be made by the planning director, and by denying the application. The District Court concluded that the zoning ordinance gave the Commission broad discretion in granting applications for site plan approval and that because plaintiff had no protected interest in the application, plaintiff was prevented from establishing a substantive due process or equal protection claim. The Commission was held to have followed proper procedures, and because no material facts were in dispute, summary judgment was granted to the city. On appeal, the Supreme Court affirmed. A constitutional substantive due process analysis was inapplicable in this case because plaintiff did not allege that the zoning ordinance was unconstitutional. Likewise plaintiff did not allege that the Commission treated plaintiff's application differently from applications of others owning property in the zoning district, so any equal protection claim failed as well. The City Commission considered the relevant criteria and stated its reason why plaintiff's site plan did not conform to the zoning regulations, and it was within the discretion of the Commission to reclaim and pass on plaintiff's application. Town & Country Foods, Inc. v. Bozeman, 2009 MT 72, 349 M 453, 203 P3d 1283 (2009). See also Raisler v. Burlington N. RR Co., 219 M 254, 717 P2d 535 (1985).

Failure to Prove Unconstitutionality of Municipal Ordinance Prohibiting Storage of Salvage: Albert was charged in City Court with two counts of unlawful storage of salvage pursuant to a Billings municipal ordinance. Albert moved to dismiss, asserting that the ordinance was unconstitutionally vague because substantive terms in the ordinance were not defined, so the ordinance failed to provide actual notice of what conduct was proscribed and minimal guidelines sufficient to govern city code enforcement officers. Albert's motion was denied and Albert appealed. The Supreme Court applied the test for vagueness from St. v. Dixon, 2000 MT 82, 299 M 165, 998 P2d 544 (2000), which requires that actual notice be given to citizens and that the statute contain minimal guidelines sufficient to govern law enforcement. The first element was met because Albert received multiple warnings before being cited, was told specifically what items had to be removed from his yard, and was even offered assistance in removal efforts; thus Albert was clearly on notice of a potential violation. The second element was also met inasmuch as the enforcement process did not encourage arbitrary and discriminatory enforcement because enforcement was generated only by citizen complaints, and officers were entitled to exercise a certain degree of subjective judgment in enforcement efforts. Therefore, Albert failed to show that the ordinance was vague and the dismissal motion was properly denied. There was sufficient evidence to show that Albert failed to move the salvage within 5 days as required by the ordinance, so Albert's conviction was affirmed. Billings v. Albert, 2009 MT 63, 349 M 400, 203 P3d 828 (2009). See also Kolender v. Lawson, 461 US 352 (1983).

Defendant's Possession of Detective's Summary Notes From Witness Interviews — Claim of Suppression of Exculpatory Evidence Denied: A detective repeatedly interviewed a witness in Giddings' homicide trial but did not keep the original notes or recordings from the interviews; instead, the detective destroyed the notes after summarizing the interviews, although Giddings was provided with a copy of the summaries. Giddings asserted that the destruction of the original interview materials amounted to the destruction of possible exculpatory evidence in violation of Giddings' right to due process. The Supreme Court disagreed. In order to show that a suppression of material evidence constitutes a due process violation, a defendant must meet the criteria of Brady v. Maryland, 373 US 83 (1963), which includes a showing that: (1) the state possessed evidence, including impeachment evidence, favorable to the defense; (2) defendant did not possess the evidence and could not have obtained it with reasonable diligence; (3) the prosecution suppressed the evidence; and (4) there was a reasonable probability that the outcome of the proceedings would have been different had the evidence been disclosed. Giddings failed to show a Brady violation. Giddings could not show that the destroyed interview notes had or did not have exculpatory value. Giddings had the opportunity to obtain similar evidence by interviewing the detective and the witness and failed to show that the trial outcome would have been different had he possessed the original materials rather than the summaries. Giddings' motion to dismiss on grounds of destruction of exculpatory evidence was properly dismissed. St. v. Giddings, 2009 MT 61, 349 M 347, 208 P3d 363 (2009), following St. v. Johnson, 2005 MT 318, 329 M 497, 125 P3d

1096 (2005), and distinguishing St. v. Swanson, 222 M 357, 722 P2d 1155 (1986). See also St. v. Seiffert, 2010 MT 169, 357 Mont. 188, 237 P.3d 669, and St. v. James, 2010 MT 175, 357 Mont. 193, 237 P.3d 672.

Incarceration of Mentally Ill Defendant — No Plain Error Review for Alleged Due Process Violation: Following Rovin's parole violations, the District Court revoked Rovin's suspended sentence and imposed a sentence in the state prison, despite the fact that Rovin suffered from mental illness. Rovin argued for the first time on appeal that incarceration would fail to achieve rehabilitation and thus violated due process, that the Supreme Court should invoke plain error review to address the constitutional violation, and that failure to do so would be a manifest miscarriage of justice. The Supreme Court declined. Rovin failed to demonstrate that the due process claim met the elements for plain error review. The District Court considered sentencing alternatives but rejected community-based treatment over concerns for the safety of Rovin and the public. Rovin was represented at every stage of the proceedings, knowingly and voluntarily admitted the parole violations, and waived the right to appeal by failing to object at trial. Further, a mere assertion that failure to review a claimed error might result in a manifest miscarriage of justice is not sufficient to implicate plain error review. St. v. Rovin, 2009 MT 16, 349 M 57, 201 P3d 780 (2009), following St. v. Mackrill, 2008 MT 297, 345 M 469, 191 P3d 451 (2008).

Farmowners Policy Construed to Cover Individuals, Not Partnership: Modroo's daughter was killed in an auto accident, and Modroo sought coverage under a farmowners policy that listed Modroo (and by definition Modroo's family members) as insureds. The insurer asserted that the policy was for the family farming partnership and covered only insureds who were driving a vehicle insured under the policy, which the daughter was not. The District Court agreed and held that the policy did not cover Modroo individually or family members. On appeal, the Supreme Court determined that the insurer's interpretation was reasonable but was not the only interpretation. Another reasonable interpretation was that the policy granted Modroo coverage as an individual because the named insured block on the form listed Modroo, not the partnership. If the insurer intended to cover only the partnership, that entity could have been listed as the named insured, but no reason existed for the insurer to list individuals as insureds unless it intended coverage to apply to them. Construing the ambiguity against the insurer, the policy was held to cover Modroo individually, and the daughter as a family member as well. Modroo was entitled to medical payments under the farmowners policy and the District Court decision was reversed. Modroo v. Nationwide Mut. Fire Ins. Co., 2008 MT 275, 345 M 262, 191 P3d 389 (2008). See also Mitchell v. St. Farm Ins. Co., 2003 MT 102, 315 M 281, 68 P3d 703 (2003).

Ohio Law Applied to Disallow Stacking of Coverages — Offsets Allowed: The District Court conducted a conflict of law analysis and concluded that Ohio law governed Modroo's entitlement to damages for an accident that occurred in Montana under a personal auto policy that Modroo obtained in Ohio. Under Ohio law, stacking of policy coverages is disallowed and offsets are allowed. Citing Csulik v. Nationwide Mut. Ins. Co., 723 NE 2d 90 (Ohio 2000), Modroo contended that the policy's multiple choice-of-law provisions resulted in ambiguity and that Montana law should have applied because it is more favorable to the insured. The Supreme Court disagreed and noted that although the policy provided for payment of compensatory damages under Montana tort law while also providing that Ohio law governed interpretation of the contract, the presence of two choice-of-law provisions did not necessarily create an ambiguity. The issue of stacking policies was a question of contract law rather than tort law, so the Ohio law applied. Likewise, the provisions in the policy that any amounts available under uninsured motorist coverage would be offset by any amounts available for payment by or on behalf of any liable parties also presented a question of contract law, so Ohio law applied to that issue as well. The Supreme Court declined to overrule its choice of law principles. The District Court did not err in applying Ohio law to the stacking and offset issues. Modroo v. Nationwide Mut. Fire Ins. Co., 2008 MT 275, 345 M 262, 191 P3d 389 (2008). The Modroo choice of law rationale was also applied in Tucker v. Farmers Ins. Exch., 2009 MT 247, 351 M 448, 215 P3d 1 (2009). In Tidyman's Management Serv. v. Davis, 2014 MT 201, 376 Mont. 72, 330 P.3d 1135, the Supreme Court overruled Tucker to the extent it suggested that the "materially greater interest" factors supplant the rule from Mitchell v. St. Farm Ins. Co., 2003 MT 102, 315 Mont. 281, 68 P.3d 703, when an insurance contract does not contain a choice-of-law provision.

Presumption That Person Who Refuses to Take Blood Test May Be Intoxicated Considered Permissive Inference: Michaud asserted that the presumption in 61-8-404, that a person who refuses to take a blood test may be considered to be intoxicated, was an impermissible presumption and that because only permissive presumptions are allowed in criminal cases, his DUI conviction should be reversed. The Supreme Court disagreed. The presumption is in fact a

permissive presumption inasmuch as a trier of fact is free to accept or reject the presumption from a given set of facts. In addition, as a permissive presumption, it does not violate due process because there is a rational connection between driving while intoxicated and refusing to take a sobriety test. St. v. Michaud, 2008 MT 88, 342 M 244, 180 P3d 636 (2008), applying Leary v. U.S., 395 US 6 (1969).

Constitutionality of Procedures Allowing Consideration of Prior Termination of Parental Rights to Sibling: A mother asserted that procedures for terminating her parental rights violated due process, particularly when the District Court considered the prior involuntary termination of the mother's rights to A.P.'s sibling when it terminated her rights to A.P. The Supreme Court noted that because it is a fundamental liberty interest, a parent's right to the care and custody of a child must be protected by fundamentally fair procedures that ensure that the parent is not placed at an unfair disadvantage during termination proceedings. In this case, consideration of the prior termination of the mother's rights to a sibling did not violate due process. The District Court is not required to terminate, but rather the court has discretion to grant or deny the state's termination petition if the state proves the statutory elements, nor is the decision limited to the facts of the prior termination because the court also considers any available evidence relating to present family circumstances and the specific child at issue. The parent is also provided an opportunity to challenge the termination petition, and the burden of proof is on the state without placing the parent at an unfair disadvantage. The Supreme Court determined that the procedure allowing consideration of a prior termination does not violate a parent's due process rights. In re Custody & Parental Rights of A.P., 2007 MT 297, 340 M 39, 172 P3d 105 (2007).

Failure to Base More Onerous Resentence on Objective Information Concerning Identifiable Conduct by Defendant or to Set Out Reasons for Longer Sentence Affirmatively in Record Violative of Due Process — Resentence Reversed: Following conviction for sexual intercourse without consent, Jackson was sentenced to the Department of Corrections for 6 years and ordered to complete a sex offender treatment program before becoming eligible for parole. More than 2 years later, Jackson moved for resentencing, alleging that the sentence violated 46-18-201(3)(d)(i), which requires that all but the first 5 years of commitment to the Department of Corrections must be suspended, but the motion was dismissed as untimely. Jackson then petitioned for a writ of habeas corpus. The state conceded that the sentence was illegal, but asserted that resentencing, rather than striking the illegal portion of the sentence, was the proper remedy. The District Court agreed and resentenced Jackson to a 6-year term at the state prison with the same program completion requirements, after determining that the new sentence was not more onerous. Jackson appealed. Reviewing the sentence for legality, the Supreme Court reversed. Under St. v. Redfern, 2004 MT 277, 323 M 225, 99 P3d 223 (2004), in order to meet due process requirements and allow full appellate review of the constitutional legitimacy of the sentence, a longer sentence on resentencing after a new trial must be based on objective information concerning identifiable conduct of the defendant after the original sentencing and reasons for the longer sentence must affirmatively appear in the record. Additionally, a sentencing court denies a defendant's due process rights by imposing a heavier sentence as punishment for setting aside the original sentence. In this case, Jackson's resentence was considered more onerous, and the sentencing judge did not base the more burdensome sentence on objective information concerning identifiable conduct by Jackson after the original sentencing or set out the reasons for the longer sentence affirmatively in the record, thus violating Jackson's due process rights. St. v. Jackson, 2007 MT 186, 338 M 344, 165 P3d 321 (2007), followed in St. v. Bullplume, 2011 MT 40, 359 Mont. 289 251 P.3d 114.

Sufficient Evidence for Conviction for Deliberate Homicide by Accountability — Evidence of Underlying Crime Required: Doyle asserted that there was insufficient evidence to convict him of deliberate homicide by accountability and that the accountability statute violated due process by relieving the state of proving that an offense had been committed. The Supreme Court affirmed the conviction based on sufficient, corroborated, independent evidence that Doyle played an active role in the homicide. The court also noted that under the accountability statute, a person may be convicted although the other person claimed to have committed the offense has not been prosecuted or convicted, has been convicted of a different offense, is not amenable to justice, or has been acquitted, but the statute in no way violates due process by lessening the state's burden of proving that the underlying offense of deliberate homicide was committed. St. v. Doyle, 2007 MT 125, 337 M 308, 160 P3d 516 (2007).

Constitutionality of Statute Requiring Mandatory Suspension of Driver's License for Failure to Appear or Pay Fine — Matthews Applied: Pyette was fined $270 in Justice's Court for traffic violations and entered a time-pay contract that allowed monthly payments. If the payments were

not made, Pyette was advised that indefinite suspension of the driver's license would occur until payments were made and a reinstatement fee was paid. Pyette made two payments but not the remainder of the payments. A second notice was sent to Pyette stating that action was required within 10 days or the license would be suspended. Pyette did nothing and was notified that the driver's license was suspended pursuant to 61-5-214 for failure to pay the fine, but the notice stated that the license could be reinstated upon the payment of fees if Pyette appeared before the court. Again, Pyette did nothing. About 6 months later, Pyette was stopped for speeding and cited for driving with a suspended license. Pyette moved to dismiss the driving-with-suspended-license charge on grounds that 61-5-214 was unconstitutional on its face for failure to provide for a hearing prior to license suspension in violation of due process. The District Court agreed and ordered the Justice's Court to dismiss the charge. The state appealed. The Supreme Court noted that the statute was presumed constitutional and that the burden was on Pyette to prove otherwise. Once issued, a driver's license becomes a property interest that may not be suspended or revoked without procedural due process. Challenges to statutes based on a violation of due process rest on lack of notice and may be overcome when reasonable persons are advised what must be done to avoid a certain result. If a person of ordinary intelligence is given fair notice of what is required to forestall an adverse result from the application of a statute, the statute is not unconstitutionally vague. Under Matthews v. Eldridge, 424 US 319 (1976), when the adequacy of notice of a proposed action is given pursuant to a statute providing for the revocation of a driver's license, three factors are considered: (1) the private interest that will be affected by the official action; (2) the risk of erroneous deprivation of the interest through the procedure used and the probable value, if any, of additional or substitute safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that additional or substitute procedures would entail. In this case, the Matthews test was met. The notice provided to Pyette that the license was to be suspended if Pyette did not appear before the court, although not perfect, was sufficient to satisfy due process. The Supreme Court reversed. St. v. Pyette, 2007 MT 119, 337 M 265, 159 P3d 232 (2007).

Enhanced Sentence for Use of Weapon — Apprendi Applied Retroactively Under Harmless Error Test — Enhanced Sentence Without Unanimous Jury Finding Harmless Error: After Adams received an enhanced sentence for use of a weapon during an aggravated assault, Adams appealed on grounds that there was insufficient evidence to support a finding that a weapon was used and that the enhanced sentence violated due process because there was no separate jury finding that a weapon was used, as required by Apprendi v. N.J., 530 US 466 (2000). The 2001 Legislature updated the law to address the Apprendi requirement, but as it read in 1997 during Adams's sentencing, 46-1-401 did not require a separate jury finding, so Adams argued that 46-1-401 was therefore unconstitutional. The Supreme Court held that Apprendi imposes a new obligation on the state and is thus a new rule that applies retroactively to cases pending on direct appeal or not final at the time that the new rule was issued, so Apprendi applied retroactively to Adams's direct appeal. Nevertheless, the Supreme Court affirmed the sentence on both issues. First, there was uncontroverted evidence that a weapon was involved in the crime. Second, the Supreme Court applied Neder v. U.S., 527 US 1 (1999), to determine the proper test to apply when a trial court fails to instruct the jury to make a finding of materiality. Under Neder, the proper test is the harmless error test, i.e., whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. Thus, in this case, the question was whether, beyond a reasonable doubt, Adams would have received an enhanced sentence based on the display or use of a weapon had the question been submitted to the jury. Given evidence that a gun was used was uncontroverted, the result would have been the same, so any error in failing to present the question to the jury was harmless. Adams v. St., 2007 MT 35, 336 M 63, 153 P3d 601 (2007), applying St. v. Van Kirk, 2001 MT 184, 306 M 215, 32 P3d 735 (2001).

Jury Trial Not Required in Civil Contempt Case: O'Neil was enjoined from and held in civil contempt for the unauthorized practice of law. O'Neil appealed on grounds that due process required that he be granted a jury trial on the charges. The Supreme Court disagreed, noting that under federal law, there might be a right to a jury trial in criminal contempt cases that impose serious contempt penalties, but that there is no general federal constitutional right to a jury trial for criminal contempt in federal or state courts. However, O'Neil was charged with civil contempt, not criminal contempt, and the penalty under 3-1-511 does not provide sanctions that rise to the level of a serious penalty. O'Neil was afforded adequate due process under 3-1-518, including a reasonable opportunity to obtain counsel, to prepare a defense or explanation prior to hearing, to testify in his own behalf, and to call witnesses at the hearing. O'Neil was not entitled to a higher standard of due process that might require a jury trial, and the District Court did not

err in holding that a jury trial was not required. Mont. Supreme Court Comm'n on Unauthorized Practice of Law v. O'Neil, 2006 MT 284, 334 M 311, 147 P3d 200 (2006), following Kauffman v. District Court, 1998 MT 239, 291 M 122, 966 P2d 715 (1998).

Due Process Requirements of Written Statement for Revoking Deferred Sentence — Record of Factfinding and Basis of Review Adequate: The District Court revoked Baird's deferred sentence, but Baird asserted that his due process rights were violated because the court failed to advise him of the reasons for the revocation in a written statement as required in 46-18-102 and Gagnon v. Scarpelli, 411 US 778 (1973). The Supreme Court found Baird's reliance of 46-18-102 and Gagnon to be misplaced. Rather, the sentencing court's memorandum combined with the hearing transcript may provide the necessary written statement explaining the evidence relied on and the reason for the revocation decision. Due process is achieved when the oral and written record support accurate factfinding and appellate review. In Baird's case, when read as a whole, the oral and written records provided an adequate basis for review and were adequate to determine that the District Court's decision to revoke the sentence was based on permissible grounds supported by the evidence. Thus, Gagnon and its progeny were adequately addressed, and Baird's sentence revocation was affirmed. St. v. Baird, 2006 MT 266, 334 M 185, 145 P3d 995 (2006). See also Black v. Romano, 471 US 606 (1985), and St. v. Richardson, 2000 MT 72, 299 M 102, 997 P2d 786 (2000).

No Implied Presumption of Parole Eligibility — Federal Constitutional Protections Not Violated by Sentence of Life Imprisonment Without Parole — Montana Constitutional Protections Not Addressed: Garrymore was sentenced to life in prison without parole for the deliberate homicide of his adopted infant child. Garrymore appealed the parole restriction and sought to have the sentence vacated on grounds that 45-5-102(2) contains an implicit presumption of parole eligibility. Garrymore contended that under the statute, standing alone and without the operation of 46-18-202, he was entitled to a parole-eligible sentence, subject to 46-23-201, that was taken away by the sentencing judge in violation of due process and a trial by jury. The Supreme Court found nothing in sentencing statutes that creates a presumption in favor of parole eligibility that must be overcome in order for a sentencing judge to impose a parole restriction. Rather, sentencing courts have broad discretion under 46-18-202 to impose parole eligibility restrictions on felony sentences, and the Legislature has placed no limitation on the exercise of that authority. A parole-eligible sentence was not taken away from Garrymore because he was not entitled to such a sentence to begin with. Additionally, although the judge must state the reasons for a parole eligibility restriction when one is imposed, no particular finding of fact need be included among those reasons. Therefore, because the statutory maximum for violating 45-5-102(1)(a) is life in prison without parole, restricting Garrymore's parole eligibility did not violate any federal constitutional rights. The Supreme Court also declined to address Garrymore's undeveloped argument that the parole eligibility restriction violated the Montana Constitution's greater jury trial right absent a compelling reason why Montana's greater jury trial right dictated a different result. St. v. Garrymore, 2006 MT 245, 334 M 1, 145 P3d 946 (2006), followed in St. v. Rosling, 2008 MT 62, 342 M 1, 180 P3d 1102 (2008).

Notice of Necessity for Driver to Complete Driver Rehabilitation and Improvement Course Not Required Following Repeal of Notice Requirement — Substantive Right Not Affected: Keeney accumulated 30 conviction points in a 3-year period and was notified by the Department of Justice that his driver's license was revoked for 3 years. Keeney had accumulated 18 conviction points on speeding violations by May 2, 2003, the last points being acquired from a speeding violation in Idaho. Prior to its May 5, 2003, repeal, 61-11-204(3)(b) required that a driver who accumulated 18 or more conviction points be notified of the necessity to complete a driver rehabilitation and improvement course. Keeney asserted that his due process rights were violated when the Department failed to notify him of his status as a habitual offender under the former notice requirement, essentially challenging the perceived retroactive application of the repealed provision. However, the Department was not notified of the Idaho violation until May 28, 2003. Therefore, the Department properly applied the law as it stood on May 5, 2003. The Department did not change the method of calculating points for speeding infractions prior to the repeal and did not punish Keeney for violations that occurred before the repeal, but rather properly considered the previous violations as points against Keeney's record when he finally accumulated 30 points. Once Keeney reached the 30-point plateau within a 3-year period, he was correctly sent a notice of revocation and afforded the option for judicial review of the revocation. Procedural due process required nothing more because it was not necessary to advise Keeney of his continuing duty to act as a law-abiding citizen. In re Driver's License of Keeney v. Dept. of Justice, 2006 MT 152, 332 M 446, 139 P3d 814 (2006).

Sufficient Documentary Evidence of Validity of Prior DUI Per Se Convictions — Enhancement to Felony Affirmed: Smerker contended that two prior DUI convictions in Justice's Court were constitutionally invalid because he never pleaded guilty to the offenses and that it was therefore improper to use evidence of the prior convictions to enhance the present DUI charge to a felony. Under St. v. Snell, 2004 MT 334, 324 M 173, 103 P3d 503 (2004), a defendant who challenges a prior conviction as unconstitutionally invalid must present direct evidence of irregularity in the prior proceeding. Smerker's affidavit unequivocally stated that, notwithstanding the Justice's Court's judgments, Smerker at no time pleaded guilty to the charges, which constituted direct evidence of irregularity in the Justice's Court proceedings and shifted the burden to the state to prove that the prior convictions were not obtained in violation of Smerker's rights. The state then introduced documentation from the Justice's Court proceedings, including a signed plea bargain agreement, that provided that the state would amend the two DUI charges to DUI per se and recommend a specified sentence in exchange for Smerker's guilty pleas to the amended charges. Thus, the state met its burden of establishing by a preponderance of the evidence that Smerker pleaded guilty to two DUI per se charges and that the convictions were not obtained in violation of Smerker's rights. The prior misdemeanor convictions were properly used to enhance the present DUI to a felony, and Smerker's felony DUI conviction was affirmed. St. v. Smerker, 2006 MT 117, 332 M 221, 136 P3d 543 (2006). See also St. v. Burns, 2011 MT 167, 361 Mont. 191, 256 P.3d 944.

Initial Best Interest Standard Applicable to Grandparent-Grandchild Proceedings: When a grandparent petitions for contact with a grandchild, the first inquiry is whether a parent adequately cares for the child. If the parent is fit, a presumption arises in favor of the parent's wishes because due process does not permit the state to infringe on the fundamental right of parents to make childrearing decisions simply because a state judge believes a better decision could be made. If the parent is not fit, no presumption arises and the parent's wishes are due no deference. The close scrutiny applied to the fundamental parenting right requires that a petitioning grandparent prove by clear and convincing evidence that it is in the child's best interest to have contact with the grandparent and that, in the case of a fit objecting parent, the presumption in favor of the parent's wishes has been rebutted. Here, it was reversible error for the District Court to neglect to inquire into the parent's fitness prior to judging whether a grandparent's request for contact should be granted. Polasek v. Omura, 2006 MT 103, 332 M 157, 136 P3d 519 (2006), following Troxel v. Granville, 530 US 57 (2000), and explained in In re Grandparent-Grandchild Contact of Snyder, 2010 MT 151, 357 Mont. 34, 235 P.3d 578. In In re C.T.C., 2014 MT 306, 377 Mont. 106, 339 P.3d 54, the Supreme Court applied the analysis in Polasek to stepparent visitation when the stepparent's spouse, the biological parent of the child, is deceased.

Inference of Intoxication From Refusal to Take Sobriety Test — Burden of Proof Not Unfairly Shifted to Defendant: Morris contended that the provision in 61-8-404(2) that allows a jury to infer a defendant's intoxication based on the refusal to take a sobriety test unconstitutionally shifted the burden of proof to a defendant by providing that the state produce no other evidence of guilt. Analyzing 61-8-404 as a whole, the Supreme Court concluded that subsection (2) requires corroborating evidence of DUI and that admissibility of a defendant's refusal to take a sobriety test presupposes other competent evidence in the form of probable cause to make an arrest in the first place. The trial court properly instructed the jury on the statutory requirements regarding the state's burden of proving that Morris was intoxicated and, given the jury instructions and the statutory requirements as a whole, the burden of proof did not impermissibly shift to Morris. Great Falls v. Morris, 2006 MT 93, 332 M 85, 134 P3d 692 (2006).

Parents' Due Process Rights Not Violated by Failure to Hold Permanency Plan Hearing When Objective of Plan Achieved: Three times the state attempted to preserve and reunite the parents with their children through the establishment of treatment plans and by emphasizing to the parents the importance of permanent placement of the children in a safe and secure home, but each time the parents failed to comply with the treatment plans and the children were returned to state custody. The District Court, without holding a permanency plan hearing, eventually terminated the parents' rights. On appeal, the parents claimed that their due process rights were violated by the failure of the court to hold a permanency plan hearing. The Supreme Court disagreed. Although a permanency plan hearing per se was never held, the purposes served by a hearing were nevertheless met. The District Court had repeatedly referenced permanency for the children and sought to ensure that the parents understood that the children could not be allowed to languish in the system. This is typical of the discussion that would normally occur at a permanency plan hearing, and had a hearing been held, it would undoubtedly have formalized

the state's goal of reunifying the parents and children, which had been attempted repeatedly. Thus, failure to hold a permanency plan hearing was not fundamentally unfair and did not violate the parents' due process rights. In re B.B. & J.B., 2006 MT 66, 331 M 407, 133 P3d 215 (2006), following In re A.R., 2004 MT 22, 319 M 340, 83 P3d 1287 (2004).

Parent Not Allowed to Examine or Present Witnesses During Child Adjudication Hearing — No Due Process Violation: A father claimed a due process violation when the District Court discontinued a hearing to determine whether his child was a youth in need of care before the father was allowed to examine a witness or to present two of his own witnesses. Fundamental fairness and due process require that a parent not be placed at an unfair disadvantage during parental rights termination proceedings; however, pretermination proceedings entitle a parent to less process than the actual termination proceedings. In this case, the father did not allege that allowing him to examine a witness or to present his own witnesses would have provided any relevant information or that failing to do so prejudiced him. The proceeding was fundamentally fair, and the District Court's decision to terminate the hearing was not reversible error. In re A.N.W., 2006 MT 42, 331 M 208, 130 P3d 619 (2006). See also In Re Custody & Parental Rights of M.W. & C.S., 2001 MT 78, 305 M 80, 23 P3d 206 (2001).

No Due Process Violations in Parental Rights Termination Proceeding — Statutory Mandates Addressed: A mother asserted that her due process rights were violated in a parental rights termination proceeding because: (1) the state failed to make reasonable efforts to reunify mother and child as required in 41-3-423; (2) the District Court, in effect, terminated her right while purporting only to grant a planned permanent living arrangement and permanent care and control of the child to the state in violation of 41-3-609; (3) the state failed to petition the District Court for termination in a timely fashion in violation of 41-3-604; and (4) the District Court failed to hold a permanency plan hearing in a timely manner in violation of 41-3-445. The Supreme Court considered each claim and affirmed. Although reunification efforts failed, the state's efforts were reasonable and in compliance with the governing statutes. The mother's parental rights were severely limited, but not actually terminated, so her argument regarding improper termination procedures failed. The state does not have to petition to terminate parental rights if a compelling reason has been documented for determining that filing a petition would not be in the child's best interests. In this case, there was such a compelling reason—namely, that the state had tried to reunify mother and child for years and did not seek termination casually. The tardy permanency hearing argument also failed in light of the state's diligent, although unsuccessful, efforts to create a permanent and stable environment for the child in an effort to ensure that the child did not languish in foster care. In re B.N.Y., 2006 MT 34, 331 M 145, 130 P3d 594 (2006). See also In re R.T.L.P., 238 M 384, 777 P2d 892 (1989), and In re A.R., 2004 MT 22, 319 M 340, 83 P3d 1287 (2004).

Denturists' Due Process Rights Not Violated by Placement Under Board of Dentistry: Denturist plaintiffs contended that the policies, membership, and restrictions imposed on denturity by the Board of Dentistry was a violation of due process, entitling plaintiffs to a federal claim under 42 U.S.C. 1983. The District Court rejected the claim, and the Supreme Court affirmed. Although the Board was comprised mostly of dentists, under Friedman v. Rogers, 440 US 1 (1979), due process does not require that a regulatory board equally represent all professions subject to that board's regulations, nor is there a constitutional right for a profession to be regulated by a board that is sympathetic to the commercial practice of that profession. Additionally, under Zinermon v. Burch, 494 US 113 (1990), to determine whether a procedural due process violation has occurred, the adequacy of the state's process must be examined for constitutionality. Here, plaintiffs did not show that administrative procedures afforded to them were inadequate, and in fact, they did not avail themselves of the process available to them. Plaintiffs' failure to exhaust the administrative process precluded relief by judicial review. Thus, the due process claim failed, and absent a constitutional claim, the 42 U.S.C. 1983 claim failed as well. Wiser v. St., 2006 MT 20, 331 M 28, 129 P3d 133 (2006), affirmed in Wiser v. Bd. of Dentistry, 2011 MT 56, 360 Mont. 1, 251 P.3d 675.

Due Process Satisfied by Requiring Hearing After Information Filed — Butler Overruled: In St. v. Butler, 1999 MT 70, 294 M 17, 977 P2d 1000 (1999), the Supreme Court held that to satisfy due process, a youth must be afforded a hearing prior to the filing of an information in District Court to charge the youth as an adult. Subsequent amendment to 41-5-206 established a transfer hearing requirement within 30 days after leave to file an information is granted. The amendment was held to satisfy due process, so to the extent that Butler required a hearing before filing in District Court, Butler was overruled. St. v. McKee, 2006 MT 5, 330 M 249, 127 P3d 445 (2006).

No Affirmative Defense of Renunciation to Charge of Solicitation: Lynch was charged with solicitation to commit deliberate homicide. At trial, Lynch sought to introduce a defense of renunciation or withdrawal to the charge, but the trial court denied the defense, and Lynch appealed. The Supreme Court affirmed. Lynch conceded that the Legislature has not codified renunciation as an affirmative defense to a solicitation charge, but contended that because the defense is allowed with respect to some other crimes, he should have been able to assert that defense. The Supreme Court declined to extend the renunciation defense to solicitation, noting that the fact that a renunciation defense is statutorily available for other possible charges is irrelevant. The state has broad discretion in making charging decisions when facts support more than one possible charge, and the trial court did not err in disallowing Lynch's renunciation defense in this case. St. v. Lynch, 2005 MT 337, 330 M 74, 125 P3d 1148 (2005), distinguishing St. v. Bullock, 272 M 361, 901 P2d 61 (1995).

Jury Instruction Regarding Effect of Intoxication on Mens Rea Properly Rejected: Following conviction for deliberate homicide, Smith asserted that the trial court erred in refusing to instruct the jury regarding evidence of Smith's intoxication when considering whether Smith acted with intent to commit the crime. Smith contended that 45-2-203 unconstitutionally violated due process by excluding evidence of intoxication in determining mental state. The Supreme Court noted that the due process issue had been decided contrary to Smith's argument in Mont. v. Egelhoff, 518 US 37 (1996), so declining Smith's intoxication instruction was not error. Viewed as a whole, the jury instructions fully and fairly instructed the jury on the applicable law, and Smith's conviction was affirmed. St. v. Smith, 2005 MT 325, 329 M 526, 127 P3d 353 (2005), distinguishing U.S. v. Burdeau, 168 F3d 352 (9th Cir. 1999). See also St. v. Myran, 2012 MT 252, 366 Mont. 532, 289 P.3d 118, and St. v. Ring, 2014 MT 49, 374 Mont. 109, 321 P.3d 800.

Statute Not Unconstitutionally Vague for Failure to Give Notice of Conduct Considered Aggravated Circumstance: A mother's parental rights were terminated without reunification services being offered pursuant to 41-3-423 after the state contended that the mother subjected her child to an aggravated circumstance, namely abuse and neglect. On appeal, the mother contended that 41-3-423(2)(a) was vague and void on its face because the term "including but not limited to" failed to clearly define the standard that would warrant either termination of parental rights or withholding of reunification services, in violation of due process. The mother also asserted that by failing to provide direction to courts in determining what an aggravated circumstance is, basic policy matters were impermissibly delegated to judges for resolution on an ad hoc basis. The Supreme Court noted that a statute is vague on its face when it fails to give a person of ordinary intelligence fair notice that contemplated conduct is forbidden and that an appellant faces a high burden of proof of showing that no standard of conduct is specified at all. The court cited Ward v. Rock Against Racism, 491 US 781 (1989), for the holding that even when statutory standards are flexible and officials implementing them will exercise considerable discretion, perfect clarity and precise guidance are not required. Here, the statute listed several examples of conduct that constituted an aggravated circumstance, including conduct that the mother exposed her child to. Because the mother failed to prove that 41-3-423(2)(a) did not give fair notice of any standard of conduct at all, the statute was not void for vagueness. In re Custody & Parental Rights of D.S., 2005 MT 275, 329 M 180, 122 P3d 1239 (2005).

Plea Bargain Rejected — Imposition of State-Recommended Maximum Sentence Not Violative of Due Process: Killam was charged with felony aggravated assault with a weapon. The state entered into plea negotiations, but Killam rejected the proposed agreement. Killam ultimately pleaded guilty. At sentencing, the state recommended the maximum sentence, which was greater than the sentence offered in the plea agreement, and the sentencing court imposed the maximum statutory sentence. On appeal, Killam contended that the state acted vindictively and violated Killam's due process rights by recommending a more severe sentence than was offered in the plea negotiations, citing N.C. v. Pearce, 395 US 711 (1969), and Blackledge v. Perry, 417 US 21 (1974). The Supreme Court distinguished both federal cases because they dealt with vindictiveness based on harsher sentences imposed following retrial, while Killam argued vindictiveness during initial sentencing. The court noted that a defendant is free to accept or reject a plea offer, but if the offer is rejected, the prosecution may proceed with the case and make any legal sentencing recommendation because there is no agreement to the contrary. When Killam entered a guilty plea, the District Court informed him of the maximum sentence and the state was free to recommend the maximum statutory sentence. Thus, imposition of the maximum sentence did not violate Killam's due process rights. St. v. Killam, 2005 MT 255, 329 M 50, 122 P3d 439 (2005), following Bordenkircher v. Hayes, 434 US 357 (1978).

Adoption of Sentence Recommended in Presentence Investigation Report, With Variations — No Error in Disparity Between Oral and Written Sentence: As set out in St. v. Lane, 1998 MT 76, 288 M 286, 957 P2d 9 (1998), the oral pronouncement of sentence is the legally effective sentence, and the written judgment and commitment serves as evidence of the sentence orally pronounced. Wiedrich contended that because his written sentence contained terms and conditions that were not orally pronounced, the extra conditions were invalid and should be removed from the sentence. The Supreme Court disagreed. The transcript revealed that the sentencing court clearly adopted the sentence recommended in the presentence investigation report, with some variations—a fact that Wiedrich and his counsel were fully aware of—and the Supreme Court therefore declined to remand for resentencing. St. v. Wiedrich, 2005 MT 127, 327 M 214, 112 P3d 1054 (2005).

Outfitter's Obligation to Ensure Licensure of Guide — Board's Failure to Notify Outfitter of Unlicensed Guide Not Due Process Violation: Crismore hired an unlicensed guide and was sanctioned by the Board of Outfitters. Crismore appealed on grounds that he was denied due process because he was not informed until after the contested case hearing that the guide had applied for a license through a different outfitter but the application was returned for administrative reasons, denying Crismore of the opportunity to present a full and complete defense at the hearing. Although acknowledging that Crismore had a property interest in the outfitter's license that entitled him to due process protections, the Supreme Court nevertheless affirmed that Crismore was not denied due process. It is the responsibility of an outfitter to employ only licensed guides and to sign a guide's license when the guide is employed. It is not the responsibility of the Board to inform every licensed outfitter of the name of each person who unsuccessfully applies for a guide's license. Crismore was given a timely and meaningful opportunity to present his case to the Board as to why he hired an unlicensed guide. Crismore v. Bd. of Outfitters, 2005 MT 109, 327 M 71, 111 P3d 681 (2005). See also In re Crow Water Compact, 2015 MT 353, 382 Mont. 46, 364 P.3d 584.

Sexual and Violent Offender Registration Requirements Not Part of Criminal Sentencing — Registration Violation Separate Offense: White Bear was convicted of failing to register as a sexual or violent offender. On appeal, White Bear contended that offender registration violated due process, but the argument was based on an incorrect premise that registration was a condition of sentencing and punishment for the original offense. In fact, the registration requirements are not part of criminal sentencing for a sexual or violent offense, and violation of registration requirements is a separate offense. White Bear's conviction for failing to register as a sexual or violent offender was affirmed. St. v. White Bear, 2005 MT 7, 325 M 337, 106 P3d 516 (2005). See also St. v. Mount, 2003 MT 275, 317 M 481, 78 P3d 829 (2003).

Mandatory Life Sentence Not Violative of Due Process, Cruel and Unusual Punishment, or Separation of Powers — Exception Properly Considered: Webb pleaded guilty to second offense sexual intercourse without consent and was sentenced to life in prison without parole pursuant to 46-18-219. Webb appealed the sentence on grounds that the mandatory life sentence violated procedural and substantive due process, the prohibition against cruel and unusual punishment, and the separation of powers doctrine. Webb also asserted that the sentencing court failed to properly consider the exception to mandatory sentencing set out in 46-18-222(3). The Supreme Court affirmed. The sentencing court properly considered the exception and did not abuse its broad discretion in finding no unusual and substantial distress. The sentencing court offered Webb all the procedural due process necessary and did not violate substantive due process because the sentence fit within the statutory sentencing limits. Webb's contention that life without parole was cruel and unusual punishment failed because the sentence was commensurate with the gravity of the crime and consistent with state sentencing and correctional policy. The argument that mandatory sentences violate the separation of powers doctrine also failed because it is in the Legislature's province to distinguish between criminal offenses and to establish punishments, and enactment of 46-18-219 was based on constitutional principles and Montana public policy. St. v. Webb, 2005 MT 5, 325 M 317, 106 P3d 521 (2005). See also St. v. Bruns, 213 M 372, 691 P2d 817 (1984), and St. v. Dahms, 252 M 1, 825 P2d 1214 (1992).

Retroactive Applicability of Decision Prohibiting Antistacking of Insurance Provisions to Pending Cases: In Hardy v. Progressive Specialty Ins. Co., 2003 MT 85, 315 M 107, 67 P3d 892 (2003), the Supreme Court decided that antistacking provisions in an underinsured motorist policy were unconstitutional. Plaintiffs brought a class action in federal court claiming that Hardy entitled them to additional payments from past insurance claims that were not previously allowed because their policies did not allow for stacking. The federal court certified the question to the Supreme Court as to whether Hardy applied prospectively only or retroactively to qualified claims arising before the Hardy decision. The Supreme Court agreed with the decision in Harper

v. Va. Dept. of Taxation, 509 US 86 (1993), that limiting a rule of law to its prospective application creates an arbitrary distinction between litigants based merely on the timing of their claims and that in the interests of fairness and finality, the line should be drawn between claims that are final and claims that are not. The Supreme Court then decided that the retroactivity test in Chevron Oil Co. v. Huson, 404 US 97 (1971), still applies to Montana civil decisions if all three Chevron factors are met: (1) the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed; (2) the court must weigh the merits and demerits in each case by looking at the prior history of the rule in question, its purpose and effect, and whether retroactive application will further or retard its operation; and (3) the inequity imposed by retroactive application has been weighed. However, the retroactive effect of a decision does not apply to cases that became final or that were settled prior to a decision's issuance. Thus, Hardy applies retroactively in qualifying circumstances on open claims arising before its issuance and is limited to cases pending on direct appeal or not yet final. Dempsey v. Allstate Ins. Co., 2004 MT 391, 325 M 207, 104 P3d 483 (2004). See also LaMere v. Farmers Ins. Exch., 2011 MT 272, 362 Mont. 379, 265 P.3d 617, holding that under Dempsey, a settled case is considered final.

Breath Test Administered Before Reading of Implied Consent Advisory — Motion to Suppress Properly Denied: Kintli was stopped for suspicion of DUI. She was administered field sobriety tests and was read the preliminary alcohol screen test advisory. At the detention center, she refused to repeat the field sobriety tests and indicated that she wanted to take the breath test. The test was administered and resulted in a BAC of 0.262. Following the test, the officer read Kintli the consent advisory and offered to void the test and administer a new one. Kintli indicated that she did not want to retake the test. Kintli was found guilty of DUI per se in City Court and appealed to District Court for a trial de novo. She moved to suppress the results of the breath test, which was denied. Kintli then pleaded guilty, reserving the right to appeal the suppression denial. The Supreme Court upheld the District Court. Because the right to independent blood testing remains constant regardless of whether the suspect refuses or submits to testing, Kintli's argument that the officer's failure to advise her of this right before she consented invalidates her consent is nonsensical. She was timely advised of her right to obtain independent blood testing, and this was sufficient to safeguard her due process rights. Section 61-8-409 requires an officer to advise a person submitting to a preliminary breath test ("PBT") of the right of refusal and the consequences of refusal. The Supreme Court has held that in order for that statutory section to have meaning, the notice of the right of refusal and the consequences of refusal necessarily must precede the testing. No similar statutory requirement is found as to other BAC tests conducted after arrest. St. v. Kintli, 2004 MT 373, 325 M 53, 103 P3d 1056 (2004).

Award of Attorney Fees at Variance With Contingency Agreement Permissible — Constitutionality of Workers' Compensation Hourly Attorney Fee Rule: Bustell entered a contingency fee agreement with the attorney handling her workers' compensation claim. Bustell's claim was found to be compensable, and the Workers' Compensation Court held that Bustell was entitled to attorney fees. However, the court awarded fees based on the hourly attorney fee provisions in 39-71-614 rather than on the contingent fee agreement. On appeal, Bustell contended that the hourly fee rule violated due process by failing to protect a claimant's net benefits, particularly claimants who enter a contingency fee agreement, and by shifting the burden of paying attorney fees from the insurer to the claimant. Bustell also asserted that the rule violated equal protection by preventing her from seeking reasonable attorney fees as compared to other similarly situated claimants. Section 39-71-614 was enacted in response to the holding in Wight v. Hughes Livestock, Inc., 204 M 98, 664 P2d 303 (1983), which created a strong presumption in favor of the reasonableness of a contingent fee contract, and the section was intended to eliminate any question that the basis for determining attorney fees would be an hourly fee to be determined in the judge's discretion. Bustell failed to overcome the presumption of constitutionality, and the Workers' Compensation Court correctly found no due process violation. Bustell's equal protection claim also failed. There are not two legitimate classes for an equal protection challenge because every claimant is treated equally under the statutes. The amount of fees awarded is not relevant to any discriminatory treatment of the claimants themselves. Bustell v. AIG Claims Serv., Inc., 2004 MT 362, 324 M 478, 105 P3d 286 (2004).

Restitution Order Proper Given Defendant's Ability to Pay: The sentencing court ordered Thaut to pay $69,457 in restitution. Thaut appealed the award on grounds that the court failed to meet statutory requirements establishing Thaut's financial resources and future ability to pay and on grounds that due process rights were violated when the court failed to consider several

factors in Thaut's ability to pay, including Thaut's age and short time to work following parole, minimum wage employment history, lack of assets and ability to acquire assets in the future, and mental health issues related to an alleged prior head injury. However, the presentence investigation and supplemental presentence investigation provided adequate documentation regarding Thaut's ability to pay restitution and to work hard to earn a living. Further, Thaut had no documented physical limitations and was unemployed only because he was incarcerated. The District Court's determination that Thaut had the ability to pay medical expenses, a grant from the Board of Crime Control, and property damages was amply supported by the record, and the Supreme Court affirmed. St. v. Thaut, 2004 MT 359, 324 M 460, 103 P3d 1012 (2004).

Former Statute of Repose Precluding Redress Under Former Occupational Disease Act: Hardgrove was employed by W.R. Grace until 1984. About 14 years later, Hardgrove discovered that he had been exposed to asbestos while employed and filed an occupational disease claim 1 month and 1 day after discovering the problem. The employer's insurer refused to cover the claim. The District Court concluded that Hardgrove's claim was barred under 39-72-403(3) (subsection (3) deleted in 1985 and section now repealed) and that the statute violated neither the constitutional equal protection clause nor the full legal redress clause. On appeal, the Supreme Court affirmed after characterizing 39-72-403(3) (now repealed) as a statute of repose. As distinguished from a statute of limitations, which limits the time within which a claimant may pursue a right, a statute of repose extinguishes the existence of the underlying right itself and establishes the absolute time beyond which no party is liable if the statutory period for bringing the claim can lapse before the action accrues. A court may equitably toll a statute of limitations, but only a legislative mandate can toll a statute of repose. In this case, the statute of repose extinguished Hardgrove's right to the cause of action 3 years after Hardgrove finished work, so the claim filed 14 years later was barred and Hardgrove had no right to legal redress under the former Occupational Disease Act of Montana (now repealed and merged with Workers' Compensation Act). Without deciding whether Hardgrove had a legal remedy outside the former Act, the Supreme Court nevertheless affirmed that 39-72-403(3) (now repealed) was a statute of repose that did not violate the constitutional equal protection and full redress provisions. Hardgrove v. Transp. Ins. Co., 2004 MT 340, 324 M 238, 103 P3d 999 (2004).

Prior DUI Convictions Affirmed in Absence of Direct Evidence of Irregularity — Presumption of Regularity of Prior Convictions: Snell contended that it was improper for the state to use two prior DUI convictions to elevate a new DUI charge to a felony based on the fact that the prior convictions were invalid because Snell was not informed of the right to counsel. Although the state may not use a constitutionally infirm conviction to support an enhanced punishment, a defendant must overcome the presumption of the regularity of the prior convictions with direct evidence of irregularity. However, Snell was unable to recall facts about the judges involved in both prior DUI cases, casting considerable doubt on his ability to recall other critical details in those cases. The District Court correctly held that Snell's testimony was not sufficient to overcome the presumption of regularity through direct evidence and that the prior convictions were therefore constitutionally firm. Denial of the dismissal motion was affirmed. St. v. Snell, 2004 MT 334, 324 M 173, 103 P3d 503 (2004). See also St. v. Moga, 1999 MT 283, 297 M 1, 989 P2d 856 (1999), and St. v. Weldele, 2003 MT 117, 315 M 452, 69 P3d 1162 (2003).

Time Limit for Filing for New Trial Constitutional — No Jurisdiction to Grant New Trial After Time Limit Runs: After the 60-day deadline for granting a new trial in former Rule 59(d), M.R.Civ.P. (now superseded), the District Court granted plaintiff a new trial. Defendant appealed, saying that the District Court was without jurisdiction. On appeal, plaintiff argued that the time limit was unconstitutional and arbitrary and deprived plaintiff of procedural due process. Citing In re Marriage of Richards, 2001 MT 183, 306 M 212, 31 P3d 1002 (2001), the Supreme Court noted that just because a rule is arbitrary does not mean that it should not be favored and that insisting on a firm time limit advances the cause of justice by bringing predictability to the legal process. The court concluded that the time limit is constitutional and that the District Court did not have jurisdiction to grant plaintiff a new trial after the time limit had run. Forsythe v. Leydon, 2004 MT 327, 324 M 121, 102 P3d 25 (2004), overruled in part by Green v. Gerber, 2013 MT 35, 369 Mont. 20, 303 P.3d 729. See also Kelly v. Sell & Sell Paint Contractors, 175 M 440, 574 P2d 1002 (1978).

Placement of Children With Noncustodial Parent Proper — Parental Rights Not Terminated: A mother contended that her due process rights were violated when the children were adjudicated as youths in need of care and the state placed the children with their father. The Supreme Court declined to address the due process claims because they were raised for the first time on appeal, and the court affirmed the placement. The mother's parental rights were not terminated; rather,

the District Court followed the statutory procedure in 41-3-438 after finding that placement with the father was in the children's best interests. The state took the necessary steps to ensure safe placement as required in the Interstate Placement of Children Compact, and the state was properly relieved of any further obligation once the concern for the children being youths in need of care was eliminated by the placement. In re A.C., T.C., & C.W., 2004 MT 320, 324 M 58, 101 P3d 761 (2004).

Increased Sentence Imposed on Resentencing After Original Sentence Vacated Not Due Process Violation: After Redfern's petition for postconviction relief was granted, Redfern's original sentence was vacated and the District Court resentenced him to a greater period of potential imprisonment and supervision than the original sentence. Redfern appealed the new sentence, contending that the greater sentence on resentencing violated the right to due process. The Supreme Court affirmed. Under N.C. v. Pearce 395 US 711 (1969), neither double jeopardy nor equal protection bars imposition of a more severe sentence upon resentencing after an original conviction is set aside unless a heavier sentence is imposed to punish a defendant for successfully having the original conviction set aside. However, in order to meet due process requirements and allow full appellate review of the constitutional legitimacy of the sentence, a longer sentence on resentencing after a new trial must be based on objective information concerning identifiable conduct of the defendant after the original sentencing and reasons for the longer sentence must affirmatively appear on the record. Both conditions were met here, there was no showing that the more severe sentence was imposed as retaliatory motivation by the sentencing judge, and the new sentence was within statutory sentencing parameters. St. v. Redfern, 2004 MT 277, 323 M 225, 99 P3d 223 (2004), following St. v. Forsyth, 233 M 389, 761 P2d 363 (1988), and St. v. Hubbel, 2001 MT 31, 304 M 184, 20 P3d 111 (2001), and distinguishing St. v. Ringewold, 2001 MT 185, 306 M 229, 32 P3d 729 (2001). Redfern was followed in St. v. Bullplume, 2011 MT 40, 359 Mont. 289 251 P.3d 114.

Punishment for Contempt by Judge Who Issues Order Not Erroneous Absent Showing of Impartiality — No Due Process Violation: Drew was appointed to represent a criminal defendant but failed to file an amended petition for postconviction relief as ordered. Following several months of missed deadlines, the District Court held that Drew had failed to provide any plausible explanation for the failure to comply with the court's orders. Drew was then removed from the case, charged with contempt, and sentenced to jail time and a fine. The day before the jail term was to begin, Drew filed a writ of certiorari and a motion for an emergency stay order, contending that the District Court's action constituted a deprivation of Drew's due process right, including the right to allocution, a hearing before a neutral magistrate, and the opportunity to present testimony through witnesses by way of defense or explanation. The stay was issued, but in an original proceeding, the Supreme Court disagreed, denied the writ, and lifted the stay. Under 3-1-518, the judge who issues a contempt order is authorized to punish the contempt, and the only proviso against the court's punishment authority is if it is shown that the judge would not be impartial. The statute itself provides that the charged person is entitled to a hearing and to examine witnesses and also takes into account the issue of partiality by allowing the charged person to demonstrate that the sitting judge could not be impartial, in which case the neutral magistrate requirement will be imposed. Section 3-1-518 contains its own due process safeguards. Thus, due process is not offended by allowing a District Court Judge to preside over a contempt hearing when the contempt arose from violation of an order of that court issued after a hearing on the merits on the subject of the order. In these situations, the judge who conducted the hearing and issued the order retains the authority to punish that violation by contempt proceedings, as long as the other due process protections in the statute and enunciated by the Montana and U.S. Supreme Courts are met and honored, unless it is shown that the judge could not be impartial. Drew v. District Court, 2004 MT 154, 321 M 520, 92 P3d 1195 (2004). See also Animal Foundation of Great Falls v. Eighth Judicial District Court, 2011 MT 289, 362 Mont. 485, 265 P.3d 659.

No Standing of One Parent to Assert Due Process Rights of Another Parent — No Eradication of Court Jurisdiction Based on Lack of Notice to Purported Fathers: A mother asserted that guardianship proceedings regarding her children were invalid because the purported fathers, whose identities or whereabouts were unknown, were not notified, in violation of the fathers' due process rights. The Supreme Court disagreed. Regardless of whether the notice statute was fully complied with, the mother's rights were not compromised, nor was she injured by the statutory violation; thus, the mother had no standing to assert a violation of the purported fathers' due process rights. Further, the District Court had statutory subject matter jurisdiction over the guardianship proceedings, and any failure of the court to comply with the notice requirements

would have resulted in lack of personal jurisdiction over the fathers, but not eradication of the court's jurisdiction over the subject matter. In re B.F. & A.W., 2004 MT 61, 320 M 261, 87 P3d 427 (2004).

Failure to Hold Parental Permanency Plan Hearing Within Statutory Time Not Violative of Due Process: A mother whose parental rights were terminated contended that the failure to hold a permanency plan hearing within the time enumerated in 41-3-445, the length of the proceeding, and the denial of her request to allow her counselor to videotape her visits with her children violated her due process rights. The Supreme Court examined the case for fundamental fairness and affirmed. Under 41-3-445, a permanency plan hearing is not required if a child has been returned to a biological parent, and in this case, the children were returned to the custody of their biological father. The court did not condone the failure to hold a timely hearing as required, but noted that in this case, there was an ongoing attempt to reunify the children with one of the parents, which was the goal of the permanency plan, so the goal was accomplished without a hearing. As to the issue of length of proceedings, the court noted that despite the failure of the mother to show progress toward reunification goals, after 15 months, the Department was still actively working with her to accomplish the goal and did not seek termination until more than 20 months after the children were removed from the home, so the length of time did not prejudice the mother's rights. Moreover, the request for presence of the mother's counselor during visits was never actually denied by the District Court because the mother had no visitation rights at the time of the request that could have been denied. In re A.R. & S.A.R., 2004 MT 22, 319 M 340, 83 P3d 1287 (2004).

No Abuse of Discretion in Giving More Weight to Testimony of Guardian Ad Litem Than Parent: In determining the best interests of the children, the District Court relied more on the testimony of a guardian ad litem than on that of the mother. The mother contended that the guardian's testimony was highly prejudicial and based on hearsay, violated her due process rights, and lowered the state's burden of proof. She also contended that the statute that allowed the guardian's testimony was unconstitutional. Without reaching the issue of constitutionality, the Supreme Court affirmed. The District Court did not rely on the guardian's testimony in determining whether the mother complied with her treatment plan or whether her unfitness was likely to change within a reasonable time. Those criteria were established by other testimony, so the District Court did not abuse its discretion in terminating the mother's parental rights. In re S.H. & B.H., 2003 MT 366, 319 M 90, 86 P3d 1027 (2003).

Dismissal of Charges Required if Defendant's Fitness to Proceed Undetermined After Ninety Days — Civil Proceedings Mandated Upon Dismissal: Pursuant to Jackson v. Ind., 406 US 715 (1972), after only a pretrial competency hearing, it is unconstitutional to hold a person who is unfit to proceed without following civil and criminal commitment procedures provided by state law. Due process requires, at a minimum, some rational relationship between the nature and duration of commitment and its purpose. Thus, 46-14-221 requires the committing court to review a defendant's fitness to proceed within 90 days of the original commitment, and if, after 90 days, the court finds that the defendant is still unable to proceed and will not be fit to proceed within the reasonably foreseeable future, the proceeding against the defendant must be dismissed. However, dismissal does not mandate freedom for a potentially violent mentally ill individual. The statute provides that once the criminal proceeding is dismissed, the next mandatory step is to pursue civil commitment proceedings under Title 53, ch. 20 or 21. However, an alternative procedure is available under 46-14-202, in which the court may set the time for determining fitness to proceed. St. v. Tison, 2003 MT 342, 318 M 465, 81 P3d 471 (2003), following St. v. Meeks, 2002 MT 246, 312 M 126, 58 P3d 167 (2002).

No Due Process Violation Based on Lack of Requirement Under Implied Consent Statutes to Provide Information Concerning Ramifications of Refusal to Take Breath Test: Turbiville, a North Dakota resident, was stopped in Montana for suspected DUI and was read a preliminary alcohol screening test advisory that outlined the right to refuse a breath test and the license suspension accompanying a refusal. He was provided no additional information concerning other rights regarding the preliminary breath test (PBT), particularly that Turbiville could refuse the test and challenge the license seizure in court. Turbiville took the PBT and an Intoxilyzer test, both of which indicated intoxication, and later moved to suppress the test results on grounds that the Montana implied consent statutes were misleading and inaccurate as applied to nonresidents. The motion was denied, and Turbiville appealed, asserting that if he had been advised of the right to a hearing to challenge the license seizure, he would have refused the PBT and that failure to provide an adequate advisory violated due process. The Supreme Court disagreed. The option to refuse a breath or blood test is not a matter of due process, but rather a matter of grace

bestowed by the Legislature, and the Legislature may contour the favor in any manner considered appropriate. The implied consent statutes do not require an officer to provide information to an arrested motorist as to ramifications of the refusal to take a test, nor is a driver even entitled to be informed of the option to refuse the test. Further, by clear definition in 61-1-136, a driver's license includes a nonresident's driving privilege, so Turbiville's contention that the advisory was misleading on grounds that Montana had no authority to suspend a North Dakota driver's license also failed because the advisory was technically correct and accomplished the purpose of informing Turbiville of the potentially serious consequences of losing Montana driving privileges upon refusal to take a breath test. St. v. Turbiville, 2003 MT 340, 318 M 451, 81 P3d 475 (2003).

No Due Process Violation of Workers' Compensation Claimant Who Uses Available Statutory Processes: Following a work-related injury in 1992, Wiard did not submit a medical claim within 60 months, as required under 39-71-704(1)(d) (now (1)(e)) to avoid termination of benefits. When a subsequent claim based on the 1992 injury was denied in 2000, Wiard asserted that the denial of benefits was a due process violation because there was no notice and opportunity to be heard prior to termination of Wiard's property right in workers' compensation benefits. The Supreme Court held that Wiard's claim of a violation of due process was properly dismissed because Wiard availed himself of the mediation process and trial before the Workers' Compensation Court and thus was afforded due process. Wiard v. Liberty NW. Ins. Corp., 2003 MT 295, 318 M 132, 79 P3d 281 (2003).

Three-Year Statute of Limitations Reasonable for Prosecution of Misdemeanor Fish and Game Violations — Equal Protection and Due Process Not Violated: Defendant was charged with five misdemeanor fish and game and outfitter violations that occurred nearly 2 years earlier. Although misdemeanor violations must generally be charged within 1 year, 45-1-205(5) and (6) allow charges for misdemeanor fish and game crimes to be brought within 3 years of violation. Defendant contended that the extended statute of limitations for charging fish and game crimes violated equal protection and due process guarantees. The District Court reviewed the legislative history of 45-1-205(5) and (6) and concluded that the extended statute of limitations served a reasonable relation to the proper legislative purpose of protecting wildlife and that in order to effectively enforce fish and games laws, additional time to discover and investigate fish and game violations was warranted. The Supreme Court agreed. A separate class of misdemeanors for fish and game violations did not violate equal protection because all persons who commit such crimes are in a similarly situated class and subject to the same treatment. Further, because fish and game and outfitter violations sometimes require investigation over several hunting seasons and involve perpetrators who reside out of state, an extended statute of limitations is a reasonable exercise of the state's legitimate police power in preserving wildlife and does not violate substantive due process. St. v. Egdorf, 2003 MT 264, 317 M 436, 77 P3d 517 (2003).

Probation Revocation Based on Statements of Defense Counsel Without Waiver of Right to Hearing by Defendant Violative of Due Process: At Finley's rerevocation hearing, his attorney told the court that Finley had decided to admit violating the terms of his probation. The court accepted the admission, revoked probation, and sentenced Finley to 10 years in prison. Finley immediately asked to withdraw the admission, but the request was denied. On appeal, Finley contended that his due process rights were violated because he never personally admitted any alleged violations or waived the right to a revocation hearing. The state countered that Finley did not refute counsel's statement, so the court was correct to accept counsel's statement as true and revoke Finley's suspended sentence. In a case of first impression, the Supreme Court agreed with Finley. Under 46-18-203, a probationer is guaranteed a hearing before the sentencing court. Alternatively, a probationer may waive the right to a full revocation hearing and admit the alleged violation or accept favorable relief granted by the court, but for a waiver of a fundamental right to be recognized by the courts, the waiver must be informed, intelligent, and voluntary, and this applies to waiver of a revocation hearing as well. Courts may not presume waiver based on the representations of counsel. Here, in accepting counsel's statement, the District Court committed reversible error when it: (1) failed to admonish Finley regarding his constitutional rights; (2) neglected to ascertain that Finley knew the consequences of admitting a parole violation; (3) failed to determine that Finley voluntarily waived the right to a revocation hearing; (4) accepted a waiver of the right to a hearing based on presumption only; and (5) failed to establish a factual basis for the alleged violation. The state's argument that Finley admitted the violations at a prior initial revocation hearing also failed. The District Court took no notice of the entry of Finley's admission at the prior voided hearing, nor was testimony at the earlier voided proceeding admissible as evidence during the later proceeding. Because Finley's alleged waiver was not informed, intelligent, and voluntary, his due process rights were violated, and the case

was remanded. St. v. Finley, 2003 MT 239, 317 M 268, 77 P3d 193 (2003). See also Gagnon v. Scarpelli, 411 US 778 (1973), and People v. Hall, 760 NE2d 971 (Ill. 2001).

Misleading Testimony of Arresting Officer Not Material to DUI Verdict — No Due Process Violation: At Gratzer's DUI trial, he argued that he could not have been in actual control of a vehicle because he had no ignition key for it. The arresting officer testified that he once owned a similar vehicle and needed no key to operate it. Gratzer filed for postconviction relief after discovering that the officer never actually owned a similar vehicle, but relief was denied. Gratzer appealed, contending that the officer's false testimony violated his due process rights. The Supreme Court noted that under Gollehon v. St., 1999 MT 210, 296 M 6, 986 P2d 395 (1999), it must be shown that false testimony was material to the verdict to prevail on a due process claim. Gratzer argued that Gollehon applied because the officer's testimony was material to the conviction inasmuch as it supported one of the elements of the crime. The Supreme Court disagreed. Although the officer may have been misleading in saying that he had owned a similar vehicle when in fact the vehicle was a county-owned car that was issued to him, ownership of the vehicle was irrelevant to the question of whether the vehicle would start without a key and was not material to the verdict. Further, testimony that the officer saw Gratzer drive and exit the vehicle was sufficient in itself for the trier of fact to determine that Gratzer was driving or in actual physical control of the vehicle. The District Court was affirmed. Gratzer v. St., 2003 MT 169, 316 M 335, 71 P3d 1221 (2003).

Waiver of Constitutional Issues Related to No-Bond Hold by Failure to Object in Trial Court: Hendricks contended that his constitutional right to due process and the right against excessive bail were violated when he was held without bond for more than 72 hours in violation of 46-23-1012. However, there was no factual record to support the allegations, nor did Hendricks object to the asserted constitutional violations at a revocation hearing or move to dismiss the proceedings. Failure to adequately raise the issue in District Court and to create a factual record constituted a waiver of objection and precluded review of the issue on appeal. Further, Hendricks' assertion of error in the District Court's reliance on hearsay testimony at the revocation hearing failed on the same grounds. St. v. Hendricks, 2003 MT 163, 316 M 296, 71 P3d 1212 (2003), following St. v. Azure, 2002 MT 22, 308 M 201, 41 P3d 899 (2002).

No Constitutional Liberty Interest in Being Housed Exclusively at State Prison: Following a conviction for deliberate homicide and use of a firearm, Wright was sentenced in 1996 to the state prison in Deer Lodge for 75 years, where he was originally placed. Over the years, Wright was placed at various other institutions, including out-of-state and in-state regional detention and private correctional centers. Wright filed a writ of prohibition to prevent the state from housing him anywhere but the state prison in Deer Lodge, pursuant to the terms of the written judgment. Under the law in effect at the time of Wright's sentencing, the Deer Lodge prison was the only adult male correctional facility in Montana, but the statutory definition has since been expanded to include other facilities. Wright contended that application of the amended definition to his sentence was unconstitutionally ex post facto, in violation of his liberty interests. The Supreme Court disagreed. Pursuant to Meachum v. Fano, 427 US 215 (1975), Wright's conviction sufficiently extinguished Wright's liberty interest to empower the state to confine him in any of its prisons, and under Olim v. Wakinekona, 461 US 238 (1983), Wright also had no justifiable expectation that he would be imprisoned in any particular state. Further, in order for the state to create a liberty interest, under McDermott v. Dept. of Corrections, 2001 MT 134, 305 M 462, 29 P3d 992 (2001), it must first enact a law that establishes a right of real substance, and then even those statutorily defined interests are restricted to freedom from atypical and significant hardships in relation to the ordinary incidents of prison life or restraints that inevitably affect the duration of the prisoner's confinement. The Supreme Court held that even if the 1995 definition of state prison did confer a right of real substance, being transferred from one prison to another, even out of state, did not meet the McDermott test for hardship or duration of confinement. Thus, Wright had neither a federal nor a state constitutional liberty interest in being housed exclusively at the state prison in Deer Lodge, and the state has authority to transfer Wright from that facility. Wright v. Mahoney, 2003 MT 141, 316 M 173, 71 P3d 1195 (2003), followed in Quigg v. Slaughter, 2007 MT 76, 336 M 474, 154 P3d 1217 (2007).

Addition of Written Sentencing Conditions Not Enunciated Orally at Hearing — Johnson Applied: Drube failed to complete a sex offender program, so the District Court revoked his suspended sentence and sentenced him to a 9-year term, with commitment to the Department of Corrections for the first 5 years and the remainder to be served at the state prison. The court specified that the prison portion of the sentence be suspended as long as Drube met sentencing conditions, including completion of a long-term aftercare program. Drube appealed the sentence

on grounds that the court imposed a condition on the sentence that was impossible to fulfill and because the written revocation and sentencing order differed from the oral sentence enunciated at the sentencing hearing. Reviewing the sentence for legality, the Supreme Court affirmed. Drube presented nothing establishing that it would be impossible to complete the sex offender program within the reinstated 5-year commitment to the Department. Arguing that eight written conditions added to the suspended sentence by written order should be stricken, Drube cited St. v. Lane, 1998 MT 76, 288 M 286, 957 P2d 9 (1998), for the proposition that when written and oral sentences differ, the oral order prevails. The Supreme Court agreed with the general rule in Lane, but noted that the rule is not absolute. Under St. v. Johnson, 2000 MT 290, 302 M 265, 14 P3d 480 (2000), when deciding whether a subsequent written sentencing order is unlawful because it contains conditions not enunciated orally, the court first determines whether a defendant was afforded the opportunity to respond to the inclusion upon sufficient notice at hearing and second whether the portion of the written sentence substantively increases the defendant's loss of liberty and sacrifice of property. Here, all the conditions in the 2002 written revocation and sentencing order were contained either in Drube's original sentence or in a 2001 revocation and sentencing order and thus were not new or unknown to Drube, who had the opportunity to respond to the conditions placed on the sentence, nor did Drube present any argument that the eight conditions substantively increased the loss of liberty or sacrifice of property. Thus, the 2002 sentencing order was not rendered unlawful by the addition of conditions not imposed orally at the sentencing hearing. St. v. Drube, 2003 MT 138, 316 M 156, 69 P3d 1182 (2003).

Rule of Law Regarding Admissibility of Evidence of Subsequent Accident With Nonparty — Defendant's Burden to Show That Damages Divisible and Apportionment Proper: Following Truman's injury in an automobile accident, she was involved in a second automobile accident and in an accident involving an ultralight aircraft. The District Court held that evidence of Truman's injuries in the second automobile accident and the aircraft accident would be admissible in a trial related to the first automobile accident to disprove causation. After accepting supervisory control, the Supreme Court relied on an analogous situation in Azure v. Billings, 182 M 234, 596 P2d 460 (1979), holding that once a plaintiff presents a prima facie case that the defendant's conduct contributed as a cause of injury, the burden shifts to the defendant to prove that the injury is divisible. A defendant is permitted to submit relevant evidence of subsequent accidents to negate allegations that the defendant is the cause or sole cause of the injury, but the defendant may not attempt to apportion fault to the conduct of a nonparty because assignment of liability to a nonparty without affording that party the opportunity to defend against liability risks an unreliable and disproportionate assignment of liability and places the burden of defending the nonparty on the plaintiff. In this case, plaintiff must prove that defendant's conduct contributed as a substantial factor to the damages, but need not prove the extent to which defendant is responsible. If defendant proves by a reasonable medical probability that the injury is divisible and that defendant is responsible for only a portion of the damages, the jury may reduce defendant's obligation by the portion of damages for which it is proved that defendant is not responsible. However, if the injury is indivisible and evidence does not permit an apportionment, then defendant is liable for the entire damage. Truman v. District Court, 2003 MT 91, 315 M 165, 68 P3d 654 (2003), followed in Olson v. Shumaker Trucking & Excavating Contractors, Inc., 2008 MT 378, 347 M 1, 196 P3d 1265 (2008), and distinguished in Cheff v. BNSF Ry. Co., 2010 MT 235, 358 Mont. 144, 243 P.3d 1115.

Offset Provision in Underinsured Motorist Policy Violative of State Policy — Antistacking Provisions Unconstitutional: Hardy paid separate premiums for underinsured motorist (UIM) coverage of $50,000 a person and $100,000 an accident for each of three vehicles. Hardy was injured when the vehicle that he was riding in was negligently struck by another car. Hardy recovered $50,000 from the other driver's liability insurer, but that amount was insufficient to cover Hardy's injuries, so Hardy sought compensation pursuant to the UIM coverage on his vehicles. Hardy believed that the policies could be stacked to aggregate $150,000 of UIM coverage. Defendant insurance company denied coverage, and Hardy sued in federal District Court. The insurer raised three arguments in its defense, contending that: (1) the tortfeasor's vehicle was not underinsured, as defined in the policy, because the total liability coverage for the tortfeasor's vehicle was equal to the highest single UIM coverage limit in Hardy's policy; (2) the policy required Hardy's UIM coverage for one vehicle to be offset by all amounts recovered from the tortfeasor; and (3) Hardy's UIM coverages could not be stacked or aggregated for purposes of either comparing limits or affording $150,000 of UIM coverage. The federal District Court certified the three questions to the Montana Supreme Court, which determined that the UIM definition and offset clause in Hardy's policy violated Hardy's reasonable expectation of coverage when a

tortfeasor's insurance provided inadequate indemnity. The policy declarations page suggested coverage in an amount that was actually not available; therefore, the terms of the UIM coverage were ambiguous in violation of Montana public policy and rendered the coverage that the insurer promised to provide illusory. Further, the provisions of 33-23-203 that allow insurers to charge premiums for nonexistent coverage are not rationally related to the objective of maintaining affordable insurance in Montana and constitute an arbitrary and capricious legislative action that is unconstitutionally violative of due process. A Montanan should reasonably expect coverage up to the aggregate limits of separate policies when a separate premium for UIM coverage was charged for each policy. Antistacking provisions that allow an insurer to receive valuable consideration for coverage that is not provided are against public policy. Hardy v. Progressive Specialty Ins. Co., 2003 MT 85, 315 M 107, 67 P3d 892 (2003), followed in Mitchell v. St. Farm Ins. Co., 2003 MT 102, 315 M 281, 68 P3d 703 (2003), and distinguished in Parish v. Morris, 2012 MT 116, 365 Mont. 171, 278 P.3d 1015. The Hardy decision was applied retroactively to open claims arising before its issuance and was limited to cases pending on direct appeal or not yet final in Dempsey v. Allstate Ins. Co., 2004 MT 391, 325 M 207, 104 P3d 483 (2004), which was followed in LaMere v. Farmers Ins. Exch., 2011 MT 272, 362 Mont. 379, 265 P.3d 617, holding that under Dempsey, a settled case is considered final. See also Chaffee v. USF&G Co., 181 M 1, 591 P2d 1102 (1979), and Bennett v. St. Farm Mut. Auto. Ins. Co., 261 M 386, 862 P2d 1146 (1993).

Process for Establishing County Building Code Jurisdictional Area Based on Franchise Limitation Unconstitutional: The 2001 Legislature enacted Senate Bill No. 242 (SB 242), which established a process for designating a county building code jurisdictional area and eliminating municipal jurisdictional areas by an election procedure limited to record owners of real property instead of the general constituency. When questioned regarding the constitutionality of the process, the Supreme Court noted that because voting rights cases involve a fundamental political right, strict scrutiny required the state to demonstrate a compelling governmental interest in restricting the voting franchise. The court concluded that: (1) the application and enforcement of building codes is an issue of public safety that affects all persons living in the area, not just record owners of real property; (2) governmental entities that oversee building codes are not special-purpose units whose functions and actions exclusively or disproportionately affect record owners of real property over other constituents in the area that do not own real property; and (3) elections to determine who may impose and enforce building codes in a given area are general interest elections rather than special interest elections. The state failed to show a compelling interest in limiting the voting franchise to only record owners of real property, and because the valid provisions of SB 242 were not severable from the invalid provisions, the court held that SB 242 was invalid in its entirety. (However, see Ch. 443, L. 2003, wherein the Legislature amended the voting procedure to address the franchise limitation.) Finke v. State ex rel. McGrath, 2003 MT 48, 314 M 314, 65 P3d 576 (2003). See also Kramer v. Union School District, 395 US 621 (1969).

Administration of Breath Test Not Mandatory: Beanblossom was arrested for felony DUI and was read an implied consent advisory. When asked if he would consent to a breath test, Beanblossom consented, but the test was never administered. Beanblossom moved to dismiss the charge based on the officer's failure to administer the test, contending that the language of 61-8-402 mandatorily required administration of the test, and that failure to do so violated his due process rights. The motion was denied, and Beanblossom appealed. The Supreme Court noted that a driver in Montana is presumed to have consented to taking a breath test if an officer has reasonable grounds to believe that the driver is intoxicated. However, the language in 61-8-402(2) merely mandates who must administer a breath test, but does not mandate administration of the test. Thus, denial of Beanblossom's motion to dismiss was not erroneous. St. v. Beanblossom, 2002 MT 351, 313 M 394, 61 P3d 165 (2002). See also St. v. Entzel, 805 P2d 228 (Wash. 1991).

No Violation of Due Process Rights Upon Failure to Request Independent Blood Test: When an alleged crime involves intoxication, the accused has the right under 61-8-405 to obtain, upon request, a sobriety test independent of that offered by the arresting officer. Beanblossom contended that failure to administer an independent blood test was violative of his due process rights. However, a due process violation arises only when an accused requests but is then denied an independent sobriety test. Beanblossom did not request an independent test, so no due process violation occurred. St. v. Beanblossom, 2002 MT 351, 313 M 394, 61 P3d 165 (2002).

Deferral of Sentence to Allow Payment of Restitution Not Violative of Due Process Rights: Benoit was charged with felony theft and entered a nonbinding plea agreement to plead guilty in exchange for a recommendation for a 2-year deferred sentence, based on the possible imposition of various conditions, including the payment of restitution. Benoit was then convicted and

ordered to repay $15,933.90 in restitution. At the restitution hearing, Benoit admitted that with her current take-home salary and expenses, the restitution could not be repaid in 2 years, so the sentencing court sentenced Benoit to a 6-year deferred sentence to allow time to pay the restitution, but gave Benoit the opportunity to withdraw the guilty plea after 2 years if restitution was paid within that time. Benoit appealed on grounds that increasing the deferred sentence was a violation of due process, citing St. v. Farrell, 207 M 483, 676 P2d 168 (1984), and St. v. Pritchett, 2000 MT 261, 302 M 1, 11 P3d 539 (2000), and asserted that the sentence should be remanded for determination of a length of sentence consistent with the charge and Benoit's history instead of the ability to pay restitution. The Supreme Court distinguished Farrell and Pritchett, noting that Benoit's sentence was not based on indigency, and coupled with the fact that Benoit was given the opportunity to withdraw the guilty plea prior to the termination of the 6-year deferred sentence, Benoit's due process rights were not violated through imposition of the conditional 6-year deferred sentence. St. v. Benoit, 2002 MT 166, 310 M 449, 51 P3d 495 (2002).

Defendant Informed of Right to Independent Blood Test After Administration of Portable Breath Test — No Violation of Due Process Rights: After Feldbrugge was stopped for speeding, the investigating officer noticed that Feldbrugge seemed confused, had difficulty removing his driver's license from his wallet and producing proof of registration and insurance, had bloodshot and glassy eyes and slurred speech, and was unsteady on his feet. Upon questioning, Feldbrugge admitted having had a couple of drinks. The officer did not perform field sobriety tests, but did ask Feldbrugge to take a portable breath test (PBT). The officer read a short advisory that did not contain information regarding Feldbrugge's right to obtain an independent blood test to challenge the PBT results and told Feldbrugge that if he passed the PBT, he would not be arrested, but if he failed the PBT, he would be arrested for DUI. Feldbrugge consented to the PBT, which he failed, and was arrested and taken to the county jail. Before being administered an Intoxilyzer breath test at the jail, Feldbrugge was read the informed consent advisory form, which included a statement regarding Feldbrugge's right to obtain an independent blood test. At trial, Feldbrugge moved to suppress the evidence on grounds that his due process rights were violated because he was not informed of the right to an independent blood test until after the PBT was administered, citing St. v. Strand, 286 M 122, 951 P2d 552 (1997), which establishes an officer's affirmative duty to inform a defendant of the right to an independent blood test at the time of arrest while the blood can still be analyzed. The motion was denied, and Feldbrugge appealed. The state maintained that the officer in this case complied with Strand by informing Feldbrugge of the right to an independent blood test after arrest and at a time when the right could be meaningfully exercised, noting that Strand involves a defendant's right to attempt to obtain exculpatory evidence and does not implicate the separate right to refuse to submit to a breath test that has been requested under the implied consent statute. Feldbrugge argued that had he been informed of the right to an independent blood test, he might have refused to consent to the PBT. However, the notion that Feldbrugge had a choice between taking a PBT or obtaining an independent blood test, without penalty, was misguided. Under the implied consent statute, every person who operates a motor vehicle in this state impliedly consents to a blood or breath test, and if the test is refused, the person's driver's license is subject to immediate seizure and suspension. A person may obtain an independent blood test in addition to the test administered at the direction of an officer, but the right to an independent blood test, as discussed in Strand, is separate from the obligation to submit to an officer-designated test under the implied consent law. Here, it was unnecessary for the officer to inform Feldbrugge of the right to an independent blood test prior to requesting the PBT because even if Feldbrugge had been so informed, his options remained the same: consent to the PBT or refuse and have his driver's license seized. Rather, under Strand, the officer was required to timely inform Feldbrugge that he could obtain an independent blood test in addition to the PBT and Intoxilyzer breath test so that Feldbrugge could gather exculpatory evidence. Informing Feldbrugge after the PBT was timely, so Feldbrugge's due process rights were not violated. Because the PBT results were admissible, Feldbrugge's arrest was supported by probable cause, and the DUI conviction was affirmed. St. v. Feldbrugge, 2002 MT 154, 310 M 368, 50 P3d 1067 (2002), followed in St. v. Kintli, 2004 MT 373, 325 M 53, 103 P3d 1056 (2004).

Business Owner's Burden of Proof in Showing Independent Contractor Status Not Considered Unfair or Unconstitutional: The District Court held that a business owner had the burden of proof to rebut a presumption of employee status, that the burden was constitutionally valid, and that the employer failed to demonstrate that application of the presumption implicated any fundamental liberty or property interests. The Supreme Court affirmed. Requiring the business owner to show independent contractor status did not create an irrebuttable presumption, but

rather placed the burden of proof on the workers—those individuals who could most effectively demonstrate whether they were employees or independent contractors. Here, the business owner did not attempt to have its workers testify or try to obtain tax information, thus failing to meet the burden of showing that several of its workers were independent contractors. Spain v. Dept. of Revenue, 2002 MT 146, 310 M 282, 49 P3d 615 (2002).

Zoning Decision Not Arbitrary or Capricious in Light of Legitimate Governmental Objective: Plaintiffs petitioned the Board of County Commissioners for a zoning change from residential to commercial. The request was denied, and plaintiffs filed an action in District Court alleging that the Board's action was arbitrary and capricious and constituted a taking by inverse condemnation. The District Court summarily dismissed the claim, and the Supreme Court affirmed as to the takings claim, but remanded on the due process claim because the Board had not issued specific findings in support of the denial of the zone change request. The Board subsequently provided the findings, and the District Court dismissed the due process claim. Plaintiffs appealed again. The Supreme Court noted its holding in Mack T. Anderson Ins. Agency, Inc. v. Belgrade, 246 M 112, 803 P2d 648 (1990), that the purpose of zoning is not to provide for the highest and best use of each lot or parcel within the zone, but rather to benefit the community generally by the sensible planning of land uses, taking into consideration the peculiar suitabilities and most appropriate use of land throughout the community. The court also pointed out that it will not sit as a super-Legislature or superzoning board. After reviewing the record, the court concluded that substantial evidence supported the finding that the zoning change would not be compatible with the majority of surrounding land uses or be in accord with the county comprehensive plan. The Board adequately considered and based its decision on the statutory factors. The decision was reasonably related to the legitimate governmental objective of promoting the public health, safety, and welfare. Thus, denial of the zoning change was not arbitrary or capricious. Further, the District Court did not err in declining to consider evidence of a subsequent 2000 zone change application because it was not relevant to the 1997 application in question. Englin v. Yellowstone County Bd. of County Comm'rs., 2002 MT 115, 310 M 1, 48 P3d 39 (2002).

Limitation on Right of Subsequently Joined Party to Substitute Judge Without Cause Not Violative of Substantive Due Process: Mattson filed a complaint against Montana Power Co. and, more than 30 days following service, moved without objection to join PPL Montana, LLC (PPL), as an additional party defendant. PPL moved to substitute the District Court Judge without cause, but the motion was denied. PPL contended that 3-1-804 violated substantive due process by distinguishing between three classes of parties—original parties, subsequently joined parties and intervenors, and third-party defendants—and that no rational basis existed for treating the three classes of parties differently for purposes of substituting a District Court Judge without cause. The Supreme Court disagreed and affirmed. Because the state may not use its power to take unreasonable, arbitrary, or capricious action against an individual, a statute must be reasonably related to a permissible government objective in order to satisfy the guarantees of substantive due process. In this case, there is not only a rational basis for distinguishing the classes, but responsible judicial administration requires doing so. Subsequently joined parties and intervenors often appear at a much later stage of the proceedings, and to allow a joined or substituted defendant to remove the presiding judge without cause, after the judge has presided over the case for what could be a substantial period, would disrupt the continuity of litigation, precipitate delay, cause duplication of effort, and waste time and expense while providing little corresponding benefit. The right of a subsequently joined party to move for substitution for cause is preserved under 3-1-805. Mattson v. Mont. Power Co., 2002 MT 113, 309 M 506, 48 P3d 34 (2002), followed in Eisenhart v. Puffer, 2008 MT 58, 341 M 508, 178 P3d 139 (2008).

Arresting Officer's Advice Considered Frustration of Due Process Right to Independent Blood Test — Strand Remedy for Violation of Due Process Rights Overruled: Minkoff was arrested for DUI and informed of his right to an independent blood test. Minkoff asked the arresting officer whether he should get a blood test, and the officer initially replied that he could not advise Minkoff, but that the test would only be given at Minkoff's expense. Minkoff then asked whether there was any difference between the blood test and the breath test, and the officer repeatedly stated that the blood test would be more exact and higher than the breath test. Minkoff then took a breath test, which he failed, but did not request a blood test. After being convicted, Minkoff appealed on grounds that his right to an independent blood test was frustrated by the arresting officer's response to the inquiry about whether to get a blood test. The District Court had relied on St. v. Sidmore, 286 M 218, 951 P2d 558 (1997), in denying Minkoff's motion to dismiss. Sidmore provides that two criteria must be met to support an allegation of denial of due process rights regarding the right to an independent test: (1) the accused must timely claim

the right to an independent blood test; and (2) a law enforcement officer must unreasonably impede the defendant's right to obtain an independent blood test. Here, given the immediacy of the officer's advice, the period within which Minkoff could timely request the test under the first Sidmore criteria had not passed, and to conclude otherwise would permit frustration of a person's due process right to an independent test in advance of the person's reasonable opportunity to request the test. Then, to determine whether the officer unreasonably frustrated Minkoff's right to obtain the blood test, the Supreme Court applied Lau v. St., 896 P2d 825 (Alaska 1995). Under Lau, a government officer having custody of an arrested driver cannot attempt to dissuade the driver from exercising the right to an independent blood test. Here, the officer's repeated statements, albeit well-intentioned, that a blood test would show a higher blood alcohol level, were affirmative acts that would frustrate, if not obliterate, the intention of any rational arrestee to obtain an independent blood test. Regarding the proper remedy for such a due process violation, the Supreme Court previously held in St. v. Strand, 286 M 122, 951 P2d 552 (1997), that suppression of the breath test was an appropriate remedy on the basis that if the state frustrated the right to an independent test, it could not then be allowed to use its own scientific evidence of intoxication against the defendant. On further consideration, the Supreme Court held that the Strand remedy was manifestly incorrect and overruled Strand in that regard, holding that dismissal rather than suppression of the breath test is the appropriate remedy when the right to an independent blood test is frustrated. St. v. Minkoff, 2002 MT 29, 308 M 248, 42 P3d 223 (2002), followed in St. v. Smerker, 2006 MT 117, 332 M 221, 136 P3d 543 (2006), and St. v. Wrzesinski, 2006 MT 263, 334 M 157, 145 P3d 985 (2006).

Failure to Appoint Counsel for Minor Parent During Formulation of and Prior to Court Approval of Treatment Plan Violative of Due Process Rights: H.C. was adjudicated a youth in need of care, and was simultaneously a minor parent in an abuse and neglect proceeding whose own child was adjudicated a youth in need of care. Although a guardian ad litem was appointed to represent H.C.'s child, counsel was never appointed for H.C. herself during the formulation of her treatment plan or prior to the District Court's approval of the plan. A natural parent's right to the care and custody of a child is a fundamental liberty interest that requires that the state provide a fundamentally fair procedure at all stages in proceedings for the termination of parental rights. Due process requires fundamental fairness, and fundamental fairness requires fair procedures. Further, under Art. II, sec. 15, Mont. Const., a minor parent is entitled to the same due process protections and procedures as adult counterparts. In this case, in order to preserve the fundamental fairness of the proceedings and for the treatment plan to be considered appropriate, due process required that counsel be appointed for the minor mother during the formulation of her treatment plan and prior to the District Court's approval of the plan, and the failure of the District Court to do so was reversible error. In re A.F.-C., 2001 MT 283, 307 M 358, 37 P3d 724 (2001), distinguishing In re T.C. & R.C., 240 M 308, 784 P2d 392 (1989), inasmuch as appointment of counsel is not always inappropriate or otherwise precluded during the earlier stages of child protective proceedings that precede termination proceedings, if due process requires.

Question Whether Parole Denied for Failure to Satisfy Additional Treatment Conditions — Remand: Ringewold pleaded guilty to two counts of felony assault and was sentenced to a total of 14 years' commitment to the Department of Corrections. The next day, Ringewold was placed in the state hospital. The placement order allowed Ringewold to petition for a conditional release from the hospital, but did not specify any conditions. About 17 months later, Ringewold petitioned for release from the hospital. The state agreed that a hearing on the petition was proper, but argued that if it was found that Ringewold no longer suffered from a mental disease or defect that presented a risk to Ringewold or others, it was appropriate to remand Ringewold to the Department. The District Court ordered an independent mental evaluation, but it was never performed. Ringewold then filed another petition for release, but about the same time, the hospital staff determined that Ringewold would no longer benefit from active inpatient treatment and transferred him to the state prison pursuant to 46-14-312. At the request of counsel, Ringewold was transferred back to the state hospital, with the state conceding that hospital placement was proper and that Ringewold should be allowed to petition for release pursuant to 46-14-312. About 4 months later, the Department Director sought an order transferring Ringewold back to the prison on grounds that Ringewold continued to suffer from a dangerous mental disorder but would no longer benefit from active inpatient treatment for the disorder. At a conditional release hearing about 9 months later, the District Court orally resentenced Ringewold to 8 years in prison. The court specified that the total sentence not exceed more than the original sentence, but the court also conditioned Ringewold's parole on completion of an anger management course,

moral reconation therapy, and chemical dependence treatment. In a written amended judgment about 1 month later, the District Court reimposed the original 14-year sentence and restated the parole conditions. Ringewold appealed. The Supreme Court held that under St. v. Lane, 1998 MT 76, 288 M 286, 957 P2d 9 (1998), the oral pronouncement of sentence was legally effective and constituted final judgment. However, it was not possible to determine from the record whether the additional conditions added to the sentence improperly lengthened Ringewold's sentence, so the case was remanded for supplementation of the factual record to determine if Ringewold was being denied consideration for parole because of failure to satisfy the additional treatment conditions and, if so, to strike the conditions from the amended judgment, because under those circumstances, the practical effect of the conditions would be to lengthen the sentence in violation of 46-14-312. St. v. Ringewold, 2001 MT 185, 306 M 229, 32 P3d 729 (2001).

No Authority to Grant Third-Party Petition for Parenting Plan Absent Termination of Parental Rights: A young, single mother left her child in the temporary care of the Knopps, her aunt and uncle, while she sought employment and a place to live. About 2 months after the child was left with them, the Knopps petitioned for a parenting plan and support for the child. Although the document was referred to as a petition for a parenting plan, child support, and medical support, it was the functional equivalent of a petition for permanent custody. The Knopps applied for temporary custody and received it, ex parte, so that when the mother returned and tried to remove the child to their new home, she was not allowed to do so. The mother then sought termination of the guardianship and the return of her child. The mother's parental rights were never terminated or suspended by the state or county, nor were any proceedings ever commenced to demonstrate that the child was abused, dependent, or neglected. The District Court dismissed the petition, relying on In re Guardianship of D.T.N., 275 M 480, 914 P2d 579 (1996), in holding that the mother had a constitutional right to custody of her child and that permanent guardianship could not be granted because the mother's parental rights had not been terminated or suspended. The Knopps appealed, but the Supreme Court affirmed. The rule of law does not permit destruction of a natural parent's fundamental right to the custody of a child based simply on the subjective determination of the child's best interests. Rather, a natural parent cannot be denied custody of a child absent termination of parental rights for abuse or neglect pursuant to Title 41, ch. 3. In re Parenting of J.N.P., 2001 MT 120, 305 M 351, 27 P3d 953 (2001). See also In re A.R.A., 276 M 66, 919 P2d 388 (1996), and Girard v. Williams, 1998 MT 231, 291 M 49, 966 P2d 1155 (1998). However, see In re Parenting of M.M.G., 2012 MT 228, 366 Mont. 386, 287 P.3d 952, in which the Supreme Court held that the petitioners could seek a parenting plan if the petitioners could establish a child-parent relationship, even though the mother's parental rights had not been terminated, distinguishing this case from In re Parenting of J.N.P.

Failure to Credit Inmate With Time Served in Written Judgment After Allowing Credit in Oral Pronouncement of Sentence: At the sentencing hearing, Horton inquired as to whether he would get credit for time served between arrest and sentencing. The judge responded that credit would be granted automatically. However, in the written judgment entered 2 days later, the judge denied credit for time served because Horton was being held on a probation violation. Under 46-18-403, Horton was entitled to credit for each day of incarceration prior to or after incarceration, and pursuant to St. v. Lane, 1998 MT 76, 288 M 286, 957 P2d 9 (1998), the court's oral pronouncement controlled over the written judgment. Thus, the Supreme Court directed that the provision in the written judgment denying Horton credit for time served be stricken. St. v. Horton, 2001 MT 100, 305 M 242, 25 P3d 886 (2001).

Liberty Interest in Parole by Inmates Who Committed Offenses Prior to 1989 — Due Process Consideration: As a general rule, inmates have no liberty interest in parole. However, prior to amendment in 1989, 46-23-201 required the Board of Pardons (now Board of Pardons and Parole) to release on parole any prison inmate when the Board determined that there was a reasonable probability that the prisoner could be released without detriment to the prisoner or the community. The U.S. Supreme Court subsequently held in Bd. of Pardons v. Allen, 482 US 369 (1987), that this mandatory statutory language created a liberty interest in parole that was protected by the federal constitutional due process clause. Although the mandatory language was removed in 1989, the Montana Supreme Court later held in Worden v. Bd. of Pardons & Parole, 1998 MT 168, 289 M 459, 962 P2d 1157 (1998), that inmates who committed offenses prior to 1989 continue to enjoy a federally protected liberty interest in parole. In the present case, McDermott committed his offenses in 1985 and 1986, so pursuant to Allen and Worden, his liberty interest in parole could not be denied without due process. McDermott v. McDonald, 2001 MT 89, 305 M 166, 24 P3d 200 (2001), followed in George v. Bd. of Pardons, 2001 MT 163, 306 M 115, 30 P3d 1065 (2001).

Due Process Rights of Inmate Regarding Preparole Interview — Presence of Sufficient Number of Board of Pardons and Parole Members Required: Under 46-23-107 (now repealed), decisions regarding an inmate's parole are to be made by a majority vote of the members of the Board of Pardons and Parole. As stated in Sage v. Gamble, 279 M 459, 929 P2d 822 (1996), to deny an inmate the opportunity to appear before those who will personally decide the merits of the parole application implicates the inmate's due process rights. In this case, only one member of the Board was present at West's parole hearing. West contended that he had a right to appear before the full Board and that a hearing before only one member violated his due process rights. The state argued that pursuant to the unpublished opinion of Radford v. Mahoney, No. 98-150 (July 1998) (unpublished), not all Board members are required to be present for the personal interview and that 46-23-104 allows the Board to delegate the responsibility for parole eligibility interviews to one of its members. The state contended that having only one Board member present was permissible because the full Board ultimately participated in the decision to deny West' parole. The Supreme Court was unpersuaded by the state's argument, noting that the copy of the case disposition attached to West's habeas corpus petition was signed by only one Board member. The court found its order in Radford inconsistent with the Sage decision, and therefore unpersuasive. West's due process rights were no less implicated because West had the right to appear before one Board member when a majority vote of the Board was required for a decision. The court remanded to the Board with instructions to provide West with an opportunity to appear before a sufficient number of Board members so that those who decide his case will have done so based on a personal interview. West v. Mahoney, 2001 MT 82, 305 M 117, 22 P3d 201 (2001).

Issue of Department of Labor and Industry Jurisdiction Raised in Two Separate Hearings — Collateral Estoppel Applicable — Due Process Rights Not Implicated When Party Fails to Pursue Available Remedies: The Workers' Compensation Court concluded that the Department of Labor and Industry should have allowed plaintiff to raise the argument that State Fund had improperly canceled plaintiff's policy for nonpayment of a premium as a defense to the claim by the Uninsured Employers' Fund for assessments and penalties. The court said that the issue was not barred by collateral estoppel because an order from a first hearing only determined whether the Department had subject matter jurisdiction over contract disputes between an insurance carrier and its policyholder (a determination that plaintiff did not appeal) and did not address the issue raised in a second hearing, which was whether the Department had jurisdiction to determine coverage in a proceeding seeking a penalty and indemnification. The court held that collateral estoppel did not apply because the issues in the two hearings were not identical. The court went on to hold that the Department did have jurisdiction, through its quasi-judicial power, to resolve the dispute regarding whether State Fund had rightfully canceled the policy. The Supreme Court disagreed. In the first case, a hearings officer determined that the Department did not have subject matter jurisdiction over the contractual dispute between plaintiff and State Fund, noting that proper adjudication would be in the District Court. The Department only has jurisdiction granted to it by statute, and the adjudication of insurance contracts does not fall within its jurisdiction. Plaintiff's failure to appeal the issue from the first hearing precluded it from arguing that the Department did have jurisdiction over the insurance contract dispute regarding a penalty and indemnification in the second hearing, so relitigation of the jurisdiction question in the second proceeding was barred by collateral estoppel. Further, it was error to give the Department jurisdiction to adjudicate the insurance contract dispute pursuant to its general quasi-judicial powers because an administrative agency may not assume jurisdiction without express delegation by the Legislature and there is no statutory delegation of authority to the Department to resolve contract disputes. Rather, regulation of insurance contracts is governed by the Insurance Commissioner and the relevant statutes relating to insurance disputes. The Department cannot and should not be adjudicating disputes between insurance companies and employers. The Workers' Compensation Court's conclusion that plaintiff was denied due process when it was prevented from presenting evidence relating to the insurance contract between itself and State Fund was also erroneous. Plaintiff had the opportunity to appeal the initial Department order to the Workers' Compensation Court, but failed to do so. Plaintiff also had the opportunity to pursue its remedies against State Fund in District Court, but again failed to do so. There is no denial of due process when a party fails to pursue the remedies provided. Auto Parts of Bozeman v. Employment Relations Div. Uninsured Employers' Fund, 2001 MT 72, 305 M 40, 23 P3d 193 (2001).

Common-Law Plain Error — Defendant Must Demonstrate With Specifics That a Fundamental Constitutional Right Was Violated at Trial: Whipple claimed that the trial court erred in allowing five witnesses to testify as to the credibility of the testimony of two minors who testified that

Whipple had sexually abused them. The Supreme Court stated that because claims of plain error are almost always raised for the first time on appeal, a defendant must do more than simply make a generalized claim that the defendant's rights were violated by the alleged error. See St. v. Finley, 276 M 126, 915 P2d 208 (1996). The Supreme Court stated that it would not exercise its power of common-law plain error review of alleged errors not objected to at trial because Whipple had not met his burden of demonstrating specifically how a constitutional right of his had been violated by an error of the trial court. St. v. Whipple, 2001 MT 16, 304 M 118, 19 P3d 228 (2001).

Statutory Limitation on Workers' Compensation Family Member Domiciliary Care Benefits Justified — Not Violative of Equal Protection or Substantive Due Process: Plaintiff, injured in a vehicle accident in the scope of his employment, received disability benefits and payments for domiciliary care provided at home by his wife at the maximum rate permitted by 39-71-1107. Plaintiff challenged the constitutionality of the limits on benefits for 24-hour care provided by a family caregiver, arguing that the cap violated his right to equal protection because it forced him to choose between being placed in a nursing home or having his wife assist him. His wife received less compensation as a result of his choice to live at home rather than at a skilled nursing facility. Additionally, plaintiff alleged that establishment of different benefit limits for family and nonfamily caregivers violates his right to substantive due process because it arbitrarily and unfairly balances cost containment with plaintiff's personal choice of who acts as his care provider. In affirming the District Court decision, the Supreme Court ruled that the differences in care provided by family member caregivers and nonfamily member caregivers offer significant justification for limiting compensation to family care member caregivers. As a result, family member caregivers and nonfamily caregivers are not similarly situated for purposes of equal protection, and the difference in family caregiver compensation is not arbitrary and capricious in violation of substantive due process, but is reasonably related to a permissible legislative objective. Powell v. St. Comp. Ins. Fund, 2000 MT 321, 302 M 518, 15 P3d 877, 57 St. Rep. 1353 (2000).

Negligent Endangerment Not Lesser Included Offense of Assault of Peace Officer: Section 45-5-210 provides that criminal endangerment, negligent endangerment, and assault are not included as offenses of assault on a peace officer. Fuqua was convicted of assault on a peace officer and argued that 45-5-210 unconstitutionally eliminated consideration of his claim of negligent endangerment as a lesser included offense. The Supreme Court noted that negligent endangerment differs from assault on a peace officer by requiring a lesser kind of culpability and by requiring proof of different conduct; thus, negligent endangerment is not a lesser included offense of assault on a peace officer. Having so concluded, the court declined to address the constitutional question of whether the Legislature can specifically eliminate consideration of an offense as a lesser included offense. St. v. Fuqua, 2000 MT 273, 302 M 99, 13 P3d 34, 57 St. Rep. 1141 (2000).

No Brady Violation When Petitioner Could Have Obtained Evidence by Other Available Means: Ellenburg asserted that the state committed a Brady violation (see Brady v. Md., 373 US 83, 10 L Ed 2d 215, 83 S Ct 1194 (1963)) and violated his due process rights by the state's loss or destruction of potentially exculpatory documents seized from his office without a warrant while Ellenburg was in prerelease status in the intensive supervision program following his imprisonment at the state prison. Applying Gollehon v. St., 1999 MT 210, 296 M 6, 986 P2d 395 (1999), the Supreme Court noted that one element of proving a Brady violation is that the petitioner did not possess the evidence and could not have obtained it with reasonable diligence. In this case, the court affirmed, finding no Brady violation because Ellenburg did not demonstrate that he was unable to obtain comparable evidence by other reasonably available means. St. v. Ellenburg, 2000 MT 232, 301 M 289, 8 P3d 801, 57 St. Rep. 958 (2000).

No Claim to Unconstitutional Effect of Mandatory Minimum Sentence When Defendant Not Subject to Mandatory Minimum: Duffy was sentenced to 20 years for each offense of sexual abuse of his daughters, who were less than 16 years old at the time of the offense. On appeal, Duffy claimed that because of their ages, 45-5-503 and 45-5-507 required a minimum 4-year prison term, which deprived him of equal protection and due process because he did not qualify for the exception to the minimum term in 46-18-222(5) regarding instances involving a lack of serious bodily injury, asserting that he was similarly situated to persons convicted of sexual assault but treated differently because those offenders could qualify for the exception. However, before Duffy could claim standing to complain that he was unconstitutionally affected by the mandatory minimum sentences, he must have been subjected to those sentences, which was not the case here. Thus, Duffy was not affected by the disparate treatment of sex offenders based on the nature of the offenses and lacked standing to challenge the sentencing scheme on equal

protection or due process grounds. St. v. Duffy, 2000 MT 186, 300 M 381, 6 P3d 453, 57 St. Rep. 734 (2000).

Jury Instruction Disallowing Evidence of Intoxication in Determining State of Mind Not Error — Full and Fair Instructions on Law: Following Raugust's criminal trial, the court instructed the jury that it could not consider evidence of intoxication for any purpose, pursuant to 45-2-203. Raugust maintained on appeal that the instruction was in error because depriving him of the ability to admit intoxication evidence lessened the state's burden of proof and confused the jury, in violation of his due process rights. However, the error urged on appeal was not contained in the objection made to the instruction during the final settling of jury instructions, constituting waiver of the argument on appeal. Moreover, the plain error doctrine did not apply because review under that doctrine was requested for the first time on appeal. Here, the jury was instructed regarding: (1) the elements of each offense charged and the state's burden of proving each element beyond a reasonable doubt; (2) the definition of the applicable mental states—purposely and knowingly; (3) the fact that the existence of a mental state may be inferred from the acts of the accused and from the facts and circumstances connected with the offense; (4) the difference between direct and circumstantial evidence; (5) witness credibility; and (6) the need for a unanimous verdict. Read as a whole, these instructions fairly and fully instructed the jury on the law applicable to the case, and giving the instruction disallowing the defense of intoxication was not erroneous. St. v. Raugust, 2000 MT 146, 300 M 54, 3 P3d 115, 57 St. Rep. 570 (2000). See also St. v. Hagen, 283 M 156, 939 P2d 994 (1997).

No Due Process Right to Sentence Review — Actual Incarceration Required Before Sentence Subject to Review — Suspended Sentences Precluded From Review: Holt pleaded guilty to sexual assault, received a 10-year suspended sentence, and subsequently applied for sentence review. The Sentence Review Division denied the application on grounds that Holt did not qualify for sentence review because his sentence was suspended in its entirety and involved no actual incarceration. Holt appealed, alleging violation of his due process rights. After granting Holt's writ of supervisory control pursuant to Art. VII, sec. 2(2), Mont. Const., and former Rule 17(a), M.R.App.P. (now superseded), the Supreme Court held that sentence review is not a constitutional right, but rather a system that the Legislature voluntarily created. Thus, the discretion to determine the circumstances and conditions under which sentence review will be allowed lies with the Legislature, and the state's discretion is not subject to due process concerns unless it offends some principle of justice so deeply rooted in the traditions and conscience of the people as to be ranked fundamental (see Mont. v. Egelhoff, 518 US 37, 135 L Ed 2d 361, 116 S Ct 2013 (1996)). The Sentence Review Division's interpretation of 46-18-903(1), excluding a person who is not incarcerated from sentence review, comports with the rules of statutory construction, is consistent with the sentence review statutes as a whole, reflects the intent of the Legislature, avoids absurd or unduly harsh results, and is entitled to deference because the Division is charged with administration of the sentence review statutes. Because sentence review is a statutory right of relatively recent origin, the due process clauses of the U.S. and Montana Constitutions do not demand that sentence review be available at all, nor do they limit the Legislature's restriction of sentence review to defendants who are actually incarcerated. State ex rel. Holt v. District Court, 2000 MT 142, 300 M 35, 3 P3d 608, 57 St. Rep. 560 (2000).

Notice of Administrative Hearing Regarding Unemployment Insurance Proceedings Not Violative of Due Process Rights — Administrative Hearings Not Governed by Rules of Civil Procedure: In an unemployment insurance case, the notice of appeal sent to the attorney for Wheelsmith Fabrication, Inc. (Wheelsmith), stated that the purpose of an administrative hearing was to determine whether Hall was discharged for misconduct connected with her work or directly affecting her employment. Wheelsmith contended that the notice failed to adequately inform Wheelsmith of the factual claims involved, constituting a denial of due process of law. Applying the traditional due process balancing test in Mathews v. Eldridge, 424 US 319, 47 L Ed 2d 18, 96 S Ct 893 (1976), the Supreme Court held that Wheelsmith failed to show a risk of erroneous deprivation of a private interest affected by official government action. Further, unemployment insurance proceedings are governed by administrative rule, rather than the Montana Rules of Civil Procedure, and pursuant to 2-4-601, a notice of hearing must contain a short and plain statement of the matters asserted. The notice sent to Wheelsmith's attorney met the statutory criteria of a short and plain statement, and the District Court did not err in holding that Wheelsmith's due process rights were not violated by the notice of hearing. Wheelsmith Fabrication, Inc. v. Dept. of Labor and Industry, 2000 MT 27, 298 M 187, 993 P2d 713, 57 St. Rep. 131 (2000). See also ARM 24.11.201 and 24.11.317.

No Apportionment Mechanism Regarding Negligence of Nonparties Under 1995 Statute: The 1995 amendments to 27-1-703 did not cure the due process problem created by the absence of a statutory mechanism by which the negligence of nonparties, including third-party defendants released from liability, can be fairly apportioned by a jury. Here, the District Court properly refused to permit the jury to apportion negligence to third-party defendants who were released from liability by plaintiff and who were impecunious and judgment-proof. Cusenbary v. Mortensen, 1999 MT 221, 296 M 25, 987 P2d 351, 56 St. Rep. 864 (1999), following Plumb v. District Court, 279 M 363, 927 P2d 1011, 53 St. Rep. 1187 (1996), and distinguishing Whiting v. St., 248 M 207, 810 P2d 1177, 48 St. Rep. 396 (1991). (See 1997 amendment.)

Criteria Necessary to Establish Brady Violation: The suppression by the prosecution of material evidence favorable to the accused violates the due process rights of the accused, pursuant to Brady v. Md., 373 US 83, 10 L Ed 2d 215, 83 S Ct 1194 (1963), including failing to disclose an agreement with a prosecution witness in exchange for testimony if the agreement provides tangible benefits. When there is no agreement, there is no duty to disclose. To establish a Brady violation, the petitioner must establish that: (1) the state possessed evidence, including impeachment evidence, favorable to the defense; (2) the petitioner did not possess the evidence and could not have obtained it with reasonable diligence; (3) the prosecution suppressed the favorable evidence; and (4) had the evidence been disclosed, a reasonable probability exists that the outcome of the proceedings would have been different. Here, Gollehon asserted that pretrial and posttrial agreements by the state with a prosecution witness prejudiced Gollehon's due process rights because if the jury had known of the agreements, the credibility of the witness would have been in doubt. However, aside from a guarantee of the witness's safety, which was disclosed to the jury at trial, Gollehon could not establish a Brady violation through the existence of an undisclosed pretrial agreement. Further, in order for posttrial assistance to be relevant, there must have been an agreement for parole before trial in order to support a Brady violation. In the absence of evidence of a pretrial agreement, there can be no Brady violation because no evidence was suppressed from the jury. Gollehon's claim for relief was denied. Gollehon v. St., 1999 MT 210, 296 M 6, 986 P2d 395, 56 St. Rep. 811 (1999), followed in St. v. Ellenburg, 2000 MT 232, 301 M 289, 8 P3d 801, 57 St. Rep. 958 (2000), and St. v. Johnson, 2005 MT 318, 329 M 497, 125 P3d 1096 (2005). See also Giglio v. U.S., 405 US 150, 766 L Ed 2d 104, 92 S Ct 763 (1972), Alderson v. Zant, 22 F3d 1541 (11th Cir. 1994), and Mills v. Singletary, 63 F3d 999 (11th Cir. 1995).

Burden on Defendant in Justifiable Use of Force Case to Raise Reasonable Doubt of Guilt: Longstreth was charged with deliberate homicide and relied on a defense of justifiable use of force. After being convicted of negligent homicide, Longstreth alleged that the jury was incorrectly instructed in violation of her due process rights, contending that the instructions improperly allocated the burden of proof by failing to require the state to prove an absence of justification beyond a reasonable doubt. Citing St. v. Daniels, 210 M 1, 682 P2d 173, 41 St. Rep. 880 (1984), and St. v. Miller, 1998 MT 177, 290 M 97, 966 P2d 721 (1998), the Supreme Court reiterated that justifiable use of force is an affirmative defense and that only the defendant has the burden of producing sufficient evidence to raise a reasonable doubt of guilt. The state's burden is to prove the elements of the charged offense beyond a reasonable doubt, which does not include the absence of justification. Further, 45-5-112 allows for a permissive inference by the jury rather than a mandatory inference. As long as the instructions given to the jury make it clear that the burden of proof of guilt and all necessary elements of guilt lies squarely with the state, placing the burden of presenting evidence to raise a reasonable doubt of guilt on the defendant is not unconstitutional. St. v. Longstreth, 1999 MT 204, 295 M 457, 984 P2d 157, 56 St. Rep. 795 (1999). See also Leland v. Oreg., 343 US 790, 96 L Ed 1302, 72 S Ct 1002 (1952), Patterson v. N.Y., 432 US 197, 53 L Ed 281, 97 S Ct 2319 (1977), and St. v. Lopez, 185 M 187, 605 P2d 178 (1980). St. v. Daniels, 2011 MT 278, 362 Mont. 426, 265 P.3d 623, held that the enactment of 46-16-131 in 2009 abrogated Longstreth, St. v. Henson, 2010 MT 136, 356 Mont. 458, 235 P.3d 1274, and other cases to the extent they held the burden of establishing justifiable use of force was the defendant's in a justifiable use of force case.

Actionable Section 1983 Claim Under State-Created Danger Theory: A government official who, while acting under color of state law, deprives an individual of constitutionally protected rights may be subject to personal liability for civil damages pursuant to 42 U.S.C. 1983. Generally, a government official's failure to protect an individual from harm does not constitute a due process violation. Inaction by the state, even when a danger is known, does not trigger a due process obligation except under the "state-created danger" theory, derived from DeShaney v. Winnebago County Dept. of Social Services, 489 US 189, 103 L Ed 2d 249, 109 S Ct 998 (1989), which provides

that a constitutional duty to protect may be imposed when state actors have affirmatively acted to create plaintiff's danger or to render plaintiff more vulnerable to it. Adopting the test in Huffman v. County of Los Angeles, 147 F3d 1054 (9th Cir. 1998), the Supreme Court held that to assert an actionable 42 U.S.C. 1983 claim under the state-created danger theory, plaintiff must demonstrate that the state acted affirmatively, with deliberate indifference, in creating a foreseeable danger to plaintiff, leading to deprivation of plaintiff's constitutional rights. In the present case, material facts existed as to whether an officer affirmatively and with deliberate indifference placed a woman in danger, increased her vulnerability to danger, or deprived her of her right to life; thus, summary dismissal of her husband's personal liability claim against the officer was reversible error. Nelson v. Driscoll, 1999 MT 193, 295 M 363, 983 P2d 972, 56 St. Rep. 744 (1999). See also Wood v. Ostrander, 879 F2d 583 (9th Cir. 1989), and Kneipp v. Tedder, 95 F3d 1199 (3rd Cir. 1996).

Direct Filing of Information in District Court Rather Than Filing in Youth Court Violative of Due Process — Probable Cause Hearing Required: Pursuant to 41-5-206, Butler, a youth, was charged in District Court with attempted deliberate homicide and attempted robbery. Butler moved to have the District Court declare 41-5-206 unconstitutional on grounds that it violated his right to due process by allowing the prosecution to file an information directly in District Court rather than Youth Court without first affording him a hearing. The motion was denied, and Butler appealed. Although it is within the province of the prosecution to move the District Court for leave to file an information in that court if the youth has attained a certain age and is alleged to have committed certain unlawful conduct, the prosecution's discretion ends at that point. Absent a pure prosecutorial waiver system, the ultimate decision rests with the District Court, which must make specific findings that there is probable cause to believe the youth committed the offense and that, because of the seriousness of the offense, the case should be filed in District Court. In Butler's case, the District Court based its decision solely on the affidavit of the prosecution and Butler did not have the opportunity, with assistance of counsel, to challenge the specific findings of the court. Although declining to declare the entire statute unconstitutional, the Supreme Court cited Kent v. U.S., 383 US 541, 16 L Ed 2d 84, 86 S Ct 1045 (1966), in holding that because the decision in this regard is potentially critically important to the youth, under the 14th amendment to the United States Constitution, Butler's right to due process requires that the District Court hold a hearing when rendering a decision under 41-5-206(3). St. v. Butler, 1999 MT 70, 294 M 17, 977 P2d 1000, 56 St. Rep. 291 (1999), followed and applied retroactively in St. v. O'Neill, 1999 MT 224, 296 M 71, 985 P2d 154, 56 St. Rep. 886 (1999). Butler was overruled, to the extent that it requires a hearing before filing in District Court, in St. v. McKee, 2006 MT 5, 330 M 249, 127 P3d 445 (2006).

Constitutionally Protected Property Interest in Statutory Exemption From Execution — Due Process Requiring Notice and Hearing to Allow Assertion of Available Exemptions: In order to establish a property interest in a benefit such as the personal property exemptions from execution, a person must show a legitimate claim of entitlement to the benefit. By stating that judgment debtors are entitled to the statutory property exemptions, the Legislature has given judgment debtors a legal right to claim and benefit from those exemptions. Therefore, Montana judgment debtors have a property interest in the statutory exemptions from execution that is protected by constitutional due process guarantees. Montana's postjudgment execution statutes violate those due process guarantees because they do not provide for notice to a judgment debtor of the seizure of the debtor's property, of the availability of statutory exemptions from execution and where to locate additional information about them, and of the availability of procedures by which to claim exemptions from execution. Further, the statutes are deficient from a due process standpoint because they do not provide for a prompt hearing on claimed exemptions. Dorwart v. Caraway, 1998 MT 191, 290 M 196, 966 P2d 1121, 55 St. Rep. 777 (1998), following Mathews v. Eldridge, 424 US 319, 47 L Ed 2d 18, 96 S Ct 893 (1976), and Aacen v. San Juan County Sheriff's Dept., 944 F2d 691 (10th Cir. 1991), and distinguishing Endicott-Johnson Corp. v. Encyclopedia Press, 266 US 285, 69 L Ed 288, 45 S Ct 61 (1924).

Violent Offender Registration Not Violative of Due Process: After being convicted of mitigated deliberate homicide, Miller contended that the District Court's order requiring him to register as a violent offender infringed his right to due process because the court made no specific findings regarding his violent offender status and failed to hold a hearing to allow the introduction of contradictory evidence regarding his status. However, violent offender status is determined purely by statute, 46-23-504. The registration statute does not vest a District Court with the discretion to designate defendants as violent offenders, does not prescribe a notice and hearing procedure for determining violent offender status, and does not require a District Court to issue

findings based on evidence regarding a defendant's violent offender status. Rather, a defendant's designation as a violent offender is triggered merely by conviction of a violent offense. The process due to a defendant for designation as a violent offender is reasonable notice and an opportunity to be heard during sentencing. St. v. Miller, 1998 MT 177, 290 M 97, 966 P2d 721, 55 St. Rep. 719 (1998), following St. v. Krantz, 241 M 501, 788 P2d 298 (1990).

Constitutionality of Implied Consent Statutes — General Versus Specific Construction: Section 61-8-403 is a general statute concerning appeals of suspensions and revocations of driver's licenses under the implied consent laws, while 61-8-409 is the specific statute on preliminary alcohol screening tests (PAST), including issues that may be discussed at hearings on license suspension or revocation based upon refusal to submit to a PAST. A specific statute prevails over a general statute. Appellant's contention of conflict among Montana's implied consent statutes was not established because the various provisions are clear and specific and give a person of ordinary intelligence fair notice that the contemplated conduct is forbidden. Smith v. St., 1998 MT 94, 288 M 383, 958 P2d 677, 55 St. Rep. 375 (1998).

Oral Pronouncement as Legally Effective Sentence — Correction of Error in Written Judgment by Nunc Pro Tunc Order — Due Process and Double Jeopardy Rights Not Violated: The oral pronouncement of sentence is the legally effective sentence. The written judgment and commitment serves as evidence of the sentence orally pronounced. In the event of a conflict between the oral and written sentence, the oral controls. The sentencing court may correct an error in a written judgment and commitment by a nunc pro tunc order, pursuant to 46-18-117 (now repealed), to accurately reflect what was orally pronounced at the sentencing hearing. Absent evidence of a tangible detriment or concrete injury to defendant, a clarifying nunc pro tunc order does not jeopardize a defendant's due process rights or constitute double jeopardy. St. v. Lane, 1998 MT 76, 288 M 286, 957 P2d 9, 55 St. Rep. 311 (1998), overruling St. v. Enfinger, 222 M 438, 722 P2d 1170 (1986), St. v. Wirtala, 231 M 264, 752 P2d 177 (1988), St. v. Mason, 253 M 419, 833 P2d 1058 (1992), and St. v. Graveley, 275 M 519, 915 P2d 184 (1996), to the extent that those cases held that the written judgment and commitment, rather than the oral pronouncement of sentence, was to be considered the final, valid order. The Supreme Court amended former Rule 5, M.R.App.P. (now superseded), to reflect the Lane decision in In re Amending Rule 5 of the Mont. Rules of Appellate Procedure, 55 St. Rep. 1267 (1998). See also St. v. Johnson, 2000 MT 290, 302 M 265, 14 P3d 480, 57 St. Rep. 1225 (2000). Lane was followed in St. v. Horton, 2001 MT 100, 305 M 242, 25 P3d 886 (2001), and St. v. Ringewold, 2001 MT 185, 306 M 229, 32 P3d 729 (2001).

Strict Compliance With Tax Sale Statutes Required — Noncompliance Held Violation of Due Process — Insufficient Reasons to Justify Deviation From Statutes — County Deprived of Jurisdiction to Issue Tax Deed: After Isern's property was sold for taxes by Missoula County, Isern attempted to redeem the property, but the county refused to accept payment. Isern challenged the sale of his property, but the District Court upheld the sale, explaining that irregularities in the county's sale process were "minor clerical errors" or "nonsubstantive deviations" from statutory requirements. The Supreme Court held that failure to prepare a list of delinquent properties in accordance with 15-16-301, failure to publish or post a notice of the sale in compliance with 15-17-122, failure to prepare a tax sale certificate in accordance with 15-17-212 or to follow the alternative procedure under 15-17-214, failure to give notice of the pending issue of a tax deed to interested parties at their addresses of record in the office of the County Clerk in accordance with 15-18-212, and failure to give the full legal description of the property on the tax deed, as required by 15-18-211, violated Isern's right to due process and voided the tax deed. In making its ruling, the Supreme Court held that the facts that the offices of County Treasurer and Clerk and Recorder had been combined in Missoula County and that there had been electronic advances in recordkeeping were insufficient reasons to justify deviation from the statutory requirements for property tax sales and issuance of tax sale deeds. The Supreme Court also noted that Isern's new address in Spokane, Washington, had been received by the County Assessor's office several months before the tax sale and that Isern's new address could therefore easily have been obtained by the County Clerk and Recorder by simply walking across the hall to the County Assessor's office. Isern v. Summerfield, 1998 MT 45, 287 M 461, 956 P2d 28, 55 St. Rep. 177 (1998). However, see Zinvest, LLC v. Hudgins, 2014 MT 201, 376 Mont. 72, 330 P.3d 1135, in which the Supreme Court held that failure to comply with a tax lien statute did not render the tax deed void.

Child Support Enforcement Remedies Held Separate Remedies to Be Exercised Within Ten-Year Statute of Limitations — Due Process Requirements Applicable to Separate Remedies — Connell Distinguished: Emery was divorced from Keep in 1987, and Emery was ordered to pay child support. In exchange for Keep's receipt of payments under the Aid to Families With Dependent Children (now FAIM financial assistance) program, Keep assigned the Child Support

Enforcement Division (CSED) of the Department of Public Health and Human Services her right to receive child support and her right to enforcement of support. In 1991, CSED served Emery with a Notice of Intent (NOI) to collect the child support payments by referral of his debt to the Internal Revenue Service (IRS) for collection by interception of any federal tax refund owed to Emery. In response to the NOI, Emery timely requested an administrative hearing before CSED, which was granted, but the hearing was indefinitely continued, and no interception was made by the IRS. In 1992, CSED sent a second NOI to Emery, but Emery made no response. In 1992, no interception was made by the IRS. Also in 1992, Emery and Keep executed a stipulated change of their children's custody. In that stipulation, Keep waived her ability to collect child support arrearages, and the District Court approved the stipulation in an order. In 1995, CSED sent a third NOI to Emery notifying him of CSED's intent to collect child support payments by interception of Emery's federal tax refund. In response to the 1995 NOI, Emery requested a hearing before the CSED. Within 8 months from service of the 1995 NOI upon Emery, the Administrative Law Judge (ALJ) held that CSED's assigned right to child support was not affected by the waiver because CSED was not a party to the stipulation. The District Court approved the decision of the ALJ. On a motion for alteration or amendment of the District Court's order, the District Court, relying upon In re Connell v. St., 280 M 491, 930 P2d 88 (1997), held that the delay between Emery's 1991 request for administrative review and the 1996 hearing before the ALJ violated Emery's right to due process of law and his right to the administration of justice without delay. The Supreme Court reviewed its decision in Connell and pointed out that in that case, 44 months elapsed before the ALJ made a decision in response to Connell's request for administrative review of a CSED NOI and that the 44-month lapse denied Connell his constitutional rights to due process and administration of justice without delay. In contrast, the Supreme Court held that the NOI served upon Emery in 1995 in the case before it was a separate proceeding from the NOI served upon him in 1991 and was not, as interpreted by the District Court, a continuation of the 1991 proceeding because the 1991 proceeding was discontinued once the IRS failed to make an interception of the federal tax refund owed to Emery. Further, the Supreme Court pointed out that the various administrative remedies, such as state debt offsets, license suspension, warrants for distraint, and state income withholding, are all separate remedies for the CSED to pursue, and election of one remedy does not preclude pursuit of another remedy after, or at the same time as, the remedy chosen by the CSED until the debt assigned to the CSED is fully paid. Any of the remedies, the Supreme Court held, were subject to the 10-year statute of limitations provided in 27-2-201. The Supreme Court therefore held that because the lapse of time in the case before it was between different proceedings and not within one proceeding and the lapse of time within the 1995 proceeding was reasonable, Emery's right of due process and right to administration of justice without delay were not violated. The Supreme Court also held that because Emery had no right under Montana law to a hearing when no action was being taken by the CSED against him, the failure of the CSED to grant a hearing did not implicate Emery's rights of due process and administration of justice. In response to Emery's argument that the CSED did not act soon enough in initiating its collection action, the Supreme Court held that section 16 of this article imposes no requirement that the CSED act "speedily and without delay" within the 10-year statute of limitations provided in 27-2-201, noting that imposition of such a requirement would effectively eliminate that 10-year limitation period. For these reasons, the Supreme Court reversed the decision made by the District Court that Emery's constitutional rights were violated by the decision of the CSED. Emery v. St., 286 M 376, 950 P2d 764, 54 St. Rep. 1454 (1997).

When Right to Obtain Independent Blood Test Unreasonably Impeded — No Due Process Violation — Swanson Rule Clarified: One accused of a crime involving intoxication is entitled to obtain an independent blood test only when: (1) the defendant has timely claimed the right to an independent blood test; and (2) a law enforcement officer has unreasonably impeded the defendant's right to obtain an independent blood test. Both criteria must be satisfied in order to support an allegation of violation of a defendant's due process rights. The rule does not apply either if the defendant fails to timely request the independent blood test or if the independent blood test is unavailable through no unreasonable acts of law enforcement. In the present case, Sidmore's due process rights were not violated because the unavailability of an independent blood test was not caused by an unreasonable act of law enforcement but rather by Sidmore's own failure to act after requesting and being given the opportunity to arrange an independent blood test. St. v. Sidmore, 286 M 218, 951 P2d 558, 54 St. Rep. 1381 (1997), clarifying St. v. Swanson, 222 M 357, 722 P2d 1155 (1986), and distinguishing St. v. Strand, 286 M 122, 951 P2d 552, 54 St. Rep. 1333 (1997). See also St. v. Minkoff, 2002 MT 29, 308 M 248, 42 P3d 223 (2002), St. v.

Smerker, 2006 MT 117, 332 M 221, 136 P3d 543 (2006), and St. v. Wrzesinski, 2006 MT 263, 334 M 157, 145 P3d 985 (2006).

Undue Burden Not Shown: A group of physicians and a physician assistant-certified failed to establish the likelihood of prevailing on the merits of the claim that 50-20-109, restricting performance of abortions to licensed physicians, violated due process by imposing an undue burden on a woman's right to choose to terminate a pregnancy prior to the viability of the fetus. Thus, there was no right to preliminary injunctive relief. Mazurek v. Armstrong, 520 US 968, 138 L Ed 2d 162, 117 S Ct 1865 (1997).

Nonparty Defense Not Rationally Related to Liability Apportionment — Due Process Violated: Substantive due process analysis requires deciding whether the legislation in question is related to a legitimate government concern and requires that the means chosen by the Legislature to accomplish its objective are reasonably related to the result sought to be attained. Although the state has a legitimate interest in enacting a scheme of liability that apportions liability for damages based on the degree of a party's fault for another person's injuries, the nonparty defense provided for by the 1995 amendments to 27-1-703, which allows apportionment of liability to parties who are not named in the lawsuit and who do not have an opportunity to appear and defend themselves, is not rationally related to that legitimate government objective and is violative of the constitutional right to due process. Remaining portions of the statute are severable and remain in effect. Plumb v. District Court, 279 M 363, 927 P2d 1011, 53 St. Rep. 1187 (1996), followed in State ex rel. Maffei v. Second Judicial Court, 282 M 65, 935 P2d 266, 54 St. Rep. 244 (1997), and Cusenbary v. Mortensen, 1999 MT 221, 296 M 25, 987 P2d 351, 56 St. Rep. 864 (1999).

Failure to Conduct Preliminary Onsite Hearing in Extradition Case — No Due Process Violation: In 1989, Hardy pleaded guilty to four counts of burglary and was sentenced to four concurrent terms of 10 years in prison with 9 years suspended. In 1990, Hardy was released on probation to serve the suspended portion of his sentence, and pursuant to the Uniform Act for Out-of-State Parolee Supervision, supervision of his parole was transferred to Utah. While in Utah, Hardy committed other crimes, and Utah refused to continue parole supervision. Hardy pleaded no contest to the Utah offenses. After judgment and sentencing in Utah, Hardy was extradited back to Montana where his suspended sentence was revoked, he was sentenced to four concurrent terms of 9 years in prison, and he was not given credit for the 2 years he spent on probation in Utah. Hardy contended that there was a violation of his due process rights in not receiving a preliminary hearing upon his return to Montana, that his Montana probation officer wrongly informed him that his probation would not be revoked for misdemeanor convictions, and that he was improperly denied credit for his street time while on probation in Utah. In this case, a preliminary onsite hearing would have contributed nothing to a determination of whether Hardy had violated his probation. As evidenced by his no contest pleas and admissions, Hardy indisputably violated the conditions of his probation. A preliminary onsite hearing would not have led to any other finding. Failure to provide Hardy with a hearing did not prejudice his substantial rights. St. v. Hardy, 278 M 516, 926 P2d 700, 53 St. Rep. 998 (1996).

Best Interest of Child Standard Unconstitutional in Custody Award to Nonparent Over Natural Parent Absent Finding of Abuse, Neglect, or Dependency: The best interest of the child standard referred to in 40-4-221 in determining the custody of a child whose custodial parent dies is unconstitutional to the extent that it allows the grant of a petition prior to the termination of the noncustodial parent's constitutional right to custody. Use of the standard is improper in that any showing that a nonparent may be able to provide a better environment than a natural parent is irrelevant to the question of custody between the two in view of the constitutional right of a parent to custody. Although 40-4-221 gives a nonparent standing to request a custody hearing, it does not give the District Court authority to deprive a natural parent of the right to custody absent a finding of abuse, neglect, or dependency on the part of the natural parent. In re A.R.A., 276 M 66, 919 P2d 388, 53 St. Rep. 543 (1996), following In re Doney, 174 M 282, 570 P2d 575 (1977), and overruling Brost v. Glasgow, 200 M 194, 651 P2d 32 (1982), and In re C.G., 228 M 118, 740 P2d 1139 (1987).

Sexual Abuse — Failure of District Court to Consider Sentencing Alternatives — No Objection — Sentence Not Illegal or Violation of Due Process: Swoboda pleaded guilty to sexual abuse of children, was classified as a nondangerous offender, and was sentenced to 15 years with the Department of Corrections. On appeal, she claimed as error the District Court's failure to consider alternatives to incarceration. The Supreme Court noted that she had not objected at sentencing to the District Court's failure and declined to review the judgment. The Supreme Court noted that in the past, it had made an exception and reviewed such a failure of the District

Court when the state conceded the failure of the District Court or when the sentence was illegal. Here, however, the Supreme Court noted that the sentence was not beyond the District Court's jurisdiction. Citing St. v. Finley, 276 M 126, 915 P2d 208, 53 St. Rep. 310 (1996), the Supreme Court also held that the failure of the District Court was not a manifest miscarriage of justice and would not leave unsettled the question of the fundamental fairness of the trial or the proceedings. St. v. Swoboda, 276 M 479, 918 P2d 296, 53 St. Rep. 478 (1996).

Common-Law Plain Error — Case-by-Case Review: Despite the passage of 46-20-701, Montana's plain error statute restricting the review of errors not objected to at trial, the doctrine of common-law plain error review by the Montana Supreme Court continues to exist to allow correction of errors not objected to at trial but that affect the fairness, integrity, and public reputation of judicial proceedings. The Supreme Court retains the inherent power and obligation to interpret the constitution, protect individual rights, prevent manifest injustice, and correspondingly review lower court decisions and actions for error. The power of such review is inherent in the appellate process itself. Thus, while acknowledging the constraints of 46-20-701, the Supreme Court will discretionarily review claimed errors that implicate a criminal defendant's fundamental constitutional rights even if no contemporaneous objection is made and notwithstanding the statutory criteria, in the class of cases when failure to conduct the review may result in a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of trial proceedings, or compromise the integrity of the judicial process. The doctrine will be applied sparingly and on a case-by-case basis. Nevertheless, the necessity for contemporaneous objection to claimed error remains because 46-20-701 will be applied, except in the class of cases mentioned above. St. v. Finley, 276 M 126, 915 P2d 208, 53 St. Rep. 310 (1996), followed in St. v. Monaco, 277 M 221, 921 P2d 863, 53 St. Rep. 604 (1996), Seyferth v. St., 277 M 377, 922 P2d 494, 53 St. Rep. 698 (1996), St. v. Sullivan, 280 M 25, 927 P2d 1033, 53 St. Rep. 1282 (1996), St. v. Harris, 1999 MT 115, 294 M 397, 983 P2d 881, 56 St. Rep. 481 (1999), St. v. Pizzichiello, 1999 MT 123, 294 M 436, 983 P2d 888, 56 St. Rep. 499 (1999), St. v. Hanson, 1999 MT 226, 296 M 82, 988 P2d 299, 56 St. Rep. 891 (1999), Columbus v. Harrington, 2001 MT 258, 307 M 215, 36 P3d 937 (2001), and St. v. Auld, 2006 MT 189, 333 M 125, 142 P3d 753 (2006). See also Halldorson v. Halldorson, 175 M 170, 573 P2d 169 (1977), St. v. Wilkins, 229 M 78, 746 P2d 588 (1987), and their progeny.

Failure of City to Comply With Request for DUI Independent Blood Test — Due Process Violation: Defendant timely requested an independent blood test during the booking procedure on a DUI violation and was told that the test would be obtained, but the test was not obtained. A person accused of a criminal offense has a constitutional right to attempt to obtain exculpatory evidence, and when the offense charged involves intoxication, this right, as set out in St. v. Swanson, 222 M 357, 722 P2d 1155 (1986), encompasses the accused's right to obtain an independent blood test to establish sobriety, regardless of whether the accused submitted to a police-designated test. Failure to obtain the test when timely requested was a due process violation warranting reversal and dismissal of the charge. Whitefish v. Pinson, 271 M 170, 895 P2d 610, 52 St. Rep. 384 (1995). See also St. v. Peterson, 227 M 418, 739 P2d 958 (1987), and St. v. Klinkhammer, 256 M 275, 846 P2d 1008 (1993).

Constitutionality of Retroactive Statute of Limitations for Claims Involving Childhood Sexual Abuse: At age 41, appellant filed a complaint of sexual abuse against her father for incidents occurring when she was between the ages of 16 and 19, averring that through counseling she had discovered the alleged abuse and filed the complaint a short time later. The District Court dismissed the complaint by summary judgment, holding that the retroactive application of the childhood sexual abuse statute of limitations placed an unreasonable hardship and oppression on respondent, basically destroying any limitations of actions by reviving a claim after that claim was barred by the conventional statute of limitations in violation of respondent's due process rights. However, as determined in Penrod v. Hoskinson, 170 M 277, 552 P2d 325 (1976), the Legislature has specific power to extend a statute of limitations and apply it retroactively to reverse barred claims. The Supreme Court will not examine the actions of the Legislature in addressing a public need when a statute has a reasonable relation to a legitimate state purpose. The language of 27-2-216 clearly allows the bringing of a claim for childhood sexual abuse within 3 years of discovering the injuries. Respondent failed to prove unconstitutionality beyond a reasonable doubt. Because there was a genuine issue of fact as to when appellant knew or should have known of her injury and its cause, summary judgment was improper and the case was remanded for trial. Cosgriffe v. Cosgriffe, 262 M 175, 864 P2d 776, 50 St. Rep. 1501 (1993), overruling E.W. v. D.C.H., 231 M 481, 754 P2d 817 (1988).

Constitutionality of Statutory Scheme Involving Evidence of Mental Disease or Defect — Due Process Rights Protected: Prior to the 1979 changes in Montana law, insanity was treated as an affirmative defense that the defendant had to establish by a preponderance of the evidence. Now a defendant may submit evidence of mental disease or defect without applying any particular evidentiary standard. Byers contended that failure to instruct a jury on the traditional insanity defense contravened the fundamental legal principle that criminal sanctions will only be imposed on persons who act with wrongful intent in the commission of an offense, in violation of his right to due process. However, the Montana statutory scheme in Title 46, ch. 14, provides adequate due process protection at various stages by: (1) under 46-14-103, considering defendant's state of mind before trial by analyzing whether defendant is able to understand the proceedings and assist counsel in the defense; (2) under 46-14-102, allowing the presentation of evidence that defendant suffers from mental disease or defect and did not have the requisite mental state; and (3) under 46-14-311, considering during sentencing whether at the time of the commission of the offense, defendant's mental disease or defect rendered defendant unable to appreciate the criminality of defendant's behavior or to conform defendant's behavior to the requirements of law. St. v. Byers, 261 M 17, 861 P2d 860, 50 St. Rep. 1162 (1993), following St. v. Korell, 213 M 316, 690 P2d 992 (1984), and overruled in part by St. v. Egelhoff, 272 M 114, 900 P2d 260, 52 St. Rep. 548 (1995).

Criminal Mischief Statute Not Unconstitutionally Vague: Defendants Richard and David Fertterer were convicted of felony criminal mischief for illegally killing game. They contended on appeal that the statute violated principles of due process in that it was vague and did not provide them with sufficient notice that their conduct violated the criminal mischief statute. The Supreme Court held that wild animals are public property and that reasonable persons would have realized that destroying wild animals without the consent of the state violated the statute. The court also held that the criminal mischief statute applies explicit standards that prevent arbitrary and discriminatory application and that the statute therefore does not violate due process. St. v. Fertterer, 255 M 73, 841 P2d 467, 49 St. Rep. 846 (1992).

Constitutionality of Statute Regulating Fees of Workers' Compensation Attorneys — No Due Process Violation: An attorney whose fee arrangements were disallowed by the Employment Relations Division claimed that 39-71-613, which allows regulation of fees of workers' compensation attorneys, was a violation of constitutional due process. However, he was given a hearing on the subject by the Department of Labor and Industry, the Workers' Compensation Court, and finally the Supreme Court, so his due process argument could not stand. He further contended that 39-71-613 violated his equal protection rights because the Department regulates the fees of only claimants' attorneys and not defense attorneys, which impaired his right to contract. However, there is neither a suspect class nor a fundamental right involved. The Department's application of the statute to a claimant's attorney fee is rationally related to the government's legitimate interest in protecting the claimant's net benefits in workers' compensation cases, and protection from impaired fee agreements is rationally related to that interest and is therefore not a constitutional violation. Burris v. Employment Relations Div., 252 M 376, 829 P2d 639, 49 St. Rep. 326 (1992).

Prohibition of Trial De Novo Constitutional: Capital Ford Garage argued that the statute limiting appeals from a Small Claims Court to questions of law rather than trial de novo with representation by counsel denied the garage its right to due process. The Supreme Court held that the statute was constitutional because a defendant had the right to remove the case to District Court or waive the rights to trial by jury and representation by counsel by proceeding in a Small Claims Court. The Supreme Court further held that limiting the appeal in District Court to questions of law was constitutional. Johnson v. Capital Ford Garage, 250 M 430, 820 P2d 1275, 48 St. Rep. 992 (1991).

Separate Crime Not Created by Dangerous Offender Provision — Due Process Considerations: Defendant argued that the restriction of parole eligibility under 46-18-404 (now repealed) was a distinct crime separate from the underlying offense or was an element of the underlying offense and as such the prosecution must charge dangerous offender status in the information or indictment and prove it beyond a reasonable doubt. The Supreme Court disagreed, holding that the dangerous offender status does not create a separate crime or element of a crime but rather is part of a sentencing scheme that does not circumvent due process. While federal due process imposes some limits beyond which states may not go, application of the reasonable doubt standard has always depended on how state legislatures choose to define a crime. St. v. Krantz, 241 M 501, 788 P2d 298, 47 St. Rep. 454 (1990), followed in St. v. Byers, 261 M 17, 861 P2d 860, 50 St. Rep. 1162 (1993), and St. v. Arlington, 265 M 127, 875 P2d 307, 51 St. Rep. 417 (1994),

and overruled in part by St. v. Egelhoff, 272 M 114, 900 P2d 260, 52 St. Rep. 548 (1995). See also McMillan v. Pa., 477 US 79, 91 L Ed 2d 67, 106 S Ct 2411 (1986), and Patterson v. N.Y., 432 US 197, 53 L Ed 2d 281, 97 S Ct 2319 (1977).

Adequate Medical Care Not Basis for Disregarding Due Process: The medical center, in which the respondent was placed by the officers who picked her up, did not follow proper procedure, and the respondent was held without authority for 5 days before her competency hearing. The Supreme Court held that providing adequate medical care is not a basis for disregarding the due process and statutory rights of a person charged with being seriously mentally ill. The court went on to admonish the medical center, the County Attorney's office, and the county family services department for their failure to comply with the due process rights of the respondent. Mental Health of E.P., 241 M 316, 787 P2d 322, 47 St. Rep. 297 (1990).

Termination of Parental Rights — Burden of Proof: In terminating parental rights under 41-3-609, the burden of proof is on the state to prove by clear and convincing evidence that: (1) the child is a youth in need of care; (2) the parent did not comply with a court-approved treatment plan; and (3) the condition rendering the parent unfit is unlikely to change within a reasonable time. In re L.W.K., D.E.K., & A.J.K., 236 M 14, 767 P2d 1339, 46 St. Rep. 145 (1989), followed in In re R.H., 250 M 164, 819 P2d 152, 48 St. Rep. 692 (1991). See also In re A.N. & C.N., 2000 MT 35, 298 M 237, 995 P2d 427, 57 St. Rep. 155 (2000).

Due Process Right of Official Detainees to Medical Care: The Supreme Court cited Revere v. Mass. Gen. Hosp., 463 US 239, 77 L Ed 2d 605, 103 S Ct 2979 (1983), in holding that due process demands that persons detained by government agencies receive adequate medical care regardless of their ability to pay; responsibility for costs is a matter of state law. Mont. Deaconess Medical Center v. Johnson, 232 M 474, 758 P2d 756, 45 St. Rep. 1207 (1988).

Motion for New Trial Based on Recantation by Accomplice Fifteen Years After Conviction: Some 15 years after defendant was convicted of second degree murder, an accomplice recanted his testimony, claiming that he, not defendant, committed the crime. Defendant then filed a motion for a new trial or other appropriate relief. The state argued the motion was essentially a petition for postconviction relief barred by the 5-year statute of limitations in 46-21-102. The Supreme Court disagreed, finding that under such an interpretation a defendant held in violation of his constitutional rights would be deprived of a method of redress regardless of his diligence or the justness of his claim. Rather, the claim sounded in the nature of a petition for habeas corpus, and the court determined the single issue to be whether defendant was entitled to a new trial based on the proffered evidence of another person doing the crime for which defendant was convicted. St. v. Perry, 232 M 455, 758 P2d 268, 45 St. Rep. 1192 (1988), overruled, to the extent that Perry stands for the proposition that a trial judge is required to grant a new trial only when satisfied that the recantation of the witness is true, in St. v. Clark, 2005 MT 330, 330 M 8, 125 P3d 1099 (2005).

Scienter Requirement: Sections 87-5-203 and 87-5-206 (now repealed) are not impermissively vague. They require that the action made illegal be done knowingly. The mental state of "knowingly" is a sufficient scienter requirement. U.S. v. Doyle, 786 F2d 1440 (9th Cir. 1986).

Jurisdiction Not Lost Due to Delay in Mailing Notice of Bond Forfeiture: A 77-day delay between the date bond was forfeited and the date surety agent was notified did not deprive the District Court of jurisdiction simply because notice was not mailed "forthwith" as required by this section. As long as the 30-day period elapsed between the notice of forfeiture and judgment on the forfeiture, the statutory requirements and mandates of due process were met. St. v. Sunday, 224 M 340, 729 P2d 1319, 43 St. Rep. 2235 (1986).

Confidentiality of Medical Legal Panel — Denial of Transcript Upheld: Plaintiffs who filed a claim with the Montana Medical Legal Panel alleging malpractice against two doctors requested a stenographic record of the hearing. The doctors opposed the request, and the Panel chairman ruled that under Rule 15(c), Panel Rules of Procedure, no transcript would be made. Plaintiffs then applied to the District Court for a Writ of Mandamus, and the court ruled that denial of the transcript violated due process under the 14th amendment of the U.S. Constitution and Art. II, sec. 17., Mont. Const. On appeal, the Supreme Court found that the language of 27-6-502 indicated legislative intent that the Montana Administrative Procedure Act provisions concerning transcripts do not apply. The court held that the Panel is a purely advisory body and therefore confidential. Given its confidential nature, it cannot be said that Rule 15(c) arbitrarily denies parties a transcript or that denial of a transcript destroys the right to fully cross-examine witnesses at trial. The court found no constitutional infirmities in the workings of Rule 15(c); therefore, the District Court was reversed. State ex rel. Hufford v. Mont. Medical Legal Panel, 223 M 73, 724 P2d 186, 43 St. Rep. 1541 (1986).

Right to Independent Blood Test in Crime Involving Intoxication: The state interpreted 61-8-405 to mean that the right to an independent blood test arises only after an accused takes a test designated by the arresting officer. The Supreme Court, citing an Arizona Appellate Court interpretation of an identical statute, found that such an interpretation would result in an unconstitutional restraint on the right of a criminal accused to attempt to obtain independent evidence of his innocence and deprive him of due process of law (Smith v. Cada, 562 P2d 390 (Ariz. App. 1977)). Therefore, it was held that a person accused of a crime involving intoxication has a right to obtain an independent blood test to establish his sobriety regardless of whether he submits to a police designated test under 61-8-402. St. v. Swanson, 222 M 357, 722 P2d 1155, 43 St. Rep. 1329 (1986).

Tampering With Witnesses — Statute Not Unconstitutionally Vague: Defendant Woods, while under arrest for suspected burglary, wrote two notes to his codefendants that were interpreted by the jury as attempts to elicit false testimony which would exculpate him. On appeal, Woods argued that the language of 45-7-206 was so vague that it violated his right to due process under the 14th amendment to the U.S. Constitution and Art. II, sec. 17, Mont. Const. The Supreme Court found that when 45-7-206 is read as a whole, the meaning is evident. As applied to the present case, the court found that Woods knew that the testimony he sought would be false, as evidenced by the opening statement of one note which stated: "If the kid goes for it here's the story". Section 45-7-206, as applied, was not unconstitutionally vague. St. v. Woods, 221 M 17, 716 P2d 624, 43 St. Rep. 601 (1986).

Court Will Not Imply Mental State Requirement in Statute: The Supreme Court will not imply a mental state in a statute prohibiting spotlighting while hunting when that statute does not include a mental state. To do so would arbitrarily make some persons guilty of an offense, while excepting others committing the offense. St. v. Austin, 217 M 265, 704 P2d 55, 42 St. Rep. 1186 (1985).

Narrow Construction of Disturbing the Peace Ordinance — No Vagueness or Overbreadth: Appellant was convicted of breach of the peace under Whitefish Municipal Ordinance, 9.64.010, which read: "No person within the municipality, or within three miles of the municipal limits, shall willfully and maliciously disturb the peace and quiet of any street, neighborhood, family, or person by loud, tumultuous noise, or by tumultuous or offensive conduct, or by using offensive, loud radio or television sets, or by threatening, quarreling, scolding, hallooing, hollering, challenging to fight, or fighting, or by cursing, swearing, uttering obscene, profane, vulgar, or indecent language in the presence of any person or persons, or by committing any obscene, vulgar, indecent, or lewd act in any public place, or in view of any person or persons". Appellant had been talking louder than normal on a city street at about 2 a.m., and when a police officer told appellant to "hold it down", appellant said "Well, [m.f.], I will holler and yell when and wherever I want if I want to". The Supreme Court construed the ordinance narrowly as applying only to words spoken willfully and maliciously, and that constitute "fighting words" with a direct tendency to violence, and stated that as so construed the ordinance is not unconstitutional for vagueness or overbreadth. Whitefish v. O'Shaughnessy, 216 M 433, 704 P2d 1021, 42 St. Rep. 928 (1985).

Constitutionality of Habitual Traffic Offender Law: In upholding the constitutionality of the habitual traffic offender law (Title 61, ch. 11, part 2), the Supreme Court held that a driver's license is a property interest, not a right; that revocation proceedings are civil in nature; and that the due process standards are not as strict as in criminal actions. The predispositional hearing satisfies due process rights, and a postdispositional hearing is not necessary. State ex rel. Majerus v. Carter, 214 M 272, 693 P2d 501, 41 St. Rep. 2468 (1984).

Insanity Defense — Due Process Challenge: Defendant, a Vietnam veteran, had several disturbing experiences during the war. He had psychological problems upon his return. While working at St. Patrick Hospital in Missoula, he developed animosity towards his supervisor. He felt he had to kill his supervisor before the supervisor killed him. He armed himself and went to the supervisor's home, where he entered and began shooting. In an ensuing struggle, a knife was also used and both men were injured. Defendant was charged with attempted deliberate homicide and aggravated assault. Defendant gave notice he intended to rely on a mental disease or defect to prove he did not have the particular state of mind that is an essential element of the offense charged. In 1979, the Legislature abolished the traditional use of the insanity defense. Before trial, evidence may be presented to show defendant is unfit to stand trial under 46-14-221. A defendant unable to understand the proceedings or assist in his defense may not be prosecuted under 46-14-103. At trial, evidence of mental disease or defect is admissible when relevant to prove that at the time of the offense, defendant did not have the state of mind that is an element of the offense charged. Under 46-14-102, this evidence may show that the defendant did not act

knowingly or purposely. The State retains the burden of proving each element of the offense beyond a reasonable doubt. If the jury finds the State did not prove the requisite mental state, under 46-14-201 (renumbered 46-14-214), it is to return a not guilty verdict. Following a verdict of guilty, the trial judge, under 46-14-311, must consider any relevant evidence to determine whether the defendant was able to appreciate the criminality of his acts or conform his conduct to the law at the time of the offense. Section 46-14-312 governs where the defendant is sentenced based on the judge's finding. Defendant contended that this statutory scheme violated the Due Process Clause of the 14th amendment (similar to Art. II, sec. 17, Mont. Const.). Defendant contended that the traditional insanity defense was so firmly imbedded in the common law that it was a fundamental right. United State Supreme Court decisions provide that the Due Process Clause does not require use of a particular insanity test or allocation of burden of proof. The Montana Supreme Court held that Montana's statutory scheme does not unconstitutionally shift the state's burden of proof of the necessary elements of the offense. The State retains its traditional burden of proving all elements beyond a reasonable doubt. In addition, the sentencing judge must consider mitigating factors. A defendant can be sentenced to imprisonment only after a finding that he was not suffering, at the time of the offense, from a mental disease or defect rendering him incapable of appreciating the criminality of his conduct or unable to conform his conduct to the law. The statutory scheme does not violate due process. St. v. Korell, 213 M 316, 690 P2d 992, 41 St. Rep. 2141 (1984).

Retroactive Application of Tax Delinquency Interest Increase: After the Legislature passed an amendment raising the rate of interest applied to tax payments in delinquency, the Attorney General issued two opinions as to whether the increase should be given retroactive application, the first opinion saying "no" and the second opinion, issued 2 months later, saying "yes". Appellant claimed that the effect of the Attorney General's opinions was to divide delinquent taxpayers into two groups, those to whom the increase was not retroactively applied, under the first opinion, and those to whom the increase was applied, under the second opinion, and that therefore, retroactive application of the increase violated the Due Process and Equal Protection Clauses of the Montana Constitution as well as the 14th amendment of the United States Constitution. The Supreme Court upheld the District Court's dismissal of appellant's claim, ruling that the constitutionality of a law is determined by looking at the enactment itself rather than at an administrative interpretation of it. Further, the law is not discriminatory and a delinquent taxpayer does not have a vested right to application of a particular rate of interest. O'Shaughnessey v. Wolfe, 212 M 12, 685 P2d 361, 41 St. Rep. 1557 (1984).

Constitutionality of Statute Authorizing Emergency Transfer From State Institution to Mental Health Facility: In upholding the constitutionality of 53-21-130, the Supreme Court applied the test set forth by the U. S. Supreme Court in Vitek v. Jones, 445 US 480, 63 L Ed 2d 552, 100 S Ct 1254 (1980), and found that the interests of the state outweigh the interests of the individual transferred pursuant to 53-21-130 as long as the procedural safeguards mandated by that section are followed. In re the Petition of M.C., 211 M 105, 683 P2d 956, 41 St. Rep. 1242 (1984).

Constitutionality of Certain Provisions of Montana Youth Court Act: The Montana Youth Court Act, which allows a youth in need of supervision (now youth in need of intervention) who has violated probation to be adjudged a delinquent youth, is not unconstitutional as violative of the due process, equal protection, or cruel and unusual punishment provisions of the United States and Montana Constitutions. The Supreme Court rejected appellant's assertion that a juvenile status offender who violated the terms of her probation by truancy should not be considered a delinquent youth and subjected to greater punishment for the same conduct which originally gave the Youth Court authority to designate her a youth in need of supervision (now youth in need of intervention). In re C.H., 210 M 184, 683 P2d 931, 41 St. Rep. 997 (1984).

Parking Ordinance — Presumption That Owner Parked Vehicle — Unconstitutional Shifting of Burden: In striking down a parking ordinance, the Supreme Court held that to make the owner of a vehicle prima facie liable upon proof that his vehicle has been parked illegally is equivalent to a presumption that the owner parked the vehicle. The effect of the presumption is to violate constitutional due process requirements by shifting the burden of persuasion to defendant and contradicting the presumption of innocence. Missoula v. Shea, 202 M 286, 661 P2d 410, 40 St. Rep. 91 (1983).

Retroactive Calculation of Tax — Unconstitutional: Plaintiff contended that 15-31-114(2)(b)(ii)(C) was unconstitutionally retroactive. Plaintiff, Havre Federal Savings and Loan Association, had incurred a net operating loss in each of the 5 years from 1974 through 1978. The challenged portion of the statute was enacted in 1979. Under 15-31-114(2)(b)(i), plaintiff carried forward its net operating losses and applied them to its 1979 return, which resulted in no net income for

that year. The defendant, acting under the authority of the challenged subsection, recalculated plaintiff's net income for the years 1974 through 1978, which resulted in no net operating losses to carry forward. The Supreme Court held that the subsection was retroactive in effect and therefore unconstitutional. The State cannot change a law in 1979 and compel a recalculation of tax returns filed for 1974 through 1978 based on the new law effective for the first time in 1979. First Fed. S & L Ass'n v. Dept. of Revenue, 200 M 358, 654 P2d 496, 39 St. Rep. 1802 (1982).

Carrying and Showing Driver's License — Upheld as Valid Police Power: A driver challenged as unconstitutional the provision in 61-5-116 that a motor vehicle operator carry an operator's license and exhibit it upon demand by certain law enforcement and other personnel. Conviction of the offense was upheld when the driver did not meet his burden of clearly showing that the provision was unreasonable. The driver claimed that due process was violated in that he had a right to use the highway in his vehicle and with his gasoline and that his use could not be regulated in an attempt to provide for the general welfare and safety of the people of the state. St. v. Deitchler, 201 M 70, 651 P2d 1020, 39 St. Rep. 1959 (1982).

Right to Enact Police Power Regulations: State and local governments have inherent power to enact reasonable legislation for the health, safety, welfare, or morals of the public, even though the legislation is an infringement of individual rights. Police power regulations are presumed reasonable, and a clear showing is required for a finding that they are unreasonable. St. v. Deitchler, 201 M 70, 651 P2d 1020, 39 St. Rep. 1959 (1982).

Speed Limit — Upheld as Valid Police Power: A driver was convicted of violating 61-8-304 (now repealed), declaring that the Attorney General must set a conservation speed limit in conformance with limits imposed by federal law as a prerequisite to the state's receipt of federal highway money. The driver claimed the statute violated due process in that he had a right to use the highway in his vehicle and with his gasoline and that his use could not be regulated in an attempt to provide for the general welfare and safety of the people of the state. The court found that the driver did not meet his burden of clearly showing that the statute was unreasonable. St. v. Deitchler, 201 M 70, 651 P2d 1020, 39 St. Rep. 1959 (1982).

Wrongful Placement of Special Education Child — Constitutional Claims Properly Dismissed: The plaintiff, a minor child, was diagnosed as needing special education, and as a result of alleged misplacement in a special education program, regressed in her training and filed an action for damages. The Supreme Court held that the District Court did not err in dismissing the plaintiff's claims based on a denial of due process and equal protection of the law. As to due process, the complaint alleged no constitutional claim that goes beyond the protection provided by statute and administrative rules. As to the equal protection claim, it was based on the fact that persons evaluating the child's learning difficulties took the child's Indian background into account, which was necessary in order to properly evaluate the child. This action cannot be classified as invidious racial discrimination, for a psychological evaluation that considers the cultural factors cannot be avoided if it is to have any validity. B.M. v. St., 200 M 58, 649 P2d 425, 39 St. Rep. 1285 (1982).

Maternity Leave Law Not Unconstitutional: The Montana maternity leave law does not violate the Equal Protection and Due Process Clauses, and it does not conflict with and is not preempted by the Pregnancy Discrimination Act, 42 U.S.C. section 2000e(k). By amending its policy to grant reasonable sickness and disability leave to all first-year employees in its Montana stores, plaintiff could insure compliance with both the Montana maternity leave law and the Pregnancy Discrimination Act of Title VII. Miller-Wohl Co., Inc. v. Comm'r of Labor & Indus., 515 F. Supp. 1264, 38 St. Rep. 967 (D.C. Mont. 1981); on appeal to the U.S. Supreme Court, judgment vacated and case remanded, 479 US 1050, 93 L Ed 2d 972, 107 S Ct 919 (1987); judgment reinstated and remanded to the District Court for determination of appropriate attorney fees and costs, 228 M 505, 744 P2d 871, 44 St. Rep. 1718 (1987).

Accounting Requirements Void for Vagueness: Subsections (5)(a)(i) and (5)(a)(iv) of section 5-7-208, enacted by Initiative 85, are void for vagueness. It is impossible to tell when "original and derivative" research is being performed; likewise, the court is unable to determine what additional information ought to be disclosed under the subheading of "news media". Mont. Auto. Ass'n v. Greely, 193 M 378, 632 P2d 300, 38 St. Rep. 1174 (1981).

Common Understanding and Judicial Precedent Sufficient to Show Compelling State Interest: The compelling need or state interest in enactment of Initiative 85 is demonstrated by both common understanding and judicial precedent, and no additional evidence need be presented to show compelling state interest. Mont. Auto. Ass'n v. Greely, 193 M 378, 632 P2d 300, 38 St. Rep. 1174 (1981).

Definition Subsections Impermissibly Vague: Subsections (7)(c)(iv), (7)(c)(v), and (7)(f) of 5-7-102, enacted by Initiative 85, are impermissibly vague, unconstitutional, and therefore void.

(Following U.S. v. Dupree, 544 F2d 1050 (9th Cir. 1976).) The court asks rhetorically: Is there a form of "proper" economic reprisal? How does a lobbyist determine when he may retaliate lawfully against a public official? Can conduct which is potentially criminal be defined as "any means other then" the permitted means of argument on the merits? To "reflect discredit" is not sufficiently definite to give a person of ordinary intelligence fair notice that his conduct is forbidden. Mont. Auto. Ass'n v. Greely, 193 M 378, 632 P2d 300, 38 St. Rep. 1174 (1981).

Constitutionality of Planning and Zoning Districts — Interrelationship of Provisions: In this case on the establishment of planning and zoning districts before adoption of a comprehensive development plan (now growth policy), the Supreme Court held that the adoption of a planning and zoning district under 76-2-101 is a useless first step unless a development pattern is adopted under 76-2-104. At that stage, the guidelines established for the functioning of a planning and zoning commission are constitutional. Constitutionality extended to the acts of the County Commission in establishing boundaries of the planning and zoning districts in this case. The Supreme Court indicated that the other parts of Title 76, ch. 2, were added to part 1 and concluded that they were not enacted in lieu of part 1. Part 1, therefore, has its own meaning and effect and stands on its own. Mont. Wildlife Fed'n v. Sager, 190 M 247, 620 P2d 1189, 37 St. Rep. 1897 (1980).

Section Relating to Unlocatable Mineral Interest Owners Not Unconstitutionally Vague: Under the rule of law established in Cramp v. Bd. of Public Instruction, 368 US 278 (1961), that the due process test for vagueness of a statute is whether the law is so vague and uncertain that men of common intelligence must guess at its meaning, 82-1-306 is not unconstitutionally vague. This section can be interpreted to mean the following: "1. Any person holding funds payable to persons the holder cannot locate, produced from mineral interests or mineral production, including oil and gas, must turn the funds over to the clerk of the local District Court. A grace period of six months is allowed from the enactment of the statutes. 2. Subsequent to the enactment of the statutes, no holder of the type stated above may continue holding payments for the account of unlocatable persons for longer than six months. In turning over the monies to the clerk of the court as required by the statutes, the holder must petition for a trust as provided for in section 82-1-302, MCA. 3. Civil penalties are provided for failure to comply with the statutes." In re Mont. Pac. Oil & Gas Co., 189 M 11, 614 P2d 1045, 37 St. Rep. 1238 (1980).

Interpretation Consistent With the Intent of the Legislature: While a statute may have some ambiguities due to a large variety of possible situations that are covered by a statute, a court is not required under due process standards to find vagueness in the terms used in a statute so as to destroy an act; rather, it is the court's duty to construe a statute so as to be consistent with the will of the Legislature and to comport with constitutional limitations. In re Mont. Pac. Oil & Gas Co., 189 M 11, 614 P2d 1045, 37 St. Rep. 1238 (1980), citing CSC v. Letter Carriers, 413 US 548 (1973).

"Promptly" Relating to Service of Petition for Judicial Review of Administrative Decisions Not Vague: The use of the word "promptly" as a requirement for service of a petition for judicial review under 2-4-702 is not unconstitutionally vague. Its plain meaning is sufficient; a person's right of due process is not violated by its use even though clearer or more precise language might have been used. Rierson v. St., 188 M 522, 614 P2d 1020 (1980).

Statute Defining Practice of Chiropractic Not Unconstitutionally Vague: The definition of practice of chiropractic in 37-12-101 is not unconstitutionally vague in violation of the Due Process Clause. The term "specific adjustment or manipulation" is a scientific term having a readily ascertainable definition within the chiropractic community and provides a standard with meaningful differentiation between culpable and innocent conduct. Defendant, as a chiropractor licensed in two states, cannot assert lack of notice of the meaning of the terms. St. v. Blinzler, 183 M 300, 599 P2d 349 (1979).

Validity of Statute Defining Practice of Medicine — Question Moot: Although much of defendant's brief concerns the statutes controlling the practice of medicine, the question of the constitutional validity of 37-3-102(1)(a) was rendered moot by the jury's acquittal of the counts charged under that section. St. v. Blinzler, 183 M 300, 599 P2d 349 (1979).

Unconstitutional Presumption — Cultivation Provision: That part of 45-9-101 which provides that a person commits a criminal sale (now criminal distribution) of dangerous drugs if he cultivates marijuana is unconstitutional on its face because it offends due process by creating a conclusive presumption of a criminal sale of marijuana from its cultivation, which is a purely arbitrary presumption. State ex rel. Zander v. District Court, 180 M 548, 591 P2d 656 (1979).

Mental State of "Knowingly": A mental state of "knowingly" for a conviction of criminal mischief does not offend due process as either unconstitutionally vague or overly broad. St. v. Seitzinger, 180 M 136, 589 P2d 655 (1979).

Parking Meter Violation — Unlawful Search — Ordinance Unconstitutional: The search of defendant's person under a warrant of arrest issued by a police magistrate for a parking meter violation was an unreasonable search since evidence at a suppression hearing did not disclose any basis for a mandatory custodial arrest. Furthermore, the city ordinance involved was unconstitutional to the extent that it precluded the defense that defendant was not driving the vehicle when the parking violation occurred, depriving him of due process. St. v. Jetty, 176 M 519, 579 P2d 1228 (1978).

Unconstitutional Discrimination: Court struck down 33-25-103 (now repealed) because it discriminates in favor of those agents who were writing title insurance on the basis of legal opinions on July 1, 1961, and against those licensed agents who later attempted to do so and thereby is in violation of the guarantee of equal protection of the laws and unconstitutional. Mont. Land Title Ass'n v. First Am. Title & Escrow of Billings, 167 M 471, 539 P2d 711 (1975).

INVESTIGATIVE PROCEDURES

No Duty to Learn of Exculpatory Evidence in Possession of Jurisdictions Not Involved in Prosecution: As a general rule, the state's duty to disclose information under Brady v. Md., 373 US 83 (1963), does not impose a duty on prosecutors or investigators to learn of information possessed by other jurisdictions that are not involved in the investigation or prosecution at issue. McGarvey v. St., 2014 MT 189, 375 Mont. 495, 329 P.3d 576.

No Affirmative Duty for Police to Conduct Rape Exam or Fingernail Scrapings — Claim of Ineffective Assistance of Counsel Denied: A client reported to the police that the defendant, a massage therapist, had penetrated her with his finger during a massage. The alleged victim was not asked to submit to a rape exam and the police did not perform a fingernail scraping test on the defendant. Following his conviction for sexual intercourse without consent and unsuccessful appeal of his conviction, the defendant filed a petition for postconviction relief. In it, he claimed that he had received ineffective assistance of counsel because his attorney had neither sought dismissal of the charge nor requested a jury instruction regarding the lack of a rape exam or fingernail scrapings. The Supreme Court rejected the argument that his counsel was ineffective and emphasized that the police do not have an affirmative duty to collect potentially exculpatory evidence. Taylor v. St., 2014 MT 142, 375 Mont. 234, 335 P.3d 1218.

Agent's Actions Technically Violating Montana Law Not Outrageous Government Conduct: The defendants were charged with criminal possession and distribution of dangerous drugs based on their interactions with an undercover agent who had obtained a medical marijuana card. The defendants' motion to dismiss the charges based on the state's conduct constituting outrageous government conduct was granted by the trial court. The Supreme Court reversed, holding that while the agent's conduct technically violated Montana statutes, the conduct did not affect the defendants' due process rights, was the type of illegal activity necessary for the agent to infiltrate the criminal enterprise, and did not constitute the engineering or direction of the criminal enterprise from start to finish. St. v. Fitzpatrick, 2012 MT 300, 367 Mont. 385, 291 P.3d 1106.

Failure to Disclose Police Videotape — Late Discovery Not Indicative of Bad Faith: Charlie was convicted of drug violations and sought to overturn his convictions by arguing that the state's failure to turn over the police vehicle videotape of his arrest warranted a new trial. The Supreme Court held that the facts surrounding the discovery of the videotape showed that there was no bad faith in the failure to disclose the tape. The court denied the motion for a new trial, citing St. v. Giddings, 2009 MT 61, 349 Mont. 347, 208 P.3d 363, for authority that a showing of bad faith was required. The court also noted that Charlie had failed to make his argument in the District Court and that the Supreme Court has held that it would not consider arguments on appeal that were not made in the District Court. St. v. Charlie, 2010 MT 195, 357 Mont. 355, 239 P.3d 934.

Nonprejudicial Preaccusation Delay Not Violative of Due Process: To make a due process claim based on preaccusation delay, a defendant bears the heavy burden of demonstrating actual substantive prejudice resulting from the delay, meaning the sort of deprivation that impairs the defendant's right to a fair trial. The proof must be definite and not speculative or presumed, and there must be some culpability on the government's part before a dismissal may be granted. In this case, Passmore argued personal consequences resulting from a preaccusation delay but did not demonstrate actual substantive prejudice with definite nonspeculative proof, and he therefore failed to meet the burden of showing that the preaccusation delay was a violation of due process.

Passmore's motion to dismiss on grounds of prejudicial preaccusation delay was properly denied. St. v. Passmore, 2010 MT 34, 355 Mont. 187, 225 P.3d 1229.

Sufficient Explanation of DNA Evidence to Jury — Prosecutor's Reference to Defendant's DNA Not Violative of Due Process: A prosecution expert testified that the presence of Jackson's DNA could not be excluded from a weapon used to kill a deputy. During closing, the prosecutor referenced the presence of Jackson's DNA on the weapon where it should never have been. Jackson asserted that the reference to Jackson's DNA violated his due process rights because the testimony did not state that it was Jackson's DNA on the weapon, but rather that Jackson could not be eliminated as a contributor to the DNA sample. However, the jury was given a correct explanation of the DNA evidence numerous times throughout the trial, and the state's case did not rest solely on DNA evidence. The Supreme Court concluded that the prosecutor's brief incorrect reference, to which Jackson did not object, did not implicate Jackson's fundamental rights or compromise the judicial process, so plain error review of the claim was inappropriate. St. v. Jackson, 2009 MT 427, 354 M 63, 22 P3d 1213 (2009), distinguishing U.S. v. Massey, 594 F2d 676 (8th Cir. 1979), and Brown v. Farwell, 525 F3d 787 (9th Cir. 2008).

No Negligence in Officers' Response to Robbery Call or in Brief Detention of Robbery Victim: Plaintiff worked at a convenience store when a person entered the store, held a knife to plaintiff's throat, and robbed the store. Plaintiff managed to dial 9-1-1, but could not speak with police. Officers determined where the call came from and surrounded the store. However, even though officers could see two people inside, it was not possible to determine who was involved in the robbery. Meanwhile, plaintiff was taken to a back room and raped. Officers arrested the perpetrator immediately after he left the store and then ordered any other persons inside to exit. Plaintiff then left the store and was subdued and handcuffed for about 30 seconds before officers determined that she was an employee and had been raped. Plaintiff subsequently sued the county, law enforcement agencies, and several individual officers for negligently responding to the situation, allowing plaintiff to be raped, and improperly arresting plaintiff when she left the store. The District Court granted summary judgment for defendants and plaintiff appealed, but the Supreme Court affirmed. Under the circumstances, the officers responded quickly and professionally and got plaintiff to a safe position and to medical care as immediately as possible. The officers did not have custody or control of either the plaintiff or the robber at the time the rape occurred and therefore were in no position to undertake specific actions to protect the plaintiff until she came out of the store and her identity and role in the events were established. Additionally, the brief detention of plaintiff was justified and provided no cause of action against defendants. Gonzales v. Bozeman, 2009 MT 277, 352 M 145, 217 P3d 487 (2009).

Admission of Photo Identification Evidence — Due Process Not Violated Absent Substantial Likelihood of Irreparable Misidentification: Lally asserted that his due process rights were violated because the trial court denied his motion to exclude photo identification evidence by a peace officer who identified Lally as the driver of a motorcycle who had eluded arrest. Citing Neil v. Biggers, 409 US 188 (1972), the Supreme Court noted that the right to due process bars the admission of evidence deriving from suggestive identification procedures when there is a substantial likelihood of irreparable misidentification. However, under the totality of the circumstances and the specific facts of this case, the officer's identification of Lally was not so unreliable that admission of the evidence would have violated due process, so the trial court's denial of Lally's motion to exclude the evidence was affirmed. St. v. Lally, 2008 MT 452, 348 M 59, 199 P3d 818 (2008), following St. v. Lara, 179 M 201, 587 P2d 930 (1978), St. v. Higley, 190 M 412, 621 P2d 1043 (1980), and St. v. Schoffner, 248 M 260, 811 P2d 548 (1991).

Truant Smelling of Alcohol — Particularized Suspicion for Arrest — Motion to Suppress Properly Denied: A 14-year-old boy's mother called his school, reported that he had not returned home the previous night, and requested that he be picked up. The school resource officer notified police and asked that the boy be brought to school if found. An officer later found the boy on the street smelling of alcohol and took the boy to the police station where it was discovered that several town businesses had been burglarized during the night, including a bowling alley where money and liquor had been stolen. Money and liquor were found on the youth, and his shoes were taken as evidence to see if they matched prints found at the bowling alley. The youth moved that all evidence be suppressed, but the motion was denied. On appeal, the Supreme Court affirmed. Based on the fact that the officer smelled alcohol on the youth, the officer's particularized suspicion that the youth had been drinking developed into probable cause to believe that the youth committed the offense of consuming or possessing alcohol. Because the officer had probable cause to make an immediate arrest, including the fact that the boy had been reported missing from home and was truant from school, it was constitutionally permissible to take the boy into

custody pursuant to 41-5-321 and reasonable to conduct a search pursuant to that arrest for the youth's safety. In re Z.M., 2007 MT 122, 337 M 278, 160 P3d 490 (2007).

No Clear Discussion Regarding Separate Blood Alcohol Test or Impediment of Request for Independent Test — Due Process Not Violated: As the arresting officer was reading the implied consent law, Wrzesinski stated, "I want a blood test though". The officer then finished reading the implied consent law, explaining that after the requested breath test was complete, Wrzesinski could request an independent test. Wrzesinski refused the breath test and did not request an independent test or raise the topic of other alternatives to the breath test. Wrzesinski subsequently moved to dismiss on grounds that he was not given the blood test that he requested and that his request to receive one was unreasonably impeded. The motion was denied, and on appeal, the Supreme Court affirmed. An accused has a due process right to be informed of the right to obtain an independent blood alcohol test, but when a due process violation is alleged, the defendant must establish that the test was timely requested and that the arresting officer unreasonably impeded the right to the test. Here, Wrzesinski's statement could reasonably be construed as an expression of a desire to request a blood test as an alternative to the breath test that the officer selected, but could not be construed as a request for an independent blood test, and even if Wrzesinski had done so, the officer did not unreasonably impede Wrzesinski from obtaining one. St. v. Wrzesinski, 2006 MT 263, 334 M 157, 145 P3d 985 (2006).

No Expectation of Privacy for Trespasser — Entry Lawful and Warrantless Search Reasonable: Gilmore kept some belongings in a locked bedroom in Kathie Gilmore's house, and Kathie had no key to the room. Based on a tip from a confidential informant that marijuana plants had been observed in the window of the residence, officers requested and were given permission by Kathie to search the house without a warrant. Although she gave conflicting statements, Kathie stated that some of Gilmore's belongings were in the locked bedroom but he paid no rent, that Gilmore had previously assaulted her and that she was afraid of him, that she did not want him living in the house and had asked him to leave, and that she had no key to the room and advised the officers to kick down the door. Upon entering, the officers observed Gilmore asleep on the couch and drug paraphernalia in plain view. The officers then obtained a warrant and seized drugs and paraphernalia. Gilmore moved to suppress the evidence on grounds that the search was unlawful because Kathie did not have authority to authorize entry into the locked bedroom and that Gilmore had an expectation of privacy in the bedroom. The District Court found that in this case, the officers were acting under the appropriate authority of Kathie to consent to the search and denied the motion to suppress. The Supreme Court held that as a trespasser, Gilmore had no expectation of privacy in the bedroom. The District Court was affirmed. St. v. Gilmore, 2004 MT 363, 324 M 488, 104 P3d 1051 (2004). See also St. v. McLees, 2000 MT 6, 298 M 15, 994 P2d 683 (2000).

Legal Duty of Sheriff to Protect Domestic Violence Victim — Exception to Public Duty Doctrine Immunity Created Between Sheriff and Victim: Plaintiffs' mother was a domestic violence victim who was killed by her husband. Plaintiffs sued the County Sheriff for negligently failing to take action to protect the victim. A jury found the Sheriff negligent and awarded plaintiffs $358,000. The Sheriff moved for judgment as a matter of law, and the District Court granted the motion and vacated the jury verdict, finding that no special relationship existed between the victim and the Sheriff under the domestic violence statutes that would trigger a legal duty upon the Sheriff to protect the victim. On appeal, the Supreme Court noted an exception to the public duty doctrine's immunity provision in cases when a special relationship between the victim and an officer has been created. The domestic violence statutes created such a special relationship, which gave rise to a special duty by virtue of the victim's status as a member of a protected class. The Sheriff had a statutory duty to protect the victim with a notice of her rights under 46-6-602, and by failing to give the victim the required notice, the jury could conclude that the Sheriff was negligent and, arguably, negligent per se. Although arrest of the husband was discretionary, the Sheriff also had a mandatory duty under 46-6-603 to seize the husband's weapon, which had been displayed during a prior domestic dispute, but failed to do so. Thus, the jury had sufficient evidence to conclude that the Sheriff's negligence or negligent per se conduct led to the victim's death, and the District Court committed reversible error in granting judgment to the contrary. Massee v. Thompson, 2004 MT 121, 321 M 210, 90 P3d 394 (2004), following Nelson v. Driscoll, 1999 MT 193, 295 M 363, 983 P2d 972 (1999).

Youth's Waiver of Rights When Parent and Youth in Separate Places — No Specific Topic of Questioning — Admissibility of Confession: After a fire in a clandestine methamphetamine laboratory, police sought to question a youth who was reported to be involved. With the youth's mother present, the officers informed them of the youth's various rights, gave them a written

statement of rights, and allowed them to discuss waiver of the rights. In the youth's presence, the mother signed a consent to waive the youth's rights. The youth was then taken to the station without his mother, who declined to go, was informed of his rights again and signed a waiver of rights, and was questioned about the fire and the laboratory. The youth subsequently confessed to involvement in the drug operation, and the District Court declared him delinquent and entered a dispositional order. On appeal, the youth contended that the confession should have been suppressed because he and his mother did not agree together to waive his rights and because his mother was led to believe that the questioning was about the fire and not the laboratory, so she could not effectively waive his rights without accurate knowledge of the basis of the questioning, citing Evans v. District Court, 2000 MT 38, 298 M 279, 995 P2d 455 (2000). The Supreme Court disagreed. Nothing in Evans or in 41-5-331 requires that a youth and parent agree as to the specific topic of questioning to which a waiver of rights applies in order to make the waiver effective, nor does 41-5-331 requires the agreement of the youth and parent in the same place at the same time. The youth also failed to show that the confession was involuntary through police deceit because he should have known that any interview regarding the fire could involve questions regarding the drug operation. In re C.L., 2004 MT 71, 320 M 369, 87 P3d 462 (2004).

Differences Between Suspects in Photographs — Lineup Not Impermissibly Suggestive: A witness identified Baldwin in a photographic lineup, but Baldwin contended that the lineup was impermissibly suggestive because of numerous differences among the subjects in the photographs. The Supreme Court was not persuaded. Mere variations in appearance among photographs presented to a witness do not automatically invalidate an identification. St. v. Baldwin, 2003 MT 346, 318 M 489, 81 P3d 488 (2003), following U.S. v. Robertson, 606 F2d 853 (9th Cir. 1979).

No Abuse of Discretion in Ruling on Testimony Regarding Identification of Other Suspect in Photo Lineup: An issue in DuBray's homicide trial was whether another person was positively identified during a photo lineup. DuBray cited Gass v. U.S., 416 F2d 767 (D.C. Cir. 1969), for the theory that the trial court invaded the province of the jury by adopting the state's theory that the other person was not positively identified in the lineup. The Supreme Court found that Gass actually supported the District Court's rulings on the testimony. The District Court did not become DuBray's adversary or comment on the evidence but in one instance actually stopped DuBray's counsel from inappropriately commenting on the evidence and in another instance properly allowed a witness to testify regarding disputed evidence, so the rulings did not constitute an abuse of discretion. St. v. DuBray, 2003 MT 255, 317 M 377, 77 P3d 247 (2003).

No Error in Denial of Motion to Suppress Evidence Based on Failure to Record 9-1-1 Emergency Call and Promptly Provide Officer's Belt Recording: Saxton made a 9-1-1 emergency domestic violence call that ultimately resulted in officers entering Saxton's home and arresting her on drug charges. Saxton maintained that the evidence should be suppressed because the police improperly entered the home but failed to record the emergency call and promptly provide the audio recording from the belt recorder of the investigating officer, which might have provided exculpatory evidence. The Supreme Court found that entry into the home was not unlawful and affirmed. Although the state may not interfere with a defendant's right to gather exculpatory evidence, the state is not required to collect it. Here, there was no deliberate suppression of evidence by failing to record the 9-1-1 call, and Saxton was eventually allowed to review and enhance the belt recording, but it yielded no evidence that was material to Saxton's defense. Thus, the District Court did not abuse its discretion by failing to suppress the evidence under these circumstances. St. v. Saxton, 2003 MT 105, 315 M 315, 68 P3d 721 (2003), following St. v. Heth, 230 M 268, 750 P2d 103 (1988).

One-on-One Showup Identification Impermissibly Suggestive — Witness Testimony Permissible Under Totality of Circumstances: Bingman sought to exclude the testimony of witnesses in a felony DUI trial on grounds that the witnesses' observation of Bingman through a two-way window at the police department was impermissibly suggestive, resulting in an unreliable identification. The suggestive nature of one-on-one showup identifications has been previously recognized. In St. v. Clark, 2000 MT 40, 298 M 300, 997 P2d 107 (2000), the Supreme Court set out a two-part test for determining whether evidence gained from such an identification is permissible. The state conceded that the identification procedure was impermissibly suggestive, satisfying the first part of the Clark test. The second part of the test requires a determination of whether, under the totality of the circumstances, the identification gave rise to a substantial likelihood of irreparable misidentification. In this case, despite the impermissibly suggestive nature of the showup identification procedure, the certainty with which the witnesses identified Bingman outweighed the likelihood of misidentification, so the District Court did not err in allowing the witnesses' testimony. St. v. Bingman, 2002 MT 350, 313 M 376, 61 P3d 153 (2002).

Lack of Physical Description Not Precluding Particularized Suspicion Warranting Investigatory Stop — Defendant in Proximity to Suspects at Crime Scene: A convenience store clerk called police to report a possible theft and gave physical descriptions of two suspects. When a police officer arrived at the scene, he observed three people nearby, two of whom matched the physical description. Niles did not match the description, but was standing with those who did. The officer cornered one of the persons described by the clerk, after which Niles and the other person began walking away. When ordered to stop, the two tried to flee but were apprehended and arrested. Niles was charged with obstructing a peace officer and with possession of alcohol by a minor. During criminal proceedings, Niles moved to suppress evidence based on the contention that the officer lacked a particularized suspicion to detain. The motion was denied. On appeal, the Supreme Court affirmed. Although Niles was not physically described in the police report, he nevertheless was clearly associated with the two described suspects near the area of the crime, and although Niles did not initially run away from the officer, he did walk away in the presence of a suspect and in a manner that, under the totality of the circumstances, the officer could form a particularized suspicion that Niles was engaged in or had been engaged in criminal wrongdoing. St. v. Niles, 2002 MT 282, 312 M 453, 59 P3d 1129 (2002), distinguishing St. v. Broken Rope, 278 M 427, 925 P2d 1157 (1996), and St. v. Bauer, 2001 MT 248, 307 M 105, 36 P3d 892 (2001).

Due Process Violation in Failing to Afford Defendant Opportunity at Sentencing to Rebut Information Not in Presentence Investigation Report: In sentencing Hocevar for criminal endangerment of one child, the District Court denied Hocevar's due process rights by finding by a preponderance of the evidence that Hocevar smothered two other children without affording Hocevar the opportunity procedurally to challenge the accuracy of the information, which was not contained in the presentence investigation report. As determined in St. v. Orsborn, 170 M 480, 555 P2d 509 (1976), a sentencing judge may rely on facts outside the presentence report if, in order to avoid misinformation in sentencing, the defendant is given an opportunity to explain or rebut the information at the presentence hearing. The Supreme Court remanded for resentencing. St. v. Hocevar, 2000 MT 157, 300 M 167, 7 P3d 329, 57 St. Rep. 625 (2000).

Anxiety During Preindictment Period Insufficient to Trigger Prejudice Establishing Due Process or Speedy Trial Violation: In January 1996, Burt's former employer filed suit to recover more than $250,000 that Burt allegedly stole while employed as office manager and bookkeeper for the business. In January 1997, the state filed an information charging Burt with five counts of felony theft. In October 1998, Burt was convicted on all counts and later appealed, alleging that the preindictment delay between the time when the state could have filed charges and the time when the information was actually filed violated her due process rights and that she suffered actual prejudice in the effect of the delay on her health and emotions. Applying the two-step analysis in St. v. Taylor, 1998 MT 121, 289 M 63, 960 P2d 773 (1998), the Supreme Court held that, without more, Burt was not prejudiced by the preindictment delay simply because of her anxiety. Anxiety, no matter how real, does not in itself impair the accused in defending against a charge and thus does not qualify as prejudice in the due process context. The delay did not cause a loss of witnesses or evidence, nor did requiring Burt to stand trial violate the fundamental conceptions of justice that lie at the base of our civil and political institutions and that define the community's sense of fair play and decency. Burt was not incarcerated. Her stress was not excessive. Her economic hardship, the stigma of being charged with a crime for the first time, and her recourse to a psychiatrist could not be considered consequences of the pretrial delay. Although a total of 208 days of institutional delay was chargeable to the state, the remainder was chargeable to Burt. Absent a showing of prejudice, the convictions were affirmed. St. v. Burt, 2000 MT 115, 299 M 412, 3 P3d 597, 57 St. Rep. 482 (2000), following Billings v. Bruce, 1998 MT 186, 290 M 148, 965 P2d 866 (1998). See also St. v. Mouser, 806 P2d 330 (Alaska Ct. App. 1991).

Identification Procedure Impermissibly Suggestive — Motion In Limine to Suppress Witness's In-Court Identification Properly Denied — No Substantial Likelihood of Irreparable Misidentification: The witness stood by defendant's car for several minutes after an accident observing him for injuries and then left to get help when she saw that he appeared drunk and that there was a pistol on the car seat. When the witness and police returned, the defendant and pistol were gone. After many procedural delays and the suppression of evidence of defendant's driver's license taken from the car, the County Attorney's office sent a letter to the witness along with two photographs of defendant in jailhouse attire. The state affirmatively identified the person in the photos as defendant and asked the witness to notify the County Attorney's office if the photos didn't depict the person whom she saw in the car. Defendant's motion in limine to prohibit the witness's identification testimony was denied by the District Court. On appeal, the Supreme Court held that although the identification procedure was impermissibly suggestive, considering

the totality of the circumstances, it did not create a substantial likelihood of misidentification and the motion was properly denied. St. v. Clark, 2000 MT 40, 298 M 300, 997 P2d 107, 57 St. Rep. 185 (2000).

Constitutional Due Process and Equal Protection Rights Not Violated by Procedure in Rule 9 Regulating Practice of Attorneys: Formal complaints against two attorneys were filed with the State Bar Commission on Practice, which recommended disciplinary actions against the attorneys. In their appeal, the attorneys contended that Rule 9 of the Rules on Lawyer Disciplinary Enforcement, which sets forth the procedure relied on by the Commission, unconstitutionally violated their rights to due process, to an impartial tribunal, and to equal protection, because the procedure improperly vested both investigatory and adjudicatory functions in one body—the Commission. The Supreme Court disagreed. Applying Withrow v. Larkin, 421 US 35, 43 L Ed 2d 712, 95 S Ct 1456 (1975), the court noted that bias in a decisionmaker is not presumed and must be proved and that state and federal case law generally rejects the idea that the combination of judging and investigation functions is a denial of due process. Although attorneys who are confronted with proceedings that may result in the loss of their licenses to practice law are entitled to the same due process considerations as any other professionals faced with such proceedings, the attorneys in this case cited no authority stating that either equal protection or due process requires that identical procedures must be followed in all types of disciplinary proceedings, nor did they establish that the procedure for handling disciplinary complaints under Rule 9 denied them their constitutional rights. In re Goldstein & Albers v. Comm'n on Practice, 2000 MT 8, 297 M 493, 995 P2d 923, 57 St. Rep. 31 (2000), following In re Wyse, 212 M 339, 688 P2d 758, 41 St. Rep. 1780 (1984).

Public Duty Doctrine as Applied to Law Enforcement Personnel — Exception in Cases of Special Relationship: Trina admitted that she had been drinking when stopped in her vehicle by Officer Driscoll, who nevertheless believed that sufficient probable cause did not exist to arrest the woman. Instead, thinking Trina might be impaired, the officer suggested a ride home or that Trina walk the 2-mile distance and warned Trina about returning to the vehicle. Trina decided instead to walk to a phone and call for a ride and was killed in traffic. Trina's husband brought suit for civil damages under 42 U.S.C. 1983, claiming that the officer breached the duty to protect, in violation of Trina's due process rights. The District Court summarily dismissed the claim, holding that because no probable cause existed for Trina's arrest, the officer had no duty to protect Trina from harm and that without a duty, the action failed. The public duty doctrine provides that a police officer's duty to protect and preserve the peace is owed to the public at large rather than to a particular person, unless a special relationship exists, thus giving rise to a special duty that is more particular than that owed to the public. A special relationship is established: (1) by a statute intended to protect a specific class of persons, of which the plaintiff is a member, from a particular type of harm; (2) when a government agent undertakes specific action to protect a person or property; (3) by governmental actions that reasonably induce detrimental reliance by a member of the public; and (4) under certain circumstances when the agency has actual custody of the plaintiff or of a third person who harms the plaintiff. Relying on Stewart v. Standard Publishing Co., 102 M 43, 55 P2d 694 (1936), the Supreme Court agreed that although the officer may not have initially owed Trina a duty to protect, that duty was assumed as a matter of law when the officer prevented the woman from driving her car and ensured that she did not attempt to drive. The question of whether the duty to protect was breached is a question of fact for the jury, so summary dismissal was improper. Nelson v. Driscoll, 1999 MT 193, 295 M 363, 983 P2d 972, 56 St. Rep. 744 (1999), clarifying and distinguishing Phillips v. Billings, 233 M 249, 758 P2d 772 (1988), and followed in Massee v. Thompson, 2004 MT 121, 321 M 210, 90 P3d 394 (2004). Nelson was followed, as to elements of exception to the public duty doctrine (nonlaw enforcement case), in Orr v. St., 2004 MT 354, 324 M 391, 106 P3d 100 (2004), and Prosser v. Kennedy Enterprises, Inc., 2008 MT 87, 342 M 209, 179 P3d 1178 (2008). See also Krieg v. Massey, 239 M 469, 781 P2d 277, 46 St. Rep. 1839 (1989), Busta v. Columbus Hosp. Corp., 276 M 342, 916 P2d 122 (1996), and Eves v. Anaconda-Deer Lodge County, 2005 MT 157, 327 M 437, 114 P3d 1037 (2005).

Detective's Deliberate Failure to Record or Take Notes of Child Interviews Not Violation of Due Process: The defendant in a sexual assault case argued that the charges should be dismissed on the grounds that he was denied access to exculpatory evidence because the detective who interviewed the alleged victims made a deliberate decision to not record or take notes of the interviews. The Supreme Court stated that it would be good practice to record the interviews but refused to dismiss the charges, ruling that it is not the duty of law enforcement personnel to

assist in procuring evidence on behalf of an accused. St. v. Weaver, 1998 MT 167, 290 M 58, 964 P2d 713, 55 St. Rep. 668 (1998).

Unreasonable Preindictment Delay — Dismissal Warranted: The state delayed about 2 years from the time of investigation of criminal allegations until indictment of Taylor on charges of theft of workers' compensation benefits. The state suggested that whatever prejudice Taylor suffered by the delay was insignificant to the more important necessity of allowing the state reasonable time to investigate the crime. The Supreme Court noted that the criminal justice system should put a premium on conscientious investigation and that prosecutors have no duty to file charges as soon as possible. Further, a reasonable preindictment delay ultimately protects both the state and the defendant. However, in this case, the delay was unreasonable because it resulted in the loss of potential testimony and the state presented no justification for the delay. Taylor's due process rights were violated, and the Supreme Court dismissed the information. St. v. Taylor, 1998 MT 121, 289 M 63, 960 P2d 773, 55 St. Rep. 481 (1998).

Due Process Requires Individuals to Be Informed of Right to Independent Blood or Breath Test — Remedy for Failure to Inform Is Suppression of State's BAC Evidence: Strand argued that his due process right to obtain exculpatory evidence had been denied by the Kalispell Police Department's policy to not inform an individual of the right to an independent blood or breath test when the individual consents to the test designated by the arresting officer. The Supreme Court held that due process requires the arresting officer to inform the individual of the right to an independent test regardless of whether the accused consents to the test designated by the officer. The Supreme Court further held that the appropriate remedy for the state's failure to inform Strand of his rights was to suppress the state's BAC evidence because the failure to inform negated the informed consent provisions of state law. St. v. Strand, 286 M 122, 951 P2d 552, 54 St. Rep. 1333 (1997), overruled in St. v. Minkoff, 2002 MT 29, 308 M 248, 42 P3d 223 (2002).

Outrageous Government Conduct — Defendant Not Target of Investigation: The due process clause of the fifth amendment prohibits a state's involvement in a criminal enterprise if the involvement is so grossly shocking and so outrageous as to violate the universal sense of justice. The doctrine is a very narrow defense that applies only when the government activity violates some protected right of the defendant. Defendant was never the focus of a Department of Fish, Wildlife, and Parks criminal undercover investigation of wildlife offenses in which an officer accompanied persons committing offenses and allegedly committed some offenses. It appeared that the investigation focused on a person who brought defendant along on illegal hunts. Thus, the District Court correctly denied motion to dismiss for outrageous government conduct because defendant lacked standing to raise the defense. Moreover, there was no evidence that the state engineered the criminal enterprise or generated crimes merely for the sake of prosecuting defendant, which are elements of the defense. St. v. Romero, 279 M 58, 926 P2d 717, 53 St. Rep. 1050 (1996).

Failure to Demonstrate Outrageous Government Conduct — Federal Venue Appropriate: The District Court did not err in refusing to dismiss a case based on outrageous government conduct in the handling of videotapes seized as part of but unrelated to a criminal investigation when defendant failed to demonstrate that: (1) government conduct led to the charges or conviction; (2) the government manufactured any of the crimes charged; or (3) new crimes were generated merely for the sake of pressing criminal charges. Further, citing St. v. Haskins, 255 M 202, 841 P2d 542 (1992), the Supreme Court noted that the appropriate remedy for allegations of outrageous government conduct in a criminal case is not dismissal of the action, but rather to bring a federal civil rights action pursuant to 42 U.S.C. 1983. St. v. Williams-Rusch, 277 M 437, 928 P2d 169, 53 St. Rep. 1224 (1996), followed in St. v. Ditton, 2006 MT 235, 333 M 483, 144 P3d 783 (2006). See also St. v. LeMay, 2011 MT 323, 363 Mont. 172, 266 P.3d 1278, which held that the defendant's claims that he was racially profiled by law enforcement officers when they mistakenly believed he was a white supremacist and member of an outlaw biker gang did not constitute outrageous government conduct.

Inconclusive Evidence Whether One or Four Pictures Were Used in Photo Lineup — Issue for Jury: Because the evidence was inconclusive as to whether a one-photograph or four-photograph lineup was shown to witnesses, an issue of fact was raised for the jury and the judge did not abuse his discretion by permitting evidence of the photograph lineup. St. v. Courchene, 256 M 381, 847 P2d 271, 49 St. Rep. 1035 (1992).

Conduct of Undercover Agent Not Warranting Reversal of Drug Convictions: Haskins was convicted of four counts of sale of dangerous drugs (now criminal distribution of dangerous drugs) and contended on appeal that the outrageous conduct of an undercover officer hired by a tribal

government, coupled with the officer's prior felony conviction, made the officer ineligible to be hired by the tribe as a law enforcement officer and constituted grounds sufficient to warrant a reversal of the convictions. The Supreme Court cited Hampton v. U.S., 425 US 484, 48 L Ed 2d 113, 96 S Ct 1646 (1976), for the proposition that due process protection comes into play only when the government activity in question violates some protected right of the defendant. In this case, Haskins was not involved in any incidents in which the officer allegedly violated the law, nor did the officer's activities violate Haskins' constitutional rights related to the drug charges. Haskins knew of the officer's felony conviction before trial commenced, and the state filed a motion in limine to preclude any evidence of the officer's criminal history. Further, the officer was hired by the tribe and paid from tribal funds. As a federal judicially recognized sovereign nation, the tribe had its own inherent hiring authority, and the officer was properly presented to the jury as a tribal officer. St. v. Haskins, 255 M 202, 841 P2d 542, 49 St. Rep. 922 (1992). See also St. v. Hatfield, 269 M 307, 888 P2d 899, 52 St. Rep. 1 (1995).

Length of Investigative Period Subject to Due Process Requirements: The defendant alleged that the long investigation period was prejudicial to her ability to properly defend herself. The Supreme Court held the preindictment delay was subject to due process concerns but that the defendant had not shown any specific harm due to the delay. The complexity of the case justified the time spent on the investigation. St. v. Curtis, 241 M 288, 787 P2d 306, 47 St. Rep. 277 (1990).

Questioning of Witness Prior to Statement — No Due Process Violation: Prior to taking a witness's taped statement, a Deputy Sheriff described to the witness the evidence that had been found at the crime scene. Defendant claimed that the witness then described defendant's actions in the very same manner related by the Deputy and that this "suggestive questioning" deprived defendant of the due process of law. However, the witness personally testified at trial and was cross-examined, so no due process violation occurred. It is up to the trier of fact to decide who and what to believe after consideration of all the facts and circumstances collectively. St. v. Conrad, 241 M 1, 785 P2d 185, 47 St. Rep. 32 (1990).

"Show Up" Identification Not Suggestive Enough to Warrant Suppression: The police stopped two suspects in the vicinity of a robbery shortly after the incident occurred. The suspects were placed in an area illuminated by a patrol car's headlights, where they were identified by two eyewitnesses. The state's attorneys admitted that the identification process was suggestive by the mere fact that the defendants were stopped so close to the scene so soon after the crime was committed and that the defendants were the only two shown to the witnesses. The Supreme Court ruled that although the identification was suggestive, it did not have such a tendency for misidentification as to violate the defendants' due process rights. St. v. Rudolph, 238 M 135, 777 P2d 296, 46 St. Rep. 1150 (1989), followed in St. v. Schoffner, 248 M 260, 811 P2d 548, 48 St. Rep. 424 (1991).

No Affirmative Duty of Police to Gather Exculpatory Evidence: Police officers may not frustrate or hamper a defendant's right to obtain exculpatory evidence, but they have no affirmative duty to gather such evidence absent express statutory mandate. St. v. Heth, 230 M 268, 750 P2d 103, 45 St. Rep. 194 (1988), followed in St. v. Sadowski, 247 M 63, 805 P2d 537, 48 St. Rep. 93 (1991), St. v. Patton, 280 M 278, 930 P2d 635, 53 St. Rep. 1402 (1996), St. v. Belgarde, 1998 MT 152, 289 M 287, 962 P2d 571, 55 St. Rep. 590 (1998), and St. v. Saxton, 2003 MT 105, 315 M 315, 68 P3d 721 (2003). See also St. v. Gollehon, 262 M 1, 864 P2d 249, 50 St. Rep. 1250 (1993), St. v. Gollehon, 262 M 293, 864 P2d 1257, 50 St. Rep. 1564 (1993), St. v. Cox, 266 M 110, 879 P2d 662, 51 St. Rep. 680 (1994), St. v. Wild, 266 M 331, 880 P2d 840, 51 St. Rep. 872 (1994), St. v. Close, 267 M 44, 881 P2d 1312, 51 St. Rep. 876 (1994), St. v. Brown, 1999 MT 133, 294 M 509, 982 P2d 468, 56 St. Rep. 536 (1999), St. v. Seiffert, 2010 MT 169, 357 Mont. 188, 237 P.3d 669, St. v. James, 2010 MT 175, 357 Mont. 193, 237 P.3d 672, St. v. Wagner, 2013 MT 47, 369 Mont. 139, 296 P.3d 1142, and Taylor v. St., 2014 MT 142, 375 Mont. 234, 335 P.3d 1218.

Retroactive Application of Swanson Rule: Following arrest on a charge of driving under the influence of alcohol or drugs, defendant refused to take a breath test requested by the arresting officer and demanded to make a telephone call to an attorney and to obtain a blood test. Police told defendant that if he did not take the breath test, neither the telephone call nor the blood test would be permitted. Police then placed defendant in a holding cell, denying him the call and blood test for 10 hours. Upon conviction, defendant appealed, alleging police refusal denied him due process of law. Applying the Swanson rule, 222 M 357, 722 P2d 1155, 43 St. Rep. 1329 (1986), which established the right to obtain an independent blood test when accused of crime involving intoxication, the court reversed the conviction, ruling that Swanson should be retroactively applied. The 10-hour delay constituted an interference with defendant's right to

obtain exculpatory evidence, which is the type of due process denial against which Swanson was designed to protect. St. v. Peterson, 227 M 418, 739 P2d 958, 44 St. Rep. 1198 (1987).

Identification Evidence Not Impermissible: Defendant contended that courtroom identifications by the witnesses were suppressible because: (1) they were ultimately rooted in an illegal arrest; (2) the Kalispell police failed to conduct a lineup; and (3) the pretrial one-to-one confrontations, mugshot displays, and television appearances were impermissibly suggestive. The court found no reversible error in the identification procedures, although one witness' identification was held inadmissible. The court cautioned, however, that a proper lineup has greater evidentiary value than a one-to-one showup. The court also held that there is no constitutional right to appear in a lineup. St. v. Campbell, 219 M 194, 711 P2d 1357, 42 St. Rep. 1948 (1985).

Speed With Which Affidavit Based on Past Activity Becomes "Stale": Generally speaking, when the affidavit in support of a search warrant recites a mere isolated violation, probable cause based on that violation dwindles rather quickly with the passage of time. However, when the affidavit recites facts indicating activity of a protracted and continuous nature, a course of conduct, the passage of time becomes less significant. St. v. O'Neill, 208 M 386, 679 P2d 760, 41 St. Rep. 420 (1984).

Witness Identification Not Tainted by Police Interviewing Procedures: Defendant was convicted of negligent homicide after a vehicle owned by defendant and his wife struck and killed a pedestrian. Both defendant and his wife had been in the vehicle at the time of the accident. Defendant's wife first admitted that she had been the driver. Later she retracted her statement. Defendant was then charged with the crime. At the trial, Stevens, a witness, testified that he saw a passenger with long hair. Immediately after the accident Stevens had made a written statement to the police in which he made no mention of a passenger with long hair. Eight days later Stevens, after having been shown the vehicle and apparently after having been shown a picture of defendant's wife, made another statement, not submitted at trial, in which, presumably, he stated that the passenger had long hair. Defendant claimed that Stevens' testimony had been tainted by his having been shown the photograph. The Supreme Court ruled that even if the defendant's assertion of the facts surrounding the identification was correct, his due process rights had not been violated because he was never positively identified at trial and his remedy, rather than suppression of the evidence, would have been undercutting the weight of the evidence by effective cross-examination. St. v. Henricks, 201 M 157, 653 P2d 479, 39 St. Rep. 2022 (1982).

Confrontation of Witnesses — Discretionary at Presentence Hearing: Defendant was convicted of aggravated assault for pointing a gun at another person during a barroom altercation. A presentence investigation was completed and provided to the defense. The presentence investigation contained a number of statements by witnesses whose names were ordered withheld by the court. Defendant objected to the consideration of those statements because he was not allowed to confront the makers thereof. The Supreme Court held that the right of cross-examination at a presentence hearing is a discretionary matter with the trial court and that defendant's due process right was protected because he was represented by counsel at the time the information was made known to him and he was given the opportunity to rebut the information. St. v. Trangsrud, 200 M 303, 651 P2d 37, 39 St. Rep. 1765 (1982).

In-Court Identification Allowed Though Based on Suggestive Prior Procedure: Defendant was charged with kidnapping two girls 12 and 14 years old. There was no pretrial lineup, 7 months elapsed between their initial descriptions of him and their in-court identifications, their initial descriptions were "hazy", and the certainty of the girls' identification was clouded when, during a break in voir dire, one of the parents saw defendant in the hall of the courtroom and pointed him out to the girls as the defendant. The identification procedure was suggestive, but there was not a substantial likelihood of irreparable misidentification so as to deny due process where: (1) the girls had more than adequate opportunity to observe defendant during the kidnapping; (2) their view of him was unrestricted, at close range, and for a considerable time; and (3) the girls were made to sit in a small room with their abductors. St. v. Herrera, 197 M 462, 643 P2d 588, 39 St. Rep. 731 (1982).

No Substantial Likelihood of Misidentification: On the issue of an identification of defendant in the back seat of a police car, the Supreme Court stated that it could not conclude that the identification was so unreliable as to constitute a violation of due process. Considering the totality of the circumstances, the Supreme Court held that while the identification procedure was suggestive, it did not create a situation in which there was a substantial likelihood of misidentification. St. v. Jenkins, 192 M 539, 629 P2d 761, 38 St. Rep. 922 (1981).

Imprisoned Entitled to Cross-Examination in Disciplinary Proceeding: Plaintiff, a prisoner, was deprived of minimal due process requirements in the course of a disciplinary hearing in

which plaintiff was accused of extortion and in which the accuser was not subjected to cross-examination. The case rested entirely on hearsay and while it was true that minimal due process did not require the enforcement, in this context, of the hearsay rule, where the accuser repudiated his accusatory remarks at one juncture and where the facts dispelled an interpretation of extortion, plaintiff was entitled to cross-examination of his accuser. Spurlock v. Blodgett, 38 St. Rep. 616 (D.C. Mont. 1981) (apparently not reported in Federal Supplement).

Consent to Search — Voluntariness — Totality of the Circumstances Test: Defendant voluntarily went to the Billings Police Department in connection with a homicide investigation. It later came out that defendant had serious mental and drug abuse problems. Defendant was interrogated by two police officers. He was kept incommunicado in a small room for several hours, the officers used the "mean cop-nice cop" interrogation technique, and the officers lied to defendant about how much was known of his involvement in the crime (guilt assumption technique). The officers told defendant his problems might be mental or medical rather than criminal. Defendant then gave written consent to search his house and van. The police then brought in a psychiatrist who administered sodium amytal to defendant. The next day defendant was convinced by the psychiatrist to confess. The District Court suppressed evidence found during the search, ruling that the consent was involuntarily given. The question of voluntariness largely depends upon the facts of each case, no single fact being dispositive. The determination of voluntariness, rather, depends upon the "totality of the circumstances". The issue of voluntariness is a factual one addressed to the discretion of the trial court and will not be disturbed if supported by substantial credible evidence. The totality of the circumstances in the present case includes not only the police techniques employed, which were particularly coercive, but also the testimony presented by experts that defendant was a paranoid schizophrenic with severe drug problems. There can be no doubt that substantial evidence exists to support the suppression finding. St. v. Allies, 190 M 475, 621 P2d 1080, 37 St. Rep. 2089 (1980).

Suppression of Subsequent Confession — "Cat Out of the Bag" Doctrine: Defendant voluntarily went to the Billings Police Department in connection with a homicide investigation. It later developed that defendant had serious mental and drug abuse problems. Defendant was interrogated by two police officers. He was kept incommunicado in a small room for several hours, the officers used the "mean cop-nice cop" interrogation technique and lied to defendant about how much was known of his involvement in the crime (guilt assumption technique). The officers told defendant his problems might be mental or medical rather than criminal. Defendant then gave written consent to search his house and van. The police then brought in a psychiatrist who administered sodium amytal to defendant. The next day defendant was convinced by the psychiatrist to confess. Defendant was charged with four counts of deliberate homicide and taken to the maximum security unit of the Warm Springs State Hospital. During his stay he was visited by his girlfriend on numerous occasions. On each occasion she extensively questioned defendant on his involvement in the crime. In her deposition she stated that defendant told her he "thought he was involved. He said he did not know how. He did not know why. But he thought he had used his own gun to shoot." The District Court suppressed the alleged statement under the "cat out of the bag" doctrine. This doctrine is applied in cases where an inadmissible confession is obtained and subsequently the defendant makes other inculpatory statements. It has been summarized by the U.S. Supreme Court in U.S. v. Bayer, 331 US 532, 540, 67 S Ct 1394, 1398, 91 L Ed 1654, 1660 (1947), as follows: "of course, after the accused has once let the cat of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession always may be looked upon as fruit of the first . . . ." The later inculpatory statement may be rendered admissible, however, if the prosecution demonstrates that there is a "break in the stream of events . . . sufficient to insulate the final events from the effect of all that went before. The prosecution contended that the factors of passage of time, change in location, manner of interrogation, and representation by counsel removed the taint of the original confession. The trial court ruled that the prosecution's position was not carried by the preponderance of the evidence. The Supreme Court found substantial credible evidence to support the District Court's findings. St. v. Allies, 190 M 475, 621 P2d 1080, 37 St. Rep. 2089 (1980).

Suggestive Identification — Suppression of Evidence Denied: Not all suggestive identifications result in a denial of due process. A two-pronged test is applied: was the identification procedure impermissibly suggestive, and if so, did it under the totality of the circumstances have a tendency to give rise to a substantial likelihood of irreparable misidentification. Though undoubtedly the procedure here was very suggestive (the victim first identified the defendant from a picture in the

wallet she found at the scene and took with her), the circumstances point to sufficient reliability in the identification to satisfy due process and the evidence should not be suppressed. She spent 1 1/2 hours with defendant, and she was forced to engage in intimate physical activity with him. Her description of him was accurate, and she demonstrated a high degree of certainty. St. v. Higley, 190 M 412, 621 P2d 1043, 37 St. Rep. 1942 (1980), followed in St. v. Sor-Lokken, 246 M 70, 803 P2d 638, 47 St. Rep. 2264 (1990), St. v. DuBray, 2003 MT 255, 317 M 377, 77 P3d 247 (2003), and St. v. Baldwin, 2003 MT 346, 318 M 489, 81 P3d 488 (2003).

Photographic Lineup — When Not Overly Suggestive — No Right to Have Counsel Present: A defendant appealed from a robbery conviction. He alleged that a motion to suppress evidence relating to pretrial photographic lineup procedures should have been sustained. The motion was based on contentions that the victim's ability to identify him was tainted by the fact the victim had seen him in police custody shortly after the robbery and that the victim may have seen another photograph of him that had been in the custody of a police officer. The defendant also challenged the suggestiveness of the lineup because his attorney was not present. If the photographic identification process was so suggestive as to present a "substantial likelihood of misidentification", an in-court identification of the defendant would not be permitted. Under the circumstances of this particular case, there was not a substantial chance of misidentification. Further, the reviewing court followed a U.S. Supreme Court decision and stated that the confrontation clause is not violated by a photo-array identification process and therefore the right to counsel does not attach. Accordingly, the motion to suppress was properly denied. St. v. Dahl, 190 M 207, 620 P2d 361, 37 St. Rep. 1852 (1980).

Photo Identification — Only Defendant's Picture With Glasses: A photo identification process in which only one of the four pictures shown to witnesses contains a person with glasses and this person is the defendant is not so suggestive as to raise a substantial likelihood of irreparable misidentification and violation of due process. Following the holding of St. v. Pendergrass, 179 M 106, 586 P2d 691, 35 St. Rep. 1510 (1978), the Supreme Court held that although glasses do constitute a single distinguishing characteristic, one cannot say that this feature is so unnecessarily striking as to corrupt the entire display procedure. The Supreme Court found that each of the photographs generally resembled the others, that each photograph depicted a person who generally fit the description provided by the witnesses, and that a witness saw the defendant both with her glasses on and off. St. v. Strain, 190 M 44, 618 P2d 331, 37 St. Rep. 1763 (1980).

Identification Shortly After Commission of Crime — Defendant in Police Car — Not Unlawfully Suggestive: The identification of defendant while in custody and sitting in the rear seat of a police car by the victim of a robbery that occurred the same night is not a showup that is unlawfully suggestive. If the identification occurs shortly after the commission of a crime, it is not an unnecessarily suggestive confrontation; hence, its introduction at a trial does not deny the defendant due process. Spurlock v. Crist, 188 M 449, 614 P2d 498 (1980).

Voluntariness of Signed Statement: A Flathead County Sheriff's deputy downplayed the defendant's Miranda rights by telling him that reading his rights was merely procedural and that he was not being accused of anything. During the questioning, deputies suggested answers to their questions and impliedly threatened to send him to Warm Springs State Hospital if he did not cooperate. In the signed statement of the defendant they specifically requested that he add a sentence. All of these facts are sufficient to affirm the District Court's findings that the statements made by the defendant were not voluntary and should be suppressed. St. v. Grimestad, 183 M 29, 598 P2d 198 (1979).

Pretrial Photographic Identification: An in-court identification of defendant did not result from an impermissibly suggestive pretrial photographic lineup in light of the following factors considered by the Supreme Court: opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of the witness's prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. St. v. Oppelt, 176 M 499, 580 P2d 110 (1978).

Audio-Video Taping: The procedure of audio-video taping defendant arrested for driving while intoxicated was consistent with the requirements of due process. St. v. Finley, 173 M 162, 566 P2d 1119 (1977).

Photo Lineup Procedure Not Violation of Due Process: Court held where photos used for identification were categorized into three sets, one set containing miscellaneous pictures pulled from Sheriff's office file and shown together, this did not create an impermissible suggestive identification but rather verified descriptions and information already gathered and therefore did not compel witness identification in violation of due process. Defendant's remedy is in effective

cross-examination, with the identification question then becoming one of weight to be determined by the jury and not one of admissibility. St. v. Miner, 169 M 260, 546 P2d 252 (1976).

DECISIONS UNDER 1889 CONSTITUTION

GENERAL

Sentence Increase on Review: Increase of sentence by sentence review division under 46-18-903 and 46-18-904 was not a denial of due process of law. St. v. Henrich, 162 M 114, 509 P2d 288 (1973).

Right to Counsel: Petitioner was not denied his constitutional right to counsel under Art. III, sec. 27, 1889 Mont. Const., in that he was intoxicated when he received Miranda warning at time of arrest, since morning following his arrest he recalled having been warned of his rights upon arrest. Petition of Fitzpatrick, 154 M 512, 464 P2d 507 (1970).

Discriminatory Tax: Sections 1-829 through 1-832, R.C.M. 1947 (now repealed), imposing a tax on each passenger emplaning on an air common carrier at a Montana airport, were repugnant to Art. III, sec. 27, 1889 Mont. Const., in creating an unreasonable and undue discrimination. NW. Airlines, Inc. v. Joint City-County Airport Bd., 154 M 352, 463 P2d 470 (1970).

Standing to Challenge Gasoline Tax Refund: Motorboat operator could not raise due process or equal protection objections to gasoline tax statute making no provision for nonhighway use refund since statute made gasoline dealer the taxpayer rather than consumer, and the consumer, as motorboat operator, was not proper representative of all nonhighway users. Harvey v. Blewett, 151 M 427, 443 P2d 902 (1968).

Civil Insanity Determination: Commitment of patient to state hospital in civil proceeding, without a jury trial or benefit of counsel, in face of protest to jurisdiction of judge on basis that he had previously sentenced patient to 5-year prison sentence, did not constitute violation of due process since patient had neither mentioned nor requested counsel or jury trial at time of hearing and since determination of sanity question was made by medical jurors and not by judge. Petition of Brown, 151 M 440, 444 P2d 304 (1968).

Dismissal of Criminal Appeal: Dismissal of a criminal appeal for failure to file timely notice of appeal is not a denial of due process, even though the failure was that of court-appointed counsel in whose appointment defendant had no voice. St. v. Frodsham, 139 M 222, 362 P2d 413 (1961).

Health District Law: The former health district law, section 69-801, et seq., R.C.M. 1947 (now repealed), did not violate Art. III, sec. 27, 1889 Mont. Const. Bacus v. Lake County, 138 M 69, 354 P2d 1056 (1960), distinguished in Billings v. Smith, 158 M 197, 490 P2d 221 (1971).

Animal Bites — Rulemaking: A rule made by a board of health which has a relation to securing protection from bites of animals that may be rabid is a proper exercise of its functions, and determination of the means of meeting a threatening situation has been vested in the board of health and not in the courts. Ruona v. Billings, 136 M 554, 323 P2d 29 (1958).

Ward's Right to Conduct Litigation and Select Attorney After His Majority: It is not a mere technicality to insist that a person's rights may not be litigated without his authority, for that is an inherent right guaranteed by the Due Process Clauses of both the federal (5th amendment; 14th amendment, sec. 1) and state (Art. III, sec. 27) Constitutions, and by 37-61-416, applying to the right of a person sui juris (in the instant case, the ward on attaining majority) to manage his own affairs, including the right to control his own litigation and select his own attorney. Mitchell v. McDonald, 114 M 292, 136 P2d 536 (1943).

Due Process Not Applicable to Subdivisions of State: The Due Process of Law Clauses of the federal and state Constitutions are not applicable to subdivisions of the state (such as counties), and therefore contention that section 94-5610, R.C.M. 1947, as amended (now repealed), under which a District Judge is authorized to apportion costs of criminal trials between counties is not unconstitutional as offending against this clause. Rosebud County v. Flinn, 109 M 537, 98 P2d 330 (1940).

Attorneys' Fees — Recovery of Wages: Held, that 39-3-214, providing for allowance of attorneys' fees to the successful party in an action to recover wages, is not invalid as violating the Due Process of Law Clause of either the state or federal Constitutions, or as denying to either party the equal protection of the law. Britt v. Cotter Butte Mines, 108 M 174, 89 P2d 266 (1939).

Automobile Accidents — Long Arm Statute: Held, that Title 25, ch. 3, part 6, providing for service of summons in actions against nonresident automobilists arising out of accident or collision while driving upon Montana highways, are constitutional under state and federal Due Process of Law Clauses, and that the state's police power extends to nonresident as well as resident motorists. State ex rel. Charette v. District Court, 107 M 489, 86 P2d 750 (1939).

"Due Process of Law" Defined: The phrase "due process of law" does not necessarily mean by a judicial proceeding. Cunningham v. NW. Improvement Co., 44 M 180, 119 P 554 (1911). See also State ex rel. Marshall v. District Court, 50 M 289, 146 P 743 (1915).

Contradiction of Own Witness: Sections 93-1901-8 and 93-1901-12, R.C.M. 1947 (superseded by Supreme Court Order No. 12729, see compiler's comment to Rule 100, Montana Rules of Evidence), authorizing a party to contradict his own witness by other evidence and to ask him whether he had made other statements, are not repugnant to this section. St. v. Bloor, 20 M 574, 52 P 611 (1898).

RIGHT TO FAIR TRIAL

Substitution of Judge: Denial of motion for substitution of judge for cause under section 95-1709, R.C.M. 1947 (not codified—superseded by Supreme Court Rule), was not a deprivation of due process absent a showing of prejudice despite fact that defendant had been tried before the same judge previously and that a dispute between the defendant and the judge had occurred at that trial over credit for jail time; subject judge's holding of the hearing on his own prejudice, prior sentencing of the defendant, and denial of recess to allow counsel for defendant to commence an original proceeding in Supreme Court were not indications of an abuse of discretion. St. v. Parker, 161 M 394, 506 P2d 850 (1973).

Argument by Counsel: Refusal to permit defense counsel, in opposing transfer of assault case from juvenile court to adult criminal court, to make extended oral argument on legal questions concerning the philosophy, intent, and purpose of the Youth Court Act, the legal requirements relating to juvenile court transfer proceedings, and similar matters was not a denial of due process where counsel was permitted to state his objections for the record to the extent necessary for a meaningful appellate review and was permitted to present evidence in opposition to transfer. Lujan v. District Court, 161 M 287, 505 P2d 896 (1973).

Jury Trial — Voir Dire — Opening Statement: Refusal of trial court to permit voir dire examination of prospective jurors on subjects related to defense of insanity for which defendant had given notice and denial to defendant of opportunity to make opening statement until after presentation of prosecution's case were improper interference with defendant's right to have jury consider his defense. St. v. Olson, 156 M 339, 480 P2d 822 (1971).

Presence of Prejudicial Newspaper in Jury Room: When several jury members read newspaper article in jury room that defendant had pleaded guilty to a manslaughter charge arising out of the same events upon which the present suit for damages was brought, even though it was uncertain whether prejudicial or not and not read until after the verdict was rendered but before damages were established, error was inherently prejudicial and new trial was ordered. Putro v. Baker, 147 M 139, 410 P2d 717 (1966), distinguished in Charlie v. Foos, 160 M 403, 503 P2d 538 (1972).

Sufficiency of Evidence — Commission of Sexual Crime: When medical testimony pertaining to defendant's antisocial nature and difficulty in controlling his sexual impulses may have established the defendant as a sexual deviate who should be confined for the protection of society but was not sufficient to sustain the charge of attempting to commit a lewd and lascivious act upon a child, it was reversible error to convict the defendant of the felony. St. v. Green, 143 M 234, 388 P2d 362 (1964).

Change of Venue: To deny a defendant in any criminal case the right to a change of venue or place of trial from a county where he cannot be tried by an impartial jury is to deny such defendant the fair trial guaranteed by Art. III, sec. 27, 1889 Mont. Const. St. v. Dryman, 127 M 579, 269 P2d 796 (1954).

Disqualifying Judges: Motion to quash citation of attorney in proceeding for contempt of Supreme Court, urging that in denying respondent's motion to disqualify four, or in the alternative two, of the Justices of the Court, his rights under Art. III, sec. 27, 1889 Mont. Const., and the 14th amendment to the Constitution of the United States were violated, was found to be without merit. State ex rel. Hall v. Niewoehner, 116 M 437, 155 P2d 205 (1944).

No Right to Particular Judge: A litigant has no constitutional right to have his cause tried before a particular judge, and hence a party is not deprived of his life, liberty, or property by the mere fact that he cannot have his cause tried before the judge of the district where the action was commenced. State ex rel. Anaconda Copper Min. Co. v. Clancy, 30 M 529, 77 P 312 (1904).

PROPERTY RIGHTS

Discriminatory Revenue Collections: Revenue collected by the Public Service Commission under section 8-127, R.C.M. 1947 (now repealed), constituted an unconstitutional levy under Art. III, sec. 27, 1889 Mont. Const., and the 14th amendment to the Constitution of the United States in that the levy denied common carriers uniformity of taxation, was discriminatory, confiscatory,

prohibitive, and arbitrary, and was a tax on the privilege of doing business since those businesses which owned their own transportation facilities accomplished their own hauling without paying any tax, resulting in an unreasonable discrimination in favor of such carriers in that common carriers could not be competitive in price due to the gross revenue tax. Garrett Freightlines, Inc. v. Mont. R.R. and P.S.C., 161 M 482, 507 P2d 1040 (1973), distinguished in Kiewit Sons' Co. v. Dept. of Revenue, 166 M 260, 531 P2d 1327 (1975).

Nonresident Contractors' Tax: Act providing for nonresident contractor's license fee (Ch. 277, L. 1965), imposing a tax of 1% of gross receipts in addition to a $25 license fee, was arbitrary and unreasonably discriminatory in that it taxed on the basis of gross receipts rather than on profits. State ex rel. Schultz-Lindsay Constr. Co. v. St. Bd. of Equalization, 145 M 380, 403 P2d 635 (1965), distinguished in Kiewit Sons' Co. v. St. Bd. of Equalization, 161 M 160, 505 P2d 102 (1973).

Denial of Trailer Park License on Grounds Not Contained in Ordinance: When developers of trailer park had complied with state and city ordinances and had been granted a state license to operate the park, denial of a license by the city council for matters not contained in or required to be observed by the city health ordinance, thereby applying a different standard than that applied to others engaged in the same line of business, deprived developers of a property right without due process. State ex rel. Bennett v. Stow, 144 M 599, 399 P2d 221 (1965), distinguished in Barnes v. Belgrade, 164 M 467, 524 P2d 1112 (1974).

Right to Engage in Business as Property Right: In Montana, every person has a right to operate a business, subject to the applicable laws of the state and ordinances of the city, and he may not be deprived of such property right without due process of law as guaranteed by Art. III, sec. 27, 1889 Mont. Const. State ex rel. Bennett v. Stow, 144 M 599, 399 P2d 221 (1965), distinguished in Barnes v. Belgrade, 164 M 467, 524 P2d 1112 (1974).

Prohibitive Tax on Trading Stamps: Sections 3 and 27, Art. III, 1889 Mont. Const., serve to inhibit the police power in this state, and Ch. 153, L. 1961, which discriminatorily restrained the use of trading stamps or other redeemable devices in retail business by imposing an unreasonably high and prohibitive tax, was unconstitutional under these sections. Garden Spot Market, Inc. v. Byrne, 141 M 382, 378 P2d 220 (1963).

Destruction of Animals — Emergency Situation: A city, the chief of police, and police officers were not liable to a dog owner for damages, where the owner's dog was killed by officers acting under an emergency quarantine measure which was passed to meet a threatening situation involving rabies. Ruona v. Billings, 136 M 554, 323 P2d 29 (1958).

Destruction of Property Without a Trial or Hearing: Proceedings for the destruction of property in many cases must necessarily be summary and without a previous trial or hearing, and such proceedings are due process. Ruona v. Billings, 136 M 554, 323 P2d 29 (1958).

Double Tax Penalty: The double penalty provided for in the income tax statute, 15-30-321 (renumbered 15-30-2641) (section 84-4924(2), R.C.M. 1947, prior to the 1955 amendment), did not violate Art. III, sec. 27, 1889 Mont. Const. State ex rel. Hardy v. St. Bd. of Equalization, 133 M 43, 319 P2d 1061 (1958).

Trust Taxed at Settlor's Death: Where trust was created in 1915 and the transfer was taxed on the inheritance tax rate in existence in 1945, the time of the settlor's death, there was no violation of Art. III, sec. 27, 1889 Mont. Const. In re Kohr's Estate, 122 M 145, 199 P2d 856 (1948).

Tax on Oleomargarine Dealers: Section 2620.45, R.C.M. 1935 (section 3-2445, R.C.M. 1947, now repealed), levying a tax on dealers in oleomargarine, was in violation of Art. III, sec. 27, 1889 Mont. Const., in that it denied the right to carry on a lawful business without due process of law. Brackman v. Kruse, 122 M 91, 199 P2d 971 (1948).

Property Interest — Incumbency: The incumbent of a public office for a definite term carrying a fixed salary has a "property interest" therein within statute defining property and within constitutional provision that no person shall be deprived of property without due process of law. State ex rel. Ryan v. Norby, 118 M 283, 165 P2d 302 (1946).

Nonresident Alien as Heir: The provision of section 91-522, R.C.M. 1947 (now repealed), declaring the statute incapacitating nonresident aliens to receive property in this state as decedent's heir, devisee, or legatee applicable to vested interests in estates in process of probate and undistributed at effective date of statute, is invalid as denying due process of law. In re Nossen's Estate, 118 M 40, 162 P2d 216 (1945).

When Bonds Subsisting Obligations of State: Where state bonds are sold before the expiration of 6 months after adjournment of the Legislature within which period the creative act is subject to action by the people on referendum, during which period the act is attacked as unconstitutional

but found valid, and the act is "still in full force and effect" within the terms of Art. V, sec. 1, 1889 Mont. Const., the bonds are subsisting obligations of the state, since to hold otherwise would deprive the purchasers of their property without due process of law. Lodge v. Ayers, 108 M 527, 91 P2d 691 (1939).

Floating Indebtedness: Chapter 188, L. 1939 (omitted), authorizing County Commissioners to provide for the payment of floating indebtedness by levying of special taxes or the issuance of funding bonds to pay such indebtedness when the same exceeds a certain amount, held not taking of property without due process of law in violation of Art. III, sec. 27, 1889 Mont. Const. State ex rel. Siegfriedt v. Carbon County, 108 M 510, 92 P2d 301 (1939).

Eight-Hour Workday: Law mandating 8-hour workday was not invalid as violative of due process. Held, that 39-4-105 enacted at the Extraordinary Session of 1933-34, prior to the adoption of Art. XVIII, sec. 4, 1889 Mont. Const., making 8 hours a day's work, is not invalid as offending against the 14th amendment to the federal Constitution, or Art. III, sec. 27, 1889 Mont. Const. St. v. Safeway Stores, Inc., 106 M 182, 76 P2d 81 (1938).

Taxation of Motor Vehicles: Held, that Title 61, ch. 3, and Title 15, ch. 8, part 2, relating to the taxation of motor vehicles, do not violate the Due Process of Law Clause of the Constitution. Wheir v. Dye, 105 M 347, 73 P2d 209 (1937).

Elected Public Office: A public office is not property. Therefore, deprivation thereof did not violate this section. If one is granted the right to appear, make objections, and participate fully in a hearing, the Due Process Clause is satisfied. State ex rel. Riley v. District Court, 103 M 576, 64 P2d 115 (1937).

Invasion of Municipal Proprietary Rights: Since cities in maintaining fire departments are exercising proprietary and not governmental functions, Ch. 49, L. 1935 (omitted), fixing the hours of labor and minimum compensation for firemen, is unconstitutional as invading the proprietary rights of cities in manner not justifiable under the police power of the state. State ex rel. Kern v. Arnold, 100 M 346, 49 P2d 976 (1935).

Interference With Municipal Function: Sections 173.2 through 173.20, inclusive, R.C.M. 1935 (omitted), requiring insurance of public buildings, held unconstitutional as regards cities and towns because an unlawful interference with municipal function and an attempt to take municipal property without due process of law. St. v. Holmes, 100 M 256, 47 P2d 624 (1935).

Assessment — Vagueness of Statute: Held, that the concluding clause of the last sentence of the motor vehicle registration act, sec. 3, Ch. 158, L. 1933 (Title 15, ch. 8, part 2), relating to the time when motor vehicles are assessable for taxation purposes, is so vague and uncertain in its terms that taxing officials are unable to construe it uniformly or administer its provisions without discrimination, and therefore violates Art. III, sec. 27, 1889 Mont. Const., prohibiting the taking of property without due process of law. Vennekolt v. Lutey, 96 M 72, 28 P2d 452 (1934).

Certificate of Public Convenience and Necessity: Under this case, held, that Title 69, ch. 12, regulating the use of state highways by motor carriers for hire, is a valid enactment as against the contentions of a private contract carrier that, by requiring him to obtain from the state Board of Railroad Commissioners (now Public Service Commission) a certificate of public convenience and necessity, the act is invalid as denying him the right to contract and offending against the Equal Protection of the Law and the Due Process of the Law Clauses of the Constitution. (Justices Ford and Angstman dissenting.) Fulmer v. Bd. of R.R. Comm'rs, 96 M 22, 28 P2d 849 (1934); Barney v. Bd. of R.R. Comm'rs, 93 M 115, 17 P2d 82 (1932).

Ordinance Regulating Taxi Drivers: An ordinance requiring taxicab drivers to occupy a position by the side of their vehicles along the curb line of the street fronting a railway station and prohibiting them from soliciting patronage on railway property, held a valid exercise of the police power as against the objections that it was in conflict with the Due Process of Law Clause of the federal and state Constitutions, indirectly interfered with interstate commerce carried on partially within the state, and impaired the obligations of contracts between the operator of the taxicabs and railway companies. Butte v. Roberts, 94 M 482, 23 P2d 243 (1933).

Arbitrary Exercise of Licensing Power: The arrest of a person for operating a drycleaning call office within the city without a license when city's licensing ordinance did not cover such a business violated the provisions against the taking of property without due process of law. State ex rel. Willumsen v. Butte, 135 M 350, 340 P2d 535 (1932).

Unit Rule of Valuation: Held, that 15-23-303, authorizing the State Board of Equalization (now State Tax Appeal Board) to apply the unit rule of valuation in ascertaining the value of property of telegraph, telephone, and railroad companies, is not vulnerable to objections on the grounds that it violates the Due Process and Equal Protection of the Law Clauses of the Constitution. W. Union Tel. Co. v. St. Bd. of Equalization, 91 M 310, 7 P2d 551 (1932).

Commercial Use of Highways: No person has a vested right to use the public highways for a commercial purpose, and a denial of the right to do so takes from him no property or property right without due process of law. N. Pac. Ry. v. Bennett, 83 M 483, 272 P 987 (1928).

Gasoline Tax — Statement of Sales: Held, in an action by the State to collect the license tax imposed upon distributors of gasoline by the act as amended by Ch. 186, L. 1925 (since repealed), that the provision denying to a distributor who refuses or neglects to furnish to the State Treasurer a quarterly statement of his sales the right by action to attack the correctness of the statement made for him by the State Board of Equalization (now State Tax Appeal Board) upon such information as it may be able to obtain or to enjoin the collection of the tax assessed against him by the Board does not deprive the delinquent of his property without due process of law. The fault having been his, he may not be heard to complain of the consequences of his refusal or neglect. St. v. Silver Bow Ref. Co., 83 M 380, 272 P 684 (1928).

Assessment for Construction: The subjection of lands to assessments for the construction or purchase of an irrigation system and water rights is a taking of such lands to the extent of the charge thus laid upon them, and notice giving to the owner an opportunity to be heard on the question whether his lands are such as may properly be included within the district for the creation of which a petition is filed and proper service of same are essential, else the taking is without due process of law and violative of the Constitution, these steps being jurisdictional. Scilley v. Red Lodge-Rosebud Irrigation District, 83 M 282, 272 P 543 (1928).

Licensing of Carriers: Held, that sec. 4, Ch. 154, L. 1923 (since repealed), providing that no person shall operate motor vehicles on the public highways for compensation without first having obtained a license, is not violative of Art. III, sec. 27, 1889 Mont. Const., providing that no person shall be deprived of liberty or property without due process of law. Willis v. Buck, 81 M 472, 263 P 982 (1928).

Destruction of Value of Property: The constitutional guaranty that no person shall be deprived of his property without due process of law may be violated without the physical taking of it for public or private use; any law which destroys its use or value results in depriving the owner of it. Bettey v. Sidney, 79 M 314, 257 P 1007 (1927).

Herd Law — Statute to Be Followed: The provisions of the herd law (section 3348, et seq., R.C.M. 1921, since repealed) must be strictly followed in order to afford protection to those responsible for the impounding and sale of animals under its authority, and where they are not so followed, the taking constitutes a taking of private property without due process of law (Art. III, sec. 27, 1889 Mont. Const.) and a conversion of the property. Jorgenson v. Story, 78 M 477, 254 P 427 (1927).

Inheritance Tax on Estates: Held, that Title 72, Ch. 16, imposing an inheritance tax upon all estates of persons who died since April 1, 1921, remaining undistributed on the date of its approval, March 5, 1923, is a valid enactment and not open to attack on the grounds that it violates the Equal Protection of the Law Clause of the Constitution, is class legislation, and authorizes the taking of property without due process of law. State ex rel. Rankin v. District Court, 70 M 322, 225 P 804 (1924).

County Printing: On the authority of Hersey v. Neilson, 47 M 132, 131 P 30 (1913), and Stange v. Esval, 67 M 301, 215 P 807 (1923), held that section 4482, R.C.M. 1921 (since repealed), requiring the contract for county printing to be let to a newspaper published in the particular county continuously for a period of 1 year immediately preceding its letting, is not void as in violation of the 5th and 14th amendments to the federal Constitution, as depriving the county of the right to contract and granting a person a privilege or immunity not granted to another, or of Art. V, sec. 26, 1889 Mont. Const., prohibiting the enactment of special or class legislation, or of sections 3 and 27, Article III, thereof, as denying the county the right to contract and depriving it of property without due process of law. State ex rel. Woare v. Bd. of Comm'rs, 70 M 252, 225 P 389 (1924).

Natural Gas Use: Held, that Ch. 125, L. 1921 (sections 3550 through 3552, R.C.M. 1921, omitted), prohibiting the use or consumption of natural gas from a natural gas well in such a manner as to prevent the heat therein contained from being utilized for other manufacturing purposes or domestic purposes, is unconstitutional as depriving the owner of his property without due process of law. Gas Prod. Co. v. Rankin, 63 M 372, 207 P 993 (1922).

Extension of Irrigation District: Held, under this case, that 85-7-1808, prescribing the procedure for the extension of an irrigation district already created, when the act is viewed as a whole and liberally construed as provided in 85-1-103, is not open to the objection that it operates to deprive the nonconsenting landowner of his property without due process of law, in that,

while providing for a hearing, it makes no provision for granting relief to him. In re Crow Creek Irrigation District, 63 M 293, 207 P 121 (1922).

Diseased Fruit: The statutes authorizing the state inspector of fruit pests to destroy infected fruit are valid. Colvill v. Fox, 51 M 72, 149 P 496 (1915).

Railroads: The assumption that a railroad, since it is for the public use and benefit, has, through being given authority by the Legislature to construct its line, rights to which the rights of adjacent property holders are subordinated, is limited by the principle of the Constitution that no person can be deprived of property without due process of law. Wine v. N. Pac. Ry., 48 M 200, 136 P 387 (1913).

Summary Assessment of Tax: The act of the Legislature, p. 81, Ch. 67, L. 1909, (omitted), although invalid for another reason, is not in violation of the due process of law principle of the Constitution. Whether the collection of an occupation tax in the summary manner provided by the act affords due process of law is set at rest, as to taxes generally, by Kelly v. Pittsburgh, 104 US 78, 26 L Ed 658 (1881). See also Palmer v. McMahon, 133 US 660, 33 L Ed 772, 10 S Ct 324 (1890). And see also McMillan v. Anderson, 95 US 37, 24 L Ed 335 (1877), where it is said that the mode of assessing taxes is summary in all cases, in order that it may be speedy and effectual, but that summary does not mean arbitrary, unequal, or illegal. Cunningham v. NW. Improvement Co., 44 M 180, 119 P 554 (1911).

NOTICE AND OPPORTUNITY TO BE HEARD

Grazing District Assessment for Trespassing Livestock: Grazing district bylaw providing for an assessment against members owning or in control of livestock trespassing on district land did not violate Art. III, sec. 27, 1889 Mont. Const., when member at all times received timely notice of trespasses from district board, member was represented by counsel throughout hearing before district board and before Montana Grass Conservation Commission (now Department of Natural Resources and Conservation), and a complete record was made of all testimony and exhibits offered. Appeal of Two Crow Ranch, Inc., 159 M 16, 494 P2d 915 (1972).

Peremptory Writ: Peremptory Writ of Mandamus, issued after petitioners were unable to find respondent for service of an alternative writ, commanding the Sheriff to bring respondent into court and to seize and deliver to the court certain books of account in respondent's possession, was void for lack of procedural due process or fundamental fairness. State ex rel. Nybo v. District Court, 158 M 429, 492 P2d 1395 (1972).

Informal Hearings — Presence of Opponents and Record Necessary: Although 69-3-103 authorizes an informal hearing by Public Service Commission in proceedings to set aside rate increases, fundamentals of fair hearing were denied parties opposing rate increase when a hearing was held by the Public Service Commission, when the opponents were not present, and when the testimony of that hearing was not spread on the record. Cascade County Consumers Ass'n v. P.S.C., 144 M 169, 394 P2d 856 (1964), certiorari denied, 380 US 909, 85 S Ct 891 (1964).

Public Service Commission — "Mini Hearing" Following Full Hearing: Where audit had been requested in utility rate increase case by opponents of increase, both sides were given ample time to present evidence and cross-examine witnesses, opponents were permitted to go into utility books with expert witnesses, and the Public Service Commission hired independent rate experts, opponents were not denied a full and fair hearing because of posthearing audit made by the employees of the Commission. Cascade County Consumers Ass'n v. P.S.C., 144 M 169, 394 P2d 856 (1964), certiorari denied, 380 US 909, 85 S Ct 891 (1964).

Hearing Required Prior to Taking Property: "Due process of law" refers to and means certain fundamental rights which our system of jurisprudence has always recognized. It requires notice to be given and a hearing be held before property may be taken or impressed with a lien. Great N. R.R. v. Roosevelt County, 134 M 355, 332 P2d 501 (1958), distinguished in Bacus v. Lake County, 138 M 69, 354 P2d 1056 (1960), and Harrison v. Missoula, 146 M 420, 407 P2d 703 (1965).

Certificate of Motor Carrier: Cancellation of an interstate certificate of public convenience and necessity without giving the holder notice or an opportunity to appear or to show cause why it should not be canceled deprived the holder of the right to operate as a motor carrier, violated 69-12-327, and also violated Art. III, sec. 27, 1889 Mont. Const., by depriving him of a property right without due process of law. State ex rel. Daniels v. Bd. of R.R. Comm'rs, 131 M 9, 306 P2d 264 (1957).

Curative Statutes as Not Removing Necessity to Give Notice of Application for Tax Deed: Since the Legislature could not in violation of the Due Process of Law Clause of the Constitution have done away with the necessity of giving notice of an application for tax deed prescribed by 15-18-202 (now repealed), contention in an action to set aside such a deed on the grounds that notice

had not been given and that failure to give notice was cured by Ch. 94 and Ch. 105, L. 1939, held without merit. Kerr v. Small, 112 M 490, 117 P2d 271 (1941).

Eminent Domain: The jurisdiction of courts over eminent domain proceedings is wholly statutory; the due process of law clause, in addition to its requirement of public use and just compensation, protects the landowner from the adoption of any form of procedure which deprives him of a reasonable opportunity to be heard. The provisions of the law granting the right of eminent domain must be complied with. Housing Authority of Butte v. Bjork and Silver Bow County, 109 M 552, 98 P2d 324 (1940).

Competency Hearing — Notice: Held, that section 91-4701, R.C.M. 1947 (now repealed), requiring notice to an alleged incompetent of a hearing to determine his competence but not requiring notice to any other, does not violate the Due Process Clause of the state or federal Constitution. State ex rel. Haynes v. District Court, 106 M 578, 81 P2d 422 (1938).

Recount at Election: Under section 23-1301, et seq., R.C.M. 1947 (now repealed), authorizing a recount of ballots cast at any election by boards of county canvassers, a public office not being property, deprivation thereof is not violating Art. III, sec. 27, 1889 Mont. Const.; and if one is accorded the right to appear, be heard, file pleadings, make objections, and participate fully in a hearing, the Due Process Clause is satisfied. State ex rel. Riley v. District Court, 103 M 576, 64 P2d 115 (1937).

Action Against Deceased: Defendant, holder of stock in a state bank, died after action had been commenced against him to recover on his statutory liability as such stockholder. After his death his attorneys filed an answer and then withdrew from the case. The executors of his estate were not substituted as defendants until long after submission of the cause for decision, the estate not being represented at the trial. On appeal from a judgment against the executors, held, that having been denied the right to be heard before judgment was rendered against them, it was void as in violation of the constitutional Due Process of Law Clause. Mitchell v. Banking Corp. of Mont., 94 M 183, 22 P2d 155 (1933).

Hearing Before Judgment: The Due Process of Law Clauses of the federal and state Constitutions require a hearing or an opportunity to be heard before one may be held to be concluded by a judgment. Mitchell v. Banking Corp. of Mont., 94 M 183, 22 P2d 155 (1933).

Fire Hazard: Held, that Title 50, ch. 62, part 1, in not requiring service of an order to show cause on the owner of a building sought to be condemned as a fire hazard in a proceeding instituted by the State Fire Marshal, does not offend against the Due Process of Law Clause of the Constitution, since it does require the order, designated the "process" by which the court acquires jurisdiction, to be "issued", which term comprehends the idea that it be sent forth for service by an officer on the person to whom it is directed. State ex rel. Brooks v. Cook, 84 M 478, 276 P 958 (1929).

Notice and Hearing: So long as the statute authorizing the construction and maintenance of a drain and the imposition of special assessments to defray the cost thereof provides for notice to every interested landowner and an opportunity for him to be heard before he can be affected adversely, it does not deprive him of his property without due process of law. In re Valley Center Drain District, 64 M 545, 211 P 218 (1922).

Costs Upon Filing Memo — Not Allowed: A statute which authorizes the taxation of costs upon the filing of a memorandum, without notice to the person liable therefor, would seem to be obnoxious to the constitutional guaranty contained in Art. III, sec. 27, 1889 Mont. Const., the phrase "due process of law" including notice and a hearing before judgment. State ex rel. Riddell v. District Court, 33 M 529, 85 P 367 (1905).

STATUTORY CONCERNS

Penalty Assessment on Bail: Statute providing for penalty assessment on bail violated Due Process Clause in that assessment amounted to tax on right to bail, revenue being earmarked for high school driver education. State ex rel. Sanders v. Butte, 151 M 171, 441 P2d 190 (1968).

Municipal Ordinances — Storm Sewer Service Charge: A city ordinance which imposed a storm sewer service charge applicable to premises within the city limits did not violate Art. III, sec. 27, 1889 Mont. Const. Billings v. Nore, 148 M 96, 417 P2d 458 (1966).

Milk Control Law: The price-fixing provisions of the milk control law, Title 81, ch. 23, withstand the due process test. Mont. Milk Control Bd. v. Rehberg, 141 M 149, 376 P2d 508 (1962).

Rural Fire Districts Law: Portion of rural fire districts law, now codified in Title 7, ch. 33, part 21, before 1957 amendment, was unconstitutional as being in direct conflict with Art. III,

sec. 27, 1889 Mont. Const. Great N. Ry. v. Roosevelt County, 134 M 355, 332 P2d 501 (1958), distinguished in Bacus v. Lake County, 138 M 69, 354 P2d 1058 (1960).

Korean War Honorarium: Statute amending initiative act providing for honorarium for World War II veterans so as to make Korean veterans eligible to receive honorariums did not violate Art. III, sec. 27, 1889 Mont. Const. Cottingham v. Bd. of Examiners, 134 M 1, 328 P2d 907 (1958), overruled on other grounds in State ex rel. Ward v. Anderson, 158 M 279, 491 P2d 868 (1971).

Photographic Examiners Act: Section 66-1701, et seq., R.C.M. 1947 (now repealed), known as the Photographic Examiners Act, was declared unconstitutional as it violates Art. III, sec. 27, and Art. III, sec. 3, 1889 Mont. Const., and sec. 1 of the 14th amendment to the Constitution of the United States. St. v. Gleason, 128 M 485, 277 P2d 530 (1954).

Grass Conservation Act: The Grass Conservation Act (Title 76, ch. 16) does not violate Art. III, sec. 27, 1889 Mont. Const. Thompson v. Tobacco Root Co-op St. Grazing District, 121 M 445, 193 P2d 811 (1948).

Validating Statutes: Curative or validating statutes, such as section 84-4160.1, R.C.M. 1947 (not codified), validating tax deeds theretofore issued notwithstanding error in stating the amount due for taxes, interest, and penalty in the notice of application for tax deed, do not violate Art. III, sec. 27, 1889 Mont. Const., relative to due process of law. Howard v. Newlon, 112 M 189, 114 P2d 272 (1941).

Unfair Practices Act: The unfair practices act, Title 30, ch. 14, part 2, held not in conflict with either the federal or state constitutional provisions as a denial of due process of law. Assoc. Merchants of Mont. v. Ormesher, 107 M 530, 86 P2d 1031 (1939).

Creation of High School Districts: In providing emergency relief by the creation of high school districts in counties having county high schools by sections 75-4601 through 75-4606, R.C.M. 1947 (now repealed), the Legislature did not violate the provisions of Art. III, sec. 27, 1889 Mont. Const. State ex rel. Berthot v. Gallatin County High School District, 102 M 356, 58 P2d 264 (1936).

Insurance on Buildings: Sections 173.2 through 173.20, R.C.M. 1935 (omitted), requiring insurance of public buildings so far as it applies to counties and school districts, held constitutional. St. v. Holmes, 100 M 256, 47 P2d 624 (1935).

Creation of Irrigation Districts: Sections 4024, R.C.M. 1921 (since repealed), and 85-7-2201, curing defects in the creation of irrigation districts, held not open to constitutional objections based on the provisions of Art. XV, sec. 13; Art. III, sec. 27; Art. V, sec. 23; and Art. VIII, sec. 1, 1889 Mont. Const., or the 14th amendment to the Constitution of the United States. St. v. Bd. of County Comm'rs, 86 M 595, 285 P 932 (1930).

Regulation of Carriers: Chapter 154, L. 1923 (since repealed), held not open to attack with respect to the regulation of common carriers, under the Due Process of Law Clause of Art. III, sec. 27, 1889 Mont. Const. Stoner v. Underseth, 85 M 11, 277 P 437 (1929).

Teachers' Pensions: Sections 1113 through 1132, R.C.M. 1935 (since repealed), providing for teachers' pensions, are not invalid as in contravention of Art. III, sec. 27, 1889 Mont. Const. Trumper v. School District, 55 M 90, 173 P 946 (1918).

Attorney General's Opinions

Collection of Delinquent Income Taxes of Nonresidents Employed by Foreign Corporation Doing Business in Montana: The salaries or wages of nonresidents employed by a foreign corporation doing business in Montana may be considered to be property within the state for the purpose of levying a warrant for distraint for unpaid state income taxes. Requiring the foreign corporation to honor the levy does not offend the notions of "fair play and substantial justice" which govern assertions of both jurisdiction in personam and jurisdiction in rem. 41 A.G. Op. 9 (1985).

Law Review Articles

Montana Supreme Court Unnecessarily Misconstrues Takings Law, Horwich & Lund, 55 Mont. L. Rev. 455 (1994).

Over-Due Process Revisions for the Individuals With Disabilities Education Act, Zirkel, 55 Mont. L. Rev. 403 (1994).

Montana's Real Property Forfeiture Statute: Will It Pass Constitutional Muster?, Nevin, 54 Mont. L. Rev. 69 (1993).

The Expectancy of Parole in Montana: A Right Entitled to Some Due Process, Trueb, 48 Mont. L. Rev. 379 (1987).

Fair Trial and Free Press: The Courtroom Door Swings Open, Carey, 45 Mont. L. Rev. 323 (1984).

Federalism and Due Process: Some Ruminations, Cromwell, 42 Mont. L. Rev. 183 (1981).

Protecting Due Process and Civic Friendship in the Administrative State, Huff, 42 Mont. L. Rev. 1 (1981).

The Constitutionality of Montana's Prejudgment Attachment Statutes, Lacosta, 38 Mont. L. Rev. 421 (1977).

Montana Outfitters v. Fish and Game Commission: Of Elk and Equal Protection, Ramlow, 38 Mont. L. Rev. 387 (1977).

Involuntary Commitment of the Mentally Ill, Troland, 38 Mont. L. Rev. 308 (1977).

The Long Arm of Montana's Rule 4B: Due Process Limits to the Exercise of Jurisdiction Over Foreign Defendants, Rossbach, 37 Mont. L. Rev. 420 (1976).

Recent Consumer Protection Developments in Montana, Swartley, 37 Mont. L. Rev. 371 (1976).

Revocation of Probation Without Preliminary Hearing, Bishop, 37 Mont. L. Rev. 265 (1976).

A Critical Analysis of Garrett Freight Lines, Inc. v. Montana Railroad Commission, Alke, 37 Mont. L. Rev. 175 (1976).

The Supreme Court's Still Changing Attitude Toward Consumer Protection and Its Impact on the Integrity of the Court, McDermott, 37 Mont. L. Rev. 27 (1976).

Regulation of Interconnected Electric Utilities: Some Jurisdictional Considerations, Lopach & Lopach, 37 Mont. L. Rev. 1 (1976).

In Defense of a Youth, Curtis, 36 Mont. L. Rev. 225 (1975).

The Supreme Court's Changing Attitude Toward Consumer Protection and Its Impact on Montana Prejudgment Remedies, McDermott, 36 Mont. L. Rev. 165 (1975).

Abortion: Roe v. Wade and the Montana Dilemma, Uda, 35 Mont. L. Rev. 103 (1974).

Apportionment: Past to Future, Dudis, 33 Mont. L. Rev. 101 (1972).

The Constitution and Juvenile Delinquents, Mudd, 32 Mont. L. Rev. 307 (1971).

Locomotion, Liberty and Legislation, Harper, 32 Mont. L. Rev. 279 (1971).

Statutory Presumption of Guilt From Presence at Illegal Distillery, Endsley, 27 Mont. L. Rev. 216 (1966).

The "Fair Value" Test in Montana Public Utility Rate Regulation, Bottomly, 22 Mont. L. Rev. 65 (1960).

The Bases for Pre-trial Discovery in Criminal Cases, Degrandpre, 21 Mont. L. Rev. 189 (1960).

Industrial Security Clearance and Individual Freedom, Beighle, Dalthorp, & Shanahan, 19 Mont. L. Rev. 121 (1958).

Constitutional Law—Due Process—Psychologically Coerced Confession, Lovell, 19 Mont. L. Rev. 59 (1957).

Filing and Publication of Administrative Rules and Regulations in Montana, Cannon, 19 Mont. L. Rev. 43 (1957).

A Guide for More Efficient Law Enforcement, Kalbfleisch, 18 Mont. L. Rev. 198 (1956).

"Coram Nobis"—Is It Either an Available or the Most Satisfactory Post-Conviction Remedy to Test Constitutionality in Criminal Proceedings?, Briggs, 17 Mont. L. Rev. 160 (1956).

Oleomargarine and the Constitution, Hughes, 10 Mont. L. Rev. 46 (1949).

Substituted Service on Resident Motorists, McNamer, 1 Mont. L. Rev. 51 (1940).

Section 18. State subject to suit.

Convention Notes

New provision abolishing the doctrine of sovereign immunity ("the King can do no wrong") and allowing any person to sue the state and local governments for injuries caused by officials and employees thereof.

Compiler's Comments

1974 Amendment by Referendum: Constitutional Amendment No. 2, proposed by SJR No. 64, L. 1974, and approved at the general election held November 5, 1974, inserted exception allowing the Legislature to impose immunity by a two-thirds vote of each house and deleted second sentence that read: "This provision shall apply only to causes of action arising after July 1, 1973". Amendment effective July 1, 1975. (See text of referendum in final volume of 1975 Laws of Montana.)

Case Notes

Negligence Claim for Improper Removal of Children Rejected — State Entitled to Immunity — No Evidence Employees Were Grossly Negligent or Provided False Information: Plaintiff alleged that the state and Broadwater County negligently failed to adequately investigate a social worker's report before removing her children from her care. The state moved for summary judgment, arguing that it was immune from suit under 41-3-203. The District Court denied

the state's immunity claim but granted summary judgment to the state on the grounds that the plaintiff had not provided expert testimony necessary to establish that the investigator was subject to and violated a standard of care. On appeal, the Supreme Court held that the state is entitled as a matter of law to immunity from the plaintiff's claims under 41-3-203. The court reasoned that the plaintiff failed to establish a genuine issue of material fact to support her claim that the state employees involved in the investigation were grossly negligent or knowingly provided false information. Weber v. St., 2015 MT 161, 379 Mont. 388, 352 P.3d 8.

State Immune From Negligent Claim — Probable Cause to Arrest Uncle in Niece's Death — Summary Judgment Affirmed: The plaintiff had been charged with deliberate homicide of his 3-year-old niece and spent 2 months in jail before evidence revealed instead that a school bus had caused her death. The plaintiff sued Butte-Silver Bow County and the state, claiming that law enforcement had negligently investigated his niece's death and that the state medical examiner was negligent in reporting her death as a homicide. The District Court granted the defendants' motions for summary judgment and the plaintiff appealed. The Supreme Court agreed that summary judgment in favor of the state was proper because the state has statutory immunity under 44-3-401 and 46-4-104 and that summary judgment in favor of the county was proper because there was probable cause to arrest the plaintiff. The plaintiff had told investigators that he was holding the niece's hand at the time she collapsed, and therefore the investigators ruled out her being hit by the bus. Because the girl had suffered violent injuries while in the uncle's care and there was no other apparent reason for the injuries, the county had probable cause to arrest and imprison the plaintiff. Kichnet v. Butte-Silver Bow County, 2012 MT 68, 364 Mont. 347, 274 P.3d 740.

No Prejudgment Interest in Action Against State: The District Court held that 31-1-106 requires the state to pay prejudgment interest on any money collected by the Department of Public Health and Human Services in excess of federal Medicaid law. The Supreme Court reversed, concluding that 2-9-317 is unambiguous and allows no interest to be assessed against the state until 2 years after the date of entry of judgment. Blanton v. Dept. of Public Health and Human Services, 2011 MT 110, 360 Mont. 396, 255 P.3d 1229.

Conduct of City Council Meeting Hearing Criticism of City Employee — Not Restricted by Free Speech and Privileged Communication Cases and Statute — Not Legislative Act Shielded by Legislative Immunity: Denke filed complaints with the Human Rights Commission alleging that Thompson Falls and Shoemaker, a City Council member, retaliated against her for previously filing sexual harassment charges with the Commission by holding a City Council meeting at which Shoemaker was allowed, with virtually no limitation, to severely criticize her conduct as city clerk and finance officer. The Commission hearing examiner, the Commission, and the District Court held that Shoemaker's criticism of Denke's actions as city bookkeeper aired during the City Council meeting was a "legislative act" within the meaning of 2-9-111 and the city was therefore immune from a charge of retaliation. The Supreme Court held that 27-1-804(2) and free speech cases such as New York Times Co. v. Sullivan, 376 US 254 (1964), and Skinner v. Pistoria, 194 M 257, 633 P2d 672 (1981), did not limit the City Council's ability to regulate the time, place, and manner of Shoemaker's criticism. The Supreme Court also held that Denke's claim did not involve the calling of the City Council meeting (for which the city would be immune under 2-9-114) so much as the manner in which the meeting was conducted and that the conduct of the meeting did not fall within the definition of a "legislative act", and remanded the case for further proceedings. Denke v. Shoemaker, 2008 MT 418, 347 M 322, 198 P3d 284 (2008).

Respondeat Superior Applicable to City Council Member Who Severely Criticized City Employee — Criticism Within Scope of Employment for Respondeat Superior but Not for Application of Legislative Immunity: Shoemaker, a member of the Thompson Falls City Council, severely criticized Denke, the city clerk and finance officer, in two letters to the editor and in a City Council meeting for her job performance that Shoemaker alleged caused the city to hire a CPA. Denke charged that Shoemaker's criticism was unlawful retaliatory conduct for her previous filing of a sexual harassment complaint against the Mayor. Following Kenyon v. Stillwater County, 254 M 142, 835 P2d 742 (1992), the Supreme Court held that Shoemaker was a city employee. The Supreme Court held that Shoemaker was acting as a member of the City Council when he signed the letters and that the city had admitted in an administrative hearing that Shoemaker was within the scope of his employment. The court held that: (1) Shoemaker didn't have to be Denke's supervisor for purposes of applying respondeat superior; (2) Shoemaker's unlawful retaliatory conduct was not within the official discharge of Shoemaker's duties for the purposes of legislative immunity under 27-1-804, but the conduct was within the scope of Shoemaker's employment for purposes of respondeat superior; and (3) the statement of the city in the Human Rights

Commission administrative hearing that Shoemaker was acting as a member of the City Council constituted a judicial admission, was an "acknowledgment" under 2-9-305, and was binding upon the city for the purposes of its liability for retaliation. Denke v. Shoemaker, 2008 MT 418, 347 M 322, 198 P3d 284 (2008).

Initiative Banning Cyanide Mining — Reverse Condemnation Against State Not Justiciable in Federal Court: Initiative Measure No. 137, codified as 82-4-390, which banned the use of open-pit mining using cyanide leaching except as to mines operating with existing permits, could not be the basis of a reverse condemnation action in federal court because such an action is jurisdictionally barred by the 11th amendment to the U.S. Constitution. Eleventh amendment immunity cannot be avoided by the application of Ex parte Young, 209 US 123 (1908), since a reverse condemnation action is a form of retroactive relief and not a claim for prospective relief. Seven Up Pete Venture v. Schweitzer, 523 F3d 948 (9th Cir. 2008).

No Quasi-Judicial Immunity in Granting Medical License to Doctor Who Had Committed Unprofessional Conduct: Irrespective of whether the functions of the Board of Medical Examiners in investigating a license application of a doctor who had previously been subject to disciplinary action in other states for unprofessional conduct were discretionary actions, the Board was not operating in the context of a controversy or adversarial proceeding. Thus, the District Court committed error when it granted the state's motion for summary judgment based upon quasi-judicial immunity. Nelson v. St., 2008 MT 336, 346 M 206, 195 P3d 293, (2008).

Qualified Immunity Proper for Officers' Sincere but Unjustified Noncompliance With "Knock and Announce" Rule: SWAT team members were called to remove Cassady from his bar, which was in a building that was also his home, after a reported fight between Cassady and his son, R.J. After the fight, R.J. fled to his neighbor's home and informed the neighbor that he had repeatedly hit his father over the head with a baseball bat but did not know if his father was alive or dead in the bar. After entering the bar with another neighbor to find Cassady alive but with serious head injuries, the neighbor called 9-1-1 and informed law enforcement that Cassady appeared intoxicated and that a shotgun had been observed in the home. Although R.J. had provided one of the neighbors a key to the home for officers' use, the neighbor neglected to relay R.J.'s warning that officers announce themselves prior to using the key to enter the bar. After repeated attempts to contact Cassady, officers entered the bar using the key provided by R.J., but without announcing their presence. When officers saw a laser light that was consistent with a gun sight device shining on one of their fellow officer's face, officers announced their presence and ordered Cassady to drop his weapon. After Cassady ignored their order and maintained the laser light on the officer's face, officers subsequent fired several shots, severely wounding Cassady. Cassady filed a 1983 claim against Yellowstone County and individual officers, alleging a violation of civil rights. The District Court granted the officers qualified immunity for the 1983 claim, and Cassady appealed, alleging constitutional violations arising from the officers' failure to knock and announce and for use of excessive force upon entry. The Supreme Court concluded that Cassady's sustained head injuries, his reported consumption of alcohol, and his unresponsiveness to phone calls and R.J.'s indirect consent to enter the home led officers to reasonably believe that knocking and announcing their presence were unnecessary in the situation that they confronted. Consequently, because the conduct of the officers was based on a sincere but unjustified belief that their conduct was lawful, the officers were entitled to qualified immunity from the 1983 claim. Cassady v. Yellowstone County Sheriff Dept., 2006 MT 217, 333 M 371, 143 P3d 148 (2006).

No Federal Civil Rights Privacy Claim Against State or Municipal Entities: Barr sued the state and a municipal airport authority for violating his civil rights under 42 U.S.C. 1983 and 42 U.S.C. 1985 when the airport failed to hire him as a permanent security officer after discovering Barr's past public criminal record. The District Court summarily dismissed the claims, and the Supreme Court affirmed. In order for the municipality to be liable under the federal statutes, it was necessary for Barr to show that the municipality had a policy or custom that inflicted the injury of which Barr complained, which Barr could not show. Further, Barr's civil rights claims stemmed from a privacy invasion that did not occur, so he was unable to establish a federal privacy violation. Barr's claim against the state was also barred because states are not persons for purposes of the federal statutes. Barr v. Great Falls Int'l Airport Authority, 2005 MT 36, 326 M 93, 107 P3d 471 (2005). See also Monell v. Dept. of Social Services, 436 US 658 (1978), and Will v. Mich. Dept. of State Police, 491 US 58 (1989).

Applicable Immunity Is Immunity When Injury Is Manifested and Not Immunity When Injury Occurred — Sovereign Immunity Held Bar to Liability and Not Lack of Duty: Plaintiffs suffered injury from inhaling dust-borne vermiculite, a known carcinogen, while working in a

vermiculite mine in Libby, Montana, beginning in the late 1950s or early 1960s, but their injuries were not manifested until 1998 when plaintiffs were diagnosed as suffering from various forms of cancer induced by the dust present in the mine. The Supreme Court, noting that the question of what version of sovereign immunity applies was an issue of first impression, examined case law from other jurisdictions and determined that it must construe the "suit for injury" language of this section. That language, the Supreme Court held, incorporates the concept of accrual of any injury. The court further held that in determining when an injury accrues, Montana follows the "discovery rule", meaning that a legally recognized injury does not accrue until the injury is discovered. Because under 27-2-102 no cause of action accrues until the injury is discovered, the court reasoned that the version of sovereign immunity that should be applied is the version in effect at the time that the miners' injuries accrued in 1998. By 1998, the defense of sovereign immunity had long been abolished by the constitutional language effective July 1, 1973. The Supreme Court also stated, in response to the dissenting opinion and citing Jacques v. Mont. Nat'l Guard, 199 M 493, 649 P2d 1319 (1982), and Brown v. Ehlert, 255 M 140, 841 P2d 510 (1992), that sovereign immunity, a type of affirmative defense, is a matter of avoidance of a legal duty, not the absence of the duty itself. Orr v. St., 2004 MT 354, 324 M 391, 106 P3d 100 (2004).

"Class of One" Equal Protection Law Not Established at Time of Discharge From Public Employment — Saucier Test — Official Entitled to Qualified Immunity: Losleben was terminated from state employment in 1999, and following an unsuccessful grievance, Losleben filed a complaint in District Court, alleging that his former supervisors violated his right to equal protection by engaging in a vindictive and spiteful campaign to terminate his employment. Two supervisors were subsequently dismissed from the suit, and the District Court granted the third supervisor qualified immunity, concluding that Losleben's equal protection claim for a "class of one" was not clearly established at the time of the alleged misconduct. Losleben appealed. Traditionally, a person bringing an equal protection claim must show intentional discrimination because of membership in a particular class, not merely that the person was treated unfairly as an individual. However, in Village of Willowbrook v. Olech, 528 US 562 (2000), the U.S. Supreme Court concluded that an equal protection claim may be brought by a claimant as a "class of one" even though the claimant is not a member of a traditionally recognized protected class. The court subsequently held in Saucier v. Katz, 533 US 194 (2001), that a two-part test is to be applied in determining whether state officials are entitled to qualified immunity: (1) when taken in a light most favorable to the party asserting injury, do the facts alleged show that an official's conduct violated a constitutional right; and (2) if so, was the right clearly established at the time that it was allegedly infringed. The District Court in this case erred by not applying the first step of the Saucier test, but because only the qualified immunity issue was certified to the Supreme Court, it was assumed that a constitutional violation could have occurred, so the Supreme Court proceeded to the second step of the Saucier analysis. The law in effect when Losleben was terminated in 1999, prior to Olech, did not recognize an equal protection "class of one" claim, so any equal protection right held by Losleben at that time was not well enough established to impute knowledge of it to Losleben's supervisor. Thus, the District Court properly granted the supervisor qualified immunity and dismissed the supervisor from the case. Losleben v. Oppedahl, 2004 MT 5, 319 M 269, 83 P3d 1271 (2004).

Montana Scaffolding Law Not Preempted by Federal Occupational Safety and Health Act: Dukes died after being injured while performing scaffolding work. His estate sued the city of Missoula, claiming that the city failed to enforce state scaffolding laws by performing inspections required under former 50-77-106 (repealed 1999) and that the failure to inspect was a breach of a legal duty and negligence per se under state law. The District Court held that state law was preempted by the federal Occupational Safety and Health Act of 1970 (OSHA), that the state therefore could not impose a legal duty on the city, and that without a legal duty, the city could not be held negligent under state law. The estate appealed. The Supreme Court noted that there are three ways that federal law may preempt state law: (1) by express preemption through a preemption clause in the federal law stating that state law will not apply; (2) through implied field preemption, wherein federal regulation is so pervasive or comprehensive that it is reasonable to infer that Congress intended to occupy the field and leave no room for supplementary state regulation; and (3) through implied conflict preemption, which manifests itself as an inability of state law to comply with federal law or when state law stands as an obstacle to the objectives of Congress. Express preemption must be clearly manifested, and because no provision of OSHA expressly preempts state health and safety standards or statutory duties, express preemption did not apply. Field preemption also was inapplicable. States can promulgate occupational safety and health standards and enforce them in the absence of OSHA standards; OSHA does not affect

state workers' compensation laws or enlarge or diminish state common law or tort law available to injured workers; and OSHA does not create a right of action for injured workers, but allows injured workers to pursue rights of action under state law. Finally, the building inspector's duty to inspect and enforce compliance with OSHA scaffolding standards also survived conflict preemption because nothing in OSHA contemplates that inspection and enforcement are the sole responsibility of the federal government and inspection and enforcement by a state official are preempted only if in conflict with OSHA. Thus, the District Court erred in holding that OSHA preempted state law, so the case was reversed and remanded for further proceedings. Dukes v. Sirius Constr., Inc., 2003 MT 152, 316 M 226, 73 P3d 781 (2003). See also Traudt v. Potomac Elec. Power Co., 692 A2d 1326 (D.C. 1997).

Municipality Not Liable Solely on Respondeat Superior Theory — Causal Link Required: In evaluating a local government's liability under 42 U.S.C. 1983, courts must determine whether plaintiff's harm was caused by a constitutional violation and, if so, whether the local government unit is responsible for the violation. A municipality or local government unit cannot be held liable under the federal law on a respondeat superior theory solely because it employs a tortfeasor. Rather, a plaintiff must show that the local government action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the action and the deprivation of federal rights. Municipal liability under section 1983 attaches only when a deliberate choice to follow a course of action is made from among various alternatives by the official responsible for establishing final policy with respect to the subject matter in question. In the case at bar, the city of Red Lodge obtained immunity by extension based on individual immunities unavailable to local government units. The District Court, applying Reisdorff v. Yellowstone County, 1999 MT 280, 296 M 525, 989 P2d 850 (1999), granted summary judgment for the city on judicial and quasi-judicial immunity grounds. The extension of immunity to employees of governmental entities in Reisdorff was correct; however, the blanket immunity extended to all defendants including the local governmental unit itself was erroneous, and to that extent, Reisdorff was overruled. Miller v. Red Lodge, 2003 MT 44, 314 M 278, 65 P3d 562 (2003). See also Monell v. New York City Dept. of Social Services, 436 US 658 (1978), Pembaur v. Cincinnati, 475 US 469 (1986), Collins v. Harker Heights, Tex., 503 US 115 (1992), and Bd. of County Comm'rs v. Brown, 520 US 397 (1997).

No State and Local Employee Qualified Immunity for Violation of State Constitution Similar to Qualified Immunity of Federal Employee Violating Federal Constitution: Montana has no immunity for a state or local government employee who violates a person's rights under the Montana Constitution comparable to the federal common-law presumption of qualified immunity of a federal employee for violating a person's rights under the U.S. Constitution and laws. In fact, this section prohibits immunity unless it is specifically provided for by a two-thirds vote of each house of the Legislature. The Legislature has not provided a qualified immunity for state and local employees who violate a person's rights under the Montana Constitution, and the court need not decide whether it can. Furthermore, Art. II, sec. 16, Mont. Const., provides that courts of justice are open to every person and that speedy remedy is afforded for every injury of person, property, or character. For these reasons, state and local government employees do not have qualified immunity for violation of a person's rights under the Montana Constitution. Dorwart v. Caraway, 2002 MT 240, 312 M 1, 58 P3d 128 (2002).

Erroneous Conclusion That Elements of Malicious Prosecution by State Not Established — Judgment as Matter of Law Improper: Plaintiffs were cited by the state for various water quality violations related to their public swimming pools, drinking water, and discharge from a sewage lagoon. The charges were ultimately dropped, and both plaintiffs filed separate actions that were settled, except for plaintiffs' malicious prosecution claims against the state, which were joined for trial by jury. At the close of plaintiffs' case, the state's motion for judgment as a matter of law was granted, so plaintiffs appealed. As set out in Orser v. St., 178 M 126, 582 P2d 1227 (1978), in a civil action for malicious prosecution, plaintiff must introduce sufficient proof of the following elements: (1) a judicial proceeding has been commenced and prosecuted against the plaintiff; (2) the defendant was responsible for litigating, prosecuting, or continuing the proceeding; (3) there is lack of probable cause for the defendant's acts; (4) the defendant was actuated by malice; (5) the proceeding terminated in favor of the plaintiff; and (6) the plaintiff suffered damages. Here, the District Court found that plaintiffs had not met their burden of proof regarding elements three, four, and five. The Supreme Court examined each of those elements—lack of probable cause, malice, and favorable termination of the underlying suit—and concluded that the elements were met, warranting reversal for trial on the merits. Judgment as a matter of law averts trial by jury and is proper only in rare cases when undisputed evidence admits of only one conclusion.

Although the proceedings to date in this case did not demonstrate guilt or innocence, plaintiffs nevertheless made out a prima facie case that warranted jury determination. Plouffe v. Dept. of Public Health and Human Services, 2002 MT 64, 309 M 184, 45 P3d 10 (2002), following McGuire v. Armitage, 184 M 407, 603 P2d 253 (1979), Miller v. Watkins, 200 M 455, 653 P2d 126 (1982), and Sacco v. High Country Independent Press, Inc., 271 M 209, 896 P2d 411 (1995), and followed in Seipel v. Olympic Coast Investments, 2008 MT 237, 344 M 415, 188 P3d 1027 (2008).

Failure to State Cognizable Claim Under 42 U.S.C. 1983 — Judgment on Pleadings Properly Granted: Brown filed a complaint in District Court seeking to address alleged deprivations of his rights by prison officials under 42 U.S.C. 1983, but the complaint was dismissed on the pleadings for failure to state a cognizable claim under the federal law. The District Court found that Brown's claims were barred by Heck v. Humphrey, 512 US 477 (1994), which held that a state prisoner's claim for damages is not cognizable under 42 U.S.C. 1983 if a judgment in favor of plaintiff would necessarily imply the invalidity of the conviction or sentence, unless the prisoner can demonstrate that the conviction or sentence has been previously invalidated. Brown appealed, seeking to distinguish Heck by casting his claim as one for an earlier parole appearance, rather than as affecting his ultimate release date. The Supreme Court was not persuaded. Brown's claims, if proved, would necessarily imply the invalidity of his conviction or sentence and thus were not cognizable under 42 U.S.C. 1983, unless Brown could demonstrate that the conviction or sentence had been invalidated. The District Court's dismissal of Brown's 42 U.S.C. 1983 claim was affirmed. Brown v. St., 2002 MT 58, 309 M 106, 46 P3d 42 (2002), distinguishing Neal v. Shimoda, 131 F3d 818 (9th Cir. 1997).

Board of Psychologists — Immunity From Suit: Rahrer sought to hold the Board of Psychologists liable for damages arising out of a contested case hearing involving the Board's investigation of a complaint against Rahrer, a licensed psychologist. Applying Butz v. Economou, 438 US 478, 57 L Ed 2d 895, 98 S Ct 2894 (1978), and Koppen v. Bd. of Medical Examiners, 233 M 214, 759 P2d 173, 45 St. Rep. 1433 (1988), the Supreme Court held that the Board of Psychologists was entitled to quasi-judicial immunity. Initiating, investigating, and presenting a case pursuant to the Montana Administrative Procedure Act involve precisely the types of decisions for which the state and its agencies are granted quasi-judicial immunity. Rahrer v. Bd. of Psychologists, 2000 MT 9, 298 M 28, 993 P2d 680, 57 St. Rep. 53 (2000).

Test for Judicial Immunity From Federal Section 1983 Case — Quasi-Judicial Immunity Extended to Official Acting Under Valid Court Order: State immunity laws do not shield the state or its officials from liability based on 42 U.S.C. 1983. To be immune from a claim based on that section, the immunity must be found in federal law. In Stump v. Sparkman, 435 US 349 (1978), the U.S. Supreme Court established a two-part test for determining when a judge is entitled to immunity from a sec. 1983 action. The first part is whether the judge dealt with the plaintiff in a judicial capacity. If the judge was not dealing in a judicial capacity, there is no immunity. If the judge was dealing in a judicial capacity, the second part of the test is whether the judge acted in the clear absence of all jurisdiction. From the doctrine of judicial immunity has come the doctrine of quasi-judicial immunity. Officials acting pursuant to a facially valid court order have absolute immunity from damages for actions taken to execute that order. In the present case, the Justice of the Peace was clearly acting in a judicial capacity when issuing an order that Reisdorff feed and care for her animals. Reisdorff did not argue that the order was facially invalid, and the District Court did not err in holding that officials carrying out the order were entitled to quasi-judicial immunity. Reisdorff v. Yellowstone County, 1999 MT 280, 296 M 525, 989 P2d 850, 56 St. Rep. 1128 (1999), overruled, to the extent that liability under 42 U.S.C. 1983 was extended to local government units pursuant to the doctrines of judicial and quasi-judicial immunity in Miller v. Red Lodge, 2003 MT 44, 314 M 278, 65 P3d 562 (2003). See also Patterson v. Von Riesen, 999 F2d 1235 (8th Cir. 1993).

Submission of Constitutional Initiative Amending Three Parts of Constitution Violative of Separate Vote Requirement: Plaintiffs filed an original application for declaration of judgment and injunctive relief, challenging the validity of Constitutional Initiative No. 75 (CI-75), which was passed by the voters and stated that no new tax or tax increase could be enacted unless approved by a majority of the electorate. The initiative amended Art. VIII, Mont. Const., revising state revenue and finance provisions; amended this section, providing that sovereign immunity did not shield public officials or employees from appropriate civil liability for violating CI-75; and provided that notwithstanding the referendum provisions of Art. VI, sec. 10, Mont. Const., before a bill imposing new or increased taxes is referred to the people, the Governor had veto power. The dispositive issue was that CI-75 had two or more constitutional amendments, in violation of Art. XIV, sec. 11, Mont. Const., which is a cogent constitutional recognition of the circumstances

under which Montana voters receive constitutional initiatives, namely that a separate vote is required for each proposed constitutional amendment. Citing Armatta v. Kitzhaber, 959 P2d 49 (Oreg. 1998), the Supreme Court held that the separate vote requirement is distinguishable as different and narrower than the single subject requirement in Art. V, sec. 11, Mont. Const., and that to the extent that a constitutional amendment may be valid under the single subject rule but fail under the separate vote rule, holdings to the contrary in State ex rel. Teague v. Bd. of Comm'rs, 34 M 426, 87 P 450 (1906), State ex rel. Hay v. Alderson, 49 M 387, 142 P 210 (1914), and State ex rel. Corry v. Cooney, 70 M 355, 225 P 1007 (1924), were overruled. Because CI-75 expressly amended three parts of the Montana Constitution without allowing a separate vote on each amendment, CI-75 was unconstitutional under Art. XIV, sec. 11, Mont. Const. Marshall v. St., 1999 MT 33, 293 M 274, 975 P2d 325, 56 St. Rep. 142 (1999), following State ex rel. Hinz v. Moody, 71 M 473, 230 P 575 (1924), and Sawyer Stores, Inc. v. Mitchell, 103 M 148, 62 P2d 342 (1936).

Law Not Clearly Established at Time — Qualified Immunity Extended: Police officers searched Dorwart's home pursuant to writs of execution and seized his personal property, but without Dorwart's permission or a search warrant. The District Court held that the officers were entitled to qualified immunity from individual liability for Dorwart's due process claims because the constitutional notice-related rights that were violated were not clearly established at the time of the officers' entry, so the officers could not have known that their actions violated Dorwart's rights. In analyzing whether an official is entitled to qualified immunity, a court must identify the right violated and must determine whether the right was clearly established at the time of the violation and, if so, whether a reasonable person or the official would have known that the conduct violated that right. If plaintiff shows that the right was clearly established at the time of the violation, the burden then shifts to defendant asserting qualified immunity to prove that the conduct was reasonable even though it violated the law. Under the law as it existed at the time that the officers entered Dorwart's home and levied upon his property, it was not clearly established whether a writ of execution pursuant to which the deputies acted, in and of itself, authorized entry into a private residence or whether the officers' entry pursuant only to the writ violated Dorwart's right to be free from unreasonable search and seizure. Plaintiff Dorwart never satisfied the initial burden of proving that the right that the deputies violated was clearly established at the time of the violation, so the deputies were entitled to qualified immunity from individual liability for Dorwart's search and seizure claim. Dorwart's general assertion of the right to be free from unreasonable search and seizure was too broad for purposes of determining the clearly established right portion of the qualified immunity determination, which requires that violation of the right be established in a more particularized, relevant sense. Dorwart v. Caraway, 1998 MT 191, 290 M 196, 966 P2d 1121, 55 St. Rep. 777 (1998), following Hamilton v. Endell, 981 F2d 1062 (9th Cir. 1992), and Orozco v. Day, 281 M 341, 934 P2d 1009 (1997).

Qualified Immunity Defense Unavailable in Action for Declaratory or Injunctive Relief: Plaintiff did not seek monetary damages for a due process claim, requesting only a declaratory judgment and permanent injunction. Qualified immunity is a defense to damages liability but is not available in actions for declaratory or injunctive relief. The District Court erred in applying qualified immunity in the context of this due process claim. Dorwart v. Caraway, 1998 MT 191, 290 M 196, 966 P2d 1121, 55 St. Rep. 777 (1998), following Am. Fire, Theft & Collision Managers, Inc. v. Gillespie, 932 F2d 816 (9th Cir. 1991).

Sovereign Immunity Bars Tort Action by Individual Against State in Tribal Court: Following a fatal accident on a state-maintained highway located within the exterior boundaries of the Blackfeet Reservation, Gilham, the mother of the victim, filed suit against the driver and the State of Montana, alleging negligence. After the Blackfeet Tribal Court entered a judgment against the state, Montana filed an action in federal District Court challenging the jurisdiction of the tribal court. The District Court granted the state's motion, ruling that as a sovereign, Montana enjoys immunity from suit in tribal courts and that the waiver of immunity under Art. II, sec. 18, Mont. Const., waives Montana's immunity only from suit in Montana state courts. On appeal, the Ninth Circuit Court affirmed, ruling that states have retained their historic sovereign immunity from suits by individuals and that this immunity is not abrogated by the inherent powers of tribes. The waiver of immunity found in Art. II, sec. 18, Mont. Const., applies only to suits in Montana's own courts. Mont. v. Gilham, 133 F3d 1133 (9th Cir. 1998).

Deletion of Hanging as Form of Capital Punishment Not Denial of Ability to Present Argument Regarding Cruel and Unusual Punishment: Pursuant to the version of 46-19-103 that was in effect at the time that Langford was sentenced for execution, he affirmatively elected that death be imposed by hanging rather than lethal injection. Langford appealed to the District Court

for a declaration that execution by hanging was cruel and unusual punishment that violated the eighth amendment to the U.S. Constitution. The District Court denied the motion, holding that Langford's choice of hanging rendered the cruel and unusual punishment argument moot. Langford appealed to the appropriate federal courts for a writ of habeas corpus, applying the same argument. During the pendency of Langford's federal habeas corpus proceedings, the Montana Legislature met and amended 46-19-103 by removing the hanging option, rendering the federal proceedings moot and nonjusticiable. Langford asserted that the amendment to 46-19-103 violated numerous constitutional provisions by denying him the ability to present the cruel and unusual punishment argument to the federal courts. The Supreme Court found no merit in Langford's argument that the state Attorney General advised the Legislature to amend 46-19-103 in order to deny Langford the grounds for appeal, because the Attorney General supported but did not initiate the legislation. Further, the court did not agree with Langford's assertion that the amendment rendered the time that Langford spent in pursuing the cruel and unusual punishment argument retroactively useless and chargeable to the state as a form of cruel and unusual punishment in itself, because the eighth amendment argument was not the only claim that Langford pursued. Therefore, the entire time could not be charged to the state as being related to the amendment to 46-19-103. Having concluded that Langford failed to establish any constitutional violations, his petition for writ of injunction staying his execution was denied. Langford v. St., 287 M 107, 951 P2d 1357, 54 St. Rep. 1522 (1997).

Liability of State to Suit — Active Duty U.S. Army Worker Injured While Assigned to National Guard — Tort Claim Not Barred: While in full-time service to the U.S. Army, Trankel was assigned to a Montana Army National Guard unit rebuilding armored vehicles and was injured by toxic chemicals during the rebuilding project. Trankel sued the state, asserting violations of the Occupational Health Act of Montana, the Montana Safety Act, and the Employee and Community Hazardous Chemical Information Act. The state contended that Feres v. U.S., 340 US 135, 95 L Ed 152, 71 S Ct 153 (1950), and Evans v. Mont. Nat'l Guard, 223 M 482, 726 P2d 1160 (1986), barred a claim that was incident to military service regardless of the substantive law upon which the claim was based, the status of the plaintiff at the time of injury, or the status of the party against whom the claim was made and that the alleged violations of the state Acts did not provide a private cause of action and could be enforced only through the administrative remedies provided for in the Acts. The District Court agreed with the state and dismissed Trankel's complaint with prejudice. On appeal, the Supreme Court distinguished Feres and related federal cases because they were based on federal rather than state tort claims, with little bearing on rights under state law and the Montana Constitution. The Supreme Court overruled the holding in Evans that the National Guard was not a political subdivision subject to suit, finding instead that the National Guard and the Department of Military Affairs were clearly governmental entities within the meaning of 2-9-101 and that the constitutional premise on which Evans was based did not apply. Consistent with other applications of Art. II, sec. 16, Mont. Const., any statute or court decision that deprives an employee of the right to full legal redress, as defined by general Montana tort law against third parties, is absolutely prohibited. Because Trankel was not employed by the Montana Army National Guard or the Department of Military Affairs at the time of injury, Trankel's claim against the state pursuant to the tort claims statutes was not barred. Further, applying the rationale in Pollard v. Todd, 148 M 171, 418 P2d 869 (1966), the Supreme Court held that the statutory state Acts did not give rise to causes of action independent from a claim of negligence subject only to the administrative remedies contained in the Acts, but rather established duties, the violation of which is negligence per se. Trankel v. St., 282 M 348, 938 P2d 614, 54 St. Rep. 380 (1997), distinguishing Feres v. U.S., 340 US 135, 95 L Ed 152, 71 S Ct 153 (1950), U.S. v. Johnson, 481 US 681, 95 L Ed 2d 648, 107 S Ct 2063 (1987), and Stauber v. Cline, 837 F2d 395 (9th Cir. 1988); following Webb v. Mont. Masonry Constr. Co., 233 M 198, 761 P2d 343 (1988), Meech v. Hillhaven W., Inc., 238 M 21, 776 P2d 488 (1989), and Francetich v. St. Comp. Mut. Ins. Fund, 252 M 215, 827 P2d 1279 (1992); overruling Evans v. Mont. Nat'l Guard, 223 M 482, 726 P2d 1160 (1986); and followed in Lake v. St., 282 M 484, 938 P2d 698, 54 St. Rep. 442 (1997), and Oberson v. Federated Mut. Ins. Co., 2005 MT 329, 330 M 1, 126 P3d 459 (2005).

Section 1983 Action for Damages and Declaratory and Injunctive Relief — State Agency Held Not a "Person" — Individual or Official Capacity of Individual Defendants Determined — Test for Qualified Immunity in Damages Action — Remington Overruled: Orozco, an inmate in the Montana State Prison, brought a civil action for damages pursuant to 42 U.S.C. 1983 against the Department of Corrections and Human Services (now Department of Corrections) and several Department employees for the denial of his due process rights in connection with the denial of his ability to earn good time credits. The Department moved for dismissal for failure to state a

claim, based upon 11th amendment immunity. As to the Department, the Supreme Court held, citing Will v. Mich. Dept. of St. Police, 491 US 58 (1989), that because the Department has been created as part of the Executive Branch of state government, suing the Department is the same as suing the State of Montana, which is not a "person" for the purposes of a section 1983 action. In response to Orozco's argument that 2-9-305 required him to join the Department as a party, the Supreme Court noted that there is nothing in the text of that section that requires that the state be joined as a party; the section provides only for the tender of a defense and payment of damages by the state if a state employee is sued. Therefore, the Supreme Court held that the District Court correctly dismissed the action for damages against the Department. As to the individual defendants, the Supreme Court held that state employees acting in their official capacities are likewise not "persons" for the purposes of a section 1983 action but that state employees acting in their individual capacities are "persons" within the meaning of section 1983. The Supreme Court noted that Orozco had not clearly indicated the capacities in which the individual defendants were being sued, and so it looked to other provisions of the complaint and to U.S. Supreme Court decisions in order to determine Orozco's intent and held that Orozco intended to sue the individual defendants in their individual capacities. For this reason, the Supreme Court held that the District Court erred in holding that the individually named defendants were not "persons" under 42 U.S.C. 1983 for the purposes of the action for damages. The Supreme Court also held that in enacting 53-30-105 (now repealed) mandating rules for the accrual of good time, the state had created a right to good time. The Supreme Court also held that the immunity analysis used in Remington v. Dept. of Corrections and Human Services, 255 M 480, 844 P2d 50 (1992), was incorrect in light of the later decision of the U.S. Supreme Court in Sandin v. Connor, 515 US 472 (1995), and overruled Remington, but, on the basis of the Sandin immunity analysis, determined that Orozco's liberty interest in the award of good time credits was not clearly established on the date of Orozco's hearing to reclassify him as a maximum security prisoner who was no longer entitled to earn good time credits. For this reason, the Supreme Court held that the Department employees who were sued in their individual capacities were to be given qualified immunity for the purposes of the action for damages but that the District Court improperly dismissed the action for declaratory and injunctive relief and remanded the case to the District Court for a determination of what process was due Orozco before his opportunity to earn good time was revoked and whether he received that process. Orozco v. Day, 281 M 341, 934 P2d 1009, 54 St. Rep. 200 (1997).

Acts of Prosecutor Involving Conditions of Postarrest Confinement Not Protected by Prosecutorial Immunity: Although under the rationale of Ronek v. Gallatin County, 227 M 514, 740 P2d 1115 (1987), prosecutors enjoy immunity from civil liability for conduct within the scope of their duties, prosecutors are not shielded from liability for *all* acts or omissions in the course of their employment. In this case, Smith's relative sued the county and state for failure to notify the county jail of information allegedly indicating Smith's suicidal tendencies after he was incarcerated. The suit was dismissed on grounds of prosecutorial immunity. As stated in Gobel v. Maricopa County, 867 F2d 1201 (9th Cir. 1989), acts or omissions of a prosecutor involving conditions of postarrest confinement are not protected by prosecutorial immunity because they lack an intimate association with the prosecutorial phase of the criminal process. The state was properly dismissed because County Attorneys are not employees of the state with regard to their administrative conduct. However, because the County Attorney was not acting within his prosecutorial capacity when he failed to advise the jail, dismissal of the suit against him on grounds of prosecutorial immunity was improper. Smith v. Butte-Silver Bow County, 266 M 1, 878 P2d 870, 51 St. Rep. 610 (1994). See also Imbler v. Pachtman, 424 US 409, 47 L Ed 2d 128, 96 S Ct 984 (1976), Burns v. Reed, 500 US 478, 114 L Ed 2d 547, 111 S Ct 1934 (1991), and Buckley v. Fitzsimmons, 509 US 259, 125 L Ed 2d 209, 113 S Ct 2606 (1993).

Limited Application of Nondelegable Duty Exception to Respondeat Superior Doctrine: Application of the nondelegable duty exception to the respondeat superior doctrine is limited to instances of safety in which the subject matter is inherently dangerous. The Supreme Court declined to modify the presently accepted version of the doctrine by adopting the exception, set out in section 214 of Restatement (Second) of Agency, that a master or other principal who is under a duty to provide protection for or to have care used to protect others or their property and who confides the performance or duty to a servant or other person is subject to liability to others for harm caused to them by the failure of the agent to perform the duty. Noting that there are several reasons for and against extending the liability of an employer when an intentional tort is committed only because or by virtue of the employment situation, the court opted to leave adoption of such a major doctrinal change to the Legislature. Maguire v. St., 254 M 178, 835 P2d

755, 49 St. Rep. 688 (1992), followed in Estate of Strever v. Cline, 278 M 165, 924 P2d 666, 53 St. Rep. 576 (1996).

Insurance Commissioner Not Immune From Civil Rights Complaint When Sued in Personal Capacity: Insurance Commissioner Andrea Bennett, sued individually and in her capacity as Commissioner for a civil rights violation under 42 U.S.C. 1983, claimed that she was acting within the scope of her official duties and employment and that under the rationale of Will v. Mich. Dept. of St. Police, 491 US 58, 105 L Ed 2d 45, 109 S Ct 2304 (1989), neither a state nor a state official acting in an official capacity is a "person" subject to suit under 42 U.S.C. 1983. Distinguishing between official capacity suits and personal capacity suits, the Supreme Court disaffirmed the Will argument, relying instead on Hafer v. Melo, 502 US 21, 116 L Ed 2d 301, 112 S Ct 358 (1991), for the proposition that state officials sued in their official capacities are not "persons" for purposes of suit because they assume the identity of the government that employs them, while officers sued in their personal capacities come to court as individuals, fitting comfortably within the definition of "person". As a result, it is sufficient to establish personal liability under 42 U.S.C. 1983 by showing that an official acted under color of state law and caused deprivation of a federal right. Further, the 11th amendment to the U.S. Constitution does not bar such suits, nor are state officials absolutely immune from personal liability solely by virtue of the official nature of their acts. Trout v. Bennett, 252 M 416, 830 P2d 81, 49 St. Rep. 303 (1992), followed in Orozco v. Day, 281 M 341, 934 P2d 1009, 54 St. Rep. 200 (1997).

Social Worker Immunity: In a 1983 action, the Department of Social and Rehabilitation Services, the Director of the Department, and Mineral County, as state-assumed county, were immune from suit under the 11th amendment to the U.S. Constitution for removing children from a home. The social workers who removed the children and sent them to another state to stay with the mother were not absolutely immune from suit because their actions were neither quasi-prosecutional nor quasi-judicial in nature. The social workers were entitled to qualified immunity because their actions did not violate any clearly established constitutional or statutory right. Caldwell v. LeFaver, 928 F2d 331 (9th Cir. 1991).

No Immunity Under Claim That State Not Liable for Joint and Several Liability Not Attributable to State Employee: The state, wishing to avoid the effects of joint and several liability, claimed that the state could not be jointly liable for the 42% negligence of an accident victim because the victim was not an officer or employee of the state. The Supreme Court found no applicable statutory or other theory that would preclude the general rule that the state has no immunity for its torts unless otherwise provided by the Legislature. Whiting v. St., 248 M 207, 810 P2d 1177, 48 St. Rep. 396 (1991).

One Governmental Subdivision Not Subject to Suit by Another: School districts sued the county for recovery of lost revenue and investment income on decreased reserve funds. The Supreme Court found that dismissal of the suit was proper because absent specific statutory or constitutional authority, one governmental subdivision may not sue another for damages. School District No. 55 v. Musselshell County, 245 M 525, 802 P2d 1252, 47 St. Rep. 2249 (1990).

Failure to Review Application for Self-Insurance — Quasi-Judicial Immunity Not Applicable: The Division of Workers' Compensation (now State Fund) admitted negligence for failing to conduct an adequate review of a corporation's financial ability to self-insure under plan No. 1, but claimed immunity under the rationale of Koppen v. Bd. of Medical Examiners, 233 M 214, 759 P2d 173, 45 St. Rep. 1433 (1988), for its acts as a government agency. The Supreme Court, noting that for immunity to apply, the function of the Division (now State Fund) must be quasi-judicial rather than administrative or ministerial, distinguished Koppen based on the lack of discretion necessary for the Division (now State Fund) to perform its statutory duty. Because simply performing this duty did not involve the use of quasi-judicial discretion, the act was purely ministerial and not protected by quasi-judicial immunity. The discretionary function exemption will not apply when a statute, regulation, or policy specifically prescribes a course of action for an employee to follow and the employee has no rightful option but to adhere to the directive. State ex rel. Div. of Workers' Comp. v. District Court, 246 M 225, 805 P2d 1272, 47 St. Rep. 1911 (1990), following Berkovitz v. U.S., 486 US 531, 100 L Ed 2d 531, 108 S Ct 1945 (1988). See also Meinecke v. McFarland, 122 M 515, 206 P2d 1012 (1949).

State and State Officials Not "Persons" for Purposes of Federal Suit Involving Deprivation of Rights: Neither the state nor its officials acting in their official capacities are "persons" for purposes of a civil action for deprivation of rights under 42 U.S.C. 1983. State ex rel. Div. of Workers' Comp. v. District Court, 246 M 225, 805 P2d 1272, 47 St. Rep. 1911 (1990), following Will v. Mich. Dept. of State Police, 491 US 58, 105 L Ed 2d 45, 109 S Ct 2304 (1989), and Brandon v. Holt, 469 US 464, 83 L Ed 2d 878, 105 S Ct 873 (1985).

City and Its Agent Immune for Cleanup of Defendant's Property Pursuant to Court Order: The defendant was brought to trial by the City of Great Falls under a criminal statute for failure to clean up her property. The defendant was given 7 days to abate the nuisance, and when she failed to do so, the city had its employees perform the cleanup and bill the defendant for the cost. The Supreme Court ruled that the defendant could not sue the city or its employees for alleged damages resulting from the cleanup in that they were immune because the cleanup was the result of a judicial act. Great Falls v. Price, 238 M 99, 775 P2d 1260, 46 St. Rep. 1120 (1989), followed in Reisdorff v. Yellowstone County, 1999 MT 280, 296 M 525, 989 P2d 850, 56 St. Rep. 1128 (1999).

Right to Full Legal Redress Not Violated by Grant of Immunity for Acts of Legislative Body: The right to full legal redress under the state constitution is not violated by a statute granting a legislative body immunity from suit for its acts. The right involved in this case is one of access to the courts. It is not fundamental. The immunity statute's constitutionality in regard to the right is thus presumed, and the state need only show a rational basis for the immunity statute. The statute has previously passed that test. Peterson v. School District, 237 M 376, 773 P2d 316, 46 St. Rep. 880 (1989), followed in Miller v. Fallon County, 240 M 241, 783 P2d 419, 46 St. Rep. 2087 (1989), and in Hayworth v. School District No. 19, 243 M 503, 795 P2d 470, 47 St. Rep. 1361 (1990).

Quasi-Judicial Immunity as Common Law: The doctrine of quasi-judicial immunity is not a subject of statutory law, and the question of its applicability was therefore decided under the common-law rule as reviewed in Butz v. Economou, 438 US 478, 57 L Ed 2d 895, 98 S Ct 2894 (1978). The grant of judicial immunity in 2-9-112 is not in derogation of the right to sue the state, granted by Art. II, sec. 18, Mont. Const., and quasi-judicial immunity is therefore extended to state boards and to the state itself. Koppen v. Bd. of Medical Examiners, 233 M 214, 759 P2d 173, 45 St. Rep. 1433 (1988), distinguished in State ex rel. Div. of Workers' Comp. v. District Court, 246 M 225, 805 P2d 1272, 47 St. Rep. 1911 (1990), and followed in Rahrer v. Bd. of Psychologists, 2000 MT 9, 298 M 28, 993 P2d 680, 57 St. Rep. 53 (2000).

Prosecutorial Immunity Extended to Counties: In a suit against a county for liability of the County Attorney while carrying out county policy, the Supreme Court extended the concept of prosecutorial immunity established in State ex rel. Dept. of Justice v. District Court, 172 M 88, 560 P2d 1328 (1976), to counties. The County Attorney was not a named defendant in the suit. In applying the reasoning in Monell v. N.Y. City Dept. of Social Services, 436 US 658, 56 L Ed 2d 611, 98 S Ct 2018 (1978), the court held that an official of the governmental entity must be named in his official capacity and the governmental entity must be suable in its own name. Since neither circumstance pertained here, the District Court properly dismissed the complaint for failure to state a claim on which relief could be granted. Ronek v. Gallatin County, 227 M 514, 740 P2d 1115, 44 St. Rep. 1275 (1987), followed in Helena Parents Comm'n v. Lewis & Clark County Comm'rs, 277 M 367, 922 P2d 1140, 53 St. Rep. 687 (1996).

National Guardsman Injured on Weekend Drill — No Right to Sue State — Summary Judgment Upheld: The Supreme Court affirmed summary judgment granted state by District Court because: (1) issues raised on appeal were not genuine issues of material fact but rather questions of law, therefore summary judgment was proper; (2) the National Guard is a military force, not a political subdivision of the state, so appellant had no right to sue under the Tort Claims Act (Title 2, ch. 9, parts 1 through 3); and (3) traditionally, the federal government and state governments have not been held liable in tort for injuries that arise in the course of activity incident to military service (Feres v. U.S., 340 US 135, 95 L Ed 152, 71 S Ct 153 (1950)). Evans v. Mont. Nat'l Guard, 223 M 482, 726 P2d 1160, 43 St. Rep. 1930 (1986), distinguished in Grove v. Mont. Army Nat'l Guard, 264 M 498, 872 P2d 791, 51 St. Rep. 366 (1994), and overruled in Trankel v. St., 282 M 348, 938 P2d 614, 54 St. Rep. 380 (1997).

Liability of Municipality: In Montana, a municipality is a government entity and is liable for its acts or omissions like an ordinary private party. Kaiser v. Whitehall, 221 M 322, 718 P2d 1341, 43 St. Rep. 846 (1986).

Repeal of Veterans' Preference: Retroactive repeal of the absolute veterans' preference, 10-2-201 through 10-2-206, revoked a government gratuity. The repealer did not provide for sovereign immunity from accrued causes of action without a two-thirds vote of the members of each house as required by Art. II, sec. 18, Mont. Const. As previously decided in Nick v. Dept. of Highways, 219 M 168, 711 P2d 795, 42 St. Rep. 1926 (1985), the Legislature could repeal the veterans' preference by a majority vote at any time. Femling v. Mont. St. Univ., 220 M 133, 713 P2d 996, 43 St. Rep. 235 (1986).

County Immune From Suit — Act of Legislative Body: In a negligence action brought against a county and its legislative body (the Board of County Commissioners), when the Board granted final approval of the plat of a subdivision without requiring subdivision improvements or a bond guaranteeing the improvements, the county was immune from suit under 2-9-111. Counties are immune from suit for acts of their legislative bodies, and members of a legislative body are immune from suit for damages arising from the lawful discharge of an official duty. In this instance, the claimed negligent act was the failure of the Commissioners to require compliance with subdivision regulations prior to approval of the plat, which comes expressly within the plain language of 2-9-111. W.D. Constr., Inc. v. Bd. of County Comm'rs, 218 M 348, 707 P2d 1111, 42 St. Rep. 1638 (1985).

Medical Malpractice — Physicians Treating Inmates Not Department Employees — Not Immune From Suit: A doctor was an independent contractor and thus not entitled to immunity from suit as a state employee even though he: (1) was the only doctor employed by the state to care for state prison inmates; (2) treated inmates in facilities and with medical support services provided by the state; (3) was paid a salary; and (4) participated in the state retirement system. Therefore, his associate, who treated the inmate twice, was likewise not immune from suit. Kyriss v. St., 218 M 162, 707 P2d 5, 42 St. Rep. 1487 (1985).

Sentencing — "Judicial Act": Petitioner was convicted of issuing a bad check in 1979. Her sentence was deferred, and she was placed on probation for 3 years. In 1982, petitioner's deferral was revoked because she was convicted of forgery. As a result of the revocation, she was sentenced to serve 5 years in prison. Later in 1982, the Supreme Court, relying on Crist v. Segna, 191 M 210, 622 P2d 1028, 38 St. Rep. 150 (1981), ordered petitioner's release because at the time of her imprisonment she had accumulated sufficient good time credit on probation that her deferred sentence would have been fully served. Petitioner then sued for damages for illegal imprisonment. The Supreme Court held that the State was immune from suit under 2-9-112 because the sentence imposed on petitioner for her violation of probation was a judicial act. Knutson v. St., 211 M 126, 683 P2d 488, 41 St. Rep. 1258 (1984).

Venue — Action Against Multiple Counties: In 1981, Silver Bow County erroneously reissued the registration number of plaintiff's vehicle to another automobile. The automobile was subsequently reported stolen. The vehicle was recovered but not shown as such on county records. Defendant, a Jefferson County Deputy Sheriff, saw plaintiff's vehicle and requested status information. The vehicle was shown as stolen. Plaintiff was arrested and later released upon discovery of the error. Plaintiff brought suit against both Silver Bow and Jefferson Counties in Silver Bow District Court seeking damages on several grounds. Jefferson County moved for a change of venue, which was denied. The Supreme Court found that if the provisions of the venue statutes and the Rules of Civil Procedure were applied strictly, plaintiff would be placed in an impossible situation whereby both counties were indispensable parties and either could object to venue and be entitled to a change or dismissal. The court, relying on State ex rel. Mont. Deaconess Hosp. v. Park County, 142 M 26, 381 P2d 297 (1963), affirmed the refusal to grant a change of venue because both counties were necessary parties and because venue was proper at least as to Silver Bow County. Hutchinson v. Moran, 207 M 330, 673 P2d 818, 40 St. Rep. 2081 (1983).

Government Punitive Damages Immunization — Constitutionality: Plaintiff had a constitutional right to redress against the state for all of her injuries but did not have a constitutional right to punitive damages. Thus the rational basis test, rather than the strict scrutiny test, was applied to equal protection review of 2-9-105, immunizing the state and other governmental entities from exemplary and punitive damages. There is a rational basis for distinguishing governmental from other entities in the grant of punitive damages, in that such damages are to punish the wrongdoer and deter future similar conduct of the wrongdoer and others similarly disposed. The deterrent effect upon a government is extremely small, and innocent taxpayers are the persons punished. Therefore, 2-9-105 is not unconstitutional. White v. St., 203 M 363, 661 P2d 1272, 40 St. Rep. 507 (1983), overruled, Meech v. Hillhaven W., Inc., 238 M 21, 776 P2d 488, 46 St. Rep. 1058 (1989).

Limitations on Certain Types of Government Tort Damages — Constitutionality: Article II, sec. 16, Mont. Const., guarantees that all persons shall have a speedy remedy for every injury to person, property, or character. The constitution's language "every injury" embraces all recognized compensable components of injury, including the right to be compensated for physical pain, mental anguish, and the loss of enjoyment of living. The right to bring a civil action for personal injury is a fundamental right, and the strict scrutiny test, requiring that the statutory scheme be found unconstitutional unless the State could demonstrate that it was necessary to

promote a compelling government interest, applied to 2-9-104 (repealed, 1983). Subsection (1) of 2-9-104 (repealed, 1983) provided that neither the state, a county, municipality, taxing district, nor any other political subdivision of the state was liable in tort for: (a) noneconomic damages; or (b) economic damages in excess of $300,000 a claimant and $1 million an occurrence. The State argued a compelling state interest in insuring that there would be sufficient funds to supply needed services to those governed by state and local government and that government has to engage in a wide range of activities, some extremely dangerous and not confronted by private industry. This bare assertion fell far short of justifying the subsection (1)(a) class discrimination that infringed upon fundamental rights. Denying noneconomic damages while allowing economic damages was unconstitutional under the strict scrutiny equal protection test. Furthermore, to strike (1)(a) and leave (1)(b) intact would create new discrimination problems in that those with economic loss could get only limited damages, while those with noneconomic loss would have no limit imposed; and since the State failed to demonstrate a compelling state interest justifying any limitation, subsection (1) was unconstitutional in its entirety. Though some liability limit may comport with equal protection, the limitation could not discriminate between those suffering pain and loss of life quality and those suffering primarily economic loss. White v. St., 203 M 363, 661 P2d 1272, 40 St. Rep. 507 (1983), followed in Pfost v. St., 219 M 206, 713 P2d 495, 42 St. Rep. 1957 (1985) (overruled, Meech v. Hillhaven W., Inc., 238 M 21, 776 P2d 488, 46 St. Rep. 1058 (1989)), in which the Supreme Court invalidated on similar grounds the Legislature's enactment of 2-9-107 as violative of the fundamental right to redress, insofar as it limits the liability of the state or any political subdivision, in tort actions for damages suffered from an act or omission of an officer, agent, or employee of the entity, to amounts not in excess of $300,000 for each claimant and $1,000,000 for each occurrence. The court rejected the legislative findings that prefaced enactment of 2-9-107 as a substitute for 2-9-104, which was declared unconstitutional in White. The legislative findings denigrate the right of the individual to full legal redress in favor of not raising taxes and do not constitute a compelling state interest.

Constitutionality of Limitation of Interest: Application of 2-9-317, providing that a governmental entity paying a judgment within 2 years cannot have interest or a penalty assessed against the entity, to a tort judgment against the state does not offend this constitutional provision. Interest on a judgment is not an integral part of the cause of action, and as interest is not a detriment arising from the wrongful act, it can be suspended by statute. Jacques v. Mont. Nat'l Guard, 199 M 493, 649 P2d 1319, 39 St. Rep. 1565 (1982).

Entities Liable Prior to Enactment of Immunity Statute: Irrigation district, a state government entity, was subject to punitive damages in tort action where action arose in and was limited to summer of 1974. This section provided that the state, counties, cities, towns, and all other local governmental entities have no immunity from suit for injury to person or property except as may be specifically provided by law by a two-thirds vote of each house of the Legislature, and the Legislature did not provide immunity for certain governmental entities until 1977 when it enacted 2-9-104 (repealed, Ch. 675, L. 1983) and 2-9-105, which cannot be retroactively applied. Dvorak v. Huntley Project Irrigation District, 196 M 167, 639 P2d 62, 38 St. Rep. 2176 (1981).

Waiver of Sovereign Immunity — State Must Expressly Waive Eleventh Amendment: Appellees were students enrolled in a 2-year aviation technology program at the Missoula Technical Center, a vocational-technical center operated by the state. Because of budget cutbacks the program was terminated after the first year. The students sued for damages in federal District Court, alleging that the termination of the program violated their rights of equal protection and due process. The District Court held the State had contracted with the students to provide 2 years of instruction and that termination constituted a breach of that contract. The court then ruled that the breach violated the students' due process rights. The U.S. Court of Appeals reversed, saying that the 11th amendment to the United States Constitution explicitly withholds from the U.S. courts jurisdiction over suits brought against a state by citizens of another state or another country. The 11th amendment has also always been interpreted to provide that an unconsenting state is immune from suits brought in federal courts by her own citizens, unless the state waives such immunity. Article II, sec. 18, Mont. Const., waives state immunity from suit. The U.S. Court of Appeals held that in order to waive immunity from suit in federal courts, Art. II, sec. 18, Mont. Const., would expressly have to extend to federal suits, which it does not. The District Court had concluded alternate jurisdiction could lie under 18-1-404, but that provision holding the state liable on contracts grants Montana State District Courts exclusive jurisdiction over such contract disputes. St. v. Peretti, 661 F2d 756 (9th Cir. 1981).

No Waiver of Immunity From Suit in Constitution — State Officials Liable in Federal Civil Rights Suit: A former state employee sued the state for violations of his civil rights while he

worked for the state. Under 2-15-104, the Department of Institutions (now Department of Corrections), the plaintiff's former employer, was held an alter ego of the state and not the sort of separate corporate entity held to be a citizen for purposes of federal diversity. The federal District Court held that neither Title 2, ch. 9, part 3, nor the legislative history of Art. II, sec. 18, Mont. Const., suggests an intent to submit the state to suit in federal court. The 11th amendment immunity of the state from suit is not waived. However, the court also held that 2-9-305 was intended to facilitate suit against the sovereign and its employees and that there was no evidence in that section of an intent to impart immunity to state officials as individuals in a federal civil rights suit under 42 U.S.C. section 1983 (1976). Holladay v. St., 506 F. Supp. 1317, 38 St. Rep. 285 (D.C. Mont. 1981), followed in King v. St., 259 M 393, 856 P2d 954, 50 St. Rep. 848 (1993).

Constitutionality of Limitation of Interest: In an action in which the plaintiff was awarded damages for the unilateral and unlawful termination of a lease of certain communications equipment by the State, the trial court did not err in holding the limitation of interest on judgments in contract actions constitutional. The transcripts of the Constitutional Convention debates show that the purpose of the delegates in adopting Art. II, sec. 18, Mont. Const., was to limit nonimmunity to torts committed by the State. Leaseamerica Corp. of Wisc. v. St., 191 M 462, 625 P2d 68, 38 St. Rep. 398 (1981), followed in Peretti v. St., 238 M 239, 777 P2d 329, 46 St. Rep. 1235 (1989), and in Weber v. St., 258 M 62, 852 P2d 117, 50 St. Rep. 425 (1993).

Limitation of Damages as Reinstatement of Immunity — Final Judgment on Noneconomic Damages Required — Remedies of Plaintiff: When the plaintiff brought an action against the state for injuries received by her minor son from the explosion of a National Guard practice grenade, claiming $93,000 in noneconomic damages and claiming that the limitation on noneconomic damages imposed by 2-9-104 (now repealed) was an unconstitutional limitation on the immunity of the state, the Supreme Court declined to rule on the constitutionality of the limitation and held instead that the District Court improperly granted partial summary judgment for the state, excluding all economic damages, as 2-9-104 (now repealed) allows a plaintiff to petition the governing body of the defendant governmental entity for payment of economic damages only after a final judgment has been obtained as to those damages. Makin v. St., 190 M 363, 621 P2d 477, 37 St. Rep. 1998 (1980).

Stipulation of Dismissal of Action Against Police Officer as Applying to City and County Under "Respondeat Superior" Doctrine: A man fleeing from police officers was shot by one of them. The man entered into a stipulation for dismissal with prejudice of the claim against the officer, but later the city and county, also defendants in the suit, were denied their motions for dismissal with prejudice. The Montana Supreme Court held that a stipulation of dismissal with prejudice of a defendant is tantamount to a judgment on the merits and, accordingly, such a dismissal with prejudice is res judicata as to every issue reasonably raised by the pleadings. Under the doctrine of respondeat superior, an employer defendant's liability is vicarious or derivative and does not arise until an employee acts negligently within the scope of his employment. A dismissal with prejudice of a claim against an employee is equivalent to a finding that the employee was not negligent. Under the doctrine of respondeat superior, such a dismissal of an employee operates to exonerate the employer. The Supreme Court will look at the dismissal with prejudice on its face and will not look behind the words "with prejudice". State ex rel. Havre v. District Court, 187 M 181, 609 P2d 275 (1980).

No Sovereign Immunity in Contract Actions: An action arising out of contract is an action for injury to property; therefore, the state, counties, towns, and all other local governmental entities have no sovereign immunity in contract actions. Peretti v. St. Bd. of Education, 464 F. Supp. 784 (D.C. Mont. 1979), reversed on other grounds, St. v. Peretti, 661 F2d 756 (9th Cir. 1981).

Game Wardens: The rule of absolute state immunity that the Supreme Court applied to acts of the Attorney General and other prosecutors does not apply to acts of state game wardens in their capacity as law enforcement officers. It is the more limited form of statutory immunity that applies to law enforcement officers, including state game wardens. Orser v. St., 178 M 126, 582 P2d 1227 (1978), followed in Hill v. Burlingame, 244 M 246, 797 P2d 925, 47 St. Rep. 1580 (1990).

Highway Death: The State may not under Montana's Constitution or any law maintain a defense of sovereign immunity against claims arising from death, and there is no such defense as "financial feasibility or discretion" which would relieve the State of liability for traffic deaths resulting from highways maintained unsafely. State ex rel. Byorth v. District Court, 175 M 63, 572 P2d 201 (1977). However, where cost is but one among many factors affecting the state's choice of a particular method of construction or maintenance, it is relevant evidence on the reasonableness of the alternative taken. Townsend v. St., 227 M 206, 738 P2d 1274, 44 St. Rep.

1014 (1987), citing Modrell v. St., 179 M 498, 587 P2d 405 (1978), followed in Walden v. St., 250 M 132, 818 P2d 1190, 48 St. Rep. 893 (1991).

Prosecutorial Immunity: Prosecutorial immunity and sovereign immunity are different concepts supported by different considerations of public policy. It is an established general principle that any statutory waiver of a state's immunity from suit be strictly construed. Prosecutorial immunity remains in this state and applies to the state and the Department of Justice. State ex rel. Dept. of Justice v. District Court, 172 M 88, 560 P2d 1328 (1976).

City Liable for Negligent Acts of Police Officers: The power in the city to control its policemen in both broad and detailed affairs related to their work brings the policemen squarely within the definition of "employee" and subjects the city to liability for torts committed within the scope of their employment or duties. St. v. District Court, 170 M 15, 550 P2d 382 (1976).

State Not Responsible for Negligence of Municipal Police Officers: City's claim that state is liable under doctrine of respondeat superior where plaintiff sustained injuries allegedly due to negligence of city police was without merit. St. v. District Court, 170 M 15, 550 P2d 382 (1976).

Conditions Precedent to Waiver of Immunity: Statutes that required the filing of a claim within 120 days from the date of injury or discovery in a reasonable time are unconstitutional as requiring a condition precedent to the government's waiver of immunity. Noll v. Bozeman, 166 M 504, 534 P2d 880 (1975).

Purpose: The purpose of this section was to provide redress for all persons, whether victims of governmental or private torts, and prior to the 1975 amendment of this section any legislative limitations on the waiver of sovereign immunity were precluded; provisions of the state insurance plan and tort claims act creating conditions precedent to the bringing of a claim against the state were unconstitutional. Noll v. Bozeman, 166 M 504, 534 P2d 880 (1975).

Attorney General's Opinions

Judicial Decision Invalidating Constitutional Amendments — Constitutional Language and Statutory Implementation Language Restored: In 2002, Montana voters approved Constitutional Amendment Nos. 37 and 38, along with statutory implementing provisions, to modify county distribution requirements for signatures to qualify an initiative petition for the ballot. In Mont. PIRG v. Johnson, CV 03-183-M-DWM (D.C. Mont. 2005), a federal District Court held that the amended distribution requirements resulted in an unequal treatment of qualified electors in different counties and were unconstitutional on their face and invalid. The Attorney General cited State ex rel. Woodahl v. District Court, 162 M 283, 511 P2d 318 (1973), in concluding that the nullification of the constitutional amendments by the judicial decision invalidating the county distribution requirements restored the language of the constitution and implementing statutes as they existed before the approval of the invalid amendments. 51 A.G. Op. 2 (2005).

Law Review Articles

Limitations on Legislative Immunity: A New Era for Montana's Sovereign Immunity Doctrine, Conwell, 54 Mont. L. Rev. 127 (1993).

The King's Resurrection: Sovereign Immunity Returns to Montana, Kutzman, 51 Mont. L. Rev. 529 (1990).

The Passing of Sovereign Immunity in Montana, The King Is Dead, Hjort, 34 Mont. L. Rev. 283 (1972).

Collateral References

Limitations on the Waiver of Sovereign Immunity, Interim Report, Montana Legislative Council (1975-76).

Section 19. Habeas corpus.

Convention Notes

Revises 1889 constitution which allowed the writ of habeas corpus to be suspended in case of rebellion or invasion. Revision provides that the writ (the right to test the lawfulness of a person's being detained) may never be suspended.

Compiler's Comments

Former Constitutional Provision: This section is similar to Art. III, sec. 21, 1889 Mont. Const.

Case Notes

Life Sentence for Juvenile Offender Upheld — Miller v. Alabama Is Procedural Rule — Not Substantive — Not Watershed Procedural — Not Retroactive on Collateral Review: In 1984, petitioner was sentenced to the maximum sentence of 100 years' imprisonment for a deliberate homicide that was committed when he was age 17. Twenty-eight years later, the U.S. Supreme Court held in Miller v. Alabama, 567 US __, 132 S Ct 2455 (2012), that: (1) mandated life

incarceration without the possibility of parole for a juvenile offender is unconstitutional; and (2) a sentencer must follow a certain process before imposing a life without the possibility of parole sentence on a juvenile. In light of Miller, petitioner, in a habeas corpus proceeding, argued that his sentence is equal to life without parole and unconstitutional given that his sentencer did not consider how age counseled against his sentence. After concluding that the sentencing consideration rule is a new rule, subject to the general rule of nonretroactivity, the Supreme Court declined to apply an exception and label the rule as a substantive rule or a watershed procedural rule. Instead, the court determined that Miller is a procedural rule that is not retroactive on collateral review and it did not reach the merits in the case. Beach v. St., 2015 MT 118, 379 Mont. 74, 348 P.3d 629.

Appeal From District Court's Denial of Petition for Writ of Habeas Corpus Prohibited: After the District Court denied a criminal defendant's petition for a writ of habeas corpus, the defendant appealed to the Supreme Court. The Supreme Court held it will no longer consider as an original petition a party's appeal from a District Court's denial of a petition for a writ of habeas corpus. A petitioner must file an original petition for a writ of habeas corpus in the Supreme Court in order for the court to consider it. Thomas v. Doe, 2011 MT 283, 362 Mont. 454, 266 P.3d 1255.

Illegal Revocation of Sentence — Habeas Corpus Relief Warranted: The state petitioned to revoke Borgen's suspended sentence, and the District Court granted the petition and resentenced Borgen to incarceration for an additional 14 years. Borgen petitioned for habeas corpus relief. The Supreme Court determined that after an illegal weapon enhancement sentence was subtracted from Borgen's original sentence, the total time remaining on Borgen's suspended sentence was about 9 years, 1 month. However, the petition to revoke the suspended sentence was not filed until 9 years, 8 months after sentencing. Because the legal portion of Borgen's sentence had expired before the petition to revoke was filed, revocation of Borgen's sentence was facially illegal, and Borgen's incarceration constituted a grievous wrong and a miscarriage of justice warranting habeas corpus relief. Therefore, the Supreme Court granted Borgen's petition, vacated the sentence revocation, and ordered that Borgen be released from custody. Borgen v. Sorrell, 2009 MT 143, 350 M 339, 217 P3d 1022 (2009). See also Lott v. St., 2006 MT 279, 334 M 270, 150 P3d 337 (2006).

Federal Prohibition Against Penalty Beyond Statutory Maximum Not Retroactively Applicable: Following Gratzer's 1982 conviction for deliberate homicide, the District Court sentenced Gratzer to a consecutive 10-year term for using a weapon in committing the crime. The U.S. Supreme Court subsequently decided Apprendi v. N.J., 530 US 466 (2000) (followed in Ring v. Ariz., 536 US 584 (2002), and Blakely v. Wash., 542 US 296 (2004)), holding that other than the fact of a prior conviction, any fact that increases a penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. Gratzer later petitioned for a writ of habeas corpus on grounds that the consecutive sentence for use of a weapon was a violation of Gratzer's constitutional rights. Gratzer's sentence enhancement was not submitted to the jury, so Apprendi was potentially applicable. Notwithstanding that Gratzer's conviction became final in 1984, long before Apprendi and its progeny were decided, the Supreme Court nevertheless considered Gratzer's claim pursuant to Teague v. Lane, 498 US 288 (1989), on grounds of whether Apprendi and its progeny applied retroactively. Under Teague, a new constitutional rule of criminal procedure does not apply retroactively to cases on collateral review unless the rule: (1) places certain kinds of primary, private individual conduct beyond the power of the criminal lawmaking authority to proscribe; or (2) qualifies as a watershed rule of criminal procedure. Noting that the U.S. Supreme Court held that Ring (and by implication Apprendi and Blakely) did not apply retroactively in Schriro v. Summerlin, 542 US 348 (2004), the court applied the Schriro rationale to Gratzer's case, holding that Apprendi failed to satisfy the first Teague exception for retroactivity because Apprendi announced a rule that did not inhibit the state's ability to substantively proscribe and punish a defendant for using a weapon in the commission of an offense, but merely established procedures that the state must follow in doing so, nor did the Apprendi rule qualify as a watershed rule of criminal procedure without which the likelihood of an accurate conviction would be seriously diminished. Federal courts of appeals nearly unanimously agree that the Apprendi line of cases do not apply retroactively to cases on collateral review, and the Supreme Court concurred. Gratzer's petition was denied. Gratzer v. Mahoney, 2006 MT 282, 334 M 297, 150 P3d 343 (2006).

Life Sentence Without Parole Not Violative of Constitutional Rights: Gratzer asserted that the sentencing court exceeded its authority and violated the constitutional right to habeas corpus when the court sentenced Gratzer to life without the possibility of parole. Gratzer's argument was that use of the word "term" implied that there was a distinction between sentences imposed for

a specific time and indeterminate life sentences and that the statutory sentencing scheme does not authorize a court to remove a prisoner's eligibility for parole if the prisoner is serving a life sentence. The Supreme Court declined to recognize the distinction. "Term" is used throughout the criminal code to refer to the duration of a sentence without any indication that it is meant to refer exclusively to determinate time sentences, and the language in 46-18-202 that allows a court to impose the parole eligibility exception applies equally to time sentences and life sentences. A sentence of imprisonment in the state prison for a term exceeding 1 year refers to all felonies, including those punishable by a life sentence, rather than a cryptic means of limiting a sentencing court's ability to restrict the parole eligibility of prisoners serving life sentences. The District Court did not violate Gratzer's rights, and the sentence of life without parole was affirmed. Gratzer v. Mahoney, 2006 MT 282, 334 M 297, 150 P3d 343 (2006).

Facially Invalid Sentence — Statutory Bar Against Appeal Unconstitutional — Habeas Corpus Relief Granted: Lott was sentenced in 1992 for aggravated kidnapping, sexual intercourse without consent, aggravated burglary, and felony assault, and each sentence was enhanced by 10 years for use of a dangerous weapon. The 5-year limit on appealing the sentences that was in effect at sentencing (now a 1-year limit) expired, so Lott was procedurally barred from challenging the sentences. The Supreme Court subsequently decided in St. v. Guillaume, 1999 MT 29, 293 M 224, 975 P2d 312 (1999), that application of the weapons enhancement to a felony offense that itself required proving use of a weapon constituted a double jeopardy violation. Guillaume was held to apply retroactively in St. v. Whitehorn, 2002 MT 54, 309 M 63, 43 P3d 922 (2002), so Lott's sentence was unconstitutionally enhanced with regard to the aggravated burglary and felony assault convictions. The state asserted that Lott was procedurally barred from raising the issue in a habeas corpus petition because Lott did not raise the issue on direct appeal or in a petition for postconviction relief. After analyzing habeas corpus and postconviction relief in Montana, the Supreme Court noted the constitutional guarantee that the writ of habeas corpus may never be suspended and concluded that as applied to a facially invalid sentence, the procedural bar in 46-22-101 unconstitutionally suspends the writ. Even if Lott had filed a direct appeal or petition for postconviction relief, the double jeopardy argument would have been unavailing because Guillaume and Whitehorn were not decided until well after both filing dates had expired. In order to avoid a grievous wrong and a miscarriage of justice, the Supreme Court granted Lott's petition for habeas corpus and remanded for resentencing pursuant to Guillaume and Whitehorn. Lott v. St., 2006 MT 279, 334 M 270, 150 P3d 337 (2006), followed in St. v. Jackson, 2007 MT 186, 338 M 344, 165 P3d 321 (2007), and followed in St. v. Andersen-Conway, 2007 MT 281, 339 M 439, 171 P3d 678 (2007).

Attempt to Use Writ of Habeas Corpus to Demand Physical Presence of Children Removed From Parent in Abuse and Neglect Proceeding — Petition Properly Denied: The mother petitioned the District Court for a writ of habeas corpus demanding that her children be physically present for an abuse and neglect hearing because they were material witnesses and had been removed from her custody unlawfully. The petition was denied. On appeal, the mother cited In re Bertelson, 189 M 524, 617 P2d 121 (1980), for the proposition that a writ of habeas corpus was the appropriate procedural device to bring the custody matter before a court. The Supreme Court disagreed and distinguished Bertelson because the mother's position ignored the substantial differences between dissolution proceedings and abuse and neglect proceedings, differences that were not at issue in Bertelson. The court also cited its earlier holding in In re B.P. & A.P., 2000 MT 39, 298 M 287, 995 P2d 982 (2000), in which it was held that the children were properly removed from the mother's home. Because temporary custody of the children with the state was legal, relief pursuant to habeas corpus premised on illegal restraint was not available to the mother under these circumstances. In re B.P. & A.P., 2001 MT 219, 306 M 430, 35 P3d 291 (2001).

Denial of Writ of Habeas Corpus to Compel Attendance of Children in Abuse and Neglect Hearing Not Violative of Due Process Rights or Right to Confront Witnesses: The mother petitioned the District Court for a writ of habeas corpus demanding that her children be physically present for an abuse and neglect hearing because they were material witnesses and claiming that the writ was necessary to ensure her due process rights by having the children available to rebut allegations against her at the hearing. The petition was denied. On appeal, the Supreme Court affirmed. Although the mother was entitled to an opportunity for a meaningful hearing, that opportunity need not be provided at the expense of the children whose best interests were the paramount focus of the proceeding, and subjecting the children to direct and cross-examination could exacerbate the abuse that they had already experienced. Denial of the petition did not violate the mother's right to confront witnesses because the children were not her accusers and she had no right to confront them. Rather, the abuse and neglect case was brought by the state,

and the mother had ample opportunity to confront and examine the state's witnesses and experts at the hearing, so her due process rights were met. In re B.P. & A.P., 2001 MT 219, 306 M 430, 35 P3d 291 (2001).

Petition for Writ of Habeas Corpus Not Necessarily Mooted by Release of Petitioner From Physical Custody: Sebastian argued that he was entitled to a writ of habeas corpus because he was being unlawfully imprisoned under the Department of Corrections good time policy. The state contended that the legality of Sebastian's imprisonment was moot because he had been released from incarceration. Sebastian argued that even though he was released from prison, he was still suffering under an unlawful restraint on his liberty because the discharge date of the 10-year suspended sentence that he was serving depended on good time credit to which he was entitled. The Supreme Court noted that release from custody may moot some habeas corpus petitions because the relief requested, i.e., release from unlawful imprisonment, can no longer be granted. However, release from physical custody does not necessarily moot the petition when the court can still grant effective relief. In this case, the completion date of Sebastian's suspended sentence depended on the discharge date of his term of confinement and was thus based on the jail good time credit to which he was entitled. If the good time policy was in fact unlawful and its application to Sebastian's prison term led to an erroneous discharge date, the completion date of the suspended sentence would also be incorrect. Thus, despite the fact that Sebastian was no longer imprisoned, it was still within the power of the court to grant relief to prevent the possible unlawful restraint on Sebastian's liberty, so the petition was not moot, and the court went on to address the merits of the petition. Sebastian v. Mahoney, 2001 MT 88, 305 M 158, 25 P3d 163 (2001).

Writ of Supervisory Control Inappropriate in Appealing Department of Corrections' Decision Regarding Good Time Allowance — Writ of Habeas Corpus Granted: Inmate Eisenman applied to the Supreme Court for a writ of supervisory control and moved to proceed in forma pauperis, requesting that the court order the Department of Corrections to direct the reduction of his sentence for good time served. Supervisory control is an extraordinary remedy that is appropriate only when a District Court is proceeding upon a mistake of law that, if not corrected, would cause significant injustice and when the remedy by appeal is inadequate. The Supreme Court held that a writ of supervisory control was inappropriate in this case because the court's power to issue that writ extends only to inferior courts, not to other governmental agencies. Eisenman's claims were more appropriately asserted by a writ of habeas corpus because habeas corpus relief is available to every imprisoned person. The state claimed that a writ of habeas corpus was not appropriate either because Eisenman failed to plead that he would be entitled to release if he received the good time credits as requested. However, under Peyton v. Rowe, 391 US 54 (1968), and Garlotte v. Fordice, 515 US 39 (1995), immediate physical release is not the only remedy available under a writ of habeas corpus, so it was not premature to consider a habeas corpus petition prior to Eisenman's release. The Supreme Court thus considered Eisenman's application for writ of supervisory control to be a petition for writ of habeas corpus and proceeded to consider the good time issue on that basis. Eisenman v. St., 2000 MT 170, 300 M 322, 5 P3d 542, 57 St. Rep. 704 (2000).

Deletion of Hanging as Form of Capital Punishment Not Denial of Ability to Present Argument Regarding Cruel and Unusual Punishment: Pursuant to the version of 46-19-103 that was in effect at the time that Langford was sentenced for execution, he affirmatively elected that death be imposed by hanging rather than lethal injection. Langford appealed to the District Court for a declaration that execution by hanging was cruel and unusual punishment that violated the eighth amendment to the U.S. Constitution. The District Court denied the motion, holding that Langford's choice of hanging rendered the cruel and unusual punishment argument moot. Langford appealed to the appropriate federal courts for a writ of habeas corpus, applying the same argument. During the pendency of Langford's federal habeas corpus proceedings, the Montana Legislature met and amended 46-19-103 by removing the hanging option, rendering the federal proceedings moot and nonjusticiable. Langford asserted that the amendment to 46-19-103 violated numerous constitutional provisions by denying him the ability to present the cruel and unusual punishment argument to the federal courts. The Supreme Court found no merit in Langford's argument that the state Attorney General advised the Legislature to amend 46-19-103 in order to deny Langford the grounds for appeal, because the Attorney General supported but did not initiate the legislation. Further, the court did not agree with Langford's assertion that the amendment rendered the time that Langford spent in pursuing the cruel and unusual punishment argument retroactively useless and chargeable to the state as a form of cruel and unusual punishment in itself, because the eighth amendment argument was not the

only claim that Langford pursued. Therefore, the entire time could not be charged to the state as being related to the amendment to 46-19-103. Having concluded that Langford failed to establish any constitutional violations, his petition for writ of injunction staying his execution was denied. Langford v. St., 287 M 107, 951 P2d 1357, 54 St. Rep. 1522 (1997).

Denial of Bond Pending Appeal — Method of Supreme Court Review — Jurisdiction: After conviction for negligent homicide and on related charges, Ingraham moved the District Court to continue bond pending appeal. The District Court denied the motion, finding that Ingraham was a danger to the community and therefore did not meet the requirements of 46-9-107. Ingraham then moved the Supreme Court, pursuant to former Rule 22, M.R.App.P. (now superseded), to continue bond pending appeal or, in the alternative, to accept appeal of the District Court's order denying bond, pursuant to former Rule 1, M.R.App.P. (now superseded), and 46-20-104. The Attorney General moved to dismiss, contending that there was no provision in law for appeal from a District Court order denying bond pending appeal and that Ingraham should have brought an original habeas corpus proceeding. The Supreme Court agreed with the Attorney General and dismissed Ingraham's motion or appeal, holding that Ingraham should have brought a petition for a writ of habeas corpus pursuant to 46-22-103. Ingraham then filed a petition for a writ of habeas corpus, which was filed with Justice Trieweiler pursuant to 3-2-212. Justice Trieweiler granted the petition to the extent necessary for the District Court to hold an evidentiary hearing as provided by statute, under the theory that the District Court was the more appropriate court for the hearing than was the Supreme Court. The Attorney General opposed the order by applying to the full Supreme Court for a writ of supervisory control, arguing, contrary to the state's previous position, that 46-22-103 does not really apply to persons convicted in a criminal case and that the more appropriate procedure was an original proceeding "in the nature of habeas corpus" before the full Supreme Court. The application for a writ of supervisory control was denied, was treated by the Supreme Court as a late-filed response to Ingraham's petition for a writ of habeas corpus, and was referred to Justice Trieweiler. Justice Trieweiler determined that it was inappropriate for him alone to determine the form of review of the District Court's denial of bond. Justice Trieweiler also determined that: (1) Ingraham had no constitutional right to bond pending appeal; (2) Ingraham did have a right to the proper exercise of the District Court's discretion in the application of 46-9-107; and (3) that right was a substantial right for the purposes of 46-20-104. For these reasons, Justice Trieweiler vacated his previous order granting Ingraham's petition for a writ of habeas corpus and referred the matter to the full Supreme Court for review of the District Court's order denying bond pending appeal. St. v. Ingraham, 284 M 77, 945 P2d 16, 54 St. Rep. 614 (1997).

Substitution of Postconviction Proceedings for Habeas Corpus Proceedings When Appeals Exhausted — Not Unconstitutional Suspension of Habeas Corpus Writ: The District Court dismissed defendant's habeas corpus petition, relying on 46-22-101, which provides that habeas corpus relief is not available to attack the validity of a conviction or sentence of a person adjudged guilty in a court of record who has exhausted the remedy of appeal. Defendant argued that 46-22-101 was an unconstitutional suspension of the constitutional right to a writ of habeas corpus. However, relying on Swain v. Pressley, 430 US 372, 51 L Ed 2d 411, 97 S Ct 1224 (1977), the Supreme Court held that the substitution of postconviction proceedings for habeas corpus proceedings when a petitioner has exhausted the right of appeal does not amount to a suspension of the writ of habeas corpus. Kills On Top v. St., 273 M 32, 901 P2d 1368, 52 St. Rep. 608 (1995).

Failure of Sentencing Court to Consider Time Served — Remand — Writ of Habeas Corpus Denied: Petitioner was sentenced to 5 years in the state prison for aggravated assault, with all 5 years suspended upon certain conditions. He served 4 1/2 years of the suspended sentence before violating probation. After an appropriate petition, the District Court revoked the suspended sentence and sentenced petitioner to 5 years in the state prison, with 2 years suspended upon certain conditions. Petitioner sought a writ of habeas corpus seeking restoration of his good time but not appealing his sentence or conviction. After review, the Supreme Court held that the District Court had jurisdiction to revoke the suspended sentence and impose the original sentence but remanded for compliance with 46-18-201, requiring the District Court to consider elapsed time and state its reasons for either expressly allowing or rejecting elapsed time as credit against the sentence. The petition for writ of habeas corpus was denied for failure to set forth any basis for granting the writ. Speldrich v. McCormick, 243 M 238, 794 P2d 339, 47 St. Rep. 1186 (1990), followed in St. v. Docken, 274 M 296, 908 P2d 213, 52 St. Rep. 1240 (1995).

Federal Appeal — Presumption in Favor of State Proceedings: A habeas corpus appeal was filed in federal court (see Art. II, sec. 19, Mont. Const.) by petitioner who had been convicted of deliberate homicide in Montana. In habeas corpus proceeding, there is a presumption that the

factual determinations of the state court are correct. This presumption is rebutted or inapplicable when one of seven factors showing a denial of due process is shown or the federal court determines that the findings are not supported by the record. The record in this case indicated that petitioner received due process in the state proceedings. The record failed to support petitioner's allegations of insufficiency of evidence, ineffective assistance of counsel, and a hostile trial atmosphere. Bashor v. Risley, 730 F2d 1228 (9th Cir. 1984). See also Norris v. Risley, 878 F2d 1178 (9th Cir. 1989).

Writ Granted — Improper Transfer of Juvenile From Correctional Institution to Mental Health Facility: The Supreme Court upheld issuance of a Writ of Habeas Corpus when a juvenile was transferred under 53-21-130 from a juvenile correctional institution to a mental health facility and the record did not indicate that petitioner's transfer was caused by an emergency or that petitioner was afforded any due process protection upon expiration of the 10-day period specified in 53-21-130. In re the Petition of M.C., 211 M 105, 683 P2d 956, 41 St. Rep. 1242 (1984).

Knowledge of Sentencing Judge: Coleman petitioned for a Writ of Habeas Corpus as an original proceeding, asking the Supreme Court to vacate his death sentence and remand his cause for resentencing as to the aggravated kidnapping conviction by a District Court Judge other than the judge who had twice sentenced him to death. Coleman contends that during a plea bargaining session, at which the judge was present, his original counsel stated that he believed Coleman was guilty of deliberate homicide and sexual intercourse without consent, based on a sodium amytal examination Coleman underwent. At the same time, counsel stated he thought the State would have difficulty proving Coleman committed aggravated kidnapping. The Supreme Court found this was not equivalent to an admission of the aggravated kidnapping. The court said that guilt was determined by the jury. The death sentence was based on the finding of guilt on the aggravated kidnapping charge. There was no indication counsel's remarks influenced the judge. Coleman v. Risley, 203 M 237, 663 P2d 1154, 40 St. Rep. 418 (1983), followed in St. v. Smith, 261 M 419, 863 P2d 1000, 50 St. Rep. 1388 (1993).

Habeas Relief — Charge to Be Explained: After exhausting his state court remedies, plaintiff petitioned under Art. I, sec. 9, U.S. Const. (similar to Art. II, sec. 19, Mont. Const.), for habeas relief, alleging ineffective assistance of counsel and that his plea of guilty was involuntary in that it was not intelligently made. The U.S. Court of Appeals found that the record showed no explanation of the charge against him by the state to the defendant. Defendant contended no such explanation was made, and the state contended it was given in private. Where the state cannot prove that an explanation of the charge was given, a habeas corpus hearing must be held. Sober v. Crist, 644 F2d 807 (9th Cir. 1981). See also Little Light v. Crist, 649 F2d 682 (9th Cir. 1981).

Federal Habeas Corpus Appeal — State Remedies to Be Exhausted: The rule that a petitioner to federal court under the United States Constitution's habeas corpus provision (similar to Art. II, sec. 19, Mont. Const.) who seeks preconviction habeas corpus relief must first exhaust state remedies serves two purposes: (1) to avoid isolating state courts from federal constitutional issues by assuring those courts an ample opportunity to consider constitutional claims; and (2) to prevent federal interference with state adjudication, especially criminal trials. Carden v. St., 626 F2d 82 (9th Cir. 1980).

Parole to Out-of-State Prison: Writ of Habeas Corpus was not available to secure release of prisoner who had been granted parole in Montana, since prisoner had been concurrently sentenced in Montana and Wyoming, and if parole was accepted the prisoner would be released to the custody of the Wyoming prison. Petition of Glover, 166 M 546, 539 P2d 721 (1975).

Law Review Articles

The Writ of Habeas Corpus, Swanberg, 26 Mont. L. Rev. 57 (1964).

Section 20. Initiation of proceedings.

Convention Notes

Retains method in 1889 constitution of starting criminal actions. Increases grand jury from seven to eleven persons.

Compiler's Comments

Former Constitutional Provision: This section is similar to Art. III, sec. 8, 1889 Mont. Const.

Case Notes

DECISIONS UNDER 1972 CONSTITUTION

Illegal Pretrial Process and Procedure — State's Right to Charge and Try Case: A Youth Court petition initiating proceedings did not state the facts constituting the offense the youth was

charged with in ordinary and concise language so as to enable a person of common understanding to know what was intended. The petition did not include a witness list. An arrest warrant was issued out of the Youth Court, although there is no provision in the Youth Court Act for issuance of an arrest warrant. Presumably the warrant was issued under 46-6-201, but there was no showing of probable cause supported by oath or affirmation reduced to writing. The youth had already been arrested in Oklahoma at the time the warrant was issued. By what process and authority he was arrested in Oklahoma was not shown, nor was it shown he was arrested by a law enforcement officer. He was subsequently transferred to the District Court for trial as an adult and convicted of two counts of deliberate homicide. The Youth Court proceedings from issuance of the warrant for arrest onward were patently defective. However, this did not preclude the state from having him transferred to the District Court, proceeding against him, and obtaining a conviction. St. v. Woods, 203 M 401, 662 P2d 579, 40 St. Rep. 533 (1983).

Transfer From Youth Court to District Court — Youth Court Hearing — Valid Initiation of District Court Action: At a Youth Court hearing at which it was decided to transfer youth to District Court for trial as an adult, testimony established probable cause for filing of an information in the District Court. This procedure satisfied the state constitutional requirement that a criminal action in the District Court be initiated either by an information after examination and commitment by a magistrate or after leave granted by the District Court. St. v. Woods, 203 M 401, 662 P2d 579, 40 St. Rep. 533 (1983).

Reliance on Unconstitutional Statute — Reversal Not Automatic — Prejudice Required: The defendant was charged with aiding and abetting in the commission of a burglary. Six days before trial an amended information was filed pursuant to 46-11-403 (renumbered 46-11-205) charging the defendant with burglary. Since that time, 46-11-403 (renumbered 46-11-205) has been declared unconstitutional. On review the Supreme Court said that it will not presume that the use of 46-11-403 (renumbered 46-11-205) is per se prejudicial. The requisite prejudice must be shown. It is clear from the record that the defendant received every procedural consideration concerning notice and arraignment and that he was afforded sufficient time to prepare his legal defense against the amended information. The use of 46-11-403 (renumbered 46-11-205) in no way prejudiced defendant's case or materially interfered with his rights to a fair trial. St. v. Olsen, 189 M 43, 614 P2d 1061 (1980).

"Prosecuted" Construed: The term "prosecuted" used in Art. II, sec. 20, Mont. Const., means to institute and carry forward. Section 46-11-403(1) (renumbered 46-11-205, with unconstitutional portion deleted) is unconstitutional under this interpretation of "prosecute" because it allows amendments without leave of court in direct conflict with the constitutional provision. St. v. Cardwell, 187 M 370, 609 P2d 1230 (1980).

Information — Adequacy of Affidavit in Support — Probable Cause: Defendant, charged with mitigated deliberate homicide, argued that the affidavit in support of the application for leave to file an information was insufficient without statements which were suppressed on his motion being included. The court disagreed, saying that a prima facie case showing that defendant committed an offense was not necessary in the affidavit. A mere probability is sufficient for probable cause. Evidence to establish probable cause need not be as complete as evidence to establish guilt. Judges reviewing such affidavits should use their common sense in determining whether probable cause exists. There is no requirement that the affidavit claim that no other persons had access to the home where the deceased was found. The court concluded that a common-sense reading of the affidavit, with the parts objected to deleted, indicates that the statutory and decisional guidelines were more than adequately met by the affidavit. St. v. Hamilton, 185 M 522, 605 P2d 1121 (1980).

Discretion of Judge — Review by Supreme Court: Although judicial authority to summon a grand jury is discretionary, this is not absolute unbridled discretion; and upon application of the Attorney General with findings and assertions establishing the necessity for the grand jury, it is an abuse of discretion to deny the application. The Supreme Court may review the exercise of the court's discretionary power to empanel a grand jury by means of supervisory control and reverse the decision of the court when an abuse of its discretion is found. State ex rel. Woodahl v. District Court, 166 M 31, 530 P2d 780 (1975).

DECISIONS UNDER 1889 CONSTITUTION

Complaint — Misdemeanor Charge: Complaint in a Justice's Court, rather than indictment, was proper on charge of misdemeanor of obtaining money by false pretenses. Petition of Brown, 150 M 483, 436 P2d 693 (1968).

Information — Capital Offenses: Charges made by information filed after hearing before magistrate or by leave of District Court are sanctioned by statute and Constitution, and defendant

may be held to answer, even for capital crime, without presentment or indictment by grand jury. St. v. Corliss, 150 M 40, 430 P2d 632 (1967), certiorari denied, 390 US 961, 88 S Ct 1063 (1968).

Preliminary Hearing: Grant of leave to file information directly, without preliminary hearing, was neither error nor abuse of statutory privilege when motion to file directly was supported by affidavit and where preliminary hearing would have served no purpose. St. v. Johnson, 149 M 173, 424 P2d 728 (1967).

Filing Information Without Preliminary Examination: It is settled that a court may grant leave to file an information without previous examination by a committing magistrate. State ex rel. Juhl v. District Court, 107 M 309, 84 P2d 979 (1938); St. v. Foot, 100 M 33, 48 P2d 1113 (1935); St. v. Vuckovich, 61 M 480, 203 P 491 (1921); St. v. Martin, 29 M 273, 74 P 725 (1903); St. v. Little Whirlwind, 22 M 425, 56 P 820 (1899); St. v. Spotted Hawk, 22 M 33, 55 P 1026 (1899); St. v. Bowser, 21 M 133, 53 P 179 (1898); St. v. Brett, 16 M 360, 40 P 873 (1895).

Self-Executing and Not Self-Executing Provisions:

The clause of Art. III, sec. 8, 1889 Mont. Const., relating to the prosecution of criminal actions by information did not execute itself, and before it could be carried into effect, the exercise, jurisdiction, and limitations of the procedure and the rights and pleadings of the State and accused must be defined by the legislative department. St. v. Fisher, 79 M 46, 254 P 872 (1929); St. v. Ah Jim, 9 M 167, 23 P 76 (1890).

The provision of the Constitution relating to prosecution by information is not self-executing, and in the absence of legislation defining the procedure, a trial and conviction upon information is without process of law. In re Durbon, 10 M 147, 25 P 442 (1890).

The clause of Art. III, sec. 8, 1889 Mont. Const., relating to the grand jury executes itself, and in the absence of further legislation all offenses of the grade of felonies or having their origin in the District Court must be inquired into under the provisions of the criminal practice act relative to indictments. St. v. Ah Jim, 9 M 167, 23 P 76 (1890).

Object of This Provision in the Constitution: One of the objects of the Constitution was to do away to a great extent with the machinery and expense of a grand jury by substituting therefor prosecution by information. It is not necessary, in order to vest power in the County Attorney to file an information, that there be a preliminary examination and commitment. He may act, after leave has been granted by the court, in a case where there may not have been any charge or information before a committing magistrate. St. v. Vinn, 50 M 27, 144 P 773 (1914); St. v. Bowser, 21 M 133, 53 P 179 (1898); St. v. Cain, 16 M 561, 41 P 709 (1895); St. v. Brett, 16 M 360, 40 P 873 (1895).

Operation and Effect in General:

After dismissal of an indictment because of substantial defects therein, the court may submit the case to another grand jury or permit or order the County Attorney to file an information charging the defendant with the same offense ineffectually sought to be charged against him by the indictment. St. v. Vinn, 50 M 27, 144 P 773 (1914).

An information may be filed with leave of court without a previous commitment of accused by a magistrate. An information need not show on its face that it was filed with leave of court. St. v. Spotted Hawk, 22 M 33, 55 P 1026 (1899).

Prosecutions may be either by information, in cases where there has been an examination and commitment or admission to bail by a magistrate, in which case an order of the court is not necessary, or by information filed by order of the court upon written motion of the County Attorney, which may be done without such examination. St. v. Bowser, 21 M 133, 53 P 179 (1898).

Under Art. III, sec. 8, 1889 Mont. Const., either there must have been an examination and commitment or leave of court procured, but both steps are not required. St. v. Brett, 16 M 360, 40 P 873 (1895).

In a prosecution for murder, the substantial rights of the accused were not prejudiced by the submission of his case to the grand jury created by the Constitution, and the clause of Art. III, sec. 8, 1889 Mont. Const., relating to the number of jurors composing that body is not ex post facto. St. v. Ah Jim, 9 M 167, 23 P 76 (1890).

"Criminal Offenses" Defined: When prosecuted under the code of civil procedure, a contempt of court is not to be regarded as a "criminal offense", to be prosecuted only by complaint, information, or indictment, as laid down by this section. State ex rel. Boston & Mont. Consol. Copper & Silver Min. Co. v. Clancy, 30 M 193, 76 P 10 (1904); State ex rel. Flynn v. District Court, 24 M 33, 60 P 493 (1900).

Not in Violation of Fourteenth Amendment to United States Constitution:

The provision of Art. III, sec. 8, 1889 Mont. Const., that prosecutions shall be either by information or indictment and authorizing the court to decide which method shall be pursued in

each particular case, was not an abridgment of the privileges and immunities of citizens. St. v. Little Whirlwind, 22 M 425, 56 P 820 (1899).

The proceeding authorized by Art. III, sec. 8, 1889 Mont. Const., allowing prosecution by information with leave of court, without a preliminary examination, was not a deprivation of the liberty of the citizen without due process of law and did not abridge the privileges and immunities of any citizen as guaranteed by the 14th amendment to the United States Constitution. St. v. Brett, 16 M 360, 40 P 873 (1895).

Necessity for Grand Jury: When defendant was indicted by a grand jury of seven persons drawn and summoned by order of the judge, it was not required that the order should show the necessity therefor, it being presumed that the judge considered his action necessary. St. v. King, 9 M 445, 24 P 265 (1890).

Section 21. Bail.

Convention Notes

Identical to 1889 constitution. Guarantees that all persons are bailable except in cases of certain offenses punishable by death.

Compiler's Comments

Former Constitutional Provision: This section is the same as Art. III, sec. 19, 1889 Mont. Const.

Prohibition Against Death Penalty Rejected: A prohibition against the death penalty that was rejected by the electorate adopting the 1972 Montana Constitution would have resulted in the adoption of different language in this section. For the text of the rejected language, see the Adoption Schedule compiler's comment under the annotations to the Transition Schedule.

Case Notes

DECISIONS UNDER 1972 CONSTITUTION

No Showing That Defendant's Rights Violated by Failure to Make Bail or to Be Released on Own Recognizance — Writ of Habeas Corpus Denied: Following Miller's arrest on charges of negligent homicide and failure to remain at the scene of an accident, the District Court set bail at $30,000. When Miller could not make bail, the amount was reduced to $10,000. Indigent, Miller could not pay the reduced bail and remained incarcerated. Miller petitioned the Supreme Court for a writ of habeas corpus, arguing that his continued incarceration was a violation of 46-9-106 and 46-9-111 and the constitutional guarantees of bail and against excessive sanctions. The Supreme Court noted that a defendant has a presumptive right to be released on a reasonable bail or on the defendant's own recognizance on conditions that will protect the community. However, the burden in a habeas corpus proceeding is on the petitioner to present a record that is sufficient to make a prima facie showing that the District Court's order constituted a violation, deprivation, infringement, or denial of the petitioner's constitutional, statutory, or legal rights. After considering the meager record and the seriousness of the allegations, the Supreme Court was not convinced that Miller had no ability to provide any bail or that the District Court could have released Miller on conditions that could be enforced and that could ensure the protection of the community. Thus, Miller failed to show that his rights were violated, and his petition for a writ of habeas corpus was denied. Miller v. District Court, 2007 MT 58, 336 M 207, 154 P3d 1186 (2007).

Waiver of Constitutional Issues Related to No-Bond Hold by Failure to Object in Trial Court: Hendricks contended that his constitutional right to due process and the right against excessive bail were violated when he was held without bond for more than 72 hours in violation of 46-23-1012. However, there was no factual record to support the allegations, nor did Hendricks object to the asserted constitutional violations at a revocation hearing or move to dismiss the proceedings. Failure to adequately raise the issue in District Court and to create a factual record constituted a waiver of objection and precluded review of the issue on appeal. Further, Hendricks' assertion of error in the District Court's reliance on hearsay testimony at the revocation hearing failed on the same grounds. St. v. Hendricks, 2003 MT 163, 316 M 296, 71 P3d 1212 (2003), following St. v. Azure, 2002 MT 22, 308 M 201, 41 P3d 899 (2002).

Good Time Credit for Indigent Defendant Confined to County Detention Facility: The decision in Bearden v. Ga., 461 US 660, 76 L Ed 2d 221, 103 S Ct 2064 (1983), clearly and unambiguously stands for the principle that to deprive a criminal defendant of freedom simply because, through no want of bona fide effort, willful refusal, or fault of the defendant, the defendant lacks the financial resources to buy liberty is contrary to the fundamental fairness required by the 14th amendment to the U.S. Constitution. This is not to say that poverty insulates a defendant from

having to post a reasonable bond should the facts and circumstances of the case so require. However, if a criminal defendant is unable to secure presentence freedom by posting bail for no other reason than indigency, that defendant is entitled to good time credit for the presentence time spent in a county detention facility to the same extent that the law allows good time credit to the criminal defendant who is able to post bail and thus serve the entirety of a sentence in the state correctional facility. In the present case, it was not clear from the record whether defendant was offered or denied bail and whether, if offered, the sole reason for defendant's inability to post bail was indigency; nevertheless, the Supreme Court granted defendant's petition for writ of habeas corpus and remanded to the District Court for a determination of whether defendant was entitled to good time credit for time served in the county detention facility. MacPheat v. Mahoney, 2000 MT 62, 299 M 46, 997 P2d 753, 57 St. Rep. 291 (2000), following MacFarlane v. Walter, 179 F3d 1131 (9th Cir. 1999), followed in Eisenman v. St., 2000 MT 170, 300 M 322, 5 P3d 542, 57 St. Rep. 704 (2000), in which the case of an indigent defendant was remanded for a determination of whether defendant was detained presentence in a county detention facility because he was too poor to post bail and thus entitled to credit for good time under the MacPheat test, and distinguished in Sebastian v. Mahoney, 2001 MT 88, 305 M 158, 25 P3d 163 (2001). However, see also McGinnis v. Royster, 410 US 263, 35 L Ed 2d 282, 93 S Ct 1055 (1973).

Bail Not Excessive: Defendant was not effectively denied his right to bail by reason of excessive bail. The court considered the factors in 46-9-301 and set bail in an amount calculated to ensure defendant's presence at future criminal proceedings. St. v. Pease, 227 M 424, 740 P2d 659, 44 St. Rep. 1203 (1987).

Right to Bail Not Denied: The defendant was arrested in his home on a misdemeanor charge. The arrest was affected without a warrant. He subsequently confessed to and was convicted of deliberate homicide. He moved to suppress evidence of his confession on the basis his statements were obtained after he was denied his constitutional right to release on bail; however, the record does not show that the defendant was denied any right to bail. Bail was set on the misdemeanor charge and there was no allegation or evidence in the record that anyone tendered bail on behalf of the defendant, nor did the defendant or his representatives request that his bail be reduced or ask that he be released on his own recognizance. By not diligently pursuing his right to bail, he waived it. St. v. Beach, 217 M 132, 705 P2d 94, 42 St. Rep. 1080 (1985).

Cash Bail — Findings in Record Required: Defendant contended that by ordering his $25,000 bail bond to be comprised of $15,000 by the normal surety method and $10,000 in cash, the District Court violated Art. II, sec. 31, Mont. Const., and 46-9-401. The issue was moot as to defendant. The Supreme Court said in the future it would closely scrutinize a requirement of bail in the form of cash, which could effectively prevent a person from being free on bail pending trial and clash with the presumption of innocence. If a court believes a cash bail is necessary, it must make specific findings to that effect and include those findings in the record for purposes of review. St. v. Rodriguez, 192 M 411, 628 P2d 280, 38 St. Rep. 578F (1981).

Courts Mandated to Approve Bonds: The courts are mandated to approve all bonds offered by those commercial sureties properly authorized to do business as commercial sureties in the state of Montana. Wilshire Ins. Co. v. Carrington, 570 P2d 301, 34 St. Rep. 1135 (1977) (not reported in Montana Reports).

DECISIONS UNDER 1889 CONSTITUTION

Capital Offenses:

Court abused its discretion in denying bail after reversal of conviction for first-degree murder and remand for new trial when defendant offered evidence of good conduct while in prison, appeared for sentencing after release on bail for 2 weeks after guilty verdict in the first trial, made proof as to an amount of bail and its availability, and was not a security risk. State ex rel. Warwick v. District Court, 160 M 122, 500 P2d 800 (1972).

First-degree murder is a bailable capital offense except in cases where it has been shown that the proof is evident or the presumption great. St. v. Zachmeier, 153 M 64, 453 P2d 783 (1969).

Penalty Assessment on Bail: Statute providing for penalty assessment on bail violated Due Process Clause in that assessment amounted to tax on right to bail, revenue being earmarked for high school driver education. State ex rel. Sanders v. Butte, 151 M 171, 441 P2d 190 (1968).

Amount of Bail — Criteria: The judge in determining the amount of bail to be fixed should take into consideration the enormity of the crime charged, the maximum penalty which the law authorizes, the pecuniary condition of the defendant, the probability of the defendant's flight to avoid punishment, his general character and reputation, the apparent nature and strength of

the proof as bearing upon the probability of his conviction, and other matters bearing upon the particular case. St. v. McLeod, 131 M 478, 311 P2d 400 (1957).

Amount of Bail — Discretion of Judge: The amount of bail that the judge may fix is within his sound legal discretion and is always to be a reasonable amount. St. v. McLeod, 131 M 478, 311 P2d 400 (1957).

Reduction of Bail — Condition of Victim Uncertain: Court did not err in refusing defendant's motion to reduce bail, which was initially set at $25,000, when the person assaulted was in a very precarious condition and it was not known whether he would live or die. When the judge was advised that the victim would probably live, he reduced the bail to $7,500, which was a very reasonable amount. St. v. McLeod, 131 M 478, 311 P2d 400 (1957).

Showing Required to Deny Bail: When an application is made for bail in a capital case, the County Attorney, if he resists the application, should make some showing that the proof is evident or the presumption great, thus bringing the case within the exception mentioned in the Constitution. On failure to make such showing, the defendant is entitled to bail in all cases. But, if such showing is made, the court or judge should refuse bail without hesitation. State ex rel. Murray v. District Court, 35 M 504, 90 P 513 (1907).

Attorney General's Opinions

No Entitlement to Bail After Waiver of Extradition — State Jurisdiction Only to Effect Transport: There is no provision for bail either after an arrest on a Governor's extradition warrant or upon waiver of extradition, so a fugitive prisoner, after waiver of extradition, is not entitled to bail. Once extradition is waived, Montana District Courts retain jurisdiction only to effect transport of the fugitive to another state. 50 A.G. Op. 7 (2004).

Authority of Municipal Court to Grant Time-Pay Bail Bonds: A time-pay bail bond system, which allows a defendant to make payments in monthly or weekly installments in an amount and frequency set by a court to correspond with the requirement that the defendant pay the full bail amount before the date of trial, promotes the constitutional policy of providing bail except in capital cases. The system also comports with statutory requirements that the bail amount not be oppressive and be considerate of the defendant's financial ability. The system requires a defendant to pay cash for the bond, albeit in installments paid over a period of time. Because a court has discretion to set the appropriate bail amounts and to accept personal property in lieu of cash, the court also has discretion to set the timing on the payment of any cash bond. Therefore, a Municipal Court Judge is authorized to release a defendant on a time-pay bail bond in an amount set by the judge to be paid in installments. 49 A.G. Op. 18 (2002).

Law Review Articles

The Death Penalty in Montana: A Violation of the Constitutional Right to Individual Dignity, Eklund, 65 Mont. L. Rev. 135 (2004).

Criminal Procedure—Montana Law and the Federal Impact, Elison, 38 Mont. L. Rev. 27 (1977).

Section 22. Excessive sanctions.

Convention Notes

Identical to 1889 constitution.

Compiler's Comments

Former Constitutional Provision: This section is the same as Art. III, sec. 20, 1889 Mont. Const.

Case Notes

DECISIONS UNDER 1972 CONSTITUTION

24/7 Sobriety and Drug Monitoring Program Fees Not Violation of Due Process — Individualized Assessment Required Prior to Participation in Program: After the defendant was charged with DUI, a second offense, he was ordered by the Justice's Court to participate in the 24/7 Sobriety and Drug Monitoring Program as a condition of his release on bond. While enrolled in the program, the defendant missed three tests and was charged with three counts of contempt for the missed tests. The District Court dismissed the contempt charges, concluding that the program fees constituted pretrial punishment in violation of the defendant's right to due process. On appeal, the Supreme Court concluded that fees required under the program do not have a punitive effect on pretrial criminal defendants and that the imposition of the program can be an appropriate condition of release. However, enrollment in the program is discretionary and prior to imposing the testing requirement, a court must conduct an individualized assessment of the defendant, including considering prior alcohol-related arrests, whether the defendant's history

and circumstances suggest an increased risk to the community, and whether the defendant is financially able to pay the fees associated with testing. Because the Justice's Court did not conduct an individualized assessment of the defendant before imposing the testing requirement, it was proper to dismiss the defendant's contempt charges. St. v. Spady, 2015 MT 218, 380 Mont. 179, 354 P.3d 590.

Statute Denying Benefits Due to Incarceration — Not Excessive Fine: The plaintiffs filed an action against the State Fund for wrongfully denying them partial disability benefits due to their incarceration. They alleged that 39-71-744 of the Workers' Compensation Act, which prevented them from receiving benefits during the incarceration, constituted an excessive fine that was grossly disproportionate to their crimes. After the Workers' Compensation Court granted summary judgment to the State Fund, the plaintiffs appealed. The Supreme Court affirmed the ruling, noting that the denial of the plaintiffs' benefits was an indirect consequence of their incarceration unrelated to their underlying sentences. Goble v. Mont. St. Fund, 2014 MT 99, 374 Mont. 453, 325 P.3d 1211.

Life Sentence Without Parole Based on Nature of Offense Not Cruel and Unusual Punishment: The defendant argued that his deliberate homicide sentence of life in prison without the possibility of parole violated the prohibition on cruel and unusual punishment, but the Supreme Court affirmed the sentence, holding that it fell within the statutory guidelines for deliberate homicide and did not shock the conscience or outrage the moral sense of the community or of justice. The defendant himself acknowledged the brutal nature and severity of the offense. St. v. Paulsrud, 2012 MT 180, 366 Mont. 62, 285 P.3d 505.

Prescription of Different Psychiatric Medicines Not Cruel and Unusual Punishment or Denial of Dignity: After Wilson was incarcerated at the Montana State Prison, he was prescribed two psychiatric drugs different from the three drugs that were originally prescribed to keep him psychiatrically stable. The District Court found that the reason for the denial was a professional difference of opinion between the prescribing physician and the prison psychiatrist as to the medical value of one of the drugs in a prison setting and that the prison had a policy not to allow the use of one of the originally prescribed drugs by prisoners because of its potential for abuse. Based upon a record of numerous hearings and much testimony, the Montana Supreme Court found that the prison had not deprived Wilson of one of the basic necessities of life and that the prison was not deliberately indifferent to Wilson's medical care or to the standards adopted by the Montana Supreme Court, based upon decisions by the U.S. Supreme Court, in Quigg v. Slaughter, 2007 MT 76, 336 Mont. 474, 154 P.3d 1217, and Walker v. St., 2003 MT 134, 316 Mont. 103, 68 P.3d 872. Wilson v. St., 2010 MT 278, 358 Mont. 438, 249 P.3d 28.

Life Sentence for Sexual Intercourse Without Consent Affirmed: Thorp was convicted of sexual intercourse without consent after having been previously convicted of the same offense in another state and was sentenced to life imprisonment without parole. Thorp contended that the sentence amounted to cruel and unusual punishment, but the Supreme Court disagreed. The sentence was within the statutory guidelines and could not be seen as so disproportionate to the crime as to shock the conscience or to outrage the moral sense of the community or of justice and thus was not considered cruel and unusual punishment. St. v. Thorp, 2010 MT 92, 356 Mont. 150, 231 P.3d 1096, following St. v. Shults, 2006 MT 100, 332 Mont. 130, 136 P.3d 507.

Federal Constitutional Prohibition Against Excessive Fines Inapplicable to State: Defendant's truck was seized in a methamphetamine arrest and forfeited pursuant to state law. Defendant argued in state court that the forfeiture violated the excessive fines clause of the Eighth Amendment to the U.S. Constitution, which is virtually identical to Art. II, sec. 22, Mont. Const. The U.S. Supreme Court has not applied the federal excessive fines clause to states, and the Montana Supreme Court declined to do so as well. The court noted that even if the claim had been brought pursuant to the Montana Constitution, it would be difficult to hold that forfeiture of a truck used to facilitate the scourge of methamphetamine was a violation of the state prohibition against excessive punishment. St. v. Forfeiture of 2003 Chevrolet Pickup, 2009 MT 25, 349 M 106, 202 P3d 782 (2009). See also St. v. Good, 2004 MT 296, 323 M 378, 100 P3d 644 (2004).

Failure to Establish Race-Based Sentencing — Illegal Incarceration Argument Dismissed: Baker contended that the District Court illegally based her sentence for vehicular homicide on race, in violation of constitutional guarantees of equal protection, no cruel or unusual punishment, and no discrimination. However, Baker presented no case law or legal analysis in support of the constitutional arguments, and thus failed to establish trial court error. The Supreme Court declined to consider Baker's unconstitutional incarceration argument. St. v. Baker, 2008 MT 396, 347 M 159, 197 P3d 1001 (2008).

Life Sentence Under Felony-Murder Rule Not Considered Cruel and Unusual Punishment: Although his accomplice admitted committing the murder, Rickman was involved, pleaded guilty, and was convicted of deliberate homicide under the felony-murder rule. Rickman was sentenced to life with no parole eligibility for 55 years and appealed on grounds that the sentence was cruel and unusual punishment because the sentence was the same as the sentence of his accomplice who actually committed the murder, even though Rickman was less culpable. Deferring a detailed proportionality analysis to the Sentence Review Board, the Supreme Court nevertheless considered whether Rickman's sentence violated the prohibition against cruel and unusual punishment and decided in the negative. Given the horrific and random nature of the crime and Rickman's significant role in it, the sentence was not so disproportionate as to shock the conscience, and when combined with Rickman's substantial criminal history and a higher-than-average statistical risk that Rickman would reoffend, the sentence was not considered cruel and unusual and was affirmed. St. v. Rickman, 2008 MT 142, 343 M 120, 183 P3d 49 (2008).

No Showing That Defendant's Rights Violated by Failure to Make Bail or to Be Released on Own Recognizance — Writ of Habeas Corpus Denied: Following Miller's arrest on charges of negligent homicide and failure to remain at the scene of an accident, the District Court set bail at $30,000. When Miller could not make bail, the amount was reduced to $10,000. Indigent, Miller could not pay the reduced bail and remained incarcerated. Miller petitioned the Supreme Court for a writ of habeas corpus, arguing that his continued incarceration was a violation of 46-9-106 and 46-9-111 and the constitutional guarantees of bail and against excessive sanctions. The Supreme Court noted that a defendant has a presumptive right to be released on a reasonable bail or on the defendant's own recognizance on conditions that will protect the community. However, the burden in a habeas corpus proceeding is on the petitioner to present a record that is sufficient to make a prima facie showing that the District Court's order constituted a violation, deprivation, infringement, or denial of the petitioner's constitutional, statutory, or legal rights. After considering the meager record and the seriousness of the allegations, the Supreme Court was not convinced that Miller had no ability to provide any bail or that the District Court could have released Miller on conditions that could be enforced and that could ensure the protection of the community. Thus, Miller failed to show that his rights were violated, and his petition for a writ of habeas corpus was denied. Miller v. District Court, 2007 MT 58, 336 M 207, 154 P3d 1186 (2007).

Differences Between Medical Care, Visitation, Education, and Recreation Available at State Prison and Regional or Private Prisons Not Cruel and Unusual Punishment: Quigg and 64 other inmates were sentenced to imprisonment at the Montana State Prison (MSP) and, because of overcrowding, were subsequently transferred to regional and private prisons. Following the transfer, the inmates sought a declaratory judgment from the court that prisoners sentenced to the state prison prior to 1999 had to be confined at MSP rather than at regional or private prisons and that the incarcerations were unlawful because the regional and private prisons do not have the same opportunities for treatment, training, and rehabilitation as MSP. The District Court granted summary judgment to the state on all inmate claims. On appeal, the Supreme Court affirmed, ruling that although this section provides Montana citizens with greater protections from cruel and unusual punishment than does the federal constitution, any differences between medical care, visitation, education, and recreation at MSP and the regional and private prisons do not rise to the level of cruel and unusual punishment. Quigg v. Slaughter, 2007 MT 76, 336 M 474, 154 P3d 1217 (2007).

Imposition of Restitution Based on Documented Losses Not Violative of Constitutional Prohibition Against Excessive Fines: As set out in St. v. Good, 2004 MT 296, 323 M 378, 100 P3d 644 (2004), a restitution award violates the constitutional prohibition against excessive fines if the award is grossly disproportional to the gravity of the offense. Here, Kuykendall was convicted of criminal endangerment and ordered to pay restitution of over $10,000 to a peace officer who was injured during the crime. Kuykendall asserted that the restitution amount was grossly disproportional to the crime of criminal endangerment, but the Supreme Court disagreed. The amount of loss suffered by the officer was documented and was not refuted by Kuykendall at trial. The sentencing court relied on the only evidence presented at the sentencing hearing, and the amount of restitution ordered was directly related to the amount of loss and thus was not grossly disproportional. The restitution amount was not excessive and was affirmed. St. v. Kuykendall, 2006 MT 110, 332 M 180, 136 P3d 983 (2006).

Constitutionality of Persistent Felony Offender Statutes: Shults contended that the persistent felony offender (PFO) statutes were unconstitutional on their face in violation of double jeopardy, equal protection, and cruel and unusual punishment or as they applied to Shults's case. The

Supreme Court disagreed. First, the PFO statutes do not constitute double jeopardy because a sentence as a habitual criminal is not viewed as a new jeopardy (see Gryger v. Burke, 334 US 728 (1948)). Second, Shults was not able to show that the PFO statutes classify two or more similarly situated groups in an unequal manner and thus failed to meet the first threshold of a meritorious equal protection claim. Last, a sentence that is within maximum statutory guidelines and that is not so disproportionate as to shock the conscience or outrage the moral sense of the community is not considered cruel and unusual punishment. Shults's sentence was within statutory parameters, and in light of Shults's 18-year criminal history and repeated failure to conform his behavior to societal norms despite having numerous opportunities to do so, the sentence could not be seen as so disproportionate as to shock the conscience or outrage the moral sense of the community and thus was not considered cruel and unusual punishment. St. v. Shults, 2006 MT 100, 332 M 130, 136 P3d 507 (2006).

Use of Persistent Felony Offender Statute to Increase Sentence Not Considered Cruel and Unusual Punishment: Wardell was originally sentenced as a persistent felony offender to 45 years in prison with 30 years suspended. Wardell filed a petition for postconviction relief, and that sentence was vacated. Upon resentencing, Wardell's sentence was increased to 20 years suspended plus 5 years for failure to register as a sex offender. Wardell argued on appeal that the sentence constituted cruel and unusual punishment because it was excessive when compared to other sentences for failure to register. The Supreme Court noted that Wardell's sentence was within statutory maximum guidelines and was not so disproportionate to the crime as to shock the conscience or outrage the moral sense of the community or of justice. The sentence was affirmed. St. v. Wardell, 2005 MT 252, 329 M 9, 122 P3d 443 (2005), distinguishing St. v. Mount, 2003 MT 275, 317 M 481, 78 P3d 829 (2003).

Mandatory Life Sentence Not Violative of Due Process, Cruel and Unusual Punishment, or Separation of Powers — Exception Properly Considered: Webb pleaded guilty to second offense sexual intercourse without consent and was sentenced to life in prison without parole pursuant to 46-18-219. Webb appealed the sentence on grounds that the mandatory life sentence violated procedural and substantive due process, the prohibition against cruel and unusual punishment, and the separation of powers doctrine. Webb also asserted that the sentencing court failed to properly consider the exception to mandatory sentencing set out in 46-18-222(3). The Supreme Court affirmed. The sentencing court properly considered the exception and did not abuse its broad discretion in finding no unusual and substantial distress. The sentencing court offered Webb all the procedural due process necessary and did not violate substantive due process because the sentence fit within the statutory sentencing limits. Webb's contention that life without parole was cruel and unusual punishment failed because the sentence was commensurate with the gravity of the crime and consistent with state sentencing and correctional policy. The argument that mandatory sentences violate the separation of powers doctrine also failed because it is in the Legislature's province to distinguish between criminal offenses and to establish punishments, and enactment of 46-18-219 was based on constitutional principles and Montana public policy. St. v. Webb, 2005 MT 5, 325 M 317, 106 P3d 521 (2005). See also St. v. Bruns, 213 M 372, 691 P2d 817 (1984), and St. v. Dahms, 252 M 1, 825 P2d 1214 (1992).

No Standing to Raise Constitutionality of Restitution Statutes Absent Showing of Direct Personal Injury: The 2003 Legislature amended the state restitution statutes, and Thaut sought to challenge the constitutionality of the amendments on numerous grounds. However, Thaut was unable to show a direct personal injury resulting from application of the restitution laws. Pursuant to St. v. Krantz, 241 M 501, 788 P2d 298 (1990), and Helena Parents Comm'n v. Lewis & Clark County Comm'rs, 277 M 367, 922 P2d 1140 (1996), Thaut lacked standing to challenge the constitutionality of the restitution statutes, and the Supreme Court declined to address the issue. St. v. Thaut, 2004 MT 359, 324 M 460, 103 P3d 1012 (2004). See also St. v. Ellis, 2007 MT 210, 339 M 14, 167 P3d 896 (2007), in which defendant established direct economic injury and thus standing to challenge the constitutionality of repayment conditions on equal protection grounds through the District Court's order to repay $2,398 in costs of appointed counsel.

Restitution Order Reimbursing Victim for Mortgage Payments and Cost of Installing Surveillance Equipment Not Unconstitutional Excessive Fine or Cruel and Unusual Punishment: Good was found guilty of assault and as part of his sentence was ordered to pay restitution to the victim of approximately $6,000. Good argued that restitution constituted an excessive fine and cruel and unusual punishment. The Supreme Court held that although by nature all fines are punitive, the test to determine if the fine is excessive is whether the fine is grossly disproportional. When the amount of restitution is geared directly to the amount of the victim's loss caused by the defendant's illegal activity, proportionality is built into the order. The Supreme Court also

held that in the instant case, there was a finding that the defendant was not indigent and had the means to pay the restitution and therefore the order did not constitute cruel and unusual punishment. St. v. Good, 2004 MT 296, 323 M 378, 100 P3d 644 (2004).

Sentence Under Plea Bargain Within Statutory Maximum Not Cruel and Unusual Punishment — Cruel and Unusual Punishment Claim Not Raised on Direct Appeal Barred in Postconviction Proceedings: In exchange for dismissal of a charge of assault with a bodily fluid, Basto entered a plea agreement to plead guilty of possession of a deadly weapon by a prisoner. Basto was sentenced to 5 years in prison and subsequently filed a timely petition for postconviction relief on grounds that the sentence was disproportionately severe when compared to the sentences of other defendants in the case, constituting cruel and unusual punishment. The state responded that there is no guarantee of proportionality under the constitutional prohibition against cruel and unusual punishment and that even if there were, Basto's sentence was still within statutory parameters. The Supreme Court agreed with the state. A sentence that is within maximum statutory guidelines does not violate the constitutional prohibition against cruel and unusual punishment. Basto received the sentence that he bargained for, and there was nothing in the plea agreement that indicated that Basto would receive the same sentence as the other defendants. Further, Basto failed to raise any cruel and unusual punishment argument on direct appeal, so the argument was barred in postconviction proceedings under 46-21-105. Basto v. St., 2004 MT 257, 323 M 80, 97 P3d 1113 (2004). See also St. v. DeSalvo, 273 M 343, 903 P2d 202 (1995), and St. v. Mingus, 2004 MT 24, 319 M 349, 84 P3d 658 (2004).

Challenge to Equity of Sentence Properly With Sentence Review Division, Not Supreme Court: A challenge to the equity of a sentence, as opposed to the legality of a sentence, properly lies with the Sentence Review Division, not the Supreme Court, which does not review a sentence on appeal for mere inequity or disparity. In this case, defendant cloaked an equity challenge in the vestiges of a constitutional argument in seeking Supreme Court review, but the court declined to address it, leaving the matter to the Sentence Review Division. St. v. Legg, 2004 MT 26, 319 M 362, 84 P3d 648 (2004), followed in St. v. Baker, 2008 MT 396, 347 M 159, 197 P3d 1001 (2008), and following St. v. DeSalvo, 273 M 343, 903 P2d 202 (1995).

Prison Behavior Modification Plans Violative of Excessive Sanction Protection and Equal Protection — State Directed to Revise Incarceration Procedures: Walker, an inmate with diagnosed mental illness, alleged that conditions at the state prison violated constitutional sanctions against excessive punishment and equal protection guarantees because of his mental condition. Although Walker had been released from the state prison when his petition for postconviction relief was considered by the Supreme Court, the case was not moot, as the state contended, because the prison programs remained in place. The court went on to consider whether behavior modification programs used at the prison unconstitutionally exacerbated inmates' mental health conditions and concluded that they do. The plain meaning of the dignity clause in Art. II, sec. 4, Mont. Const., commands that the intrinsic worth and basic humanity of persons may not be violated, and if the particular conditions of confinement cause serious mental illness to be greatly exacerbated or deprive inmates of their sanity, those conditions then cross into the realm of psychological torture. Thus, prison behavior modification programs and living conditions in maximum security constitute an affront to the inviolable right to human dignity and constitute cruel and unusual punishment when they exacerbate an inmate's mental health condition. The prison was directed to conform the operations of its administrative segregation units to the requirements of this opinion. Walker v. St., 2003 MT 134, 316 M 103, 68 P3d 872 (2003), distinguished in Quigg v. Slaughter, 2007 MT 76, 336 M 474, 154 P3d 1217 (2007). See also Campbell v. Mahoney, 2001 MT 146, 306 M 45, 29 P3d 1034 (2001), and Wilson v. St., 2010 MT 278, 358 Mont. 438, 249 P.3d 28.

Twenty-Year Prison Sentence and Completion of Anger Management Program Not Cruel and Unusual Punishment: Defendant was found guilty of assault with a weapon and was sentenced to a 20-year prison term with a requirement to successfully complete an anger management program. Defendant appealed, claiming that the sentence violated the state's prohibition against cruel and unusual punishment. The Supreme Court affirmed the District Court decision, ruling that defendant did not meet his burden of proof establishing that the sentence imposed shocked the conscience or outraged the moral sense of the community or of justice. St. v. Johnson, 2002 MT 251, 312 M 164, 58 P3d 172 (2002).

Arrest and Detention for Nonjailable Offense Unreasonable Absent Circumstances to Justify Immediate Arrest: A Havre police officer responded to a 2:47 a.m. complaint that two people were "messing around with cars" and were running toward the post office, but no physical description was provided. While searching the post office area, the officer noticed a person walking down the

street. Upon seeing the police car, the person began running. Bauer was eventually found and arrested for minor in possession (MIP), second offense. During booking, Bauer was also found to be in possession of drugs, but moved to suppress on grounds that his arrest and detention for a nonjailable offense was an unlawful violation of the right to privacy, the right to be free from unreasonable search and seizure, and the right to be free from cruel and unusual punishment. The District Court concluded that the arrest was lawful because once the officer had probable cause to arrest, the right to detain was inherent. The Supreme Court disagreed, reversed, and suppressed the fruits of the search. When determining the reasonableness of a warrantless search, the state's interest must be balanced against the level of intrusion into an individual's privacy resulting from the search, and this analysis applies equally to the seizure of a person. Although 46-6-311 gives officers the discretion to either arrest or issue a notice to appear, to be constitutional, the officer's exercise of that discretion must be reasonable, and in addition to probable cause, there must also be circumstances that require immediate arrest. It is unreasonable for an officer to effect an arrest and detention for a nonjailable offense when there are no circumstances to justify an immediate arrest, and a person stopped for such an offense should not be subjected to the indignity of an arrest and police station detention when a simple, nonintrusive notice to appear will serve the interests of law enforcement. Here, the officer knew that imprisonment was not a potential punishment for Bauer's second offense MIP, and there were no circumstances that required Bauer's immediate arrest, so Bauer should have been issued a notice to appear in lieu of arrest. St. v. Bauer, 2001 MT 248, 307 M 105, 36 P3d 892 (2001).

Waiver of Right to Earn Good Time Credits in Boot Camp Program — Incarceration for Full Term Not Considered Cruel and Unusual Punishment: After being sentenced to 5 years in prison for negligent homicide, Campbell applied for admission to the boot camp program. As part of the application process, Campbell was required to read and sign a detailed, clearly written explanation of program goals, objectives, rules, and criteria, which included an acknowledgment that Campbell would be ineligible for good time credits while in the program. Pursuant to its administrative authority, the Department of Corrections had determined that good time credits would conflict with the program's emphasis on positive achievement, earned rewards, and the possibility of sentence reductions for successful program completion. Campbell was accepted in the program and spent nearly 3 months in boot camp, but did not complete the program because of a series of infractions. As a consequence, Campbell did not earn either a sentence reduction or the good time credits that might have been earned in prison. Campbell then filed a writ of habeas corpus, contending that he had a right to good time credits and that the Department's refusal to award the credits deprived him of liberty without due process and resulted in his being held beyond the lawful term of his sentence, which constituted cruel and unusual punishment. The Supreme Court noted that under Orozco v. Day, 281 M 341, 934 P2d 1009 (1997), Campbell had a protected liberty interest in the opportunity to earn good times credits at boot camp. However, Campbell voluntarily chose to relinquish his interest in good time credits in order to gain the benefits of boot camp. Thus, the state did not deprive Campbell of anything, and his due process claim failed. The Supreme Court went on to examine the distinction between nonwaivable public rights and waivable private rights, as contemplated in 1-3-204, holding that there were no grounds to conclude that Campbell could not voluntarily waive his interest in good time credits. Allowing an inmate to waive good time credits does not defeat any protectionist purpose of the good time allowance statute, particularly when the inmate chooses to relinquish the benefits of one legislatively created program for another. Finally, Campbell's cruel and unusual punishment argument was predicated on the belief that he was entitled to good time credits, but by choosing to forego the opportunity to earn good time at boot camp, Campbell actually received all the good time credit to which he was entitled and could not complain that incarceration for the full term of his lawfully imposed sentence was cruel and unusual. Campbell v. Mahoney, 2001 MT 146, 306 M 45, 29 P3d 1034 (2001). See also Davidson v. Cannon, 474 US 344 (1986), and Zinermon v. Burch, 494 US 113 (1990).

Minimal Liberty Interest of Prison Inmate: As an inmate at the state prison, Jellison participated in a sitdown demonstration, repeatedly disobeying direct orders from corrections officers. Jellison claimed that his subsequent detention and custody reclassification violated his due process rights and right to be free from cruel and unusual punishment. The Supreme Court disagreed and denied Jellison's petition for relief. Considering that prison disciplinary actions take place in a closed, tightly controlled environment peopled by those who have chosen to violate the criminal law and have been lawfully incarcerated for doing so, the liberty interest of an inmate is minimal and is generally limited to freedom from restraint that, although not exceeding the sentence in such an unexpected manner as to give rise to protection by the due process clause by

its own force, nevertheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life. Discipline in segregated confinement does not generally rise to that level, nor does custody classification generally implicate a liberty interest sufficient to give rise to due process protection for an inmate. Further, Jellison was not subjected to cruel and unusual punishment because prison officials are accorded wide-ranging deference in adopting policies to preserve internal order and discipline among the inmates, including prophylactic and preventative measures intended the reduce the incidence of breaches of prison order. Jellison v. Mahoney, 1999 MT 217, 295 M 540, 986 P2d 1089, 56 St. Rep. 853 (1999).

Death Row Not Considered Cruel and Unusual Punishment — Delay Attributed to Defendant's Appeals: Citing Lackey v. Tex., 514 US 1045, 131 L Ed 2d 304, 115 S Ct 1421 (1995), Gollehon claimed that his right to be free from cruel and unusual punishment was violated by the amount of time that he spent on death row and by the number of sentencing hearings in his capital murder case,. The Supreme Court declined to apply Lackey because the majority of the delay in Gollehon's case was caused by his own pursuit of constitutional and statutory rights in state and federal courts and was not caused by the state. Gollehon's claim for relief was denied. Gollehon v. St., 1999 MT 210, 296 M 6, 986 P2d 395, 56 St. Rep. 811 (1999). See also St. v. Smith, 280 M 158, 931 P2d 1272, 53 St. Rep. 1345 (1996).

Grant of Petition to Dispose of Evidence Held No Denial of Constitutional Rights — Inclusion of Additional Property for Restitution — Order to Dispose of Property Held Not to Impose Restitution Obligation: Woods was convicted of writing a bad check for $3,830. However, Woods continued to write other bad checks totaling over $30,000, even as of the time that his probation officer was preparing his presentence investigation. The investigation showed that the bad checks had been used to purchase merchandise and to obtain cash. After sentencing, which included a requirement for restitution, the state filed a petition for destruction of evidence, requesting that it be allowed to return the merchandise to the rightful owners, to apply the value of that property to satisfy Woods's obligation to make restitution, and to destroy other property that had been seized as evidence. The District Court granted the petition but stayed enforcement pending appeal. Woods contended that the District Court order granting the petition violated his rights under Art. II, sec. 3, 4, 15, and 17, Mont. Const., and this section and under the 5th, 8th, and 14th amendments to the United States Constitution. The Supreme Court held that Woods had waived his right to object to restitution, even restitution in an amount greater than $3,830, because Woods promised to make restitution in response to the recommendation of his probation officer that Woods make restitution in an amount in the "tens of thousands of dollars". The Supreme Court held, contrary to Woods's claim that the state misinterpreted the District Court order as to the amount of restitution, that the District Court had ordered Woods to make "full restitution" and that the order included the amounts over and above the $3,830 involved in the underlying conviction for writing a bad check. Woods also objected to the timing of the state's petition, arguing that he was not required to make restitution until he was released from jail. In response, the Supreme Court pointed out that Woods misconstrued the purpose of the state's petition; all the state wanted to do was receive permission from the District Court to return the merchandise to its rightful owners and apply the value to Woods's obligation for restitution. For this reason, the Supreme Court held that the District Court did not err when it granted the state's petition. St. v. Woods, 286 M 355, 951 P2d 981, 54 St. Rep. 1445 (1997).

Accomplice to Felony Murder — Review for Compliance With Proportionality and Individualized Treatment Standards: Vernon Kills On Top contended upon review of his death penalty for felony murder that the sentence violated both the constitutional requirement for individualized punishment and the proportionality requirement. In analyzing the imposition of a death sentence, the Supreme Court will apply both federal and state constitutional standards derived from the eighth amendment to the U.S. Constitution and this section. Although these constitutional provisions contain no explicit prohibition against disproportionate sentences and no express mandate for individualized punishment, the cruel and unusual punishment clauses ban sentences that are grossly disproportionate to the crime for which the defendant was convicted. As set out in Enmund v. Fla., 458 US 782 (1981), the death penalty is unique in its severity and irrevocability, so states are required to focus on the defendant's personal intent, character, and culpability, not merely on the defendant's role as an accomplice. Because Vernon was not present when the killing occurred, did not inflict the death-causing injuries, and actually sought to avoid the killing, the sentence of death imposed on Vernon was disproportionate and thus was vacated. This reasoning does not preclude imposition of a death sentence upon an accomplice to felony murder; however, each case will be reviewed on the basis of its unique facts to ensure that the death sentence is not disproportionate to the degree of the defendant's culpability. Kills On Top

v. St., 279 M 384, 928 P2d 182, 53 St. Rep. 1197 (1996), reversing St. v. Kills On Top, 243 M 56, 793 P2d 1273 (1990), and distinguishing Tison v. Ariz., 481 US 137 (1987).

Sentence of 100 Years Without Parole for Sexual Intercourse Without Consent Committed Upon Person of Same Gender Not Excessive — Persistent Felony Offender: Ford contended that his sentence of 100 years without parole eligibility for sexual intercourse without consent committed upon a person of the same gender was excessively harsh and disproportionate to the gravity of the crime. The Supreme Court found that the sentence was within legal parameters provided by statute and affirmed the sentence, noting that Ford: (1) was a persistent felony offender; (2) had a prior criminal history of sexually preying on young boys; (3) had undergone previous attempts by professional therapists and state officials to treat his problems but was apparently unwilling to accept the provided treatment; and (4) had a predatory nature. St. v. Ford, 278 M 353, 926 P2d 245, 53 St. Rep. 947 (1996).

Election of Hanging as Precluding Contention That Hanging a Cruel and Unusual Punishment: Langford sought a declaration that punishment by hanging was a cruel and unusual punishment in violation of the eighth amendment to the U.S. Constitution (similar to this section). However, he had been afforded an ample opportunity under 46-19-103 to elect lethal injection over hanging as the form of execution but chose not to do so. Accordingly, he rendered moot any claim concerning the constitutionality of hanging as a method of execution. St. v. Langford, 254 M 44, 833 P2d 1127, 49 St. Rep. 615 (1992).

Sentence for Felony Assault (now Assault With a Weapon and Knowing Use of Firearm — Sentence Within Statutory Guideline Not Excessive: Defendant was sentenced to 10 years in prison for felony assault (now assault with a weapon) and to a consecutive term of 10 years with 5 years suspended for the knowing use of a firearm during commission of the offense, was designated a dangerous offender for purposes of parole eligibility, and was fined $50,000 to be paid out of proceeds recovered in a pending civil suit. Defendant contended the sentence was excessive given the nature of the offense and his prior record. However, the sentence was within the statutory guidelines for the offense and therefore did not violate the constitutional ban on cruel and unusual punishment. St. v. Dahms, 252 M 1, 825 P2d 1214, 49 St. Rep. 106 (1992), followed in St. v. DeSalvo, 273 M 343, 903 P2d 202, 52 St. Rep. 1019 (1995).

Twenty-Year Sentence for Drug Dealing Not Excessive Sanction: The defendant argued that a 20-year sentence with 5 years suspended and a $30,000 fine constituted excessive sanctions. The Supreme Court noted that the defendant could have been sentenced to 20 years and fined up to $50,000. The Supreme Court held that the trial court had set out sufficient reasons for its sentence and had not abused its discretion. St. v. Paulson, 250 M 32, 817 P2d 1137, 48 St. Rep. 838 (1991).

Bail of $300 for Indigent Not Excessive: The Supreme Court held that a $300 bail for an indigent accused of two traffic offenses was not excessive because the sum equaled the maximum amount of the fines and the defendant had failed three times to appear on the charges. Billings v. Layzell, 242 M 145, 789 P2d 221, 47 St. Rep. 558 (1990).

Indigent Intentionally Prolonged Incident — No Constitutional Violation: The defendant, an indigent, failed three times to appear to answer charges on two traffic violations. The lower court ordered him held in jail until his trial, which was set for 65 days later, with bail set at $300. The Supreme Court stated that the record indicated that the City Court Judge had engaged in a wholly inappropriate exercise of judicial power to punish the defendant by setting the bail in an amount the defendant could not pay and then setting an excessively late trial date. While incarceration of indigents is not prevented in every case, a court must search for the least oppressive alternative. However, the Supreme Court refused to find a constitutional violation because the defendant had $47 and could have obtained a surety bond for $50 and made no attempt to obtain the additional $3 he needed. Billings v. Layzell, 242 M 145, 789 P2d 221, 47 St. Rep. 558 (1990).

Standing to Challenge Constitutionality of Weapon Enhancement and Dangerous Offender Statutes: To challenge the constitutionality of a criminal statute or procedure, the defendant must show a direct personal injury resulting from application of the law in question. The Supreme Court held that a defendant had standing to challenge both Montana's weapon enhancement statute and dangerous offender statute because he faced direct injury to his liberty interests through application of those laws. St. v. Krantz, 241 M 501, 788 P2d 298, 47 St. Rep. 454 (1990), followed, with regard to standing to challenge criminal restitution statutes, in St. v. Thaut, 2004 MT 359, 324 M 460, 103 P3d 1012 (2004).

Habeas Corpus Inappropriate Remedy: In an original proceeding before the Supreme Court, petitioners protested the physical conditions under which they were held in a county jail. They alleged a tort cause of action and violation of their constitutional right to be free from cruel

and unusual punishment. They sought relief under the habeas corpus and declaratory judgment statutes. Habeas corpus is not an appropriate remedy because it allows a prisoner to challenge the legal sufficiency of the cause for his incarceration, not the physical conditions under which he is held. Gates v. Missoula County Comm'rs, 235 M 261, 766 P2d 884, 45 St. Rep. 2370 (1988).

Death Penalty Upon Finding of Aggravating Circumstances — Not Cruel and Unusual Punishment: Defendant maintained that 46-18-305 allowed the imposition of cruel and unusual punishment because it did not sufficiently narrow the class of death-eligible defendants. The Supreme Court disagreed, noting that this argument was previously rejected in St. v. McKenzie, 186 M 481, 608 P2d 428 (1980). St. v. Dawson, 233 M 345, 761 P2d 352, 45 St. Rep. 1542 (1988).

Reference to Victim Impact Information by Sentencing Judge Not Cruel and Unusual Punishment: Defendant claimed the death sentence was improper because the sentencing judge referred to the victim impact information contained in the presentence investigation report. Defendant cited the holding in Booth v. Maryland, 482 US 496, 96 L Ed 2d 440, 107 S Ct 2529 (1987), that it was a violation of the eighth amendment of the U.S. Constitution (similar to Art. II, sec. 22, Mont. Const.) for a sentencing jury to refer to information in a victim impact statement during the sentencing stage of a capital murder trial. The Montana Supreme Court held that Booth was factually distinguishable from Montana sentencing procedures, noting that a judge rather than a jury performs sentencing under Montana law. Furthermore, the judge may be allowed to hear and rule on the admissibility of evidence that the jury is not allowed to hear, yet he is still responsible for sentencing. Absent evidence that the judge was adversely affected by victim impact information, there was no constitutional violation. St. v. Keith, 231 M 214, 754 P2d 474, 45 St. Rep. 556 (1988), followed in St. v. Dawson, 233 M 345, 761 P2d 352, 45 St. Rep. 1542 (1988), and Kills On Top v. St., 2000 MT 340, 303 M 164, 15 P3d 422, 57 St. Rep. 1444 (2000).

Bail Not Excessive: Defendant was not effectively denied his right to bail by reason of excessive bail. The court considered the factors in 46-9-301 and set bail in an amount calculated to ensure defendant's presence at future criminal proceedings. St. v. Pease, 227 M 424, 740 P2d 659, 44 St. Rep. 1203 (1987).

Transfer From State Hospital to State Prison — Not Cruel and Unusual Punishment: District Court's amended sentencing order transferring defendant from Montana State Hospital at Warm Springs to Montana State Prison did not constitute cruel and unusual punishment when it was based on medical opinions that the defendant did not suffer from a treatable mental illness. St. v. Korell, 222 M 112, 720 P2d 688, 43 St. Rep. 1101 (1986).

Incarceration of Claustrophobic Not Cruel and Unusual Punishment Per Se: The court found that evidence did not support defendant's claim of being claustrophobic, but that if it did, the condition would be but one factor to consider and would not foreclose incarceration. St. v. Johnson, 221 M 503, 719 P2d 1248, 43 St. Rep. 1010 (1986).

Driver's License — Property Interest, Not Right — Revocation Not Cruel and Unusual Punishment: Revocation of driver's license under habitual traffic offender's law is civil in nature, and the due process standards are not as strict as in criminal actions. The law's predispositional court hearing satisfies due process rights, and a postdispositional hearing is not necessary. Licensing drivers is within the police power of the state, and the fact that the law gives a judge no discretion to determine who is a habitual traffic offender or the consequences of being one does not constitute cruel or unusual punishment. State ex rel. Majerus v. Carter, 214 M 272, 693 P2d 501, 41 St. Rep. 2468 (1984).

Jail Sentence for DUI Not Cruel and Unusual Punishment: The defendant, who has an extensive record of driving under the influence of alcohol, was convicted on three counts of driving under the influence (DUI) and sentenced to serve 10 months in the county jail. The defendant contends her sentence is cruel and unusual punishment and a denial of equal protection because it may be greater than would be served in the state prison for a more serious offense since county jail inmates are not entitled to statutory good time allowance or parole eligibility as are prison inmates. However, the sentence falls within the maximum authorized by statute and is not so disproportionate to the crime that it shocks the conscience and outrages the moral sense of the community or of justice. Therefore, the sentence imposed is not cruel and unusual punishment which would render it unconstitutional. St. v. Bruns, 213 M 372, 691 P2d 817, 41 St. Rep. 2178 (1984).

Insanity Defense Restriction — Not Cruel and Unusual: Defendant, a Vietnam veteran, had several disturbing experiences during the war. He had psychological problems upon his return. While working at St. Patrick Hospital in Missoula, he developed animosity towards his supervisor. He felt he had to kill his supervisor before the supervisor killed him. He armed himself and went

to the supervisor's home, where he entered and began shooting. In an ensuing struggle, a knife was also used and both men were injured. Defendant was charged with attempted deliberate homicide and aggravated assault. Defendant gave notice he intended to rely on a mental disease or defect to prove he did not have the particular state of mind that is an essential element of the offense charged. Defendant contended that Montana's abolition of insanity as an affirmative defense violated the eighth amendment to the United States Constitution's prohibition of cruel and unusual punishment (similar to Art. II, sec. 22, Mont. Const.). The Supreme Court held that the criminal code does not permit punishment of a mentally ill person who has not committed a crime. The sentencing court is required to review the convicted defendant's mental condition at the time of the offense under 46-14-311. If the court finds a mental disease or defect existed, the defendant is placed in an appropriate institution for care and treatment. This independent review of mental condition is designed to prevent the imposition of cruel and unusual punishment. St. v. Korell, 213 M 316, 690 P2d 992, 41 St. Rep. 2141 (1984), followed in St. v. Cowan, 260 M 510, 861 P2d 884, 50 St. Rep. 1153 (1993).

Three Hundred-Year Prison Sentence of Mentally Ill Defendant Upheld: Sentencing defendant, who was found mentally ill but criminally culpable, to the Montana State Prison for a term of 300 years without the possibility of parole or furlough was not cruel and unusual punishment. The District Court had stated, among other things, that defendant was very dangerous and there was no treatment program that would alter his behavior. St. v. Watson, 211 M 401, 686 P2d 879, 41 St. Rep. 1452 (1984).

Youth in Need of Supervision (Now Youth In Need of Intervention) Who Violates Probation by Truancy Adjudged Delinquent Youth: The Montana Youth Court Act, which allows a youth in need of supervision (now youth in need of intervention) who has violated probation to be adjudged a delinquent youth, is not unconstitutional as violative of the due process, equal protection, or cruel and unusual punishment provisions of the United States and Montana Constitutions. The Supreme Court rejected appellant's assertion that a juvenile status offender who violated the terms of her probation by truancy should not be considered a delinquent youth and subjected to greater punishment for the same conduct which originally gave the Youth Court authority to designate her a youth in need of supervision (now youth in need of intervention). In re C.H., 210 M 184, 683 P2d 931, 41 St. Rep. 997 (1984).

Partially Disabled Defendant — Excessive Sentence: Ordinarily a sentence is not cruel and unusual punishment if it is within the maximum established by statute, and review properly lies with the Sentence Review Division. The fact that defendant is partially disabled does not automatically render him incapable of harming other persons or society, and the facts here are sufficient to justify the designation of dangerous offender. St. v. Austad, 197 M 70, 641 P2d 1373, 39 St. Rep. 356 (1982), followed in St. v. Peck, 263 M 1, 865 P2d 304, 50 St. Rep. 1692 (1993).

Death Penalty Not Disproportionate to Crime: When a life has been taken by an offender, it cannot be said that the punishment of death is invariably disproportionate to the crime. McKenzie v. Osborne, 195 M 26, 640 P2d 368, 38 St. Rep. 1745 (1981), followed in St. v. Keith, 231 M 214, 754 P2d 474, 45 St. Rep. 556 (1988).

Death Penalty — Public Attitude Considered: Petitioner alleged that the death penalty is imposed so rarely that it does not deter crime and serves no legitimate state interest. The U.S. Supreme Court has held that the death penalty is not per se cruel and unusual. Inhumane punishment is forbidden, as is punishment that does not suit the crime. The court looks to "objective indicia that reflect the public attitude toward a given sanction", because an assessment of contemporary values concerning the infliction of a challenged sanction is relevant to the application of the eighth amendment to the United States Constitution (Art. II, sec. 22, Mont. Const.). Montana voters elected to retain capital punishment, and the Legislature voted to reject an attempt to change the penalty to a different means of inflicting death. The State appears to have retained a legitimate interest in capital punishment. The District Judge properly dismissed the claim. Fitzpatrick v. St., 194 M 310, 638 P2d 1002, 38 St. Rep. 1448 (1981).

Jury Not Involved in Sentencing — Different Factors Required: Petitioner claimed he was denied constitutional rights because the jury was not involved in the sentencing determination; he was sentenced to hang. The factor of overriding importance in sentencing schemes is that the trial and sentencing must be bifurcated, with different factors considered at each. The factors considered by a judge in imposing the death penalty are not elements of the crime. There is no constitutional requirement that a jury make the determination to impose the death penalty. Petitioner's claim was properly dismissed. Fitzpatrick v. St., 194 M 310, 638 P2d 1002, 38 St. Rep. 1448 (1981).

Defendant Sane at Time of Crime — Insane at Other Times: Defendant, convicted of aggravated assault, contended that sentencing a man suffering from severe mental illness to prison violates the constitutional ban against cruel and unusual punishment as well as 53-21-101. When a defendant is convicted and claims that he was suffering at the time of the crime from a mental disease or defect that rendered him incapable of conforming his conduct to the requirements of the law, the sentencing judge is to consider the relevant evidence of the defendant's disorder. If the judge finds the defendant did not suffer mental illness at the time of the crime, he is to be sentenced according to the guidelines in Title 46, ch. 18. If the finding is to the contrary, the defendant must be sentenced to Warm Springs. Despite the lack of provisions in Title 46, ch. 14, for sentencing a defendant who was sane at the time of the crime but may be insane at other times, Title 53, ch. 21, does not apply to criminal defendants. The defendant's claim that he is covered by Title 53, ch. 21, is in error. Without a finding of insanity followed by sentencing to a penal institution without provision for adequate treatment, defendant has suffered no statutory or constitutional violation. St. v. Mercer, 191 M 418, 625 P2d 44, 38 St. Rep. 312 (1981).

Delay in Determination as Nondangerous: Delay of 5 months from conviction until defendant was declared "nondangerous" because the judge wanted a psychological evaluation of the defendant did not constitute cruel and unusual punishment and was not void for lack of certainty, nor was the time taken unreasonable in that it was in the interest of justice to obtain more information about the offender. St. v. Higley, 190 M 412, 621 P2d 1043, 37 St. Rep. 1942 (1980).

Hanging as Cruel and Unusual Punishment: There is no evidence that shows that death from hanging, when properly carried out, is anything other than swift and immediate or that hanging results in any more suffering than that associated with other modes of execution. The Supreme Court has no power to change the legislatively settled provisions of the sentence in the absence of constitutional violation. St. v. Coleman, 185 M 299, 605 P2d 1000 (1979).

Cruel and Unusual Punishment — Length of Sentence: The general rule is that a sentence within the maximum authorized by law is not cruel and unusual. The discretion of the trial judge cannot be called into question considering: (1) the number of counts for which defendant was convicted; (2) his unbelievable arrogance and lack of remorse; (3) that the sentence was only 25% of that allowed by law; and (4) all the other circumstances of the case. St. v. Bretz, 185 M 253, 605 P2d 974 (1979).

Suspended Sentence Conditioned on Restitution Not Cruel and Unusual Punishment: Conditioning suspension of the last 30 years of a 56-year sentence on restitution, which included restitution for three counts for which defendant was acquitted, did not constitute cruel and unusual punishment or an excessive fine considering defendant's indigent status. Restitution, particularly in theft-type convictions, is a proper condition for suspension on probation. St. v. Bretz, 185 M 253, 605 P2d 974 (1979).

Sentence Under Persistent Offender Statute Not Cruel and Unusual — Fairness Question for Sentence Review Board: A sentence of 100 years is within the maximum allowable by the persistent felony offender statute, and as such does not violate the eighth amendment to the United States Constitution. Challenges to the equitability of a sentence as opposed to its legality are properly directed to the sentence review board. St. v. Metz, 184 M 533, 604 P2d 102 (1979).

Constitutionality of Statute — Standing to Challenge: In a prosecution for attempted deliberate homicide, the court did not err in denying defendant's motion to strike the information filed against the defendant, which motion alleged the unconstitutionality of the death penalty. The defendant was neither convicted of attempted deliberate homicide, the crime for which he could have been sentenced to death, nor was he in fact sentenced to death. In St. v. Johnson, 75 M 240, 243 P 1073 (1926), it was held that a defendant cannot question the provisions of an act which do not apply to his case. This case is controlling here. St. v. Kirkland, 184 M 229, 602 P2d 586 (1979).

Persistent Felony Offender Sentence — Presumption of Constitutionality: Following a conviction for attempted deliberate homicide, the defendant was sentenced as a persistent felony offender to 30 years in prison without possibility of parole. While the defendant claims the sentence to be unconstitutional, it was held in St. v. Karathanos, 158 M 461, 493 P2d 326 (1972), that a sentence within statutory limits is presumed to be constitutional. The defendant has the burden of overcoming the presumption and has not done so. St. v. Kirkland, 184 M 229, 602 P2d 586 (1979).

Findings of Sentence Review Board — Sentence Not Disproportionate: Given the function of the sentence review board, its decision to leave as originally imposed a 40-year sentence for robbery amounts to an implicit finding that the sentence was not so greatly disproportionate to the crime so as to constitute cruel and unusual punishment. In re Jones, 176 M 412, 578 P2d

1150 (1978), clarified in Driver v. Sentence Review Div., 2010 MT 43, 355 Mont. 273, 227 P.3d 1018, to the extent that the proper standard of sentence review by the Sentence Review Division is first whether the sentence imposed by the District Court is presumed correct, and after a hearing, whether this presumption has been overcome and whether a new sentence should be imposed, after determining if the original sentence was clearly inadequate or excessive.

Sentence Not Excessive — Persistent Felony Offender: A 20-year sentence imposed upon conviction for carrying a concealed weapon did not constitute cruel and unusual punishment as excessive and disproportionate to the offense because defendant was being sentenced as a persistent felony offender. St. v. Maldonado, 176 M 322, 578 P2d 296 (1978).

Death Penalty: This section does not prohibit the death penalty as cruel and unusual punishment. St. v. McKenzie, 171 M 278, 557 P2d 1023 (1976).

DECISIONS UNDER 1889 CONSTITUTION

Cruel and Unusual Punishment: Fourteen-year prison sentence with 4 years suspended was not cruel and unusual punishment under Art. III, sec. 20, 1889 Mont. Const., or the eighth amendment to the United States Constitution on conviction of first-degree burglary where maximum prison sentence provided by statute was 15 years. St. v. Harris, 159 M 425, 498 P2d 1222 (1972).

Tax Penalty: The double penalty provided for in the income tax statute did not violate Art. III, sec. 20, 1889 Mont. Const. State ex rel. Hardy v. St. Bd. of Equalization, 133 M 43, 319 P2d 1061 (1958).

Penalty for Failure to File Annual Statement: A fine is a penalty exacted by the state for some criminal offense, and this provision has no application to the penalty imposed upon the directors of a corporation for neglect to file an annual statement required by law. Daily v. Marshall, 47 M 377, 133 P 681 (1913).

Law Review Articles

Montana's Death Penalty After State v. McKenzie, Tweeten, 38 Mont. L. Rev. 209 (1977).

Constitutional Law—Cruel and Unusual Punishment—Solitary Confinement, Kirwin, 29 Mont. L. Rev. 242 (1968).

Section 23. Detention.

Convention Notes

Deleted provision in 1889 constitution that depositions may be used in a trial if the witness who gave it is dead or out of state. Retained language is identical to 1889 constitution.

Compiler's Comments

Former Constitutional Provision: This section is similar to Art. III, sec. 17, 1889 Mont. Const.

Case Notes

DECISIONS UNDER 1889 CONSTITUTION

Introduction of Deposition: Article III, sec. 17, 1889 Mont. Const., allowing for the taking of depositions, did not violate Art. III, sec. 16, 1889 Mont. Const., which provided for the right to confrontation, and depositions taken under authority of Art. III, sec. 17, 1889 Mont. Const., were admissible at trial upon a showing that the witness was either dead or not within the jurisdiction. Tooker v. St., 147 M 207, 410 P2d 923 (1966).

Criminal Cases — When Deposition to Be Taken: In cases of a criminal nature, depositions can be taken, on notice, in the presence of the accused and his counsel "or without their presence, if they shall fail to attend". St. v. Vanella, 40 M 326, 106 P 364 (1910).

Section 24. Rights of the accused.

Convention Notes

Identical to 1889 constitution. Establishes fundamental procedural rights of a person accused of crime.

Compiler's Comments

Former Constitutional Provision: This section is the same as Art. III, sec. 16, 1889 Mont. Const.

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DECISIONS UNDER 1972 CONSTITUTION

RIGHT TO APPEAR AND DEFEND IN PERSON

Entry of Trial Court Judge Into Jury Room Without Defendant — No Reversible Error Based Defendant's Right to Be Present — Brief Interaction Not Structural — Harmless Error Analysis Applied: The defendant moved for a new trial after a jury convicted him of three counts of assault on a police officer. One issue asserted by the defendant was that he was deprived of his right to right to be present when the District Court Judge approached the jury room while the jury was deliberating, briefly addressed the jury regarding whether it would finish that night, and then left. The District Court held a hearing regarding the interaction with the jury outside the defendant's presence and denied the defendant's motion for a new trial. On appeal, the Supreme Court determined that although the defendant's right to be present was violated when the judge spoke to the jury outside his presence during a critical stage of the proceedings, the brief interaction between the judge and the jury was not structural in nature. As such, the court considered the issue under the harmless error standard, which required the state to demonstrate that there was no reasonable possibility that the violation prejudiced the defendant. Under this standard, the testimony of the witnesses showed that the interaction was very brief, and the evidence failed to show that the judge instructed the jury to finish early or consider other issues. Consequently, the violation of the defendant's right to presence was not reversible error, and the District Court was affirmed. St. v. Northcutt, 2015 MT 267, 381 Mont. 81, 358 P.3d 179. See also St. v. Tapson, 2001 MT 292, 307 Mont. 428, 41 P.3d 305.

Jury Deliberation Adjournment — Right to Presence — Jury Pool Procedures — Failure to Timely Object: Plain error review was inappropriate in a theft and trespass appeal concerning multiple issues that the defendants failed to raise in the trial court. The defendants moved for a mistrial based on a 3-week adjournment in jury deliberations, but a motion for a new trial does not take the place of a timely objection. On appeal, the defendants also objected based on the defendants' right to be present at critical stages of the trial, but the defendants did not object during the trial when the judge briefly stepped into the hallway with witnesses and jurors to conduct an inquiry into whether there was inappropriate contact between the witnesses and jurors and then immediately reported back on his findings. Last, the defense stipulated that the jury was properly summoned and selected during trial and failed to timely object during the sentencing phase when put on notice that three individuals who were not county residents had been called to serve in the jury pool but did not serve on the jury and were not the subject of peremptory challenge. St. v. Robertson, 2014 MT 279, 376 Mont. 471, 336 P.3d 367.

Defendant Absent From Deposition of State Witness — Right to Presence Raised for First Time on Appeal — Procedural Requirement for Preserving Right Clarified: The defendant's counsel, but not the defendant, attended the deposition of a witness for the state. Portions of the deposition were later introduced at trial. Following his conviction, the defendant appealed and argued that his absence from the deposition violated his right to be present at all critical stages of his trial. The state argued that the defendant could not raise the issue for the first time on appeal. The Supreme Court clarified the procedural requirement for preserving a right to presence claim for appellate review, holding that a right to presence claim not presented to the trial court is not considered unless plain error review is warranted or ineffective assistance of counsel is claimed. In this case, the Supreme Court concluded that the defendant's argument was not sufficient to

warrant plain error review and declined to consider it. St. v. Reim, 2014 MT 108, 374 Mont. 487, 323 P.3d 880.

Absence at Sidebar Conference During Jury Selection — No Violation of Right to be Present: Defendant appealed his conviction, arguing that he was deprived of his fundamental right to be present at all critical stages of the proceedings against him when he was not present at a sidebar conference during jury selection, after which the District Court removed a potential juror from the jury pool. The Supreme Court did not address whether a sidebar conference during jury selection constitutes a critical stage but, rather, affirmed on the basis that the defendant's absence did not prejudice him. Distinguishing St. v. Bird, 2002 MT 2, 308 Mont. 75, 43 P.3d 266, the Supreme Court concluded that the defendant's absence from the sidebar conference did not rise to the level of structural error and that the District Court mooted any potential prejudice to the defendant by removing the prospective juror from the jury pool upon stipulation by the parties. St. v. Wilson, 2013 MT 70, 369 Mont. 282, 297 P.3d 1208.

Voluntary Failure to Appear at Show Cause Hearing — No Denial of Right to Appear and Defend: The defendant argued on appeal that she was denied the right to attend all critical stages of her trial because she was not present at the original show cause hearing for her criminal endangerment charge. However, the defendant was not denied her right to appear and defend because she voluntarily failed to attend the show cause hearing, thus waiving her right to be personally present. St. v. Bekemans, 2013 MT 11, 368 Mont. 235, 293 P.3d 843.

No Right to Be Present at Omnibus Hearing: Because the defendant's omnibus hearing did not include discussion or resolution of any substantive issues pertaining to the defendant's case that might create the potential for substantial prejudice, the omnibus hearing did not constitute a critical stage of the criminal proceedings requiring the defendant's presence. St. v. Clary, 2012 MT 26, 364 Mont. 53, 270 P.3d 88.

Waiver of Right to Counsel Not Invalidated by Expression of Discontent With Attorney: The defendant, dissatisfied with his counsel's inaction on his case, requested that the District Court allow him to proceed pro se, and after concluding that the defendant was voluntarily, knowingly, and intelligently waiving his right to counsel, the District Court granted the defendant's request. The defendant appealed his subsequent conviction, arguing that the District Court erred in allowing him to proceed pro se without conducting further inquiry into his complaints about his attorney. The Supreme Court affirmed, concluding that the defendant's expression of discontent with his attorney was not sufficient to invalidate his assertion of his right to proceed pro se. Because the defendant did not request substitute counsel, the District Court was not required to conduct further inquiry into his request to proceed pro se. St. v. Clary, 2012 MT 26, 364 Mont. 53, 270 P.3d 88.

Defendant's Absence From Meeting to Answer Jury's Question on Definition of Element of Crime — No Prejudice: During Becker's trial on drug charges, the trial court held a conference to settle jury instructions. Becker was present with counsel during the conference. During jury deliberations, the jury sent a note to the judge requesting a definition for the term "possession" with respect to possession of precursors to dangerous drugs. The judge met with the prosecutor and Becker's counsel, without Becker present, to discuss a response to the note. The judge decided not to instruct the jury any differently than they had been previously instructed and, without meeting with the jury, referred the jury to the original jury instruction defining possession. Following conviction, Becker claimed ineffective assistance of counsel based on his attorney's failure to raise the issue of Becker's absence during a critical stage of the trial. The Supreme Court held that Becker's constitutional claims failed because he could not demonstrate prejudice in the trial court's referral of the jury to instructions that had been previously settled in Becker's presence. Becker v. St., 2010 MT 93, 356 Mont. 161, 232 P.3d 376.

Defendant's Absence From In-Chambers Trial Conferences Not Considered Prejudicial — No New Trial Based on Lack of Fair Trial: At Price's trial for sexual intercourse without consent, Price was excluded from 11 in-chambers conferences. Price contended that his absence from the conferences violated his right to be present at all criminal proceedings against him and that he was therefore denied a fair trial. The Supreme Court assumed for purposes of analysis that the conferences constituted critical stages of the trial and that Price did not validly waive the right to be present at the conferences. Nevertheless, the court concluded that failure to include Price in the conferences at worst constituted trial error, rather than structural error that would require automatic reversal, so the court examined the record to determine whether Price was prejudiced and concluded that he was not. The record was not ambiguous as to what occurred at the conferences, and nothing that occurred at the conferences concerned or affected the framework within which Price's trial proceeded or necessarily rendered the trial fundamentally

unfair. The one conference at which Price particularly contended that his presence should have been required was one in which a juror expressed concern regarding possible bias toward Price. However, Price's concern was irrelevant when the juror was removed from the jury. After review of the complete trial record, the court concluded that Price's absence from the conferences did not cause any conceivable prejudice depriving Price of a fair trial. Absent reversible error, the District Court was affirmed. St. v. Price, 2009 MT 129, 350 M 272, 207 P3d 298 (2009). See also St. v. Kennedy, 2004 MT 53, 320 M 161, 85 P3d 1279 (2004), St. v. Mann, 2006 MT 160, 332 M 476, 139 P3d 159 (2006), St. v. Matt, 2008 MT 444, 347 M 530, 199 P3d 244 (2008), and Rosling v. St., 2012 MT 179, 366 Mont. 50, 285 P.3d 486.

Defendant's Right to Be Present at In-Chambers Conference on Evidentiary Issues — Reversal Granted Absent Waiver of Right: At the close of the state's case-in-chief during Matt's deliberate homicide trial, the trial judge, prosecutor, and defense counsel met in the judge's chambers to discuss evidentiary matters and Matt's motion to dismiss for lack of evidence. Matt was not present during the conference, and defense counsel stated that Matt's presence was unnecessary because the issues were legal and Matt "doesn't get any of this anyway". Following conviction, Matt appealed on grounds that he had the right to be present at the conference because it was a critical stage of the trial. The Supreme Court agreed and reversed. The in-chambers conference was a critical stage of the trial, so Matt's right to be present applied. Defense counsel's statement that Matt did not need to be present was not a valid waiver of Matt's right to be present because there was no on-the-record personal waiver, so Matt did not knowingly and intelligently waive the right. Once it was established that Matt's fundamental right to be present was violated, prejudice was presumed. Although not all constitutional violations amount to reversible error, if the violation contaminates the framework within which the trial proceeds or if the constitutional right is so basic that its infraction cannot be treated as harmless, the violation is considered a structural error and reversal is automatic. If the violation does not fall within this category, the question is whether the violation was harmless, and the burden is on the state to demonstrate that there is no possibility that violation of the right to be present prejudiced the defendant. In this case, nothing discussed at the conference and ruled on by the District Court concerned or affected the framework within which Matt's trial proceeded or necessarily rendered the trial unfair, so the violation was not considered structural and subject to automatic reversal. Thus, the burden fell to the state to show that the violation was harmless and not prejudicial. The state did not provide a harmless error analysis on appeal and therefore did not meet its burden. The case was remanded for a new trial. St. v. Matt, 2008 MT 444, 347 M 530, 199 P3d 244 (2008), following Chapman v. Calif., 386 US 18 (1967), Ranta v. St., 1998 MT 95, 288 M 391, 958 P2d 670 (1998), St. v. Tapson, 2001 MT 292, 307 M 428, 41 P3d 305 (2001), St. v. Bird, 2002 MT 2, 308 M 75, 43 P3d 266 (2002), and St. v. McCarthy, 2004 MT 312, 324 M 1, 101 P3d 288 (2004), and followed in St. v. Godfrey, 2009 MT 60, 349 M 335, 203 P3d 834 (2009), regarding determination of trial error rather than structural error.

Conviction Not Entered in Violation of Defendant's Right to Be Present at Trial — Use of Prior DUI Conviction to Support Felony DUI Charge Not Error: The state sought to use three prior DUI convictions to enhance Weaver's 2005 DUI charge to felony DUI, fourth offense. Weaver contended that use of the prior 1996 conviction was constitutionally infirm because he had been tried in absentia in violation of his right to be present at the proceedings and that any waiver of that right had to be proved to be knowing, voluntary, and specific as required by 46-16-122. Because Weaver swore on direct examination that he did not have notice of the 1996 trial date, the burden shifted to the state to provide direct evidence that the 1996 conviction was not entered in violation of Weaver's rights. The Supreme Court concluded that the state met its burden. Oral and documentary evidence showed that either Weaver knew of the 1996 trial date and was willfully absent or he kept himself deliberately ignorant of the trial date, thus waiving the right to be present. When a defendant's failure to know of a continued trial date is directly attributable to the defendant's efforts to keep himself ignorant of that date, the defendant may not later complain about a lack of knowledge. Thus, the 1996 conviction was not entered in violation of Weaver's right to be present, and the District Court correctly ruled that the 1996 conviction could be used to support a charge of felony DUI. St. v. Weaver, 2008 MT 86, 342 M 196, 179 P3d 534 (2008), following U.S. v. Houtchens, 926 F2d 824 (9th Cir. 1991).

Failure of Counsel to Raise Issue of Defendant's Absence at In-Chambers Meetings as Ineffective Assistance — Failure to Raise Issue on Direct Appeal Prejudicial: During Price's trial for sexual intercourse without consent, there were 12 in-chambers conferences between the trial judge and counsels at which various subjects were discussed, including jury selection, presentation of witnesses, witness testimony, exclusion of evidence, removal of certain jurors after trial began,

basic scheduling matters, and others. Price was present for only one conference. Price's trial counsel claimed that he had informed Price of the right to be present, but that Price declined to participate, and trial counsel waived Price's right to be present at 8 of the 11 conferences. Price attained new counsel for his appeal, and even though Price claimed that he never waived the right to be present at the conferences, appellate counsel failed to raise the issue of Price's absence, despite the holding in St. v. Bird, 2002 MT 2, 308 M 75, 43 P3d 266 (2002), that a defendant has the right to be present during critical stages of a trial. The District Court held that Price was not prejudiced because, taking into account the three meetings that counsel did not waive Price's right to be present, the outcome would not have changed had Price been there. Price appealed on grounds that the failure of appellate counsel to raise the issue constituted ineffective assistance. The Supreme Court agreed and reversed. There was a legitimate legal basis upon which to raise the issue that was sufficient to undermine confidence in the outcome of the appeal, and appellate counsel's failure to raise the issue constituted prejudicial error. The case was remanded to allow Price a new appeal on the issue. Price v. St., 2007 MT 307, 340 M 109, 172 P3d 1236 (2007). See also St. v. Riggs, 2005 MT 124, 327 M 196, 113 P3d 281 (2005).

Defendant's Presence Not Required During Settling of Jury Instructions: Section 46-16-410 specifically allows for a defendant's absence during the settling of jury instructions without the need for the trial court to obtain the defendant's voluntary, intelligent, and knowing waiver of the right to be present during this critical stage of the proceedings. St. v. Roedel, 2007 MT 291, 339 M 489, 171 P3d 694 (2007).

No Right of Defendant to Be Present at Stage of Trial That Did Not Occur: On the second day of trial, with defendant present, defense counsel brought to the trial judge's attention in chambers that a juror had been seen speaking with defendant's father in the hallway next to the courtroom. The father was not a witness, but the prosecutor stated that he would inform the father not to speak to the jurors. The trial judge was satisfied with the suggestion, defense counsel did not object, and the trial proceeded. Defendant later argued that his constitutional right to be present at all critical stages of the trial was violated when the trial court did not advise him of the right to question the juror regarding the alleged conversation. The Supreme Court held that defendant's right was not violated. The questioning of the juror never took place, so defendant could not claim the right to be present at a stage of the trial that never occurred. St. v. St. Germain, 2007 MT 28, 336 M 17, 153 P3d 591 (2007).

Plenary Review of Defendant's Right to Be Present at Trial: Whether a criminal defendant's right to be present at critical stages of trial has been violated is a constitutional question, and the Supreme Court's review of that question is plenary. St. v. St. Germain, 2007 MT 28, 336 M 17, 153 P3d 591 (2007). See also St. v. McCarthy, 2004 MT 312, 324 M 1, 101 P3d 288 (2004).

Exclusion of Defendant From Pretrial Meeting to Determine Whether Defendant Be Allowed to Proceed Pro Se Violative of Right to Be Present and Defend Oneself —Reversible Error: An alleged violation of the constitutional right to be present and appear at all criminal proceedings does not warrant automatic reversal. Rather, the Supreme Court considers the effect that a violation has on a defendant to determine whether a defendant has suffered any conceivable prejudice. In this case, Mann was excluded from a pretrial meeting to determine whether Mann would be represented by counsel or proceed pro se at trial on burglary and misdemeanor assault charges. This important determination implicated a substantial issue in the scope of the criminal proceedings, and excluding Mann from the meeting, at which Mann's counsel portrayed Mann in a negative light, violated Mann's right to be present and defend himself and right to effective assistance of counsel. Violation of these fundamental constitutional rights was sufficiently prejudicial to constitute reversible error, and the case was remanded for a new trial. St. v. Mann, 2006 MT 160, 332 M 476, 139 P3d 159 (2006).

Defendant's Voluntary Absence From Trial — Trial in Absentia Affirmed: Following arraignment in City Court on numerous misdemeanor charges, Clark was informed of a trial date. Clark's motion for a continuance because of gout was denied when the state objected on grounds that Clark had a history of continuing trials on the basis of a physical ailment. The morning of trial, Clark checked into the hospital complaining of chest pains, but the hospital was unable to verify Clark's physical complaints and released him. The court informed Clark through the nurse that the trial would progress, but Clark never appeared. Clark was tied in absentia and convicted on all but two charges. The District Court affirmed the City Court decision to try Clark in absentia, and on appeal, the Supreme Court affirmed as well. Clark knew of the trial date and was voluntarily absent from trial, thereby waiving the fundamental right to be present at trial. St. v. Clark, 2005 MT 169, 327 M 474, 115 P3d 208 (2005).

Consultation Between Judge and Jurors Outside Presence of Defendant Not Violative of Defendant's Right to Be Present at All Stages of Trial: After consulting defense counsel, the judge in Riggs's criminal trial met with two jurors outside Riggs's presence to address the jurors' concerns. One juror was concerned because he recognized a witness, and the other was concerned that he would have to forfeit a nonrefundable airline ticket because of the length of the trial. The judge addressed each concern off the record and concluded the matters. Riggs contended on appeal that the meetings violated his constitutional right to be present at all stages of trial. The Supreme Court agreed that a defendant's right to appear and defend in person is a fundamental right and that a defendant must be present throughout the entire trial. However, the court relied on U.S. v. Gagnon, 470 US 522 (1985), for the holding that a defendant has a right to be present at a given proceeding whenever the defendant's presence has a reasonably substantial relation to the fullness of the opportunity to defend against the charges. In this case, both interactions were brief interludes in a complex trial, Riggs had no role to play at either meeting, defense counsel consented to the trial court's approach, and Riggs made no persuasive claim of prejudice arising out of the episodes, so the Supreme Court concluded that Riggs's constitutional rights were not infringed. St. v. Riggs, 2005 MT 124, 327 M 196, 113 P3d 281 (2005).

Written Voluntary Waiver of Right to Be Present at Trial Properly Accepted: Rather than be present at the second day of trial, McCarthy signed a waiver of that fundamental right that was presented by his attorney. McCarthy later complained that the trial court erred by accepting the waiver without conducting a competency hearing and without determining whether the waiver was voluntary and whether McCarthy understood the consequences of the waiver. The Supreme Court found no error. McCarthy was informed through counsel of his right to be present, was afforded an opportunity to waive his rights, and made a knowing, intelligent, and voluntary waiver of the right to be present that was witnessed by the attorney and properly presented to the trial court for the record. There was no substantial evidence that McCarthy was incompetent to waive his right and thus no reason for the trial court to conduct a competency hearing prior to accepting the waiver. St. v. McCarthy, 2004 MT 312, 324 M 1, 101 P3d 288 (2004), distinguishing and following St. v. Tapson, 2001 MT 292, 307 M 428, 41 P3d 305 (2001), and St. v. Bird, 2002 MT 2, 308 M 75, 43 P3d 266 (2002).

Defendant Excluded From Trial — Defendant to Be Allowed to Reclaim Right to Be Present — Violation of Fundamental Right to Be Present Absent on-the-Record Personal Waiver: At Aceto's criminal trial, he initially represented himself with counsel on standby but became agitated and frustrated when questioning a witness, cursed the court and the witness, threw files at the witness, and was removed from the courtroom. The next day, outside the presence of the jury, Aceto apologized to the court and objected to his removal. The court ordered standby counsel to take over the defense and ordered that Aceto would not be allowed in the courtroom, but would be allowed to view the proceedings from the county detention center. Following conviction, Aceto appealed on grounds that his fundamental rights were violated because he was neither warned prior to removal from the courtroom nor allowed to return after he apologized. The Supreme Court agreed and reversed. The right to appear and defend in person is a fundamental right, and waiver of the right must be informed, intelligent, specific, voluntary, knowing, personal, and on the record. Once Aceto was ejected from the courtroom, he was not accorded the right to be physically present as an option that could be waived. Thus, the District Court violated Aceto's right to be present, as well as the letter of 46-16-122, in excluding Aceto from the courtroom without warning and refusing to allow him to return. St. v. Aceto, 2004 MT 247, 323 M 24, 100 P3d 629 (2004), following St. v. Bird, 2002 MT 2, 308 M 75, 43 P3d 266 (2002). See also Ill. v. Allen, 397 US 337 (1970), and Badger v. Cardwell, 587 F2d 968 (9th Cir. 1978).

Absence of Defendant From Critical Trial Proceeding Violative of Fundamental Right to Appear and Defend in Person — No Error Given Curative Action of Trial Court: During Kennedy's criminal trial, a juror communicated with one of the state's witnesses. The trial judge then met with the juror in chambers without Kennedy or any counsel present, and the juror admitted the conversation, but denied mentioning anything about it to the jury. The court then met with counsel in chambers, replaced the juror with an alternate, excluded the witness from testifying, and went on with the trial. Defense counsel moved for mistrial and dismissal with prejudice, but the motion was denied. On appeal, the Supreme Court held that excluding Kennedy from the conversation with the juror violated Kennedy's fundamental right to be present at all critical stages of trial to defend in person. Further, any waiver by defense counsel by failing to object was ineffective because Kennedy was never told that he had a right to be present or that the juror questioning was about to occur. However, Kennedy was not prejudiced or deprived of a fair trial by the error in light of the District Court's corrective actions. Thus, denial of a mistrial was not

an abuse of discretion. St. v. Kennedy, 2004 MT 53, 320 M 161, 85 P3d 1279 (2004), followed in St. v. Godfrey, 2009 MT 60, 349 M 335, 203 P3d 834 (2009).

Defendant's Exclusion From In-Chambers Individual Voir Dire Proceedings Violative of Right to Be Present at Critical Stages of Trial: Bird was accused of felony partner or family member assault. Prior to trial, the District Court conducted in-chambers voir dire specifically to elicit prospective jurors' personal feelings and experiences regarding domestic violence. Both the prosecutor and defense counsel were present, but Bird was not. Once the jury panel was passed for cause, the court recessed and met with counsel in chambers to allow the exercise of peremptory challenges, but again Bird was not included in the meeting. At the close of the meeting, the prosecutor noticed that Bird was not present and questioned whether the defendant's presence was necessary. The judge said that it was assumed that defense counsel wished to waive Bird's presence, and defense counsel stated that Bird had expressed no feelings about it one way or another. Bird was convicted and appealed on several grounds, including whether: (1) certain jurors should have been removed for cause; (2) defense counsel rendered deficient performance; (3) Bird should have been present during the individual voir dire; (4) Bird was prejudiced by certain testimony; and (5) the burden of proof was improperly shifted to Bird. The Supreme Court found the third issue to be dispositive. The court disagreed with the state's contention that Bird's presence at voir dire had been waived. The right of a defendant to be present at all critical stages of trial, including in-chambers individual voir dire, is a fundamental right that can be waived only if the trial court obtains an on-the-record personal waiver by the defendant, acknowledging that the defendant voluntarily, intelligently and knowingly waives that right. There can be no waiver by a person who does not know the person's rights or what is being waived. Bird was not informed of the constitutional right to be present during voir dire and was not given the opportunity to choose whether to participate, so not only did Bird not waive the constitutional right, he was never afforded the opportunity to waive it. Bird's exclusion from voir dire was a structural error that undermined the integrity of the entire trial, and constituted reversible error. St. v. Bird, 2002 MT 2, 308 M 75, 43 P3d 266 (2002), distinguished in St. v. Wilson, 2013 MT 70, 369 Mont. 282, 297 P.3d 1208, following St. v. Reed, 65 M 51, 210 P 756 (1922), and St. v. Allison, 116 M 352, 153 P2d 141 (1944), and distinguishing U.S. v. Gagnon, 470 US 522 (1985). See also St. v. Lamere, 2000 MT 45, 298 M 358, 2 P3d 204 (2000).

Entry of Trial Court Judge Into Jury Room Without Counsel, Defendant, and Court Reporter — Automatic Reversible Error Absent Recorded Waiver by Defendant of Constitutional Rights: On the second full day of jury deliberations in Tapson's trial on charges of sexual intercourse without consent, aggravated kidnapping, and attempted deliberate homicide, the trial judge met with counsel, on the record, to notify them that the jury had a verdict on one of the three counts, but was unable to reach a verdict on the other two counts. With Tapson present, the state suggested substituting the existing verdict form, which listed all three charges, with six verdict forms—one "guilty" form and one "not guilty" form for each of the three charges—to avoid the problem of the jury switching its current verdict on one charge for some sort of last minute compromise. The state also suggested that the judge take the forms into the jury room, rather than moving the jury and handling the matter in open court. Tapson's counsel stated that the defense did not have any objection to the proposition, so the judge took the forms into the jury room, without counsel or Tapson present, and returned 11 minutes later. There was no record of whether the judge spent the entire time with the jury, what the judge told the jury, whether the jury had any questions, or whether the judge gave any responses. Tapson was subsequently convicted of attempted deliberate homicide, although the jury could not reach a verdict on the other charges. Tapson was sentenced to life imprisonment, but appealed the conviction and sentence. The Supreme Court noted Tapson's fundamental constitutional right to be present and defend in person and by counsel, and the fundamental right to a public trial, which extends to the entire trial, including the judge's instructions to the jury. The state contended that defense counsel waived Tapson's right to be present, but the Supreme Court declined to engage in presumptions of waiver, holding that if a defendant chooses to waive these constitutional rights, the trial court must obtain an on-the-record personal waiver, by the defendant, acknowledging that the defendant voluntarily, intelligently, and knowingly waives the rights. Thus, when there is some circumstance arguably making it necessary for a trial judge to enter the jury room while the jury is present, the court must contemporaneously explain to the defendant, on the record, the constitutional right to be present at all critical stages of the trial and the right to a public trial. The defendant may then choose to waive those rights. However, absent a contemporaneous, personal, knowing, voluntary, intelligent, on-the-record waiver by the defendant, if a judge enters a jury room while the jury is present and without counsel, the defendant, and the court reporter, reversal will be automatic.

Tapson's constitutional rights were violated, so the case was reversed and remanded for further proceedings. St. v. Tapson, 2001 MT 292, 307 M 428, 41 P3d 305 (2001), following St. v. Reed, 65 M 51, 210 P 756 (1922), St. v. Allison, 116 M 352, 153 P2d 141 (1944), U.S. v. U.S. Gypsum Co., 438 US 422 (1978), and Commonwealth v. Patry, 722 NE 2d 979 (Mass. App. Ct. 2000), and distinguishing St. v. Harris, 1999 MT 115, 294 M 397, 983 P2d 881 (1999), and St. v. LaDue, 2001 MT 47, 304 M 288, 20 P3d 775 (2001).

Unequivocal Relinquishment of Right to Counsel Required Before Self-Representation Allowed: A defendant has a constitutional right to assistance of counsel and also has a constitutional right to proceed pro se, but before an accused may forego the right to counsel and may self-represent, waiver of the benefits associated with the right to counsel must be unequivocal, voluntary, knowing, and intelligent (see St. v. Langford, 267 M 95, 882 P2d 490 (1994)). In this case, the record showed that although Swan asked to be allowed to represent himself, what he actually hoped for was that new counsel be appointed and that he be allowed access to the law library. Thus, the request for self-representation was anything but unequivocal, and the District Court did not err in refusing the request. St. v. Swan, 2000 MT 246, 301 M 439, 10 P3d 102, 57 St. Rep. 1033 (2000), followed in St. v. Browning, 2006 MT 190, 333 M 132, 142 P3d 757 (2006).

Deletion of Hanging as Form of Capital Punishment Not Denial of Ability to Present Argument Regarding Cruel and Unusual Punishment: Pursuant to the version of 46-19-103 that was in effect at the time that Langford was sentenced for execution, he affirmatively elected that death be imposed by hanging rather than lethal injection. Langford appealed to the District Court for a declaration that execution by hanging was cruel and unusual punishment that violated the eighth amendment to the U.S. Constitution. The District Court denied the motion, holding that Langford's choice of hanging rendered the cruel and unusual punishment argument moot. Langford appealed to the appropriate federal courts for a writ of habeas corpus, applying the same argument. During the pendency of Langford's federal habeas corpus proceedings, the Montana Legislature met and amended 46-19-103 by removing the hanging option, rendering the federal proceedings moot and nonjusticiable. Langford asserted that the amendment to 46-19-103 violated numerous constitutional provisions by denying him the ability to present the cruel and unusual punishment argument to the federal courts. The Supreme Court found no merit in Langford's argument that the state Attorney General advised the Legislature to amend 46-19-103 in order to deny Langford the grounds for appeal, because the Attorney General supported but did not initiate the legislation. Further, the court did not agree with Langford's assertion that the amendment rendered the time that Langford spent in pursuing the cruel and unusual punishment argument retroactively useless and chargeable to the state as a form of cruel and unusual punishment in itself, because the eighth amendment argument was not the only claim that Langford pursued. Therefore, the entire time could not be charged to the state as being related to the amendment to 46-19-103. Having concluded that Langford failed to establish any constitutional violations, his petition for writ of injunction staying his execution was denied. Langford v. St., 287 M 107, 951 P2d 1357, 54 St. Rep. 1522 (1997).

Knowing and Intelligent Waiver — Application of Keen Standards — Colt and Langford Followed: Woods, an inmate at the Swan River Correctional Training Center, or "boot camp", made admissions that he killed two people to a trustee counselor and to other boot camp inmates in an anger management workshop. Woods later made the same admission to the boot camp superintendent. After representing himself before the District Court, Woods was convicted of the homicides. Woods argued before the Supreme Court that the District Court failed to adequately warn him of the dangers in appearing pro se, citing U.S. v. Keen, 96 F3rd 425 (9th Cir. 1996), for the proposition that he should have been advised of: (1) the nature of the charges against him; (2) the possible penalties; and (3) the dangers and disadvantages of self-representation. The Supreme Court held that Keen does not require a structured, formalistic application of those three requirements and that the Supreme Court had in any event rejected an argument similar to Woods's in St. v. Colt, 255 M 399, 843 P2d 747 (1992). The Supreme Court reviewed the transcript containing the discussion between Woods and the District Court on Woods's waiver of counsel and also held, citing St. v. Langford, 267 M 95, 882 P2d 490 (1994), that Woods's waiver of his right to counsel was unequivocal. St. v. Woods, 283 M 359, 942 P2d 88, 54 St. Rep. 617 (1997).

Section Not Violative of Constitutional Right to Jury Trial: Defendant argued that 46-14-312 allows the court to decide the issue of mental disease or defect when considering the issue as part of the sentencing scheme, in violation of the constitutional right to a trial by jury guaranteed by the sixth amendment to the U.S. Constitution (similar to this section). However, by the time 46-14-312 is applied, defendant has already received a trial. The effect of considering the issue

at sentencing does not nullify the jury verdict but rather provides a further precaution for the protection of both defendant and society by allowing mental disease or defect to be taken into account as it relates to appropriate institutionalization. St. v. Byers, 261 M 17, 861 P2d 860, 50 St. Rep. 1162 (1993), overruled in part by St. v. Egelhoff, 272 M 114, 900 P2d 260, 52 St. Rep. 548 (1995).

Requiring Standby Counsel to Assist Defendant Not Following Procedure: The constitutional right to proceed pro se was not denied when the judge required standby counsel to assist in the examination of two of the state's witnesses. The Supreme Court is tolerant of a layman's lack of familiarity with procedure and the law, but an accused may conduct his own defense only so long as he is able and willing to abide by rules of procedure and substantive and procedural law. A person does not have a license to abuse the dignity of the courtroom. In this case, Colt repeatedly commented on the evidence, failed to pose proper questions, and attempted to testify on his own behalf while cross-examining witnesses. Only then, and after several admonishments, did the court order standby counsel to assist with two witnesses, and assistance was not intrusive or excessive. St. v. Colt, 255 M 399, 843 P2d 747, 49 St. Rep. 1003 (1992).

No Right of Defendant to Interview Witnesses When Represented by Counsel: Where the defendant to a burglary charge was denied the right to interview witnesses but his defense counsel was allowed to interview them, the District Court did not err in holding that the defendant's right to participate in his own defense was not violated. Most courts agree that a defendant cannot make his own defense and also have the assistance of counsel. Under the rationale of St. v. Armstrong, 172 M 296, 562 P2d 1129 (1977) (holding that a defendant represented by counsel does not have a constitutional right to address the jury), the defendant did not have the right to interview witnesses as he was adequately represented by counsel. St. v. Smith, 206 M 99, 670 P2d 96, 40 St. Rep. 1533 (1983).

Pro Se Counsel Held to Same Standards: A defendant who elects to represent himself cannot complain on appeal that the quality of his own defense acted to his detriment by not amounting to effective counsel. Here, defendant knowingly and intelligently relinquished his right to counsel and proceeded with his defense in his own behalf. He cannot complain that rules of procedure and laws should be applied less strictly against him. St. v. Poncelet, 187 M 528, 610 P2d 698 (1980).

Waiver of Counsel and Self-Representation: Counsel was appointed for defendant and was dismissed by him prior to trial. The court warned defendant of the disadvantages of self-representation and appointed standby counsel to assist defendant should he so request. Having made the choice of self-representation knowingly and intelligently, defendant cannot later claim that he was denied the right to adequate counsel. St. v. Harvey, 184 M 423, 603 P2d 661 (1979).

Defendant's Right to Be Present at Jury View: A defendant's constitutional right to be present at all stages of the trial and to meet his witnesses against him face to face includes the right to be present at a jury view. St. v. Musgrove, 178 M 162, 582 P2d 1246 (1978).

RIGHT TO COUNSEL

Involuntary Termination Proceeding — No Indication of Wish for Counsel — No Error: At a termination hearing against a father whose counsel previously withdrew from the case, the father represented himself, including offering testimony and questioning witnesses. The District Court did not err in conducting the proceedings in the absence of counsel for the father, because the father did not indicate that he wished to have counsel appointed because he was indigent. In re Termination of the Parental Rights & Adoption of J.W.M. & A.K.M, 2015 MT 231, 380 Mont. 282, 354 P.3d 626.

Stepparent Adoption Proceedings — Indigent Parent Entitled to Counsel — Improper Termination of Parental Rights: The stepmother filed a petition to terminate the mother's parental rights. At the hearing, the mother represented herself pro se because she could not afford an attorney. Ultimately, the District Court terminated the mother's parental rights and she appealed. The Supreme Court reversed, concluding that the right to equal protection requires that counsel be appointed for indigent parents in termination proceedings under the Adoption Act, and remanded the case to the District Court to appoint the mother counsel and to provide a new hearing. In re Adoption of A.W.S. and K.R.S., 2014 MT 322, 377 Mont. 234, 339 P.3d 414. However, see In re Termination of the Parental Rights & Adoption of J.W.M. & A.K.M, 2015 MT 231, 380 Mont. 282, 354 P.3d 626, holding that there was no error in termination proceedings in which a father did not indicate that he wished to have counsel appointed because he was indigent.

Delay Appointing Counsel — Plain Error Review Declined: On appeal, the defendant argued that: (1) the Office of the Public Defender's failure to appoint counsel for 5 weeks violated his constitutional and statutory rights; and (2) the period during which he would have been able to

substitute the District Court judge was a critical stage in the proceedings, both of which required that his conviction be reversed. However, the Supreme Court found that the defendant did have a public defender for his initial court appearances and that after he was arraigned he received a specific assigned counsel within 3 weeks. The Supreme Court declined to find that the 10-day window during which a judge may be substituted is a critical stage of the proceedings, and the defendant never indicated that he wanted to substitute the judge. The failure to assign counsel sooner did not give rise to a manifest miscarriage of justice, and the Supreme Court declined to exercise plain error review. St. v. Zlahn, 2014 MT 224, 376 Mont. 245, 332 P.3d 247.

No Deprivation of Right to Counsel — Failure to Cooperate With Multiple Public Defenders — Order Granting Motion to Withdraw Not Required: After firing multiple public defenders, the defendant represented herself at trial and was convicted in Municipal Court of a handful of misdemeanors. On first appeal, the District Court determined that the Municipal Court made the appropriate balancing decision between the defendant's right to counsel and her refusal to work with everyone appointed to represent her. On final appeal, the Supreme Court held that it was within the Municipal Court's discretion to accept the defendant's decision to represent herself, and to the extent that the defendant did not expressly and unequivocally waive her right to counsel because her decision was inconsistent over time, she effectively did so by failing to cooperate with a series of court-appointed attorneys. Any procedural errors that may have occurred based on the Municipal Court's failure to act on an attorney's pending motion to withdraw did not deprive the defendant of her rights, as she informed the court that she desired to represent herself. Additionally, the Municipal Court took into consideration that the defendant had represented herself in a criminal proceeding in the past and that she was aware of the charges and possible penalties. Missoula v. Fogarty, 2013 MT 254, 371 Mont. 513, 309 P.3d 10.

No Actual Conflict of Interest for Standby Counsel — Reversal Not Warranted: The defendant, who represented himself in his trial for aggravated burglary and sexual intercourse without consent, claimed that counsel appointed to represent him as standby counsel had a conflict of interest with a witness sufficient to warrant automatic reversal of his conviction. Standby counsel informed the District Court that it had represented the witness in a related matter, but the circumstances did not progress to an actual conflict in which standby counsel needed to make a choice to the detriment of the defendant's interests. Longjaw v. St., 2012 MT 243, 366 Mont. 472, 288 P.3d 210.

Waiver of Right to Counsel Not Invalidated by Expression of Discontent With Attorney: The defendant, dissatisfied with his counsel's inaction on his case, requested that the District Court allow him to proceed pro se, and after concluding that the defendant was voluntarily, knowingly, and intelligently waiving his right to counsel, the District Court granted the defendant's request. The defendant appealed his subsequent conviction, arguing that the District Court erred in allowing him to proceed pro se without conducting further inquiry into his complaints about his attorney. The Supreme Court affirmed, concluding that the defendant's expression of discontent with his attorney was not sufficient to invalidate his assertion of his right to proceed pro se. Because the defendant did not request substitute counsel, the District Court was not required to conduct further inquiry into his request to proceed pro se. St. v. Clary, 2012 MT 26, 364 Mont. 53, 270 P.3d 88.

No Notice of Withdrawal of Counsel — Trial and Conviction in Absentia — Denial of Due Process — Invalidity of Prior DUI Conviction — Reversed and Remanded for Sentencing as Misdemeanor: Charged with his fourth DUI, the defendant claimed that one of his previous DUI convictions was invalid because the District Court had allowed his counsel to withdraw immediately prior to his trial, and he was tried and convicted in absentia. The District Court concluded that the defendant's conviction was valid because he had willfully been absent from his trial. The Supreme Court, however, reversed, concluding that under 46-16-120, a defendant who is charged with a misdemeanor has a right to appear by counsel only. Therefore, when the court allowed the defendant's previous counsel to withdraw immediately before a trial in absentia, it deprived the defendant of his right to legal representation and due process. On that basis, the Supreme Court found that the previous conviction was invalid and remanded the matter, with the instruction to the District Court to sentence the defendant for a misdemeanor. St. v. Hass, 2011 MT 296, 363 Mont. 8, 265 P.3d 1221.

Proper Jury Instruction Regarding Defendant's Lack of Right to Attorney During Field Sobriety Tests: During a traffic stop, Stanczak was asked to perform field sobriety tests. The District Court instructed the jury in Stanczak's DUI trial that because there was no custodial interrogation, Stanczak had no right to counsel before completing the tests. On appeal, the

Supreme Court affirmed the instruction as a full and fair instruction on the applicable law. St. v. Stanczak, 2010 MT 106, 356 Mont. 263, 232 P.3d 896.

Right to Counsel During Custodial Interrogation Distinguished From Right After Criminal Proceedings Initiated — No Violation of Right to Counsel Absent Unambiguous Request: Scheffer waived his Miranda rights and, after being interviewed, was arrested for sexual intercourse without consent. Scheffer contended that evidence from the interrogation should be suppressed because he requested but did not receive counsel during the interrogation. However, the requests were ambiguous when read in context, and a reasonable officer in light of the circumstances would not have understood Scheffer to be requesting an attorney. The right to counsel under Art. II, sec. 24, Mont. Const., attaches when adversarial criminal proceedings have begun. However, the right to counsel during a custodial interrogation under Art. II, sec. 25, Mont. Const., attaches when the defendant makes an unambiguous request for counsel. Here, Scheffer's motion to suppress was properly denied because formal proceedings had not begun and because the request for counsel was ambiguous. St. v. Scheffer, 2010 MT 73, 355 Mont. 523, 230 P.3d 462.

Pretrial Detainees Entitled to Visitation With Counsel — Precautions to Protect Public Health Allowed: The Office of State Public Defender sought a writ of mandamus requiring Missoula County to vacate its visitation policy at the county detention center that suspended contact visits during flu season. The Supreme Court noted that pretrial detainees have an undisputed constitutional right to access to the courts, which includes contact visitation with counsel, and that the right may not be arbitrarily abridged. The public defender's office established that the visitation policy precluded pretrial detainees from exercising their constitutional rights, and because the detainees lacked a plain, speedy, and adequate remedy to protect that right, a writ of mandamus was appropriate. The court ordered that the detention facility immediately allow attorneys representing pretrial detainees to conduct private, confidential visits with their clients but also held that the detention facility could impose reasonable precautions related to public health, such as masking and hand sanitizing to reduce the risk of infection. Office of St. Public Defender v. McMeekin, 2009 MT 439, 354 M 130, 224 P3d 616 (2009).

Failure to Inform Defendant of Right to Counsel — Conviction Dismissed Without Prejudice: Gatlin was arrested in Butte-Silver Bow County after robbing a store. Two hours earlier, a man fitting Gatlin's description had robbed two casinos in Missoula. The Missoula victims identified Gatlin as the robber, and the Missoula County Attorney charged Gatlin with two counts of robbery in Missoula County. Gatlin was arraigned in Butte and was informed of the Missoula charges but was not informed of the right to counsel on the Missoula charges. Eventually Gatlin pleaded nolo contendere on the Butte charge and was sentenced to 5 years in prison. Gatlin was then taken to Missoula, where he was arraigned and informed of his rights and subsequently pleaded guilty to the Missoula charges and was sentenced to 25 years in prison, with the term to run concurrently with the Butte sentence. Gatlin appealed on grounds that he was not informed of the right to counsel on the Missoula charges during the Butte arraignment. The state asserted that Gatlin's rights were not violated because the Butte appearance was for the Butte-Silver Bow charges, not the Missoula charges. The Supreme Court disagreed. The record was clear that Gatlin made an initial timely appearance on the Missoula charges in Butte but was not informed of the right to counsel on the Missoula charges. The appropriate remedy was to vacate the conviction and dismiss the Missoula information. However, Gatlin was not prejudiced by the lack of counsel on the Missoula charges while incarcerated in Butte or by any delay in filing the Missoula information, so dismissal of the information was without prejudice. St. v. Gatlin, 2009 MT 348, 353 M 163, 219 P3d 874 (2009).

Minor's Prior DUI in City Court Properly Applied to Felony DUI Charge — No Violation of Constitutional Rights in City Court: Allen was arrested for a felony fourth DUI in 2004. Calculation of the number of DUIs included Allen's first arrest in 1997 as a minor, to which Allen pleaded guilty in City Court. Allen contended that it was improper to include the 1997 conviction in the total because that conviction was constitutionally infirm in that the City Court failed to advise him of his rights, including the right to counsel, and accepted his guilty plea without consent of a parent. Allen further contended that as a minor he was incapable of knowingly, voluntarily, and intelligently waiving the right to counsel. The Supreme Court disagreed. City Court records provided direct evidence that Allen's 1997 conviction was not obtained in violation of Allen's constitutional rights, and Allen failed to rebut the presumption of regularity that attached to the 1997 conviction. With specific regard to the right to counsel argument, the court noted that because the Youth Court does not have concurrent jurisdiction with the City Court over traffic violations, including DUIs, Allen was incorrect in claiming that the right to counsel could only have been waived by Allen and a parent at the 1997 proceedings. Therefore, application of Allen's

1997 conviction in calculating a felony DUI was not error. St. v. Allen, 2009 MT 124, 350 M 204, 206 P3d 951 (2009).

Application of Right to Counsel Not Violative of Equal Protection: Schneider argued that the U.S. and Montana Supreme Courts' interpretation of the right to counsel violated the right to equal protection. The Supreme Court disagreed. Although some people may enjoy the right to counsel while others do not, application of the right to counsel to certain persons and not others does not create a protected class of two similarly situated classes of person who are treated differently, so the equal protection clause does not apply. St. v. Schneider, 2008 MT 408, 347 M 215, 197 P3d 1020 (2008).

Statements Made in Another State Without Effect on Montana Homicide Proceedings — Right to Counsel "Offense Specific": Schneider was stopped in Arizona while trying to gain entry into Mexico, and while detained, Schneider confessed to two murders in Montana. At the time of arrest, Schneider was on probation for felony theft in Montana and was prohibited from leaving the state without permission. Arizona charged Schneider with being a fugitive from justice and appointed a public defender. A Montana court moved to revoke Schneider's probation, and Montana officers went to Arizona to interrogate Schneider regarding the murders. Schneider waived his Miranda rights and did not request counsel during questioning, during which he made incriminating statements regarding involvement in the murders. Montana subsequently charged Schneider with two counts of accountability for deliberate homicide. Schneider moved to suppress the statements made in Arizona on grounds that his right to counsel was violated, but the motion was denied based on the holding in Texas v. Cobb, 532 US 162 (2001), and on appeal the Supreme Court affirmed. Under Cobb, the right to counsel is "offense specific", meaning that it only applies with respect to the charged or related offense and cannot be invoked once for all future prosecutions. Because the right to counsel in the Montana Constitution is consistent with Art. VI of the U.S. Constitution, the court declined Schneider's request to extend any further protection under Montana law beyond that expressed in Cobb. The constitution does not negate society's interest in the ability of police to talk to witnesses and suspects, even those charged with other offenses. In addition, regarding Schneider's argument that the Arizona statement should be suppressed under the "same transaction" rule, the Arizona case was not before the Montana court and had no effect on the disposition of the issues. Thus, Schneider's statements made in connection with the Arizona fugitive charge were admissible in the Montana homicide proceedings, and Schneider's motion to suppress was properly denied. St. v. Schneider, 2008 MT 408, 347 M 215, 197 P3d 1020 (2008), following St. v. Reavley, 2003 MT 298, 318 M 150, 79 P3d 270 (2003).

Defendant's Right to Counsel and Right to Trial Not Violated During Four Prior DUI Prosecutions — Enhancement of New DUI Charge to Felony Proper: Walker's 2005 DUI arrest was enhanced to a felony charge when driving records indicated that Walker had six prior DUI convictions. Walker alleged that four of the prior convictions were constitutionally infirm because Walker had not been advised of the right to counsel, the right to compel attendance of witnesses, the right to a trial by a jury, and penalty enhancement provisions. The District Court concluded that the four convictions did not violate Walker's constitutional rights and held that the prior convictions could be used to enhance the 2005 DUI to a felony. Walker appealed, and the Supreme Court considered each assertion in turn to determine whether Walker's waiver of the right to counsel and right to trial during the prior prosecutions was made knowingly, intelligently, and voluntarily. The initial appearance arraignment documents that Walker signed after being charged with the prior DUI offenses adequately informed Walker of the right to counsel, and Walker indicated an understanding of that right and that an attorney was not desired. A waiver of rights form and a waiver of counsel form that Walker signed evidenced that understanding. It was also sufficient that Walker was informed of the right to call witnesses to attend the proceedings, even though the Constitution does not confer a right to compel witnesses to testify. Walker was also adequately informed of the right to a trial by jury and to a unanimous verdict, but it was unnecessary for the District Court to explain all the nuances or effects of waiving the right to a trial by jury. Lastly, the documents informed Walker that there might be indirect consequences of a guilty plea, including the possible loss of driving privileges and the use of the conviction in the event Walker was convicted of a crime in the future, but the District Court was not required to specifically inform Walker of the indirect consequence that a fourth or subsequent DUI might result in a felony charge, because whether Walker committed a fourth or subsequent DUI was clearly within Walker's sole control and was an indirect consequence of guilty pleas to the prior DUI offenses. Thus, Walker's prior guilty pleas were entered knowingly, intelligently, and voluntarily, and the District Court did not err in allowing the use of the prior

convictions to elevate Walker's 2005 DUI to a felony. St. v. Walker, 2008 MT 244, 344 M 477, 188 P3d 1069 (2008).

Error in Failure to Appoint New Counsel Following Collapse of Attorney-Client Relationship: Hendershot made repeated timely requests for new counsel, but the requests were denied, and Hendershot was convicted. On appeal, the Supreme Court found that a conflict between Hendershot and counsel arose early in the relationship and that they were at serious odds for some time. The relationship continued to deteriorate, and a complete collapse was demonstrated by Hendershot and reinforced by counsel, requiring substitution of counsel. Thus, the District Court abused its discretion in denying Hendershot's requests for new counsel, and the Supreme Court reversed for further proceedings. St. v. Hendershot, 2007 MT 49, 336 M 164, 153 P3d 619 (2007), following U.S. v. Williams, 594 F2d 1258 (9th Cir. 1979), and applied in Robinson v. St., 2010 MT 108, 356 Mont. 282, 232 P.3d 403.

Standard of Review of Ruling on Request for Substitute Counsel — Abuse of Discretion: Absent an abuse of discretion, the Supreme Court will not overrule a District Court's ruling on a request for substitution of counsel, which is within the sound discretion of the District Court. An abuse of discretion occurs only if the District Court acted arbitrarily without employment of conscientious judgment or exceeded the bounds or reason resulting in a substantial injustice. St. v. Hendershot, 2007 MT 49, 336 M 164, 153 P3d 619 (2007), following St. v. Gallagher, 2001 MT 39, 304 M 215, 19 P3d 817A (2001).

No Absolute Right to Counsel in Tribal Court — Tribal DUI Conviction Properly Considered for Purposes of Charging Felony DUI in State Court: Walker was charged with felony DUI based on four prior convictions. Walker challenged two of the prior convictions—one in Justice's Court in Garfield County and one in tribal court on the Fort Belknap Indian Reservation—and asserted that in both cases, no confirmation had been made regarding Walker's right to counsel. The Supreme Court did not address the Garfield County conviction because the tribal court was dispositive. The standards of tribal law rather than federal or state constitutional law applied to the Fort Belknap case. Congress extended many of the protections in the federal Bill of Rights to Native Americans in the Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. 1301, et seq., but ICRA does not contain a provision extending the right to counsel to tribal court proceedings. Thus, no absolute right to counsel exists in tribal court unless a tribe provides for that right. Walker could cite no tribal code provision extending him the right to counsel in 1992 when the case was heard and therefore could not argue the irregularity of the tribal court case on right to counsel grounds. The District Court did not err in applying the tribal court conviction to Walker's accumulated prior convictions for purposes of charging felony DUI under 61-8-731. St. v. Walker, 2007 MT 34, 336 M 56, 153 P3d 614 (2007), following St. v. Spotted Eagle, 2003 MT 172, 316 M 370, 71 P3d 1239 (2003).

Defendant Not Considered Pro Se by Default: One year and three attorneys after being charged with several DUI-related offenses, Browning terminated the services of the third court-appointed attorney and indicated that he wished to hire private counsel. The trial court allowed Browning to proceed, but cautioned that under the circumstances, Browning was considered to be representing himself. Browning's attempt to secure private counsel failed for lack of funds. During subsequent proceedings, Browning asserted that he did not wish to proceed pro se because he did not know what he was doing, but the trial court refused to appoint a fourth attorney. Browning subsequently pleaded guilty and was sentenced to 20 years but then moved to withdraw the guilty plea on grounds that the plea was involuntary because he received ineffective assistance of counsel. The motion was denied, but on appeal, the Supreme Court reversed. Although a defendant has a right to appear pro se, every reasonable presumption is indulged in against waiver of the right to counsel, and waiver will be upheld only if a defendant made the decision knowingly, voluntarily, and intelligently. In this case, the record did not support a conclusion that Browning unequivocally requested to proceed pro se, and under the test in St. v. Langford, 267 M 95, 882 P2d 490 (1994), a defendant cannot be considered pro se by default. Thus, the trial court improperly denied Browning the assistance of counsel, and Browning's motion to withdraw the guilty plea was erroneously denied. St. v. Browning, 2006 MT 190, 333 M 132, 142 P3d 757 (2006).

Ambiguous and Equivocal Request for Counsel — Motion to Suppress Properly Denied When Admissions Voluntary: Immediately after demanding an attorney, and without interruption, Maestas told an investigator to question another witness. The investigator immediately instructed Maestas to stop talking and asked at least six times whether Maestas wanted counsel present before proceeding, but Maestas repeatedly stated that he did not want an attorney. As stated in St. v. Simmons, 2000 MT 329, 303 M 60, 15 P3d 408 (2000), a suspect must articulate the desire to

have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. Maestas's ambiguous and equivocal requests for a lawyer, followed by repeated statements refusing the provision for counsel, did not rise to the level of clarity that mandated that the investigator stop all questioning, especially questions seeking to clarify what Maestas really wanted. Thus, Maestas's right to counsel was not violated. In addition, the incriminating statements made by Maestas were not made until the following day after Maestas again waived the right to counsel. Under the totality of the circumstances, Maestas's motion to suppress the statements was properly denied. St. v. Maestas, 2006 MT 101, 332 M 140, 136 P3d 514 (2006), followed in St. v. Scheffer, 2010 MT 73, 355 Mont. 523, 230 P.3d 462.

Broad Right to Counsel During Custodial Interrogation — Limited Right to Counsel for Police Procedure Not Involving Verbal Inquiry: When first interviewed, Buck was asked to provide a fingernail scraping, but Buck requested a lawyer, and the interview was concluded. During a subsequent interrogation, Buck confessed to an assault without requesting a lawyer. Buck asserted that the confession should be suppressed because the request for a lawyer made during the first interview was not honored during the subsequent interrogation, but the suppression motion was denied. On appeal, Buck also contended that he was not educated in constitutional law sufficiently to distinguish between the right to counsel as it applied to the two different procedures. The Supreme Court noted that the right to counsel in custodial interrogation is broad enough that it may be invoked in certain circumstances by a vague statement that does not include a reference to a lawyer, but it is not so broad that it may be invoked by a request that is unambiguously linked to another police procedure. A suspect may seek legal assistance for only limited purposes in dealing with law enforcement, and a suspect's request for counsel that is unambiguously limited to a police procedure that does not involve verbal inquiry does not invoke the right to counsel in custodial interrogation. Buck's request for counsel was unambiguously limited to the search incident to the fingernail scraping and did not extend to the subsequent custodial interrogation, nor did Buck establish error related to an inability to understand the request for counsel in two different contexts. Denial of the suppression motion was affirmed. St. v. Buck, 2006 MT 81, 331 M 517, 134 P3d 53 (2006), following Conn. v. Barrett, 479 US 523 (1987), and overruling St. v. Johnson, 221 M 503, 719 P2d 1248 (1986), and St. v. Spang, 2002 MT 120, 310 M 52, 48 P3d 727 (2002), to the extent that those cases held that the right to counsel for self-incrimination purposes may be invoked in custodial interrogation.

Right of Defendant to Waive Counsel: Dawson was convicted of a capital crime and sentenced to death, and after years of appeals, Dawson decided to fire his attorneys, discontinue all appeals, and proceed with imposition of the death penalty. Dawson filed a pro se motion in state and federal courts to dismiss all pending appeals, and the Supreme Court considered whether to grant the motion. A defendant has a constitutionally guaranteed right to the assistance of counsel, but that right does not prohibit a defendant from rejecting the assistance of counsel. A defendant may be granted a request for self-representation if the waiver of the right to counsel is unequivocal, voluntary, knowing, and intelligent. The court examined the record and determined that Dawson's request to waive counsel met the criteria. Dawson was allowed to discharge his counsel, and an attorney was appointed to act as standby counsel. St. v. Dawson, 2006 MT 69, 331 M 444, 133 P3d 236 (2006).

Erroneous Language in Verification of Arraignment Form Constituting Sufficient Irregularity to Void Waiver of Right to Counsel — Remand for Resentencing: The state attempted to enhance Mann's DUI to a felony based on his pleading guilty to two prior DUIs. Mann challenged the enhancement based on Mann's alleged waiver of the right to counsel contained in a verification of arraignment form. The District Court held that Mann had waived the right to counsel. On appeal, the Supreme Court reversed. The language of the verification of arraignment form was so erroneous, intimidating, and virtually indecipherable that Mann could not be considered to have entered into a knowing, intelligent, or voluntary waiver of the right to counsel. The language in the form was prima facie evidence of irregularity. Because the state had already exercised its opportunity to establish that the prior convictions were not obtained in violation of Mann's constitutional right, the Supreme Court vacated the prior convictions and remanded for resentencing in accordance with misdemeanor DUI charges. St. v. Mann, 2006 MT 33, 331 M 137, 130 P3d 164 (2006), followed in St. v. Haas, 2011 MT 296, 363 Mont. 8, 265 P.3d 1221.

Lack of Counsel — No Due Process Violation Following Termination of Parental Rights: A mother's parental rights were terminated in 2001, after which her counsel withdrew and the District Court appointed a public defender without notifying the defender. The mother contended that her due process rights were violated because she did not have adequate representation

once her counsel withdrew. The Supreme Court recognized that due process and fundamental fairness require that a parent be represented by counsel at proceedings to terminate parental rights and that the mother had counsel during the termination proceedings and on direct appeal. The mother failed to establish that the proceedings did not comport with relevant statutory and constitutional due process requirements, and her argument was without merit. Termination of her parental rights was affirmed. In re T.H. & C.D.F., 2005 MT 237, 328 M 428, 121 P3d 541 (2005), following In re A.S., 2004 MT 62, 320 M 268, 87 P3d 408 (2004).

Two-Year Wait to Assert Parental Rights — Failure to Advise Parent of Right to Counsel Harmless Error: A father who was incarcerated waited more than 2 years to file for relief following termination of his parental rights, asserting that he was denied due process by not being provided notice of the right to counsel. The Supreme Court agreed that fairness requires that a parent be represented by counsel at parental termination proceedings, but in this case, the error was harmless because the lack of notice was not prejudicial to the father. There was adequate evidence to terminate the father's parental rights, and even if he had been notified and represented by counsel, there was no way that an attorney would have made a difference under the circumstances and the result would have been the same. Denial of the motion for relief was affirmed. In re P.D.L., 2004 MT 346, 324 M 327, 102 P3d 1225 (2004).

Prior DUI Convictions Affirmed in Absence of Direct Evidence of Irregularity — Presumption of Regularity of Prior Convictions: Snell contended that it was improper for the state to use two prior DUI convictions to elevate a new DUI charge to a felony based on the fact that the prior convictions were invalid because Snell was not informed of the right to counsel. Although the state may not use a constitutionally infirm conviction to support an enhanced punishment, a defendant must overcome the presumption of the regularity of the prior convictions with direct evidence of irregularity. However, Snell was unable to recall facts about the judges involved in both prior DUI cases, casting considerable doubt on his ability to recall other critical details in those cases. The District Court correctly held that Snell's testimony was not sufficient to overcome the presumption of regularity through direct evidence and that the prior convictions were therefore constitutionally firm. Denial of the dismissal motion was affirmed. St. v. Snell, 2004 MT 334, 324 M 173, 103 P3d 503 (2004). See also St. v. Moga, 1999 MT 283, 297 M 1, 989 P2d 856 (1999), St. v. Weldele, 2003 MT 117, 315 M 452, 69 P3d 1162 (2003), and St. v. Burns, 2011 MT 167, 361 Mont. 191, 256 P.3d 944.

Counsel Travel Expenses for Incarcerated Youth Properly Denied: A youth sentenced to a youth correctional facility requested reimbursement funds to enable his attorney to visit at the facility, contending that denial of the funds violated the right to counsel. The Supreme Court disagreed, absent evidence that adequate consultation with counsel could not be conducted by telephone. The court found no abuse of discretion in the Youth Court's denial of counsel's travel expenses. In re N.V., 2004 MT 80, 320 M 442, 87 P3d 510 (2004).

Lack of Advisement of Right to Counsel and Right Against Self-Incrimination for Youth Taken Into Custody for Questioning Reversible Error — When Waiver of Rights Attaches: A youth was questioned at the Sheriff's office regarding a burglary and criminal mischief and was then taken home, where he agreed to relinquish articles of clothing that were not inconsistent with evidence found at the crime scene. The youth's parents were not notified of any of the Sheriff's actions, and no omnibus hearing was held. The youth's clothing was later introduced at trial over the youth's objection. Following conviction, the youth appealed, contending that the clothing was not legally obtained pursuant to a search warrant, that he was not advised of his rights, and that he did not give an informed waiver of his right to have his parents contacted prior to relinquishment of the clothing. The state maintained that the youth voluntarily consented to relinquish the clothing and thus waived his rights. The Supreme Court reversed. Under the Montana Youth Court Act, a youth taken into custody for questioning on a matter that could result in allegations that the youth is delinquent must be advised of the right to counsel and the right against self-incrimination, and the youth's parents must be immediately notified by the investigating officer. A youth who is 16 years of age or older may make an effective waiver of those rights. In determining whether waiver and consent by juveniles are voluntary, the Supreme Court applies the totality of circumstances test set out in Evans v. District Court, 2000 MT 38, 298 M 279, 995 P2d 455 (2000), which provides that a determination of voluntariness takes into account: (1) the defendant's age and level of education; (2) whether the defendant was advised of the defendant's rights; (3) the defendant's prior experience with the criminal justice system; (4) the defendant's background and experience; and (5) the defendant's demeanor, coherence, articulateness, and capacity to make full use of the defendant's faculties. Here, the District Court failed to take the Evans factors into account, and the requirements of 41-5-331 regarding parental notification

were not fulfilled. Failure to follow statutory requirements and to consider the totality of the circumstances was reversible error. In re C.T.P., 2004 MT 63, 320 M 279, 87 P3d 399 (2004).

Plain Error in Allowing Youth's Extrajudicial Statements When Youth Not Advised of Right to Counsel and Right Against Self-Incrimination: A youth asserted for the first time on appeal that the Youth Court improperly admitted extrajudicial statements that the youth made regarding the youth's whereabouts when a burglary and criminal mischief were committed. Despite the state's contention that the arguments should not be considered because they were not raised at trial, the Supreme Court nevertheless considered the argument under the plain error doctrine because the youth was not notified while in custody of the fundamental right to counsel and the right to avoid self-incrimination, nor were the youth's parents notified as required. The youth's rights under the Montana Youth Court Act and the constitution were simply ignored in this case, so in order to avoid a question of the fundamental fairness of the trial by admission of constitutionally infirm extrajudicial statements, the Supreme Court reversed the trial court's decision to admit the statements. In re C.T.P., 2004 MT 63, 320 M 279, 87 P3d 399 (2004).

Adequate Advisement of Danger of Self-Representation — Voluntary Waiver of Counsel Affirmed: The Supreme Court's inquiry regarding a defendant's waiver of the right to counsel focuses not on what the defendant was told concerning the dangers of self-representation, but rather on a determination of whether the defendant understood the decision and proceeded voluntarily. Instead of requiring a trial court to recite a litany of the dangers associated with a waiver of the right to counsel, the test requires that the trial court receive sufficient evidence to find that the waiver is made voluntarily, knowingly, and intelligently. In this case, defendant was generally familiar with the criminal trial process, had personally experienced a criminal trial, had participated in jury selection, was present during suppression hearings, took law enforcement in college, understood the role of an attorney, and was cautioned that acting as a trial lawyer was not something that a person could just walk into. The trial court's questioning and defendant's responses indicated that defendant understood the decision to waive counsel and made the decision knowingly and voluntarily. The trial court's decision to allow defendant to proceed pro se was affirmed. St. v. Insua, 2004 MT 14, 319 M 254, 84 P3d 11 (2004), following St. v. Colt, 255 M 399, 843 P2d 747 (1992). See also Faretta v. Calif., 422 US 806 (1975), and St. v. MacGregor, 2013 MT 297, 372 Mont. 142, 311 P.3d 428.

No Right to Additional Counsel During Initial Inquiry Hearing on Effectiveness of Present Counsel — Initial Inquiry Not Considered Critical Stage of Proceedings: Gazda requested removal of court-appointed counsel and appointment of new counsel. The District Court conducted an initial hearing to address whether Gazda's claim was substantial enough to warrant a hearing on the merits of the ineffective assistance claim. Gazda contended that he was entitled to additional counsel during the initial hearing, but the Supreme Court disagreed. Although the right to counsel arises at every critical stage of proceedings against a defendant, the critical stage in these proceedings began with the actual hearing on the merits of the ineffective counsel claim, not during the initial hearing to establish whether Gazda had a substantial claim, which was not a hearing on the merits of the claim. Thus, the District Court did not err by failing to appoint additional counsel for Gazda during the initial hearing. St. v. Gazda, 2003 MT 350, 318 M 516, 82 P3d 20 (2003).

Use of Police Informant to Obtain Taped Conversation Not Violative of Right to Counsel or Attorney-Client Privilege — When Right to Counsel Attaches: Police used Reavley's girlfriend to obtain a taped conversation that included statements that could be viewed as incriminating. The District Court granted Reavley's motion to suppress the statements, based on Escobedo v. Ill., 378 US 478 (1964), on grounds that the right to counsel extends to all stages preceding trial, beginning when an accused first becomes the focus of a police investigation. The District Court also concluded that Reavley's attorney-client privilege was violated when the girlfriend probed into conversations that Reavley had with his counsel. The Supreme Court disagreed and reversed. Under Moran v. Burbine, 475 US 412 (1986), the right to counsel does not attach until after the initiation of formal charges. Reavley was not formally charged, and adversarial proceedings had not begun, so the right to counsel had not attached. Further, the record did not reflect that law enforcement directed the girlfriend to deliberately seek privileged information, nor did she purposely intrude into the attorney-client relationship or ask questions aimed at eliciting privileged information regarding Reavley's conversations with counsel. Rather, Reavley voluntarily disclosed the privileged communications without prompting from the girlfriend, which was sufficient to waive the right to their privileged nature. St. v. Reavley, 2003 MT 298, 318 M 150, 79 P3d 270 (2003).

Use of Prior Convictions to Enhance Offense When Defendant Waived Right to Counsel During Prior Convictions: In 1989 and 2001, Markuson was charged with misdemeanor partner or family member assault. In both cases, he waived the right to counsel and pleaded guilty. In 2002, Markuson was again charged with partner or family member assault, and based on the two prior convictions, the third charge was designated as a felony. Markuson contended that the use of the alleged constitutionally infirm prior convictions to enhance the 2002 charge was improper because the Justice's Court in the prior cases failed to advise of the dangers and disadvantages of self-representation when the right to counsel was waived. In this case, the Supreme Court disagreed. Although the state may not use constitutionally infirm prior convictions to enhance a subsequently charged offense, a rebuttable presumption of regularity attaches to prior convictions. However, Markuson failed to demonstrate that the prior waivers of the right to counsel were not knowing and voluntary. Markuson's affidavit was insufficient to demonstrate that the prior convictions were constitutionally infirm, and the felony conviction was affirmed. St. v. Markuson, 2003 MT 206, 317 M 43, 75 P3d 298 (2003), distinguishing U.S. v. Akins, 276 F3d 1141 (9th Cir. 2001), and followed, with regard to charging felony DUI based on prior convictions, in St. v. Wolfe, 2003 MT 222, 317 M 173, 75 P3d 1271 (2003), and St. v. Joseph, 2003 MT 226, 317 M 186, 75 P3d 1273 (2003).

No Absolute Right to Counsel in Tribal Court: Congress, through its plenary authority over Indian tribes, afforded many of the protections of the Bill of Rights to Indians when it passed the federal Indian Civil Rights Act of 1968 (ICRA). However, the constitutional right to counsel was not provided for in the ICRA. Therefore, unless otherwise provided by tribal law, a criminal defendant has no absolute right to counsel in tribal court. The Blackfeet tribe has not elected to guarantee criminal defendants the right to counsel, so a defendant in tribal court is entitled to counsel only at the defendant's own expense. St. v. Spotted Eagle, 2003 MT 172, 316 M 370, 71 P3d 1239 (2003), following Settler v. Lameer, 507 F2d 231 (9th Cir. 1974), and distinguishing U.S. v. Ant, 882 F2d 1389 (9th Cir. 1989).

Direct Evidence Rebutting Presumption of Regularity of Prior DUI Convictions — Remand for Evidentiary Hearing for Determination of Validity of Prior Conviction: Kvislen was charged with felony DUI based on three prior convictions. Kvislen moved to dismiss on grounds that one of the prior convictions was entered in derogation of his constitutional rights and thus could not be used to elevate the present charge to a felony. Kvislen filed an affidavit prior to trial averring that he never received notice of the prior trial and was convicted without being informed of the right to counsel. After providing the District Court with arguments to the contrary, the state moved to dismiss. The District Court, without conducting an evidentiary hearing to weigh Kvislen's affidavit against the assertions made by the state, concluded that Kvislen had not sufficiently rebutted the presumption of regularity that attaches to prior convictions and dismissed the motion, and Kvislen appealed. Citing St. v. Okland, 283 M 10, 941 P2d 431 (1997), and St. v. Jenni, 283 M 21, 938 P2d 1318 (1997), the Supreme Court noted that although a rebuttable presumption of regularity attaches to prior convictions, that presumption may be overcome by direct evidence of irregularity, and once defendant offers direct evidence, the burden shifts to the state to prove that the prior conviction was not obtained in violation of defendant's rights. Here, the state conceded that Kvislen's averments met the technical definition of direct evidence and that the state relied on insufficient evidence and failed to meet its burden of proof. Instead of denying the motion to dismiss, the District Court should have shifted the burden to the state and allowed the state to submit evidence showing that Kvislen's rights were not violated. The proper forum for consideration of the issue was through an evidentiary hearing, and the Supreme Court remanded the case for that purpose. St. v. Kvislen, 2003 MT 27, 314 M 176, 64 P3d 1006 (2003).

Court's Statement to Defendant That Guilty Plea Waives Right to Counsel Not Affirmative Waiver of Right by Defendant: Howard was charged with her fourth DUI and moved to have the felony charge dismissed on the grounds that her third DUI conviction was entered in derogation of her right to counsel. The Municipal Court Judge for Howard's third conviction testified that he informed all defendants that they had the right to counsel and that an attorney would be appointed for them and that if they pleaded guilty, they waived their rights. The judge indicated that he asked Howard if she understood her rights, and she indicated that she did and she pleaded guilty. The Supreme Court held that defendants must be specifically asked if they are waiving their right to counsel and that the method employed by the Municipal Court Judge did not elicit a specific response to the waiver of the right to counsel. The Supreme Court reversed Howard's felony conviction for a fourth DUI. St. v. Howard, 2002 MT 276, 312 M 359, 59 P3d 1075 (2002). See also St. v. Walker, 2007 MT 34, 336 M 56, 153 P3d 614 (2007).

Right to Counsel at Parole Hearing — Writ of Habeas Corpus Proper Vehicle for Review of Parole Board's Denial of Legal Representation: By writ of habeas corpus, Carson contended that the Department of Corrections unconstitutionally denied him the right to legal representation at a hearing before the Board of Pardons and Parole. The state maintained that Carson was required to exhaust administrative appeals before the District Court could review the Board's denial of Carson's request for representation. The District Court concurred and denied the petition, but on appeal the Supreme Court disagreed. To require exhaustion of administrative appeals with regard to the right of representation at parole hearings would defeat the purpose for which habeas corpus exists by requiring an unlawfully held inmate to first seek relief from the very institution by which he alleges that he is being unlawfully held—a course of action not contemplated by constitutional or statutory law. Therefore, a writ of habeas corpus was the appropriate vehicle for Carson to seek review. Under 46-23-202, a person appearing before the Board has a right to counsel, and the state was unable to cite any qualifying regulation to the contrary. Thus, the Supreme Court granted Carson's petition for a writ of habeas corpus and remanded to the Department of Corrections for a new parole hearing, expeditiously scheduled, with Carson's attorney in attendance. St. v. Carson, 2002 MT 234, 311 M 485, 56 P3d 844 (2002).

Showing of Irregularity in Prior DUI Conviction Based on Failure to Inform Defendant of Right to Counsel — Remand for Further Findings Whether Prior Conviction Applicable to Felony DUI Charge: Peterson was charged with fourth offense felony DUI. Peterson collaterally challenged the felony status of the charge, asserting that two previous misdemeanor convictions were constitutionally insufficient because he was not properly informed of the right to counsel, and moved to dismiss. The motion was denied after the District Court found that Peterson was properly informed in both prior instances. Peterson appealed. It was conceded that Peterson met his burden to show direct evidence of irregularity because he testified that he was not informed of the right to counsel or appointed counsel at either conviction, so the Supreme Court had to determine whether the District Court erroneously found that the state met its burden by a preponderance of the evidence to show that Peterson was properly informed of his rights in each of the prior pleas. The court found that Peterson was properly informed of his rights in one case, but because the District Court did not address the inconsistency in the testimony of the judge involved in the other conviction and resolve whether Peterson was actually represented by counsel, the case was remanded for further proceedings regarding the conviction in question. St. v. Peterson, 2002 MT 65, 309 M 199, 44 P3d 499 (2002). See also St. v. Okland, 283 M 10, 941 P2d 431 (1997), and St. v. Jenni, 283 M 21, 938 P2d 1318 (1997).

Pro Se Motion to Withdraw Guilty Plea Not Considered Critical Stage of Proceedings to Which Right to Counsel Attaches: Garner moved pro se to withdraw his guilty plea nearly 4 years after entering the plea and nearly 3 years after filing a petition for postconviction relief, arguing that a motion to withdraw a guilty plea constitutes a critical stage of the proceedings at which the right to counsel attaches, and that that right must be expressly waived, which was not done. Garner cited numerous non-Montana cases in which the right to counsel was found to attach to a motion to withdraw a guilty plea, but the Supreme Court noted that it had not established any bright line as to when in the sequence of proceedings the right to counsel attaches. The court noted the holding in Ranta v. St., 1998 MT 95, 288 M 391, 958 P2d 670 (1998), that a critical stage is defined as any step of the proceedings in which there is potential for substantial prejudice to the defendant. Here, Garner was represented by three different counsel during the course of the proceedings. Given the length of time since trial and the ample opportunities of representation that Garner enjoyed, the pro se motion did not raise the potential for substantial prejudice to Garner; thus, the motion did not constitute a critical stage of the proceedings, and the right to counsel did not attach. St. v. Garner, 2001 MT 222, 306 M 462, 36 P3d 346 (2001).

Failure to Appeal Violative of Right to Counsel — "Anders" Procedure Applicable to Protect Defendant's Right to Effective Assistance of Counsel on Appeal: Rogers' counsel repeatedly refused Rogers' request to file a notice of appeal, asserting that there were no appealable issues. However, under Roe v. Flores-Ortega, 528 US 470 (2000), the failure to preserve defendant's right to appeal when requested is error, and when defendant would have appealed but for counsel's deficient performance, that error is prejudicial. In order to protect defendant's right to effective assistance of counsel on appeal, the Supreme Court has adopted the procedure in Anders v. Calif., 386 US 738 (1967), for when an attorney believes an appeal lacks meritorious issues. If counsel finds after conscientious examination that a case is wholly frivolous, counsel should so advise the court and request permission to withdraw. A defendant's right to appellate counsel must be safeguarded, and allowing appellate counsel to be the final judge of the merits of an appeal does not adequately safeguard this right. Thus, counsel's failure to appeal violated Rogers' right to

counsel, constituting reversible error. St. v. Rogers, 2001 MT 165, 306 M 130, 32 P3d 724 (2001), following Smith v. Robbins, 528 US 259 (2000).

Rejection of Court-Appointed Counsel During Criminal Trial — No Requirement for Different Court-Appointed Counsel at Subsequent Hearing to Terminate Parental Rights: On the first day of his criminal trial, Jeremy rejected court-appointed counsel from the public defender's office and represented himself instead. He was convicted of deliberate homicide. Later, during hearings to terminate his parental rights, the court appointed the same public defenders to represent him. His parental rights were terminated, and he appealed on grounds that his right to counsel was violated. However, he provided no authority for the argument that his rejection of the attorneys during the criminal trial somehow required that the court find alternative counsel for later proceedings. Jeremy was entitled to counsel, but not to counsel of his choice, nor did the appointment of the same counsel for both parents in the parental rights proceedings create a conflict of interest in violation of the Rules of Professional Conduct, absent a showing that it resulted in prejudice or adverse impact to the rights of the parties. Jeremy presented no evidence or authority that the right to counsel was denied, and the termination of his parental rights was affirmed. In Re Custody & Parental Rights of M.W. & C.S., 2001 MT 78, 305 M 80, 23 P3d 206 (2001).

Ordering Defendant to Pay Counsel's Cost for First Trial as Well as Retrial: Following retrial, the judge was authorized by 46-8-113 to order defendant to pay his counsel's costs for the first trial as well as the second trial. This did not impinge upon the defendant's right to counsel, and there was no evidence to support his claim that the judge acted out of vindictiveness because defendant went to retrial. St. v. Hubbel, 2001 MT 31, 304 M 184, 20 P3d 111 (2001).

Unequivocal Relinquishment of Right to Counsel Required Before Self-Representation Allowed: A defendant has a constitutional right to assistance of counsel and also has a constitutional right to proceed pro se, but before an accused may forego the right to counsel and may self-represent, waiver of the benefits associated with the right to counsel must be unequivocal, voluntary, knowing, and intelligent (see St. v. Langford, 267 M 95, 882 P2d 490 (1994)). In this case, the record showed that although Swan asked to be allowed to represent himself, what he actually hoped for was that new counsel be appointed and that he be allowed access to the law library. Thus, the request for self-representation was anything but unequivocal, and the District Court did not err in refusing the request. St. v. Swan, 2000 MT 246, 301 M 439, 10 P3d 102, 57 St. Rep. 1033 (2000), followed in St. v. Browning, 2006 MT 190, 333 M 132, 142 P3d 757 (2006).

Finding That Three of Four Prior DUI Convictions Constitutionally Valid Affirmed — Use Proper to Support Felony Fifth Offense: In defending against felony DUI fifth offense, Brown raised various issues regarding the constitutionality of the prior four convictions. Allocating the respective burdens of proof as set forth in St. v. Okland, 283 M 10, 941 P2d 431, 54 St. Rep. 467 (1997), the District Court correctly found that the state met its burden of proving the constitutional validity of three of four of Brown's prior convictions. The court balanced Brown's contentions that he did not recall being informed of his right to counsel and did not sign a waiver of his right to counsel when he pleaded guilty to the prior charges with the state's evidence in the form of the Justice's Court Judge who read Brown his rights in three of the four original trials. Declining to narrowly prescribe the type of direct, affirmative evidence necessary for the state to prove the constitutionality of prior convictions, the Supreme Court found that Brown's signature on an advisement of rights form and a waiver of rights form were but factors to be considered in the totality of the circumstances. The District Court is in the best position to weigh each party's evidence and determine which will prevail and did so here. The evidence was properly used to support enhanced felony charges. St. v. Brown, 1999 MT 143, 295 M 5, 982 P2d 1030, 56 St. Rep. 560 (1999).

Failure to Appoint Counsel for Defendant During Sentence Review Process — Sentence Review as Critical Stage of Proceedings: To the extent that the Sentence Review Division has the power to impose any sentence that could be imposed by the District Court, including increasing a sentence, sentence review is a critical stage of the proceedings against a defendant because of the potential for substantial prejudice from possible further loss of liberty. Therefore, assistance of counsel is necessary to aid a defendant in presenting the defendant's case during all stages of the review process. Defendant's mere appearance before the Sentence Review Division does not constitute a valid waiver of the right to counsel. Thus, it is the duty of the Sentence Review Division to inform a defendant of the right to counsel representation both when deciding whether to file an application for review and when appearing and presenting a case to the Division. The Sentence Review Division rule holding to the contrary was held to be unconstitutional. Ranta v.

St., 1998 MT 95, 288 M 391, 958 P2d 670, 55 St. Rep. 378 (1998), following Consiglio v. Warden, St. Prison, 220 A2d 269 (Conn. 1966).

No Right to Counsel in Petition to Dispose of Evidence — Issue Held Res Judicata: Woods was convicted of writing a bad check. After the state filed a petition to dispose of certain evidence pursuant to 46-5-306 through 46-5-309, Woods argued to the District Court that he was entitled to appointed counsel, pursuant to 46-8-104, for the purpose of responding to the petition. The District Court held that Woods was not entitled to appointed counsel because the granting of the state's petition would not result in a conviction of an offense for which Woods could be punished. Woods appealed that decision to the Supreme Court, and the Supreme Court affirmed the District Court. After the District Court granted the petition to dispose of evidence, Woods again raised the issue of his entitlement to appointed counsel to the District Court. The District Court denied the request for the same reason that it had previously. Woods then appealed to the Supreme Court. The Supreme Court held that because of its earlier decision in the matter of Woods's right to counsel, the issue was now res judicata, and the Supreme Court therefore affirmed the holding of the District Court. St. v. Woods, 286 M 355, 951 P2d 981, 54 St. Rep. 1445 (1997).

Allegation of Uncounseled Waiver of Right to Attorney — Burden of Proof — Testimony of Routine of City Judge Held to Create Triable Issue of Fact: Olson moved to dismiss a felony DUI charge based upon his affidavit that in his previous DUI convictions, he was not represented by counsel and was not told that he could have a court-appointed attorney. In response to Olson's affidavit, the state presented the testimony of the City Judge who convicted Olson on one of the previous DUI charges. The judge testified that although he had no specific recollection of Olson's case, he always asks defendants whether they understand their rights and always reads their rights from a prepared text that includes an advisement of the right to counsel. The Supreme Court held that pursuant to Rule 406, M.R.Ev. (Title 26, ch. 10), this testimony is substantive evidence that creates a triable issue of fact. Therefore, the Supreme Court held that the District Court erred when it held that this testimony was insufficient as a matter of law to create a triable issue of fact. St. v. Olson, 283 M 27, 938 P2d 1321, 54 St. Rep. 475 (1997), followed in St. v. Couture, 1998 MT 137, 289 M 215, 959 P2d 948, 55 St. Rep. 548 (1998), and St. v. Moga, 1999 MT 283, 297 M 1, 989 P2d 856, 56 St. Rep. 1143 (1999). See also St. v. Ailport, 1998 MT 315, 292 M 172, 970 P2d 1044, 55 St. Rep. 1292 (1998).

Record Failing to Show Specific Advisement of Right to Counsel Held Insufficient Basis for Penalty Enhancement: After three previous DUI convictions, Jenni was charged with felony DUI but moved to dismiss on the grounds that he had not been represented by an attorney and had not been advised of his right to counsel. Jenni submitted an affidavit signed by himself. The Supreme Court held that pursuant to its holding in St. v. Okland, 283 M 10, 941 P2d 431, 54 St. Rep. 467 (1997), the burden shifted to the state to prove Jenni had been advised of his right to counsel and held that a court record showing that Jenni was generally advised of his rights, without specifically showing that he was advised of his right to counsel, fails to meet the state's burden. The Supreme Court therefore affirmed the District Court's dismissal of the felony DUI charge. St. v. Jenni, 283 M 21, 938 P2d 1318, 54 St. Rep. 472 (1997).

Uncounseled Waiver of Rights Held No Basis for Enhanced DUI Penalty — Presumption of Regularity of Conviction — Burden of Proof: Okland was charged with his fourth DUI violation and, by virtue of 61-8-714 and 61-8-722, was charged with a felony. Okland filed a motion to dismiss the felony charges, asserting that because he was not represented by counsel at the three previous convictions and had not adequately been advised of his right to counsel, those convictions could not be use to enhance the penalty. With his motion, Okland submitted an affidavit and a record of his 1985 conviction in Lake County. The District Court dismissed the felony charge. The Supreme Court, relying upon United States Supreme Court cases, held that a presumption of regularity attaches to prior convictions during collateral attack and that therefore, even in the absence of a transcript or record, a rebuttable presumption attaches that the prior conviction is valid and a defendant who challenges the validity of the conviction has the burden of producing direct evidence of the conviction's invalidity. In this case, the Supreme Court noted that Okland did produce sufficient evidence to shift the burden to the state and that the copy of the letter produced by the state notifying Okland that he had to complete a financial statement before a court-appointed attorney would be appointed was insufficient to meet the state's burden of proof. For this reason, the Supreme Court held that the District Court did not err in granting the motion to dismiss the felony charges against Okland. St. v. Okland, 283 M 10, 941 P2d 431, 54 St. Rep. 467 (1997), followed in St. v. Perry, 283 M 34, 938 P2d 1325, 54 St. Rep. 478 (1997), St. v. Jenni, 283 M 21, 938 P2d 1318, 54 St. Rep. 472 (1997), St. v. Brown, 1999 MT 143, 295 M 5, 982 P2d 1030, 56 St. Rep. 560 (1999), St. v. Moga, 1999 MT 283, 297 M 1, 989 P2d 856, 56 St.

Rep. 1143 (1999), St. v. Anderson, 2001 MT 188, 306 M 243, 32 P3d 750 (2001), and St. v. Kvislen, 2003 MT 27, 314 M 176, 64 P3d 1006 (2003). Okland was also followed, with a different result, in St. v. Ailport, 1998 MT 315, 292 M 172, 970 P2d 1044, 55 St. Rep. 1292 (1998).

No Right to Counsel of One's Choice: The right to assistance of counsel does not vest in a defendant the right to counsel of the defendant's choice. St. v. Craig, 274 M 140, 906 P2d 683, 52 St. Rep. 1158 (1995); St. v. Colt, 255 M 399, 843 P2d 747, 49 St. Rep. 1003 (1992); St. v. Enright, 233 M 225, 758 P2d 779, 45 St. Rep. 1442 (1988), overruled, to the extent that it stands for the proposition that a criminal defendant has a right to a "meaningful attorney-client relationship", in St. v. Gallagher, 2001 MT 39, 304 M 215, 19 P3d 817A (2001).

Prior Uncounseled Misdemeanor Used to Convert Later Misdemeanor Charge to Felony: In 1992, Hansen pleaded guilty to a first charge of domestic abuse. He was not represented by counsel in that proceeding. Later in 1992, Hansen pleaded guilty to a second charge of domestic abuse for which he was represented. In 1994, Hansen was arrested for another domestic abuse offense. Because this was the third offense, the state filed an information charging Hansen with felony domestic abuse. The District Court held that the first misdemeanor could not be counted to enhance the charge because Hansen did not knowingly waive his right to counsel. Citing Nichols v. U.S., 511 US 738, 128 L Ed 2d 745, 114 S Ct 1921 (1994), the Supreme Court held that a prior uncounseled misdemeanor may be used to provide a higher penalty upon a third offense and that because Hansen did not have a right to counsel for the first misdemeanor, whether he knowingly waived such a right was irrelevant. St. v. Hansen, 273 M 321, 903 P2d 194, 52 St. Rep. 993 (1995).

Right to Waive Counsel Discretionary With Trial Court: Langford was accused of five counts of deliberate homicide alleged to have been committed during a prison riot. Langford requested to have his two attorneys dismissed and to represent himself. The Supreme Court stated that although the right to self-representation is a constitutional right, it is subject to the trial court determining that the defendant is knowingly and intelligently foregoing the benefits of counsel and that the defendant is competent to self-defend. The Supreme Court held that the lower court had not abused its discretion in finding that Langford not be allowed to represent himself. St. v. Langford, 267 M 95, 882 P2d 490, 51 St. Rep. 962 (1994), following St. v. Colt, 255 M 399, 843 P2d 747 (1992). Langford was followed in St. v. Woods, 283 M 359, 942 P2d 88, 54 St. Rep. 617 (1997).

Waiver of Right to Counsel — Unequivocal: Langford was accused of five counts of deliberate homicide alleged to have been committed during a prison riot. Langford requested to have his two attorneys dismissed and to represent himself. The Supreme Court held that it was adopting the additional requirement that a request to waive the right to counsel be unequivocal, that a review of the record as a whole indicated that Langford's request to represent himself was equivocal, and that it was not error to deny him the right to represent himself. St. v. Langford, 267 M 95, 882 P2d 490, 51 St. Rep. 962 (1994), followed in St. v. Woods, 283 M 359, 942 P2d 88, 54 St. Rep. 617 (1997), and St. v. Swan, 2000 MT 246, 301 M 439, 10 P3d 102, 57 St. Rep. 1033 (2000).

"Confusion Doctrine" Inapplicable: Stopped for suspicion of driving under the influence, appellant was read the implied consent form and asked to submit to a blood alcohol content (BAC) test. After appellant refused, the officer read appellant's Miranda rights and allowed appellant to call an attorney. Subsequently, appellant's license was suspended for refusing to submit to the BAC test. Appealing the suspension, appellant argued that the BAC test refusal should be excused because the officer's failure to inform appellant that a driver has no right to counsel before deciding whether to submit to the BAC test caused appellant to confuse his Miranda right to counsel with rights under the implied consent law. While not adopting the "confusion doctrine", the Supreme Court ruled that it applies only when Miranda rights are given prior to or contemporaneously with a driver being informed of rights under the implied consent law. Since appellant's Miranda rights were read after the implied consent form was read and after the driver's refusal to submit to the BAC test, it was unlikely that appellant confused the Miranda right to counsel with rights under the implied consent law. Blomeyer v. St., 264 M 414, 871 P2d 1338, 51 St. Rep. 324 (1994), followed in Gentry v. St., 282 M 491, 938 P2d 693, 54 St. Rep. 450 (1997).

Use of Presentence Investigation Report Not Violative of Right to Counsel: Smith relied on St. v. Robbins, 218 M 107, 708 P2d 227 (1985), and Bullington v. Mo., 451 US 430, 68 L Ed 2d 270, 101 S Ct 1852 (1981), in arguing that the trial court's reliance on "uncounselled" statements made during a presentence investigation interview to impose the death penalty violated his right to counsel. However, Smith was represented by counsel at the arraignment, when he entered guilty pleas and requested the death penalty. Following the arraignment, the court scheduled a hearing in aggravation or mitigation of sentence and ordered a presentence investigation and report to be submitted prior to the sentencing hearing. Therefore, Smith and his attorney knew

in advance that the investigation had been ordered and that the ensuing report would be used at the sentencing hearing. Smith was aided by the guiding hand of counsel in preparing for the presentence investigation and thus could not later claim a constitutional violation of the right to counsel. St. v. Smith, 261 M 419, 863 P2d 1000, 50 St. Rep. 1388 (1993) (Smith II), following Estelle v. Smith, 451 US 454, 68 L Ed 2d 359, 101 S Ct 1866 (1981). Following automatic appeal and review, the death sentence was affirmed in St. v. Smith, 280 M 158, 931 P2d 1272, 53 St. Rep. 1345 (1996) (Smith III), certiorari denied, 522 US 965 (1997), dismissal of postconviction relief claims alleging the judge's postsentencing bias affirmed in Smith v. St., 2000 MT 327, 303 M 47, 15 P3d 395, 57 St. Rep. 1387 (2000).

Further Questioning Initiated by Accused After Demand for Counsel Not Violation of Right to Counsel: After Flack was arrested for burglary and made a demand for counsel, he was jailed because he was unable to make bail. Several days after being jailed, he was visited by a Livingston police captain who asked if he remembered the Miranda warnings given to him previously. Flack stated that he did remember and said he would waive those rights. The police captain then questioned Flack, and Flack admitted his participation in the robbery. The District Court found that the waiver of rights was made voluntarily and denied a motion to suppress Flack's admissions. The Supreme Court reviewed the transcript of the meeting with the police captain and held that the District Court's finding that the interrogation was initiated by Flack was supported by substantial evidence. This is the type of situation that is covered by the exception to the "no further interrogation" rule set forth in Edwards v. Ariz., 451 US 477 (1981). St. v. Flack, 260 M 181, 860 P2d 89, 50 St. Rep. 997 (1993).

Law Enforcement Officer's Comments — Interrogation for Purposes of Miranda Rights: Flack was taken to the Park County Sheriff's office for questioning about a robbery. After responding to questions, Flack said that he guessed he was going to have to get a lawyer, at which point the questioning stopped and the tape recorder was turned off. A Livingston police captain then continued to talk to Flack, telling him what evidence the law enforcement agencies had on Flack that proved that he participated in the robbery. Flack then admitted he had been at the scene of the robbery. The Supreme Court held that under these circumstances, it was error for the District Court not to grant a motion suppressing Flack's statements that were made after the tape recorder was turned off. Citing R.I. v. Innis, 446 US 291 (1980), the Supreme Court concluded that the comments of the Livingston police captain were a tactic that law enforcement officers should know is reasonably likely to evoke an incriminating response from a suspect and therefore were tantamount to interrogation, which should have ceased after Flack stated that he would have to get a lawyer. St. v. Flack, 260 M 181, 860 P2d 89, 50 St. Rep. 997 (1993).

Knowing and Intelligent Waiver of Time to Consult With Counsel:

The District Court Judge properly found that defendant made a voluntary, knowing, and intelligent waiver of the right to counsel. The judge twice told defendant that the judge could not help him or give him breaks and would have to hold him to the same standards as an attorney. The District Court Judge is in the best position to determine whether a waiver is knowing and intelligent and is not held to a rigid standard of making the determination. The judge can consider defendant's level of understanding, his background and prior experience with the legal system, his seriousness of purpose, and his deliberateness. St. v. Colt, 255 M 399, 843 P2d 747, 49 St. Rep. 1003 (1992), followed in St. v. Woods, 283 M 359, 942 P2d 88, 54 St. Rep. 617 (1997).

District Court did not err in refusing postconviction relief on the basis of ineffective counsel where defendant's past criminal record and the hearing transcript reflect that defendant was aware of "stand-in" counsel at a sentencing hearing yet knowingly and intelligently refused an opportunity to take the time necessary to talk with counsel. St. v. Haynie, 186 M 374, 607 P2d 1128 (1980).

Right to Appellate Counsel Not Violated for Indigent Pro Se Defendant — "Anders" Test: Under the sixth amendment to the U.S. Constitution, an indigent appellant has a right to counsel on his first appeal; however, the U.S. Supreme Court established a procedure in Anders v. Calif., 386 US 738, 18 L Ed 2d 493, 87 S Ct 1396 (1967), for when an attorney believes an appeal lacks meritorious issues. If counsel finds after conscientious examination that a case is wholly frivolous, counsel should so advise the court and request permission to withdraw. The request must be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of the brief should be furnished the indigent, and he should be allowed sufficient time to raise any points that he chooses. The court then proceeds, after full examination of all proceedings, to decide whether the case is wholly frivolous. If that decision is reached, the court may grant counsel's request to withdraw and dismiss the appeal if federal law requires or proceed to a decision on the merits if state law requires. However, if the court finds any legal

points arguable on their merits, it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal. When counsel is granted a withdrawal in this state, the Montana Supreme Court, as a matter of practice, allows the case to proceed on the merits to ensure that the indigent appellant is afforded full due process rights. A procedure conducted in accord with Anders therefore precludes a claim of denial of right to counsel. St. v. Mason, 253 M 419, 833 P2d 1058, 49 St. Rep. 506 (1992). The Anders test was applied in St. v. Birthmark, 253 M 526, 833 P2d 1103, 49 St. Rep. 583 (1992), and In re H.E., 2002 MT 257, 312 M 182, 59 P3d 29 (2002).

Presence of Counsel During Compelled Mental Examination: Defendant contended that her constitutional right to counsel entitled her to have counsel present during a compelled psychiatric and psychological evaluation. The Supreme Court found no violation of that right in light of the fact that the trial court order compelling the evaluation expressly provided that defendant's counsel could attend, that all reports would be made available to counsel, and that defendant's counsel was in fact present in the examiner's office or available during the evaluations, although not physically present in the examination room. St. v. Hess, 252 M 205, 828 P2d 382, 49 St. Rep. 217 (1992).

Effective Counsel — Presumption That Counsel's Assistance Constitutes Reasonable Professional Assistance: After pleading guilty to two murders and receiving a death sentence, the defendant moved to withdraw his guilty plea on the basis of inadequate counsel. The Supreme Court held that in reviewing the actions of the defendant's attorney, it had to indulge a strong presumption that the attorney's conduct fell within the wide range of reasonable professional assistance. The court found that the trial attorney had extensive criminal trial experience and that the defendant had not been denied adequate legal representation. St. v. Langford, 248 M 420, 813 P2d 936, 48 St. Rep. 492 (1991).

No Right to Representation by Nonlawyer: A defendant has an inalienable right to represent himself, but has no right to demand representation by a nonlawyer. A District Court lacks authority to allow representation of a defendant by a nonlawyer. St. v. Barnes, 232 M 405, 758 P2d 264, 45 St. Rep. 1150 (1988).

Denial of Request for Self-Representation When Defendant Incompetent to Abandon Right to Counsel: Defendant contended that denial of his request to represent himself amounted to forced imposition of counsel in violation of his right to effectively defend himself. The constitutional right to counsel includes the accused's right to personally make his own defense; however, before a court can remove appointed counsel, defendant must be competent to abandon his right to counsel. Where, as here, defendant's pretrial conduct was uncooperative, his competence to represent himself was doubtful and denial of the motion for self-representation was proper. St. v. Brown, 228 M 209, 741 P2d 428, 44 St. Rep. 1462 (1987).

No Conflict of Interest Because Defendant's Father Paid for and Conferred With Counsel: The fact that defendant's father paid for defendant's attorney and consulted with the attorney concerning defendant's defense does not establish a conflict of interest. Defendant was not denied effective assistance of counsel because of his father's involvement with the attorney. St. v. Pease, 227 M 424, 740 P2d 659, 44 St. Rep. 1203 (1987).

Court-Appointed Counsel for Indigent Party in Civil Proceeding — No Requirement: There is no constitutional or statutory requirement that an indigent party be provided with court-appointed counsel in a civil proceeding. In re Adoption of K.L.J.K., 224 M 418, 730 P2d 1135, 43 St. Rep. 2297 (1986).

Issue of Right to Counsel Not Raised in Lower Court — No Appeal: The Supreme Court declined to consider whether the right to counsel was violated when defendant discharged his original court-appointed counsel, did not seek additional counsel, and failed to raise the issue at District Court level where he appeared pro se. Billings v. Skurdal, 224 M 84, 730 P2d 371, 43 St. Rep. 2036 (1986).

When Right to Counsel Invoked — Subsequent Incriminating Testimony Inadmissible — Error Held Harmless: Recognizing that it was affording greater protection under the state constitutional right to counsel provision than the U.S. Supreme Court had granted under the identically worded federal constitutional provision, and that this was a departure it had previously declined to make in the area of criminal law, the Montana Supreme Court held that when detained defendant counsel. His willing participation in a subsequent recorded conversation, without advice of counsel, did not constitute a waiver of the right to counsel, and admission of the recording into evidence, being testimonial and self-incriminating in nature, was error. However, the error was harmless because defendant during trial testified to a different story than he told on the recording, and the recording was admissible for impeachment purposes. St. v. Johnson, 221 M 503, 719 P2d 1248, 43 St. Rep. 1010 (1986), overruled, to the extent that the right to counsel for

self-incrimination purposes may be invoked in custodial interrogation, in St. v. Buck, 2006 MT 81, 331 M 517, 134 P3d 53 (2006).

Attachment at "Critical Stages" — What Stages Critical: A "critical stage" of the proceedings is any step in which there is potential substantial prejudice to the defendant, and a defendant may question failure to provide counsel at a critical stage only where potential substantial prejudice inheres in the absence of counsel. St. v. Robbins, 218 M 107, 708 P2d 227, 42 St. Rep. 1440 (1985), followed in St. v. Elliott, 221 M 174, 717 P2d 572, 43 St. Rep. 723 (1986), and St. v. Finley, 276 M 126, 915 P2d 208, 53 St. Rep. 310 (1996), overruled, to the extent that it stands for the proposition that a criminal defendant has a right to a "meaningful attorney-client relationship", in St. v. Gallagher, 2001 MT 39, 304 M 215, 19 P3d 817A (2001).

Capital Sentence Requested by Defendant — No Basis for Resentencing: Defendant pleaded guilty to two counts of aggravated kidnapping and two counts of deliberate homicide. Defendant requested the death penalty. After sentencing, defendant had second thoughts and on appeal sought a resentencing. The Supreme Court held there was no basis for resentencing because: (1) sentencing was not tainted by reliance on prior Canadian convictions obtained without counsel; (2) inclusion of juvenile offenses as adult offenses in presentence report was not error; (3) a court-ordered presentence interview was not violative of the fifth amendment; (4) recommendation for the death penalty in the presentence report was not improper; (5) no judicial error was committed in the extent of review of mitigating factors and no unconstitutional limit was placed on the court's consideration of mitigating circumstances; (6) no error was found in the court's denial of defendant's motion for additional psychiatric evaluation; (7) defendant was not required to be present at proceedings occurring after the verdict; (8) jury participation is not constitutionally required in capital sentencing procedures; (9) no indication was found that the trial court imposed the death penalty out of passion or prejudice; and (10) the sentence was not excessive or disproportionate. St. v. Smith, 217 M 461, 705 P2d 1087, 42 St. Rep. 463 (1985) (Smith I). A habeas corpus petition was conditionally granted in Smith v. McCormick, 914 F2d 1153 (9th Cir. 1990), a subsequent resentencing to death was reversed and remanded for preparation of a new presentence investigation in St. v. Smith, 261 M 419, 863 P2d 1000 (1993) (Smith II), and following automatic appeal and review, the death sentence was affirmed in St. v. Smith, 280 M 158, 931 P2d 1272, 53 St. Rep. 1345 (1996) (Smith III).

No Right to Counsel Before Deciding Whether to Submit to Chemical Testing — Blood Alcohol Test Not "Critical Stage" Event, Self-Incriminating Communication, or Denial of Due Process: Defendant was arrested on a charge of driving while under the influence of alcohol. He agreed to a chemical test after being told that he had a right to refuse the test and that he did not have a right to consult an attorney before deciding whether to submit to testing. The District Court granted the defendant's motion to suppress the results of the test on the basis of the 6th and 14th amendments to the U.S. Constitution. The Supreme Court reversed and found that neither the U.S. Constitution nor the Montana Constitution guarantees a defendant the opportunity to seek an attorney's advice before deciding whether to submit to a blood alcohol test, when consent is considered given as a matter of law. A Breathalyzer test is not susceptible to the suggestive manipulation characteristic of the "critical stage" event, the results of the test are not self-incriminating communications, and the statutory procedures for the test meet due process requirements. St. v. Armfield, 214 M 229, 693 P2d 1226, 41 St. Rep. 2430 (1984), cited in St. v. Johnson, 221 M 503, 719 P2d 1248, 43 St. Rep. 1010 (1986), and followed in Meyer v. St., 229 M 199, 745 P2d 694, 44 St. Rep. 1900 (1987), Blomeyer v. St., 264 M 414, 871 P2d 1338, 51 St. Rep. 324 (1994), St. v. Van Kirk, 2001 MT 184, 306 M 215, 32 P3d 735 (2001), and St. v. Michaud, 2008 MT 88, 342 M 244, 180 P3d 636 (2008).

Denial of Continuance Unfair When Defendant Acted With Due Diligence: An information was filed December 2, 1983, charging the defendant with the offense of sexual intercourse without consent. After retaining an attorney, the defendant pleaded not guilty to the charge on December 9, 1983. The attorney continued to represent the defendant until a disagreement arose between the two concerning the handling of a motion hearing. Two days later, on May 2, 1984, the defendant released the attorney. On May 3, 1984, the defendant tried to secure another attorney, who agreed to represent the defendant only if the trial court would grant a continuance. The court refused to do so, and trial was set to begin May 14. The defendant, after trying unsuccessfully a second time to secure counsel, appeared at trial without an attorney and again moved for a continuance. The motion was denied. Voir dire commenced, a jury was selected and sworn, and the defendant again moved for a continuance, waiving his right to a speedy trial. An attorney was appointed to defend the defendant, the trial proceeded immediately without allowing defendant's counsel an opportunity to prepare, and the defendant subsequently

was convicted. The trial court abused its discretion in refusing to grant the defendant's motion for a continuance of the trial as he acted with due diligence to secure new counsel on learning he was not compatible with the attorney he initially retained. The mere right to an attorney is not sufficient if that attorney is not given sufficient time to prepare the client's case, including adequate pretrial preparation time. The defendant was denied a fair trial. St. v. Lundblade, 213 M 420, 691 P2d 831, 41 St. Rep. 2208 (1984).

Intelligent Waiver of Counsel Based on Defendant's Knowledge of Court Procedure — Federal Habeas Corpus Proceeding: The defendant pleaded guilty to one count of rape and later brought a petition for federal habeas corpus relief, claiming that the Montana Supreme Court incorrectly denied his request to withdraw his plea, based on an unintelligent waiver of counsel at his sentencing hearing. The federal District Court held that the record of the state court proceedings showed a voluntary waiver and, when combined with evidence of the defendant's "court sense", was sufficient to show that the defendant was knowledgeable of his rights and was sufficiently demanding to make himself heard if he so chose. The writ was therefore denied. Haynie v. Crist, 40 St. Rep. 923 (D.C. Mont. 1983) (apparently not reported in Federal Supplement).

Transfer of Child Proceeding From Montana Court to Tribal Court: One of the purposes of the Indian Child Welfare Act, 25 U.S.C. § 1901, et seq., is to ensure due process for all those involved. This requires a Montana court, when entertaining a tribal court motion for transfer to the tribal court of jurisdiction of children who are the subject of a Montana court proceeding, to hold a hearing on the transfer request and give a parent who claims indigency an appointed counsel if the court finds indigency. In re G.L.O.C., Youth in Need of Care, 205 M 352, 668 P2d 235, 40 St. Rep. 1354 (1983).

Minor Charged With Traffic Offense: Since a minor may not be held in any detention facility or jail by reason of a traffic violation or for nonpayment of a fine resulting from the violation, the minor is not entitled to counsel as a fundamental right in connection with the violation. Even if he is an indigent, his right to appointment of counsel exists only when he may lose his physical liberty if he loses the litigation. State ex rel. Maier v. City Court, 203 M 443, 662 P2d 276, 40 St. Rep. 560 (1983).

Waiver of Right to Counsel — Defendant Indicted and Represented by Counsel: A defendant charged with deliberate homicide by information or indictment and represented by counsel may waive his right to counsel without notice to or presence of counsel, during an interview initiated by law enforcement officers investigating the charged crime, if defendant's waiver is voluntary, knowing, and intelligent as shown by the particular facts and circumstances surrounding that case. St. v. Norgaard, 201 M 165, 653 P2d 483, 39 St. Rep. 2028 (1982).

Waiver of Right to Counsel by Defendant Claiming Mental Defect — When Confession Suppressed: Defendant, convicted of aggravated assault, appealed based on issues related to his confession. The Supreme Court on review said the real issue is whether the defendant knowingly and voluntarily waived the right to counsel. The question of waiver was inextricably interwoven with the question of the voluntariness of the accused's confession. That was especially true because the defendant alleged incapacity because of mental illness. Whether a confession should have been suppressed depends on its voluntariness, and that depends on the "totality of the circumstances". The Supreme Court found that the evidence showed that Miranda warnings were given before confession, that the defendant was capable of understanding the warnings, that the defendant waived his rights to counsel and against self-incrimination knowingly and voluntarily, and that the defendant was not improperly induced into confession. St. v. Mercer, 191 M 418, 625 P2d 44, 38 St. Rep. 312 (1981).

Neutron Activation Test for Gunpowder Residues — When Right to Counsel Attaches: The defendant was arrested at the police station without a warrant, and the police administered a neutron activation test to determine if there were gunpowder residues on the defendant's hands. The defendant sought to suppress the results of the test on the grounds that his sixth amendment right to counsel had been violated. The Supreme Court held that an initial search of a defendant incident to arrest does not require the presence of counsel because the defendant's right to counsel attaches only at the time adversary judicial proceedings are initiated against him by way of a formal charge. St. v. Ulrich, 187 M 347, 609 P2d 1218 (1980).

Reference by Defense Counsel to Prior Felony Not Prejudicial: No reversible error was found in two vague references by defense counsel during voir dire to defendant's prior felony conviction, although the court condemned the tactic. St. v. Lopez, 185 M 187, 605 P2d 178 (1980), followed in St. v. Long, 206 M 40, 669 P2d 1068, 40 St. Rep. 1493 (1983).

Knowing and Intelligent Waiver Necessary — Test: In judging a waiver of the fifth amendment right to counsel, a conclusion that the right was waived necessarily entails a finding of a knowing

and intelligent relinquishment of a known right, and some of the factors to be considered in making the finding are: (1) the background, experience, and conduct of the person; (2) his age, education, and intelligence; and (3) his capacity to understand the Miranda warnings given him, the nature of his fifth amendment rights, and the consequences of waiving those rights. St. v. Blakney, 185 M 470, 605 P2d 1093 (1979), certiorari granted, 101 S Ct 2999 (1981), and judgment vacated and case remanded for further consideration in the light of Edwards v. Ariz., 101 S Ct 1880 (1981); affirmed on remand, 197 M 131, 641 P2d 1045, 39 St. Rep. 436 (1982).

Suppression of Confession — Voluntariness — Waiver of Right to Counsel After Making Request: To determine whether a confession should have been suppressed it had to be determined whether confession was voluntary and whether there was an unconstitutional denial of the right to counsel. In so doing, the following questions had to be answered: What was the totality of the circumstances? Was there effective assertion of the right to counsel? And if so, was there an effective waiver? Since the evidence answered a large number of the requisite questions about the circumstances, the decision of the trial court was held not to have clearly contravened the weight of the evidence, and its holding of voluntariness was upheld. Since any indication by a defendant in any manner that he wishes to consult with an attorney suffices, and evidence showed the defendant had met this requirement, the trial court erred in concluding that there was ineffective assertion of the right to counsel. After adopting the rule that a defendant can validly waive the right to counsel after making a request for counsel, the Supreme Court found the trial court had properly found that the State had met its "heavy burden" of showing waiver of counsel. St. v. Blakney, 185 M 470, 605 P2d 1093 (1979), certiorari granted, 101 S Ct 2999 (1981); judgment vacated and case remanded for further consideration in light of Edwards v. Arizona, 101 S Ct 1880 (1981); affirmed on remand, 197 M 131, 641 P2d 1045, 39 St. Rep. 436 (1982).

Waiver Following Indication of Interest in Counsel: Arrested person asked police interviewing him if they thought he should get an attorney, and police stated it was up to him. He resumed talking. At a later interview with police he stated, "Maybe I should have an attorney". The police stopped talking to him and began to leave the room, and before they left he resumed talking to them, at which point they reminded him that he had just indicated he wanted an attorney. He stated that he did not want an attorney. The interview continued. He made a knowing and intelligent waiver of his right to counsel, and subsequent confession was voluntary and admissible. St. v. Blakney, 185 M 470, 605 P2d 1093, (1979), certiorari granted, 101 S Ct 2999 (1981), and judgment vacated and case remanded for further consideration in the light of Edwards v. Ariz., 101 S Ct 1880 (1981); affirmed on remand, 197 M 131, 641 P2d 1045, 39 St. Rep. 436 (1982).

Waiver of Counsel and Self-Representation: Counsel was appointed for defendant and was dismissed by him prior to trial. The court warned defendant of the disadvantages of self-representation and appointed standby counsel to assist defendant should he so request. Having made the choice of self-representation knowingly and intelligently, defendant cannot later claim that he was denied the right to adequate counsel. St. v. Harvey, 184 M 423, 603 P2d 661 (1979).

Effective Waiver: A defendant who said it probably was advisable that he have an attorney but who nonetheless went ahead and fully consented to being interrogated and tape-recorded was held to have made a voluntary statement, having been advised of his rights. A statement made voluntarily after the speaker has been made fully aware of and understands his rights is not objectionable because the statement is made without the advice or assistance of counsel. St. v. Brubaker, 184 M 294, 602 P2d 974 (1979).

Inadequate Miranda Warning: Appellant's statement was admitted into evidence erroneously for two reasons. First, the State failed to prove the voluntariness of appellant's confession at the suppression hearing by a preponderance of the evidence. When the State fails to show that appellant was advised of his Miranda rights or that appellant made the statement attributed to him or if it fails to introduce any evidence other than the evidence showing that the appellant had the mental capacity to make a voluntary statement, a finding that the State has carried its burden of proving voluntariness by a preponderance of the evidence is clearly against the weight of the evidence and must be overturned. Second, the Miranda warning allegedly given appellant was inadequate. The language "we have no way of giving you a lawyer, but one will be appointed for you, if and when you go to court", was held confusing. Because the confession "undoubtedly weighed heavily in the minds of the jurors in finding [the] appellant guilty", conviction was reversed. St. v. Dess, 184 M 116, 602 P2d 142 (1979).

Juveniles — Suppression of Statements and Evidence: In the trial of a juvenile for shooting a police officer, a motion for suppression of evidence obtained under authority of a lawful inspection and statements voluntarily made was erroneously granted. However, statements made after a

waiver of counsel that was void because of lack of counsel for the underaged defendant were properly suppressed. St. v. District Court, 176 M 257, 577 P2d 849 (1978).

Reading of Nonadmitted Police Report to Jury: When jury deliberations were tainted by reading nonadmitted police report to the material prejudice of defendant's right to an impartial jury, to confront witnesses, and to assistance of counsel at every critical stage of trial, a new trial was required. St. v. Davison, 173 M 510, 568 P2d 159 (1977).

Motion to File Information Not Critical Stage: A motion for leave to file an information is not a "critical stage" entitling defendant to the right to assistance of counsel. State ex rel. Brackman v. District Court, 172 M 24, 560 P2d 523 (1977).

Stage Where Right to Counsel Required: When defendant was not positively identified until second set of photos was shown witnesses, it was not error for trial court to deny motion to suppress photo identifications since critical stage when police procedure changes from investigative to accusatorial was not reached at time photo displays of defendant were made, as it was upon the basis of this positive identification that the information was filed and defendant arrested. Defendant was not entitled to counsel at time of second photo display. St. v. Miner, 169 M 260, 546 P2d 252 (1976).

Commencement of Right to Counsel: Defendant's right to appointed counsel attached no later than his initial hearing, and delay of 4 months in the appointment of counsel rendered counsel ineffective and prejudiced defendant's case. Fitzpatrick v. Crist, 165 M 382, 528 P2d 1322 (1974).

EFFECTIVE ASSISTANCE OF COUNSEL

Defendant's Convictions Upheld — Alleged Ineffective Assistance Not Contributing to Convictions: The defendant was questioned by police after he was arrested and charged with deliberate homicide for the death of his ex-wife and tampering with evidence. During the questioning, the defendant was advised of his Miranda rights, he declined to waive his rights, and at times he indicated that he did not need an attorney, while at other times he indicated that he had an attorney. The defendant also said he would not answer questions, but he continued to do so and never told the police to stop. At trial, the defendant filed a motion to suppress, arguing that the police interview violated his right to counsel. The District Court denied the motion, and the defendant's attorney failed to seek admission of a video recording of the interview for the purpose of pointing out undisputed inconsistencies in the trial transcript. One of the clips in the video allegedly showed the defendant indicating he would not continue in the interview without an attorney. After deliberations, the jury convicted the defendant of both charges. On appeal, the defendant argued that his defense counsel provided ineffective assistance by failing to present the video recording of the police interview at the suppression hearing. The Supreme Court determined there was no reasonable probability the results of the trial would have been different had the video recording of the interview been held admissible based on all the other evidence in the case. Consequently, the defendant was unable to establish prejudice and his ineffective assistance of counsel claim was denied. St. v. Larson, 2015 MT 271, 381 Mont. 94, 356 P.3d 488.

Ineffective Assistance of Counsel — Standard for Determining Prejudice: To bring a successful claim for ineffective assistance of counsel, a petitioner must prove that counsel's actions or omissions were both unreasonable and prejudicial to the petitioner's defense. In proving prejudice, a petitioner is not required to show that but for counsel's actions the result of the trial would have been different. Instead, prejudice is sufficiently proven if the petitioner is able to show that absent counsel's actions there was a reasonable probability that the result of the trial would have been different. Wilkes v. St., 2015 MT 243, 380 Mont. 388, 355 P.3d 755.

Ineffective Assistance of Counsel — Strategic Decision of Counsel Unreasonable — First Prong of Strickland *Test Met:* Following his conviction of deliberate homicide for causing his infant son's death by inflicting abusive head trauma on the infant, the defendant petitioned for postconviction relief, arguing that his trial counsel rendered ineffective assistance of counsel by failing to prepare a challenge to the state expert's abusive head trauma diagnosis. In determining that counsel's actions were strategic and entitled to a presumption of reasonableness under the first prong of the Strickland test for ineffective assistance of counsel, the District Court concluded that counsel's obligation to prepare a challenge to the abusive head trauma diagnosis was discharged when he consulted one expert who returned the same diagnosis as the state's expert. The District Court also cited counsel's success in his last five trials in the judicial district that resulted in an acquittal or hung jury as entitling counsel's actions to a presumption of reasonableness. On appeal, the Supreme Court disagreed, concluding that neither of the reasons the District Court

provided measured the reasonableness of counsel's decision in light of the circumstances of the defendant's case. Wilkes v. St., 2015 MT 243, 380 Mont. 388, 355 P.3d 755.

Inadequate Initial Inquiry Into Complaint About Counsel: The defendant appealed the District Court's denial of his request for new counsel, alleging the District Court failed to conduct an adequate initial inquiry into his complaints regarding counsel. The Supreme Court agreed, noting that the District Court interrupted the defendant, prohibiting him from providing an explanation; ordered the defendant to follow the Office of State Public Defender (OPD) process for the appointment of new counsel; and then when the OPD denied the defendant's request and the defendant did not appeal that decision, ruled that the matter was concluded and provided the defendant with no opportunity to explain his complaints. The Supreme Court remanded the case to the District Court to conduct an adequate inquiry into the defendant's complaints and to determine whether the complaints are seemingly substantial and require a hearing to determine the validity of the complaints and the need for new counsel. St. v. Schowengerdt, 2015 MT 133, 379 Mont. 182, 348 P.3d 664.

Ineffective Counsel Claim Dismissed Without Prejudice — Postconviction Relief Proceeding Appropriate to Develop Record: The defendant was convicted of failure to give notice of change of address by a sexual offender. During voir dire, a potential juror said that he was suspicious of a defendant who would not testify. The defendant's attorney did not question the potential witness further, passed the jury panel for cause, then exercised a peremptory challenge for the juror. On appeal, the defendant argued that his attorney was ineffective for not further questioning or challenging the potential juror for cause rather than using a peremptory challenge. The Supreme Court dismissed the argument without prejudice, holding that without the benefit of a postconviction relief proceeding, the record was not clear as to whether the representation was deficient. St. v. Greene, 2015 MT 1, 378 Mont. 1, 340 P.3d 551.

Appointed Counsel Argued for Increased Sentence — Actions Considered Ineffective Assistance — Original Sentence Reinstated: The District Court had imposed a 30-year sentence on the petitioner with 20 years suspended. The petitioner later filed a petition for sentence review with the Sentence Review Division and received appointed counsel. At the hearing, counsel argued that the petitioner's sentence should be modified to a 30-year sentence with only 10 years suspended, a longer sentence than imposed by the District Court. The Division so modified the sentence. On a petition to the Supreme Court for extraordinary relief, the petitioner argued that he had received ineffective assistance of counsel because his attorney had advocated a longer sentence than his original sentence. The court agreed, and in applying the Strickland test noted that there was no plausible explanation for counsel's conduct and that his conduct had prejudiced the petitioner. Accordingly, the Supreme Court remanded the matter to the District Court to reinstate the original sentence. Avery v. Batista, 2014 MT 266, 376 Mont. 404, 336 P.3d 924.

Defense Counsel's Failure to Offer Jury Instruction Supporting Central Theory of Case — New Trial Warranted: In a theft and arson case in which the defendant sat in the driver's seat while another person exited the vehicle, gained entry to another vehicle, stole its contents, loaded them in the defendant's vehicle, and lit the burglarized vehicle on fire, the defense argued that the defendant's mere presence at the scene of the crime was insufficient to support a conviction. However, because the defense failed to offer the standard jury instruction that would have informed the jury that the defense's theory was legally correct, the defense counsel's performance was ineffective under the Strickland test and the defendant was entitled to a new trial. St. v. Chafee, 2014 MT 226, 376 Mont. 267, 332 P.3d 240.

Decision to Withdraw Jury Instruction Based on Lesser Included Offense — Sound Legal Reasoning for Withdrawal Given Claim of Innocence — No Ineffective Assistance of Counsel: Following a police report that the defendant, a massage therapist, had penetrated a client with his finger during a massage, he was charged with sexual intercourse without consent. During trial, his defense counsel requested a jury instruction on the lesser included offense of sexual assault but later withdrew his request for the instruction because it ran counter to the defendant's claim of innocence. After his conviction, the defendant filed a petition for postconviction relief in which he claimed that his attorney had erred in withdrawing the instruction. The Supreme Court, however, concluded that the attorney's decision to withdraw the instruction was legally sound given the defendant's claim of innocence and did not constitute ineffective assistance. Taylor v. St., 2014 MT 142, 375 Mont. 234, 335 P.3d 1218.

No Affirmative Duty for Police to Conduct Rape Exam or Fingernail Scrapings — Claim of Ineffective Assistance of Counsel Denied: A client reported to the police that the defendant, a massage therapist, had penetrated her with his finger during a massage. The alleged victim was not asked to submit to a rape exam and the police did not perform a fingernail scraping test on

the defendant. Following his conviction for sexual intercourse without consent and unsuccessful appeal of his conviction, the defendant filed a petition for postconviction relief. In it, he claimed that he had received ineffective assistance of counsel because his attorney had neither sought dismissal of the charge nor requested a jury instruction regarding the lack of a rape exam or fingernail scrapings. The Supreme Court rejected the argument that his counsel was ineffective and emphasized that the police do not have an affirmative duty to collect potentially exculpatory evidence. Taylor v. St., 2014 MT 142, 375 Mont. 234, 335 P.3d 1218.

Motion in Limine to Prohibit Introduction of Evidence of Defendant's Prior Bad Acts Denied — Defense Counsel's Failure to Object to Introduction of Evidence — No Ineffective Assistance of Counsel: The defendant was charged with brutally raping his girlfriend. At trial, his counsel made a motion in limine to prevent the prosecutor from presenting evidence regarding earlier reports of alleged physical abuse by the defendant against the victim and his former girlfriend. The District Court denied the motion, and testimony about alleged physical abuse by the defendant was admitted at trial without objection by his attorney. After he was convicted, the defendant appealed, claiming that he had received ineffective assistance of counsel because his attorney had not objected to the testimony of prior bad acts. The Supreme Court rejected his claim and concluded that given that the motion in limine had been denied and that the defendant's expert had based his own opinion on that evidence, the attorney's strategy in not objecting was within the scope of competency. St. v. Crider, 2014 MT 139, 375 Mont. 187, 328 P.3d 612.

Alerting State to Charging Error Through Motion to Preclude Evidence — Appointed Counsel Not Ineffective — Defendant Not Entitled to Wait to Object to Charging Errors Midtrial: The defendant was charged with criminal distribution of dangerous drugs. His court-appointed attorney filed a motion to preclude evidence of the defendant's accountability for the same charge. The state subsequently filed an amended information to include an accountability charge. After the defendant unsuccessfully objected to the filing of the amended information, he was convicted of accountability. On appeal, the defendant claimed ineffective assistance of counsel, alleging that his attorney had improperly alerted the state to its initial charging error by filing a motion to preclude evidence of accountability. The Supreme Court rejected the notion that a defendant is allowed to wait until midtrial to object to the state's charges and affirmed his conviction. St. v. Carter, 2014 MT 65, 374 Mont. 206, 320 P.3d 451.

Failure to Specifically Address Statutory Criteria — No Ineffective Assistance of Counsel — Presentation of Facts Addressing Criteria Sufficient for Court to Consider for Sentencing: On appeal, the defendant claimed that his attorney was ineffective because the attorney failed to specifically invoke 46-18-225 at sentencing. The Supreme Court analyzed the defendant's claim under the second prong of the Strickland test and concluded that the defendant could not show that his attorney's failure to formally invoke the statute had prejudiced the defendant. Rather, the statute was implicitly invoked by the attorney's reference to facts in the case that spoke to the criteria set out in 46-18-225. St. v. Zink, 2014 MT 48, 374 Mont. 102, 319 P.3d 596, following St. v. Weisweaver, 2010 MT 198, 357 Mont. 384, 239 P.3d 952, and St. v. Wilson, 2011 MT 277, 362 Mont. 416, 264 P.3d 1146.

No Record of Why Counsel Disclosed Neurologist as Lay Witness — Ineffective Assistance Claim Not Appropriate for Direct Appeal: The defendant was convicted of felony theft by insurance fraud. On direct appeal, the defendant argued he received ineffective assistance of counsel because his attorney had disclosed a neurologist as a lay witness rather than an expert. The Supreme Court held that the record did not explain why the defendant's attorney chose not to offer the neurologist as an expert witness and dismissed the claim without prejudice, allowing the defendant to raise the claim in a petition for postconviction relief. St. v. Schaeffer, 2014 MT 47, 374 Mont. 93, 321 P.3d 809.

*Failure to Hire Computer Expert — No Ineffective Assistance of Counsel:*The Supreme Court found that the failure to hire a computer expert was not ineffective assistance of counsel. The defendant's attorney was able to introduce circumstantial evidence that other people had access to the defendant's computer, which achieved the same purpose as an expert would have. Thus, the defendant was unable to prove that, but for his attorney's failure to hire a computer expert, there was a reasonable probability the outcome would have been different, failing the second prong of the Strickland test. Stock v. St., 2014 MT 46, 374 Mont. 80, 318 P.3d 1053.

Failure to Object to Admission of Summaries of Electronic Evidence — No Ineffective Assistance of Counsel: The defendant argued that his attorney was ineffective because the attorney failed to object during trial to the admission of summaries of electronic evidence consisting of pornographic computer images. The Supreme Court disagreed, noting that the attorney had previously objected to the admission of the electronic evidence itself in a pretrial motion in limine, which was denied

by the District Court. The Supreme Court held that the defendant failed to satisfy the second prong of the Strickland test because the defendant could not show that there was a reasonable probability the District Court would have sustained the objection to the summaries, since the District Court had already ruled against the objection to the electronic evidence. Stock v. St., 2014 MT 46, 374 Mont. 80, 318 P.3d 1053.

Failure by Attorney to Investigate Surveillance Video — No Ineffective Assistance of Counsel: After being sentenced for arson, a defendant appealed, arguing that his counsel did not review a surveillance video that showed an individual at the trunk of the parked vehicle shortly before the fire started. The defendant further claimed his counsel did not obtain an expert analysis concerning the surveillance video prior to the change of plea hearing or raise the issue on appeal. The defendant relied on an expert's report to substantiate his version of events, although the report stated that the surveillance video was unreliable due to its quality. The attorney submitted a sworn affidavit that he had watched the video prior to the hearing and had explained to the defendant that its contents were damaging to his case. The Supreme Court affirmed, noting that an attorney has a duty to conduct reasonable investigations or make a reasonable decision that particular investigations are unnecessary, and it found that under the circumstances, the attorney's decision not to retain an expert in video surveillance was reasonable. Ellison v. St., 2013 MT 376, 373 Mont. 159, 315 P.3d 950.

Failure to Object Not Ineffective Assistance Under Circumstances of Case: When a defendant's explanation of events was not plausible, a trial strategy of not objecting to arguably prejudicial evidence of inappropriate conduct that was not illegal, with appropriate cautionary jury instruction related to evidence of other acts, did not constitute ineffective assistance of counsel. St. v. Morsette, 2013 MT 270, 372 Mont. 38, 309 P.3d 978.

Attorney's Actions Those of Reasonable Professional — Ineffective Assistance Claim Fails: An attorney sufficiently explained the risks and benefits of a guilty plea, and the defendant was not prejudiced by the attorney's failure to request clarification of an oral sentence because the written order legally clarified the oral judgment. Fletcher v. St., 2013 MT 266, 372 Mont. 22, 309 P.3d 998.

Effective Assistance of Counsel — Failure to Object to Hearsay Testimony Could Have Been Tactical Decision: A defendant who was convicted of sexual intercourse without consent claimed that he received ineffective assistance of counsel due to his counsel's failure to object to hearsay testimony that allegedly bolstered the victim's credibility. On appeal, the Supreme Court was unable to determine from the record why the defendant's attorney did not object, but other objections were made by the attorney and it was plausible that failure to object was a tactical strategic decision. Consequently, the ineffective assistance of counsel claim was dismissed without prejudice. St. v. Aker, 2013 MT 253, 371 Mont. 491, 310 P.3d 506, followed in St. v. Ugalde, 2013 MT 308, 372 Mont. 234, 311 P.3d 772.

Failure to Object to Proper Jury Instructions Not Ineffective Assistance of Counsel: The defendant was convicted of partner or family member assault (PFMA) against his mother and his brother, in violation of 45-5-206. On appeal, the defendant argued that his trial counsel was ineffective by failing to object to the jury instructions given by the District Court. The defendant asserted that his counsel should have offered instructions requiring the state to prove that the defendant intended his actions to cause his mother and his brother to have a reasonable apprehension of bodily injury. The Supreme Court disagreed, noting that the District Court's jury instructions properly described the law on mental state for PFMA, considering whether a reasonable person in circumstances similar to those of the victims would have a reasonable apprehension of bodily injury instead of considering the defendant's subjective intent. Because the District Court could properly have refused the defendant's proposed jury instruction regarding his intent, the defendant could not show that his counsel's assistance was ineffective. St. v. Birthmark, 2013 MT 86, 369 Mont. 413, 300 P.3d 1140.

Involuntary Commitment — Strickland Test Inappropriate: J.S.W. appealed her involuntary civil commitment, alleging ineffective assistance of counsel under the Strickland test. The Supreme Court noted that Strickland applies to criminal cases and that J.S.W. failed to properly show ineffective assistance of counsel in an involuntary commitment proceeding. In re J.S.W., 2013 MT 34, 369 Mont. 12, 303 P.3d 741, following In re T.J.F., 2011 MT 28, 359 Mont. 213, 248 P.3d 804.

No Ineffective Assistance Provided — Jury Fully and Fairly Instructed: Following a conviction for violating a permanent order of protection and tampering with a witness, the defendant alleged his counsel rendered ineffective assistance by offering instructions that included the standard definitions of "purposely" and "knowingly" in 45-2-101 and by failing to move to conform the

written sentence to the oral sentence. The Supreme Court, however, found that the defendant suffered no prejudice as a result of the instructions but that remand was appropriate to provide the defendant with an opportunity to respond to the additional terms and conditions in the written sentence. St. v. Andress, 2013 MT 12, 368 Mont. 248, 299 P.3d 316, followed in St. v. Tellegen, 2013 MT 337, 372 Mont. 454, 314 P.3d 902.

Attorney's Comment During Show Cause Hearing Insufficient Basis for Ineffective Assistance Claim: The defendant alleged that defense counsel breached his duty of loyalty by stating to the judge at a show cause hearing, which the defendant voluntarily failed to attend, that the defendant just doesn't give a rip. The Supreme Court held that the defendant was not denied effective assistance of counsel because the defendant could not demonstrate actual prejudice from counsel's comments. St. v. Bekemans, 2013 MT 11, 368 Mont. 235, 293 P.3d 843, distinguishing St. v. Jones, 278 Mont. 121, 923 P.2d 560 (1996).

Failure to Question Witnesses at Sentencing or Present Alternative Sentencing Recommendation — No Ineffective Assistance: After being convicted of incest, the defendant refused to cooperate in the presentencing investigation process. At the sentencing hearing, the defendant's counsel did not cross-examine the state's witnesses, offer any witnesses on the defendant's behalf, or offer an alternative sentencing recommendation. The District Court imposed a harsher sentence than recommended by the state and did not suspend any of the defendant's sentence. The defendant asserted that he had been denied effective assistance of counsel because his attorney did not subject the state's case at sentencing to meaningful adversarial testing and did not make an alternative sentencing recommendation. Analyzing the defendant's claim under the second prong of the Strickland test, the Supreme Court held that the defendant was not prejudiced by his attorney's performance. The defendant suggested no possible questions that his trial counsel should have asked the witnesses at the sentencing hearing, did not offer any witnesses who should have been called on his behalf, and refused to participate in the presentencing investigation, forgoing the opportunity to explain the information provided in the presentence report. Finally, the District Court detailed a number of bases to support a sentence in excess of the mandatory minimum, and the Supreme Court held that because there was not a reasonable probability that the District Court would have imposed a less severe sentence had the defendant's counsel offered an alternative recommendation, the defendant received effective assistance of counsel. St. v. Peart, 2012 MT 274, 367 Mont. 153, 290 P.3d 706.

Claim of Ineffective Assistance for Not Seeking Lesser Included Offense — Issues for Postconviction Relief Proceeding Based on Insufficient Record: After the defendant was convicted of attempted sexual intercourse without consent, he claimed that he received ineffective assistance of counsel given that his counsel did not seek a lesser included offense instruction. Citing St. v. Clary, 2012 MT 26, 364 Mont. 53, 270 P.3d 88, the Supreme Court determined that the record failed to provide a sufficient explanation for the actions of the defendant's counsel, and therefore the issues were deemed to be better examined within a postconviction relief proceeding. St. v. Bishop, 2012 MT 259, 367 Mont. 10, 291 P.3d 538. See also St. v. White, 2001 MT 149, 306 Mont. 58, 30 P.3d 340, and St. v. Hamilton, 2007 MT 223, 339 Mont. 92, 167 P.3d 906.

Failure to Move for Dismissal Not Ineffective Assistance When Based on Incorrect Interpretation of Statute: The defendant got into a fight with the victim and was holding the victim in a sleeper hold when police arrived on the scene. The defendant claimed that the victim had a knife and that his use of force was justified under 45-3-112. When the police investigated, they determined the victim had a multi-tool in a case on his belt, but they did not collect it as evidence because it had been secured and they did not consider it a threat. On appeal, the defendant asserted that he received ineffective assistance of counsel when his attorney failed to move for dismissal because the police did not collect the multi-tool in the victim's possession as evidence. Under the Supreme Court's decision in St. v. Cooksey, 2012 MT 226, 366 Mont. 346, 286 P.3d 1174, 45-3-112 does not impose an additional investigative duty on law enforcement beyond conducting a thorough investigation, which happened in this case. Thus, the defendant could not meet the second prong of the Strickland test because a motion to dismiss based on an alleged duty to seize evidence would have been unlikely to succeed under Cooksey. St. v. Mitchell, 2012 MT 227, 366 Mont. 379, 286 P.3d 1196.

Failure to File Postconviction Petition for Writ of Certiorari — No Ineffective Assistance of Appellate Counsel: The defendant asserted that he was denied effective assistance of counsel because his appellate defenders failed to file a postconviction petition for a writ of certiorari to the U.S. Supreme Court on his behalf. Without deciding whether a state constitutional right to counsel in discretionary proceedings exists, the Montana Supreme Court denied the defendant's appeal because he could not satisfy the second prong of the Strickland test, that the deficient

performance had prejudiced the defendant. Given the roughly 1% rate at which certiorari petitions are granted, even though his appellate defender asserted that the defendant would have "almost certainly" been granted certiorari via summary disposition without opinion, the defendant could not demonstrate a reasonable probability that the U.S. Supreme Court would have granted certiorari in his case. Sanchez v. St., 2012 MT 191, 366 Mont. 132, 285 P.3d 540.

No Ineffective Assistance by Trial Counsel or Appellate Counsel — Petition for Postconviction Relief Properly Denied: In a homicide trial, the defendant's trial counsel did not render ineffective assistance by failing to object to statements made by the prosecution during closing arguments or by failing to request a test of an allegedly exculpatory handprint, even though the handprint was determined not to be from the defendant or the victim following the defendants conviction. Similarly, appellate counsel acted reasonably by appealing only those issues that could have affected the defendant's conviction and sentence. Rosling v. St., 2012 MT 179, 366 Mont. 50, 285 P.3d 486.

Counsel's Failure to Object to Post-Miranda Statements Not Ineffective Assistance: The defendant was arrested for stabbing the victim. After providing detectives with a sufficient Miranda waiver, during the subsequent interrogation the defendant provided numerous incriminating statements. On appeal, the defendant contended that he had received ineffective assistance of counsel when his attorney failed to move to suppress these statements at trial. The Supreme Court found that the defendant could not satisfy the second part of the Strickland test, Strickland v. Wash., 466 US 668 (1984), because he could not show a reasonable probability that, but for his counsel's errors, the result of the proceedings would have been different. The court found that after exclusion of the statements, there was still overwhelming evidence that the defendant had stabbed the victim, and it concluded that the defendant did not receive ineffective assistance of counsel. St. v. Briscoe, 2012 MT 152, 365 Mont. 383, 282 P.3d 657.

Appellate Counsel Effective — No Claims Against Trial Counsel on Direct Appeal: Because the defendant's claims against his trial counsel lacked merit, the defendant could not claim that his appellate counsel was ineffective for failing to raise ineffectiveness claims against his trial counsel. Miller v. St., 2012 MT 131, 365 Mont. 264, 280 P.3d 272.

Counsel's Legal Assessment of Case — No Evidence of Inducement to Enter Guilty Plea — Denial of Motion to Withdraw Guilty Plea Affirmed: The defendant pleaded guilty to sexual abuse of children. Following his sentencing, he filed a motion to withdraw his guilty plea, claiming that his public defender had provided him ineffective assistance of counsel. Specifically, the defendant claimed that his counsel changed venue without his permission and had misled him about the state's ability to introduce evidence about another allegation of sexual abuse three decades before. The District Court treated the pleading as a petition for postconviction relief and denied it. On appeal, the Supreme Court similarly concluded that the defendant had neither offered adequate proof that he had been induced to enter a guilty plea nor met his burden of proof to establish that the advice he received from his counsel was not competent. Counsel's candid legal assessment of the defendant's case, though perhaps stressful to the defendant, comported with a public defender's duty to inform her client. Burns v. St., 2012 MT 100, 365 Mont. 51, 277 P.3d 1238.

Failure to Use Expert to Counter State Expert — No Ineffective Assistance: A jury found the defendant guilty of incest with his adolescent stepdaughter. In his petition for postconviction relief, the defendant claimed that he had received ineffective assistance of counsel from his trial attorney because the defense did not have a medical expert to rebut the testimony of the state's medical expert. During cross-examination, however, the defendant's attorney was successful in demonstrating that the testimony of the state's medical expert on the physical evidence was inconclusive. Accordingly, the District Court held, and the Supreme Court affirmed, that the defendant could not satisfy the Strickland standard that his counsel's performance was deficient. St. Germain v. St., 2012 MT 86, 364 Mont. 494, 276 P.3d 886.

Effective Assistance — No Prejudice From Mention of Potential DUI Charge: The defendant appealed her conviction of assault on a peace officer, claiming that she received ineffective assistance of counsel when her attorney failed to move for a mistrial after the state's witnesses referenced the defendant's potential DUI charge. The Supreme Court affirmed, concluding that the defendant's defense was not prejudiced by a reference to her potential DUI charge because she was on trial only for assault on a peace officer and failed to demonstrate that she was prejudiced by her counsel's alleged deficiency. Overwhelming evidence of the defendant's guilt overcame any prejudice resulting from the witnesses' testimony, and admonitions to the jury to not consider the witnesses' testimony relating to the DUI helped cure any minor prejudice. St. v. Miner, 2012 MT 20, 364 Mont. 1, 271 P.3d 56.

Counsel's Failure to Object to Competency of Child Witnesses, Introduction of Prior Consistent and Inconsistent Statements, and Therapist Testimony in Incest Case — No Ineffective Assistance: The defendant appealed his conviction for incest on the basis of ineffective assistance of counsel due to defense counsel's alleged failure to object to the competency of child witnesses, the introduction of a DVD containing the victim's prior consistent and inconsistent statements, and the testimony of therapists. The Supreme Court found no merit in the defendant's ineffective assistance claim, concluding no objections were warranted to challenge (1) the competency of the child witnesses, as discrepancies in testimony did not constitute grounds for a challenge under Rule 601, M.R.Ev.; (2) the DVD, as it was admissible under St. v. Lawrence, 285 Mont. 140, 948 P.2d 186 (1997); or (3) the testimony of therapists because Montana law allows therapist testimony regarding a child's credibility in a sexual abuse case, as long as the victim testifies, the victim's credibility is attacked, and the therapist is properly qualified. St. v. Howard, 2011 MT 246, 362 Mont. 196, 265 P.3d 606.

Effective Assistance of Counsel — Exclusion of Statements Contained in Report Regarding Child Abuse Investigation: After a jury convicted the defendant of incest, sexual intercourse without consent, and sexual assault, the defendant filed a petition for postconviction relief, claiming numerous instances of ineffective assistance of counsel. In one instance, the defendant claimed counsel should have moved to exclude several statements the defendant made in connection with a Department of Public Health and Human Services investigation of child abuse. The defendant argued 41-3-202(5)(b), which requires the destruction of an "unfounded" report, required the destruction of the report, including the defendant's statements, well before his trial. The Supreme Court disagreed, concluding that although a detective had used the word "unfounded" in the report, the department closed the investigation as "unsubstantiated". Because 41-3-202(5)(c) provides that "unsubstantiated" reports must be destroyed within 30 days after the end of the 3-year period starting from the date the report was determined unsubstantiated, the destruction date of the report would have been after the defendant's trial. Therefore, counsel was not ineffective for not attempting to exclude the defendant's statements under 41-3-202(5)(b). Riggs v. St., 2011 MT 239, 362 Mont. 140, 264 P.3d 693.

Failure to Object to Prosecution for Conduct Previously Used to Enhance Federal Sentence — No Ineffective Assistance: The defendant argued that the District Court erred in concluding that the defendant's trial counsel provided effective assistance when counsel failed to raise a double jeopardy objection to the state prosecution of the defendant for conduct that was used to enhance his federal sentence. Distinguishing St. v. Neufeld, 2009 MT 235, 351 Mont. 389, 212 P.3d 1063, the Supreme Court concluded that the state and federal charges were distinct and did not arise from the same transaction as defined in 46-1-202, and, in addition, controlling caselaw at the time the District Court considered the motion held that double jeopardy did not bar prosecution of an offense that was used to enhance a sentence in a prior prosecution. Because any objection on double jeopardy grounds to the state charge lacked merit, the District Court did not err in concluding counsel was effective. Heddings v. St., 2011 MT 228, 362 Mont. 90, 265 P.3d 600.

Defense Attorney's Comments Not Ineffective Assistance of Counsel: During the defendant's trial for deliberate homicide, his counsel twice commented she was not prepared to examine a witness who she had believed was going to testify the following day. After his conviction, the defendant appealed to the Supreme Court, alleging that his trial counsel's comments were evidence of the ineffective assistance of counsel he claimed to have received at his trial. Applying the Strickland test, the Supreme Court agreed with the District Court that the defendant had failed to show that his counsel's comments demonstrated a deficient performance that prejudiced the defendant. The Supreme Court determined that despite the two comments, the remainder of the record demonstrated that defense counsel had satisfactorily challenged the credibility of the witness during cross-examination. St. v. Edwards, 2011 MT 210, 361 Mont. 478, 260 P.3d 396.

Untimely Youth Court Transfer Hearing — Failure to Move for Transfer to Youth Court Within Statutory Timeframe Not Ineffective Assistance of Counsel: Lindsey was charged with sexual intercourse without consent and sexual assault from incidents that occurred when he was 16 and 17 years old. A hearing to transfer the case to Youth Court was not held within 30 days, but Lindsey, who was 18 years old at the time he was charged, pleaded guilty to sexual assault in District Court and waived a Youth Court transfer. Prior to sentencing, Lindsey obtained new counsel and moved to withdraw his guilty plea. However, Lindsey waived his claim that he was denied due process by the lack of a timely transfer hearing. In addition, Lindsey did not receive ineffective assistance of counsel when his first counsel failed to move for dismissal of the charges on the ground that a timely transfer hearing was not held. Lindsey had time to prepare for

the hearing, the District Court considered the transfer, and there was no evidence Lindsey was substantially prejudiced by the delay. St. v. Lindsey, 2011 MT 46, 359 Mont. 362, 249 P.3d 491.

Ineffective Assistance of Counsel — Strickland Test Applied: A defendant can prevail on a claim of ineffective assistance of counsel by demonstrating that counsel's performance was deficient and that the deficient performance prejudiced the defense. Counsel's performance was deficient by failing to object to the lack of expert testimony regarding the horizontal gaze nystagmus (HGN) intoxication test and by failing to object to use of an out-of-certification breath alcohol testing apparatus. Prejudice arose because the only objective tests of alcohol concentration were the breath test that contributed specific evidence of blood alcohol concentration and the HGN test that indicated impairment, both of which contributed to the verdict. St. v. Gieser, 2011 MT 2, 359 Mont. 95, 248 P.3d 300.

Failure by Defendant to Assert Substantial Complaints: The District Court did not abuse its discretion when it denied a defendant substitution of counsel. After the defendant made vague assertions that the public defender was not defending him, the District Court adequately inquired into the allegations and determined that the complaints were not substantial. A defendant has the right to counsel, but not the right to counsel of the defendant's choice. If adequate initial inquiry by the District Court finds that appointed counsel is rendering effective assistance and that there is not a total lack of communication between counsel and the defendant, the defendant can either retain the appointed counsel or proceed pro se. St. v. Dethman, 2010 MT 268, 358 Mont. 384, 245 P.3d 30, followed in St. v. Holm, 2013 MT 58, 369 Mont. 227, 304 P.3d 365.

Representation of Codefendants by State Public Defender Not Per Se Conflict of Interest: The defendant argued that the Supreme Court should adopt a rule that the representation of codefendants by the Office of State Public Defender is per se a conflict of interest. The Supreme Court declined to adopt such a rule and held instead that whether a conflict existed must be determined on a case-by-case basis. In the instant case, the Supreme Court held that sufficient safeguards were in place to protect the rights of each defendant and that the appellant had failed to show any actual conflict of interest that adversely affected counsel's performance. St. v. St. Dennis, 2010 MT 229, 358 Mont. 88, 244 P.3d 292.

No Showing of Ineffective Assistance of Counsel for Counsel's Failure to Argue Alternatives — Termination of Parental Rights Affirmed: In a hearing in which the District Court terminated a father's parental rights, the father's counsel did not provide ineffective assistance by failing to advocate for appropriate alternatives to termination of parental rights. Counsel argued against granting the petition for termination, and the question of alternatives had not yet arisen. In re B.M. and P.M., 2010 MT 114, 356 Mont. 327, 233 P.3d 338.

Failure of Counsel to Poll Jury Regarding Exposure to Press Coverage of Trial Not Considered Ineffective Counsel — No Error in Failure to Hold Hearing on Request: Absent evidence that a juror might have been exposed to news accounts of a trial, counsel cannot be found to be outside the wide range of reasonable professional conduct for declining to request jury polling, nor may a trial court be found in error for failing to hold a hearing on the request. Robinson v. St., 2010 MT 108, 356 Mont. 282, 232 P.3d 403. See also St. v. Kirkland, 184 Mont. 229, 602 P.2d 586 (1979).

No Demonstration of Ineffective Counsel Based on Breakdown of Attorney-Client Relationship — Postconviction Relief Denied: Robinson sought postconviction relief on grounds that trial counsel was ineffective by not requesting a jury poll regarding the jury's exposure to a newspaper account of the trial, and because of a breakdown in the attorney-client relationship. On the issue of jury polling, the jury was admonished each day to avoid press coverage of the trial, and Robinson failed to identify a single fact to support the speculation that the jury ignored the admonishment or to establish any prejudice from counsel's failure to request jury polling. The fact that it may be possible to poll a jury does not mean that failure to poll the jury constitutes ineffective assistance of counsel. On the issue of attorney-client relationship, the Supreme Court cited St. v. Gallagher, 2001 MT 39, 304 Mont. 215, 19 P.3d 817, for the holding that a defendant has a right to meaningful representation but not a right to a meaningful attorney-client relationship. In this case, counsel maintained communication with Robinson until just prior to trial when Robinson refused to speak further with counsel, and nothing in the record suggested that counsel's actual performance at trial was deficient. Robinson apparently initiated the breakdown in communication upon which the ineffective counsel claim was based, falling far short of a complete collapse of the relationship. The ineffective assistance claims failed the Strickland test and were denied. Robinson v. St., 2010 MT 108, 356 Mont. 282, 232 P.3d 403.

Failure of Counsel to Ascertain Expert Witness's Credentials Not Considered Ineffective Assistance: Worthan asserted that defense counsel's failure to ascertain the qualifications of an expert witness violated the right to effective assistance of counsel. The Supreme Court disagreed.

Defense counsel failed to discover that the expert received a Ph.D. degree from an unaccredited school and was therefore not a doctor. However, defense counsel met with the expert, obtained the expert's curriculum vitae, discussed the degree, and was informed that the expert had been qualified as an expert witness on some 50 prior occasions. Counsel's investigation was consistent with the responsibilities of a defense attorney, and Worthan failed to overcome the strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. Worthan v. St., 2010 MT 98, 356 Mont. 206, 232 P.3d 380.

Failure to Produce Expert Witness Not Considered Deficient Representation: Worthan's attorney promised the jury that an expert would testify regarding the credibility of two witnesses in Worthan's trial, but the expert was never produced. Worthan contended that failure to call the expert constituted ineffective assistance of counsel. The Supreme Court disagreed. Counsel's rather generic description of the expert's proposed testimony was not so strikingly significant as to have a prejudicial effect on the jury, nor did counsel claim that the expert testimony would unequivocally demonstrate Worthan's innocence. Further, it was not reasonably probable that but for counsel's unfulfilled promise to produce the expert the result of the proceeding would have been different. Thus, Worthan failed to show that counsel's performance was deficient or that the defense was prejudiced, as required under the Strickland test, so the ineffective assistance of counsel claim failed. Worthan v. St., 2010 MT 98, 356 Mont. 206, 232 P.3d 380, followed in Bomar v. St., 2012 MT 163, 365 Mont. 474, 285 P.3d 396. See also St. Germain v. St., 2012 MT 86, 364 Mont. 494, 276 P.3d 886 (no rebuttal medical expert necessary when the conclusions of the state's medical expert are inconclusive).

Failure of Counsel to Move for Dismissal or Reduced Charges Based on Lack of Physical Evidence — Record-Based Claim Subject to Postconviction Review: Taylor contended on appeal that trial counsel was ineffective in failing to move for dismissal or reduction of a rape charge based on the absence of rape examination evidence. However, the record showed no explanation of the reasons for counsel's omissions. Therefore, consideration of the issue was not appropriate for direct appeal, but rather was best suited for postconviction review. The Supreme Court declined to address why counsel chose to proceed as he did and dismissed Taylor's appeal of this issue without prejudice. St. v. Taylor, 2010 MT 94, 356 Mont. 167, 231 P.3d 79.

Defendant's Absence From Meeting to Answer Jury's Question on Definition of Element of Crime — No Prejudice: During Becker's trial on drug charges, the trial court held a conference to settle jury instructions. Becker was present with counsel during the conference. During jury deliberations, the jury sent a note to the judge requesting a definition for the term "possession" with respect to possession of precursors to dangerous drugs. The judge met with the prosecutor and Becker's counsel, without Becker present, to discuss a response to the note. The judge decided not to instruct the jury any differently than they had been previously instructed and, without meeting with the jury, referred the jury to the original jury instruction defining possession. Following conviction, Becker claimed ineffective assistance of counsel based on his attorney's failure to raise the issue of Becker's absence during a critical stage of the trial. The Supreme Court held that Becker's constitutional claims failed because he could not demonstrate prejudice in the trial court's referral of the jury to instructions that had been previously settled in Becker's presence. Becker v. St., 2010 MT 93, 356 Mont. 161, 232 P.3d 376.

Counsel Not Ineffective in Failing to Object to Defendant's Statements Recorded in Interrogation Room Without Defendant's Knowledge Absent Expectation of Privacy: While being held in a police interrogation room alone, Meredith made incriminating statements that were recorded without his knowledge and subsequently admitted into evidence during Meredith's homicide trial. Meredith contended that he received ineffective assistance of counsel when his attorney failed to object to admission of the statements at trial. The Supreme Court disagreed. Although Meredith may have had an expectation of privacy in the statements, that expectation was not one that society would recognize as objectively reasonable, nor would Meredith have made the statements if he wished to preserve his privacy. Therefore, no unlawful search occurred, and counsel's failure to object was not short of the range of conduct reasonably demanded by the constitutional right to effective assistance. Additionally, Meredith failed to demonstrate that, even if counsel's conduct could be considered deficient, the result of the proceeding would have been different without admission of the incriminating statements. Meredith's ineffective assistance claim based on admission of the incriminating statements was denied. St. v. Meredith, 2010 MT 27, 355 Mont. 148, 226 P.3d 571, distinguishing St. v. Goetz, 2008 MT 296, 345 Mont. 421, 191 P.3d 489.

Postconviction Claim of Ineffective Counsel Unfounded — Evidentiary Hearing Not Required: Following Hamilton's conviction for felony incest, he filed for postconviction relief on grounds of ineffective assistance of counsel and requested an evidentiary hearing. The District Court

dismissed the claim without holding an evidentiary hearing and Hamilton appealed. The Supreme Court held that a hearing was not necessary because Hamilton failed to meet the threshold requirement that the petition identify facts justifying relief. The Supreme Court also held that Hamilton failed to state claims for relief. The court examined each of Hamilton's ineffective assistance claims and concluded that Hamilton failed to show that counsel's performance was constitutionally deficient or prejudicial in any way, including alleged failure to investigate and impeach witnesses, improper use of an expert, informing the jury during opening statements that Hamilton would testify when Hamilton decided not to testify, allowing an investigating officer to testify about interview techniques, and perceived adverse effects of counsel's alleged alcohol and drug use. Dismissal of Hamilton's petition was affirmed. Hamilton v. St., 2010 MT 25, 355 Mont. 133, 226 P.3d 588. See also Heath v. St., 2009 MT 7, 348 Mont. 361, 202 P.3d 118.

Lack of Effective Counsel During Parental Rights Termination Hearing — Remand: Appellant father asserted that he received ineffective assistance of counsel during parental rights termination proceedings. The Supreme Court examined the quality of advocacy demonstrated at the adjudication hearing and agreed. The father's counsel failed to object to hearsay evidence presented during the hearing and did not file a response to the state's brief in support of admission of the evidence, which resulted in the automatic admission of the evidence. In addition counsel made no objections at the hearing, asked no questions on cross-examination, and failed to meet with the father prior to the hearing or request an extension to do so. Thus, the father received ineffective assistance of counsel, warranting remand. In re J.J.L., D.J.L., and R.D.L.L., 2010 MT 4, 355 Mont. 23, 223 P.3d 921, following In re A.S., 2004 MT 62, 320 Mont. 268, 87 P.3d 408, which was followed in In re T.N.-S., 2015 MT 117, 379 Mont. 60, 347 P.3d 1263.

No Ineffective Assistance in Failure of Counsel to Attach Affidavit to Proposed Findings and Conclusions When Outcome of Proceedings Would Have Been the Same: Campa's probation officer observed Campa entering a known drug house occupied by Rodriguez, who the officer believed was a felon. Campa left a short time later, and the probation officer had Campa's vehicle stopped and searched based on the officer's belief that Campa had violated probation by being involved in drugs and associating with a felon. Campa moved to suppress, contending that the vehicle stop was unlawful because it was based on insufficient grounds and asserting that Campa's attorney provided ineffective assistance by failing to attach to the proposed findings of fact and conclusions of law an affidavit from Rodriguez averring that Rodriguez was not a felon. The Supreme Court disagreed. Even without consideration of whether Rodriguez was a felon, the probation officer had reasonable cause to request the stop and search of Campa's vehicle and person. Thus, Campa could not establish ineffective assistance because the outcome of the suppression motion would have been the same even if the affidavit had been attached. St. v. Campa, 2009 MT 251, 351 M 504, 213 P3d 1102 (2009). See also Haagenson v. St., 2014 MT 223, 376 Mont. 239, 332 P.3d 268, holding that although counsel failed to give the defendant a report containing potentially exculpatory forensic pathologist opinions, the same notification was achieved, leading to the same outcome of the proceedings, when the defendant heard the pathologist testify to the same opinions before the defendant entered into a no-contest plea agreement.

Facial Showing of Competence in Counsel's Representation of Mother in Parental Rights Termination Proceedings — Ineffective Counsel Claims Dismissed: A mother raised several claims concerning the effectiveness of counsel she received during proceedings to terminate her parental rights. The Supreme Court examined the record and found that the mother's trial attorney provided her with vigorous and competent representation. There was no showing or argument concerning trial counsel's training and experience, and there was facially competent representation in the trial record. The mother failed to establish a threshold showing of ineffective assistance of counsel, and her claims were therefore without merit. In re C.M.C., 2009 MT 153, 350 M 391, 208 P3d 809 (2009). See also In re D.B., 2012 MT 231, 366 Mont. 392, 288 P.3d 160.

Evidence of Escalating Sexual Abuse, Including Uncharged Incidents Occurring in Another State, Properly Admitted Under Transaction Rule — No Ineffective Assistance of Counsel for Failure to Object to Admissible Evidence: At Crosley's incest trial, the state sought to introduce evidence of several incidents of abuse that occurred in California and in a county outside Ravalli County, where the crimes were charged. Defense counsel did not object to admission of the evidence, and the trial court allowed it. On appeal, Crosley asserted error in admitting the evidence and claimed ineffective assistance of counsel based on defense counsel's failure to object to the testimony or to request that the trial court provide a contemporaneous admonition at the time the evidence was admitted. The Supreme Court affirmed on both issues. Evidence of Crosley's other acts of incest that occurred in places other than Ravalli County was not wholly independent of or unrelated to the charged offenses in Ravalli County, and all the acts of incest, regardless of

where they occurred, were inextricably linked to and explanatory of the Ravalli County offenses, so evidence thereof was admissible under the transaction rule exception to other crimes evidence in Rule 404(b), M.R.Ev. (Title 26, ch. 10). The fact in dispute was whether various acts of incest occurred, including evidence of uncharged acts that occurred outside Ravalli County, because those acts were clearly related to and not independent of the continuous and escalating nature of Crosley's sexual abuse. The other crimes evidence was thus proper under the transaction rule, and there was no error in the trial court's other acts jury instruction or in the court's assessment of the state's notice of intent to introduce evidence of other acts. Additionally, Crosley's counsel could not have provided ineffective assistance based on failure to object to admissible evidence. St. v. Crosley, 2009 MT 126, 350 M 223, 206 P3d 932 (2009). See also St. v. Lozon, 2004 MT 34, 320 M 26, 85 P3d 753 (2004).

Acquiescence to Involuntary Commitment Without Patient's Consent — Client Refusal to Cooperate With Counsel — No Ineffective Assistance Given Counsel's Ongoing Advocacy: C.R.C. asserted that she received ineffective assistance of counsel when her attorney acquiesced to involuntary commitment of C.R.C. without her consent. The Supreme Court examined the record and found that the statutory guidelines for a waiver of C.R.C.'s rights were followed. In addition, the record revealed numerous facts to rebut the presumption that counsel was ineffective. C.R.C. refused to: (1) participate in her own defense; (2) meet with counsel; (3) attend court appearances; or (4) meet with a doctor for an independent psychological evaluation requested by counsel on C.R.C.'s behalf. The record also demonstrated that C.R.C. posed a danger to herself and others, requiring commitment. Yet even without C.R.C.'s input or cooperation, counsel continued to advocate on C.R.C.'s behalf, and counsel followed the law in waiving C.R.C.'s right to an adjudicatory hearing. Therefore, the presumption of ineffective assistance of counsel, when counsel acquiesced to involuntary commitment without C.R.C.'s consent, was rebutted by the facts of the case, and the Supreme Court declined to hold that counsel's actions were ineffective. In re Mental Health of C.R.C., 2009 MT 125, 350 M 211, 207 P3d 289 (2009). See also In re K.G.F., 2001 MT 140, 306 M 1, 29 P3d 485 (2001), In re Mental Health of T.J.F., 2011 MT 28, 359 Mont. 213, 248 P.3d 804, and In re J.S.W., 2013 MT 34, 369 Mont. 12, 303 P.3d 741.

Failure of Counsel to File Unmerited Motion Not Prejudicial — No Ineffective Assistance of Counsel: Adkins contended that he received ineffective assistance of counsel because his attorney failed to move to suppress drug evidence based on an officer's failure to administer Miranda warnings to Adkins. However, Adkins was on probation at the time the search was conducted and was therefore subject to search of his person and residence. The imminent probation search was an independent legal means by which the evidence would have been inevitably discovered in any case. Counsel's motion to suppress would thus have been without merit, and failure to file for suppression therefore did not prejudice Adkins, so the ineffective counsel argument failed. St. v. Adkins, 2009 MT 71, 349 M 444, 204 P3d 1 (2009).

Counsel Reasonably Effective in Defending Municipal Ordinance Under Strickland Test: Albert contended that he received ineffective assistance of counsel in defending a municipal ordinance because counsel presented no case-in-chief, did not call Albert as a witness, and failed to present any pretrial motion challenging the constitutionality of the ordinance. Applying the Strickland test, the Supreme Court found that Albert was not denied effective assistance of counsel. Counsel vigorously questioned the city's proof and was reasonably effective in voir dire and cross-examination. Given the overwhelming evidence against Albert at trial, there was no reasonable probability that Albert would have been acquitted had counsel pursued a different trial strategy, nor would Albert's personal testimony have changed the results of the trial. Billings v. Albert, 2009 MT 63, 349 M 400, 203 P3d 828 (2009). See also St. v. Jefferson, 2003 MT 90, 315 M 146, 69 P3d 641 (2003), and St. v. Kougl, 2004 MT 243, 323 M 6, 97 P3d 1095 (2004).

No Showing That Allegedly Withheld State Evidence Constituted Brady Violation — Due Process Not Violated: Giddings moved that the state's case should be dismissed because the state withheld evidence in a homicide trial, which prohibited defense counsel from having sufficient time to analyze scientific evidence to find exculpatory evidence and from having the necessary information to effectively impeach the state witnesses, resulting in a due process violation. The District Court denied the motion, and Giddings appealed. The Supreme Court held that Giddings failed to meet the criteria for showing an improper withholding of information under Brady v. Maryland, 373 US 83 (1963), by failing to prove that any of the information was exculpatory or to demonstrate a reasonable possibility that the evidence would have changed the outcome. Instead, Giddings offered only sweeping generalizations and broad accusations rather than the specific elements necessary to prove a Brady violation. Giddings also failed to establish that the state's actions denied the right to effective assistance of counsel or the right to confront the

accusers. Denial of Giddings' motion to dismiss was affirmed. St. v. Giddings, 2009 MT 61, 349 M 347, 208 P3d 363 (2009), followed in Taylor v. St., 2014 MT 142, 375 Mont. 234, 335 P.3d 1218.

Ineffective Counsel Argument Raised for First Time on Direct Appeal Denied as Untimely: Godfrey argued on appeal that his trial counsel was ineffective by failing to argue on direct appeal that Godfrey was denied a fair trial. The Supreme Court held that because Godfrey raised the issue for the first time on appeal, the issue was untimely, and the court refused to reach the merits of the claim. St. v. Godfrey, 2009 MT 60, 349 M 335, 203 P3d 834 (2009) .

Failure of Defendant to Establish Counsel's Conflict of Interest: Glick claimed that his court-appointed counsel violated Glick's right to conflict-free counsel because Glick's counsel was also appointed to represent two inmates at the county detention center who Glick asserted had conspired to convict Glick. Glick moved to substitute counsel, but the motion was denied. Under the standard in Cuyler v. Sullivan, 446 US 335 (1980), the mere possibility of a conflict of interest is insufficient to demonstrate a violation of the right to conflict-free counsel; rather, a defendant must establish that an actual conflict of interest affected counsel's performance. In this case, counsel sought appointment of other counsel for the two inmates upon being told that the inmates might have information concerning Glick and avoided any knowledge of or involvement in the inmates' potential testimony while continuing to zealously represent Glick. Therefore, Glick failed to meet the Cuyler standard of establishing an actual conflict of interest, and denial of Glick's motion for substitute counsel was not an abuse of discretion. St. v. Glick, 2009 MT 44, 349 M 277, 203 P3d 796 (2009).

No Error in Failure to Hold Hearing on Effective Representation Absent Seemingly Substantial Complaint: Rose alleged that the trial court erred by failing to hold a hearing on Rose's complaints regarding effectiveness of counsel. The Supreme Court noted that under St. v. Weaver, 276 M 505, 917 P2d 437 (1996), and Billings v. Smith, 281 M 133, 932 P2d 1058 (1997), a defendant is entitled to a hearing on the issue of ineffective assistance of counsel if the defendant presents a seemingly substantial complaint about effective assistance. In this case, Rose voiced no seemingly substantial complaint. In fact, when the District Court appointed another attorney to inquire into Rose's complaints about counsel, Rose stated that he did not want counsel replaced. Absent any seemingly substantial complaint, the District Court did not err by failing to hold a hearing on effective assistance. St. v. Rose, 2009 MT 4, 348 M 291, 202 P3d 749 (2009). See also St. v. Gallagher, 1998 MT 70, 288 M 180, 955 P2d 1371 (1998), and St. v. MacGregor, 2013 MT 297, 372 Mont. 142, 311 P.3d 428.

Claim of Ineffective Assistance Based on Defense Counsel's Failure to Adequately Object to Alleged Leading Questions and Prosecutor's Personal Closing Comments — Counsel's Performance Below Standard of Reasonableness But Not Prejudicial — Ineffective Assistance Claim Denied: Lindberg claimed that defense counsel failed to provide effective assistance by: (1) inadequately objecting to the alleged use of leading questions used by the prosecution during examination of the victim of Lindberg's sex offense; and (2) failing to object at all to the prosecutor's personal comments during closing arguments regarding the credibility of witnesses and evidence presented by the defense. Applying the standard of record-based review set out in St. v. White, 2001 MT 149, 306 M 58, 30 P3d 340 (2001), the Supreme Court evaluated whether, based solely on the record, counsel's performance was deficient. On the first issue, counsel's performance was not considered deficient because questions asked of the victim were arguably not leading, and it was within the trial court's discretion to allow the questions, so it could not be argued that Lindberg was prejudiced by his counsel's performance. On the second issue, the Supreme Court agreed that failure to object to the prosecutor's personal comments during closing was indeed below the objective standard of reasonableness under prevailing professional norms in light of the circumstances of the case. However, Lindberg failed to show that he was prejudiced by counsel's failure to object to the comments or that there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Absent a showing of prejudice by Lindberg, the ineffective assistance claims failed. St. v. Lindberg, 2008 MT 389, 347 M 76, 196 P3d 1252 (2008).

Charge That Defense Counsel Failed to Adequately Investigate and Rehabilitate Witness With Prior Consistent Statement — Objective Standard of Reasonableness Applied: Postconviction relief was denied after Deschon contended that he received ineffective assistance of counsel at trial because his court-appointed attorneys failed to investigate the violent history of Deschon's stabbing victim and did not attempt to rehabilitate a witness with a prior consistent statement. The Supreme Court found that investigation of the victim's history would have produced no admissible evidence because there was nothing indicating that Deschon stabbed the victim based on alleged incidents of the victim's violent past. Further, counsel believed that the witness was

credible and that calling another witness to rehabilitate the witness with a prior consistent statement was not significant because the point that the victim was drunk was otherwise established. Counsel's actions fell within the wide range of reasonable professional assistance and sound trial strategy. Deschon failed to show that counsel's conduct was unreasonable, and having failed the first prong of the Strickland test for ineffective assistance, Deschon's petition for postconviction relief was properly denied. Deschon v. St., 2008 MT 380, 347 M 30, 197 P3d 476 (2008).

Defendant Unsuccessful in Showing That Counsel Provided Ineffective Assistance in Four Different Areas of Trial: The District Court did not commit an error in denying defendant's postconviction claims. However, the case was remanded for resentencing of one of two felonies as a misdemeanor partner family member assault. Bacca v. St, 2008 MT 371, 346 M 474, 197 P3d 948 (2008).

Failure to Show Defense Counsel's Allegedly Deficient Performance Caused Sufficient Prejudice to Undermine Confidence in Jury's Verdict: The District Court's denial of a postconviction relief petition was affirmed when neither defense counsel's failure to object to the judge's comment on a defense witness's qualifications nor defense counsel's failure to object after the witness's disqualification as an expert amounted to ineffective assistance of counsel. Hammer v. St., 2008 MT 342, 346 M 279, 194 P3d 699, (2008).

Defendant May Not Argue Ineffective Assistance of Counsel When Attorney Fails to Object to Testimony That Conforms to Trial Court's Order: Wood argued that his counsel had not provided effective assistance in that he had not objected to testimony indicating that Wood was under the influence of drugs when there was insufficient evidence to prove he was under the influence. The Supreme Court stated that the trial court had ordered that the police officers could not testify that Wood was under the influence, only that he exhibited behavior indicative of someone under the influence. The Supreme Court ruled that the testimony of the officers did not violate the lower court's order and therefore there was nothing for Wood's attorney to object to and the failure to object did not constitute ineffective assistance of counsel. St. v. Wood, 2008 MT 298, 345 M 487, 191 P3d 463 (2008).

No Ineffective Assistance of Counsel Who Failed to Request Hearing That Was Not Required: Tucker contended that he received ineffective assistance of counsel when his attorney failed to request a hearing on Tucker's motion to suppress evidence from a search pursuant to 46-13-302. The Supreme Court disagreed. Tucker failed the first prong of the Strickland test because he could not demonstrate that counsel was deficient for failing to request a hearing when counsel had no basis to request a hearing absent Tucker's challenge to the truthfulness of any statements in the warrant application. St. v. Tucker, 2008 MT 273, 345 M 237, 190 P3d 1080 (2008).

Failure to Ask Jurors Followup Questions Regarding Impartiality During Voir Dire Not Considered Deficient Counsel Performance: Whitlow contended that he received ineffective assistance of counsel because, during voir dire, the defense attorney failed to ask followup questions of two jurors regarding impartiality. Whitlow's assertion was based primarily on an affidavit and testimony provided by defense counsel years later, stating that although counsel did not recall any partiality problems during voir dire, in hindsight, counsel probably should have asked additional questions of the jurors. The Supreme Court examined the trial transcript and defense counsel's voir dire notes and concluded that Whitlow failed to demonstrate that counsel's performance was deficient and failed to overcome the presumption that the challenged acts and omissions fell within the wide range of reasonable assistance measured under prevailing professional norms and in light of the surrounding circumstances. Whitlow's ineffective assistance claim failed. Whitlow v. St., 2008 MT 140, 343 M 90, 183 P3d 861 (2008), overruling St. v. Morigeau, 202 M 36, 656 P2d 185 (1982), and its progeny to the extent that the Morigeau "ignorance or neglect" test for ineffective assistance of counsel conflicts with the correct approach, which is the "objective standard of reasonableness" test set out in Strickland v. Wash., 466 US 668 (1984), and followed in St. v. Rose, 2009 MT 4, 348 M 291, 202 P3d 749 (2009).

No Showing of Ineffective Counsel — Postconviction Relief Properly Denied: In a petition for postconviction relief, DuBray asserted ineffective assistance of trial and appellate counsel based on: (1) trial counsel's introduction of prejudicial issues during trial; (2) trial counsel's conflict of interest; (3) failure of trial counsel to ensure DuBray's presence at all critical stages of the trial; and (4) appellate counsel's failure to raise issues 2 and 3 on appeal. The District Court found no ineffective assistance and denied DuBray's petition, and on appeal, the Supreme Court considered each claim and affirmed. Counsel's actions regarding the introduction of allegedly prejudicial issues were made for tactical reasons and stemmed from informed professional deliberation, and DuBray could not demonstrate that counsel's actions were deficient. Defense

counsel clearly revealed the potential conflict of interest within the trial record, so that claim was procedurally barred by 46-21-105. The claim that counsel erred by not ensuring DuBray's presence at all critical trial stages could have been raised on direct appeal and thus was procedurally barred from consideration in postconviction proceedings. DuBray's contention of error by appellate counsel for failure to raise the conflict of interest claim failed because DuBray did not establish that trial counsel actively represented conflicting interests and because DuBray himself stated that he did not wish to discharge trial counsel merely because counsel had a previous attorney-client relationship with a potentially adverse party. Last, Dubray's assertion that he might have demanded that trial counsel act differently had DuBray been present during interactions between the trial court and the jury foreman was pure speculation, particularly given that DuBray deferred to counsel on such matters. DuBray's postconviction petition was properly denied. DuBray v. St., 2008 MT 121, 342 M 520, 182 P3d 753 (2008). See also Rosling v. St., 2012 MT 179, 366 Mont. 50, 285 P.3d 486. In Marble v. St., 2015 MT 242, 380 Mont. 366, 355 P.3d 742, the Supreme Court overruled DuBray to the extent it applied the fifth factor in the Clark test to a petition for postconviction relief that is based upon newly discovered evidence.

Defense Counsel's Conduct During Voir Dire Not Considered Ineffective Assistance: Notti asserted that defense counsel's failure to elicit information from or to challenge two jurors for cause during voir dire amounted to ineffective assistance. The District Court found that counsel did not challenge the jurors because counsel believed that there was no basis for a challenge for cause and because counsel believed that the jurors would be fair. On appeal, the Supreme Court examined counsel's conduct toward each juror during voir dire and affirmed. Counsel made informed strategic decisions not to challenge the jurors, and counsel's failure to challenge the jurors did not fall below the range of competence expected of attorneys in criminal cases. Notti's claim of ineffective counsel failed. Notti v. St., 2008 MT 20, 341 M 183, 176 P3d 1040 (2008).

Failure to Object to Crime Lab DNA Evidence Not Ineffective Assistance of Counsel: Notti asserted ineffective assistance of counsel because his trial attorney did not object to DNA evidence submitted from the state crime lab. However, in counsel's view, the evidence actually comported with Notti's version of the events and buttressed Notti's defense, so counsel's failure to object was a strategic decision that did not fall below the range of competence expected of attorneys in criminal cases. Therefore, Notti's claim of ineffective counsel failed. Notti v. St., 2008 MT 20, 341 M 183, 176 P3d 1040 (2008).

Failure to Object to Prior Consistent Hearsay Testimony of Witnesses Not Considered Ineffective Assistance: Notti contended that trial counsel rendered ineffective assistance by failing to object to the prior consistent hearsay testimony of four state witnesses, asserting that the witness statements were consistent with the declarant's testimony, were not offered to rebut an express or implied charge of subsequent fabrication, and were thus inadmissible hearsay. The District Court found no error. The Supreme Court examined the statements of each witness and affirmed. One statement was admissible as an excited utterance hearsay exception; one statement was admissible as a hearsay exception for medical treatment or diagnosis; the admission of one statement was harmless error because it added no substantive content to the declarant's testimony; and one statement was not a repetition of any prior consistent statement. Notti could not show prejudice based on admission of any of the statements, and thus his ineffective assistance claim failed. Notti v. St., 2008 MT 20, 341 M 183, 176 P3d 1040 (2008).

No Ineffective Assistance in Counsel's Failure to Cite Proper Standard for Plea Withdrawal and to Challenge Plea Colloquy: McFarlane contended that he received ineffective assistance of counsel for his motion to withdraw a guilty plea when counsel cited the test in St. v. Huttinger, 182 M 50, 595 P2d 363 (1979), rather than the more lenient test in Brady v. U.S., 397 US 742 (1970), which replaced the Huttinger test (see St. v. Lone Elk, 2005 MT 56, 326 M 214, 108 P3d 500 (2005)). The Supreme Court held that despite counsel's improper reliance on Huttinger, the outcome would have been the same if counsel had relied on Brady, so McFarlane's challenge failed because he did not show that but for counsel's deficient performance, he would not have entered a guilty plea. McFarlane also contended that he received ineffective assistance because counsel failed to challenge the adequacy of the plea colloquy when the colloquy was flawed by the District Court's failure to enumerate lesser included offenses of which McFarlane might have been convicted had he proceeded to trial. The Supreme Court noted that although the District Court did not enumerate lesser included offenses, McFarlane was clearly informed that by pleading guilty, the opportunity to be convicted of a lesser offense would be lost. Additionally, pursuant to St. v. Thee, 2001 MT 294, 307 M 450, 37 P3d 741 (2001), the court had no duty to inform McFarlane about the possibility of lesser included offenses if none existed, and McFarlane failed to demonstrate any lesser included offenses to burglary that would have been applicable under

the circumstances of his charge. Thus, McFarlane's ineffective assistance claim was without merit, and denial of the motion to withdraw the guilty plea was affirmed. St. v. McFarlane, 2008 MT 18, 341 M 166, 176 P3d 1057 (2008), followed in St. v. LeMay, 2011 MT 323, 363 Mont. 172, 266 P.3d 1278.

Failure of Trial and Appellate Counsel to Adequately Assert Prejudice Element of Motion to Sever Constituting Ineffective Assistance of Counsel Warranting Reversal: Trial counsel failed to properly form a motion to sever sexual assault charges from pornography charges in a manner to demonstrate that failure to sever the criminal counts would result in prejudice to defendant. Following conviction on all counts, appellate counsel argued in St. v. Yecovenko, 2004 MT 196, 322 M 247, 95 P3d 145 (2004), that the trial court erred in failing to sever, but did not raise the issue of ineffective assistance of trial counsel, so the Supreme Court declined to consider the issue. On a petition for postconviction relief, new counsel argued the ineffective assistance of both trial and appellate counsel, and the District Court agreed. However, the petition was dismissed on grounds that counsels' conduct did not prejudice defendant in a manner that denied defendant a fair trial. Defendant appealed denial of the petition, and the Supreme Court reversed. Trial counsel's failure to allege the nature or type of prejudice that would occur absent a severance constituted ineffective assistance, and appellate counsel's failure to raise ineffective assistance of trial counsel could not be viewed as a legitimate appellate strategy. Defendant received inadequate assistance of both trial and appellate counsel and was entitled to a new trial on the sexual assault charges. Yecovenko v. St., 2007 MT 338, 340 M 251, 173 P3d 684 (2007).

Failure of Counsel to Raise Issue of Defendant's Absence at In-Chambers Meetings as Ineffective Assistance — Failure to Raise Issue on Direct Appeal Prejudicial: During Price's trial for sexual intercourse without consent, there were 12 in-chambers conferences between the trial judge and counsels at which various subjects were discussed, including jury selection, presentation of witnesses, witness testimony, exclusion of evidence, removal of certain jurors after trial began, basic scheduling matters, and others. Price was present for only one conference. Price's trial counsel claimed that he had informed Price of the right to be present, but that Price declined to participate, and trial counsel waived Price's right to be present at 8 of the 11 conferences. Price attained new counsel for his appeal, and even though Price claimed that he never waived the right to be present at the conferences, appellate counsel failed to raise the issue of Price's absence, despite the holding in St. v. Bird, 2002 MT 2, 308 M 75, 43 P3d 266 (2002), that a defendant has the right to be present during critical stages of a trial. The District Court held that Price was not prejudiced because, taking into account the three meetings that counsel did not waive Price's right to be present, the outcome would not have changed had Price been there. Price appealed on grounds that the failure of appellate counsel to raise the issue constituted ineffective assistance. The Supreme Court agreed and reversed. There was a legitimate legal basis upon which to raise the issue that was sufficient to undermine confidence in the outcome of the appeal, and appellate counsel's failure to raise the issue constituted prejudicial error. The case was remanded to allow Price a new appeal on the issue. Price v. St., 2007 MT 307, 340 M 109, 172 P3d 1236 (2007). See also St. v. Riggs, 2005 MT 124, 327 M 196, 113 P3d 281 (2005).

No Ineffective Assistance of Counsel for Failure to Object to Gun Powder Residue Evidence Given Defendant's Admission That He Fired Weapon: Roedel asserted that his counsel provided ineffective assistance by failing to object to the state's expert's testimony implying that Roedel had fired the weapon based on gun powder residue evidence found on both Roedel and the victim, even though the evidence was inconclusive. The Supreme Court noted that Roedel admitted firing the weapon, so no reason existed for counsel to object to the testimony to prevent the jury from hearing the alleged implication that Roedel fired the weapon. Counsel provided assistance that met an objectively reasonable standard, and Roedel's ineffective assistance claim failed. St. v. Roedel, 2007 MT 291, 339 M 489, 171 P3d 694 (2007).

Nonrecord-Based Assertion of Ineffective Counsel for Failure to Raise Parental Discipline Defense at Trial for Partner or Family Member Assault Appropriate for Postconviction Proceedings, Not Direct Appeal: At her trial for partner or family member assault, Fender's counsel did not raise a parental discipline defense. Fender asserted that she was entitled to a new trial because failure of counsel to raise the defense constituted ineffective assistance of counsel, but the District Court denied the motion for a new trial. On appeal, the Supreme Court was unable to determine from the record whether counsel's action was strategic, but because the alleged error was nonrecord-based, the question of whether there was merit to the parental discipline defense was more appropriate for postconviction proceedings, so the denial of a new trial was affirmed. St. v. Fender, 2007 MT 268, 339 M 395, 170 P3d 971 (2007).

Plain Error Review of Effective Assistance Claim Denied When Error Not Plain: Defendant sought to have the Supreme Court review whether it was error for defense counsel to withdraw a juror challenge, resulting in ineffective assistance of counsel. The court could not plainly determine from the record if the withdrawal was erroneous, given possible tactical reasons for the withdrawal. Absent a record-based showing that the alleged error was plain, plain error review was inappropriate. St. v. Tennell, 2007 MT 266, 339 M 381, 170 P3d 965 (2007). See also St. v. Savage, 2011 MT 23, 359 Mont. 207, 248 P.3d 308.

Prosecutor's Closing Comments Improper but Not Egregious — Failure of Counsel to Object Not Ineffective Assistance: On appeal, defendant argued that the prosecutor's comments that the prosecutor did not put any stock in the defense theory was an impermissible expression of personal opinion about the defendant's credibility and that defense counsel erred by failing to object to the comments. The Supreme Court agreed that the comments were improper, but did not conclude that the comments rose to a level of egregiousness that prejudiced defendant or that rendered the trial unfair, so any error by defense counsel in failing to object was harmless. St. v. Tennell, 2007 MT 266, 339 M 381, 170 P3d 965 (2007).

Evidence of Other Crimes Properly Admitted for Impeachment Despite Motion In Limine to Exclude Evidence of Prior Crimes — Failure of Claim of Ineffective Assistance of Counsel for Lack of Objection to Properly Admitted Evidence: Prior to trial, the Justice's Court granted defendant's motion in limine to exclude evidence of prior crimes or wrongs. However, on direct examination, the complaining witness stated that defendant had never been physical with her before, so the state moved to allow impeachment of the witness by asking questions relating to a prior conviction of defendant for assaulting the same victim. Defendant's counsel did not object, the motion was granted, and evidence of the prior assault was allowed. Following conviction, defendant appealed on grounds that the evidence was improperly admitted and that defense counsel was ineffective for failing to object to the prior crimes evidence. The District Court held that defendant's reliance on the motion in limine did not preserve the issue for appeal and that the evidence was properly admitted for impeachment purposes. On appeal, the Supreme Court affirmed. The trial court acted within its discretion and did not act arbitrarily without conscientious judgment or exceed the bounds of reason by allowing evidence of defendant's prior conviction for impeachment purposes, and defense counsel could not be considered ineffective for failing to object to properly admitted evidence. St. v. Parker, 2007 MT 243, 339 M 211, 169 P3d 380 (2007).

Failure to Object to Prosecutor's Comment During Closing Argument — Waiver of Issue on Appeal: Misner moved for a new trial on grounds that his counsel was ineffective by failing to object to the prosecutor's comments during closing arguments. The trial court determined that the comments were appropriate references to and reasonable inferences from the evidence, and the motion was denied. On appeal, the Supreme Court affirmed. An attorney may argue and draw reasonable inferences from evidence if facts support the statements, and the prosecutor's inferences that Misner staged the crime scene were reasonable given the blood spatter evidence. There was no reasonable possibility that had Misner's counsel objected to the prosecutor's remarks in closing arguments, the result of the proceeding would have been different, so Misner was not prejudiced, and the ineffective assistance claim was without merit. St. v. Misner, 2007 MT 235, 339 M 176, 168 P3d 679 (2007), following St. v. Grace, 2001 MT 22, 304 M 144, 18 P3d 1008 (2001).

No Record as to Why Counsel Took Particular Actions in Providing Defense — Effective Assistance Claim Not Appropriate for Direct Appeal: Hamilton claimed that he received ineffective assistance of counsel at a trial on incest charges, asserting that counsel: (1) failed to deliver on the promise that Hamilton would testify; (2) allowed a detective to testify regarding the veracity of Hamilton and the alleged victim; and (3) demeaned Hamilton and defense counsel in closing statements. The Supreme Court examined each claim but was unable to determine from the record why counsel took that particular strategy. Because the claims were not record-based, the effective assistance issue was not appropriate for direct appeal, and Hamilton's claim was dismissed without prejudice to raising the claim in postconviction relief proceedings. St. v. Hamilton, 2007 MT 223, 339 M 92, 167 P3d 906 (2007), following St. v. White, 2001 MT 149, 306 M 58, 30 P3d 340 (2001), and followed in St. v. Sartain, 2010 MT 213, 357 Mont. 483, 241 P.3d 1032. See also Billings v. Edward, 2012 MT 186, 366 Mont. 107, 285 P.3d 523.

Failure of Defense Counsel to Question Jurors Regarding Ethnic and Racial Bias Not Considered Ineffective Assistance Warranting New Trial: Defendant was convicted of distribution of dangerous drugs and appealed on grounds that because of defendant's ethnicity, defense counsel's failure to question potential jurors regarding ethnic or racial bias constituted ineffective assistance of counsel and deprived defendant of a fair trial. The Supreme Court found

no indication that: (1) ethnic or racial issues were intertwined with the drug offense; (2) the offense was racially motivated; (3) an ethnic issue was connected with the trial in any way; and (4) any witness, an attorney, the trial judge, a member of the court staff, or any member of the venire panel was ethnically or racially biased. Thus, defendant was not denied the right to an impartial jury. Defense counsel's performance did not fall below the range of competence required of attorneys in criminal cases simply because jurors were not questioned about ethnic or racial bias, so defendant was not denied effective assistance of counsel. St. v. Ibarra-Salas, 2007 MT 173, 338 M 191, 164 P3d 898 (2007). See also Rosales-Lopez v. U.S., 451 US 182 (1981).

No New Trial Absent Showing of Deficient Counsel Performance: Defendant claimed that counsel's failure to interview or call certain potential witnesses and to conduct certain independent investigations constituted ineffective assistance of counsel. However, the record did not establish that counsel's performance was deficient, and defendant's motion for a new trial was properly denied. St. v. Vaughn, 2007 MT 164, 338 M 97, 164 P3d 873 (2007). See also St. v. Thomas, 285 M 112, 946 P2d 140 (1997), St. v. Thee, 2001 MT 294, 307 M 450, 37 P3d 741 (2001), Swan v. St., 2006 MT 39, 331 M 188, 130 P3d 606 (2006), and Adgerson v. St., 2007 MT 336, 340 M 242, 174 P3d 475 (2007).

Claims of Ineffective Assistance of Counsel Properly Denied Absent Showing of Prejudice: Hartinger filed a petition for postconviction relief on grounds that he received ineffective assistance because his counsel: (1) failed to file a notice of appeal; (2) failed to move to suppress Hartinger's incriminating statements; (3) failed to move to suppress newly discovered evidence; and (4) incorrectly conducted voir dire. The petition was denied, and Hartinger appealed. The Supreme Court considered each claim and affirmed, noting that ineffective assistance claims must stem from counsel's neglect or ignorance rather than from informed, professional deliberation. First, Hartinger understood the right to file an out-of-time appeal but knowingly and intentionally waived that right, instead choosing to file for postconviction relief, so Hartinger could claim no prejudice from counsel's failure to file an appeal. Second, even if Hartinger's incriminating statements should have been suppressed, there was more than enough evidence to support the conviction, so no prejudice accrued. Third, counsel's decision to not suppress newly discovered evidence was an informed, tactical decision that did not constitute deficient performance. Fourth, counsel's tactic of using a peremptory challenge to remove a prospective juror who voiced pro-police views during voir dire was a reasonable trial tactic, reaffirmed the essence of voir dire, and could not be viewed as deficient performance. Hartinger v. St., 2007 MT 141, 337 M 432, 162 P3d 95 (2007).

Advising Defendant Not to Testify Not Considered Ineffective Assistance of Counsel: Stevens asserted that because he wished to testify at his trial on sexual assault charges but was advised not to testify by counsel, Stevens was not given effective assistance. The Supreme Court affirmed the District Court's findings that trial counsel's decision to not put Stevens on the stand was reasonable and sound trial strategy and that Stevens did not meet the burden of establishing that counsel's performance was deficient. Stevens v. St., 2007 MT 137, 337 M 400, 162 P3d 82 (2007).

Petition for Postconviction Relief Alleging Ineffective Assistance of Counsel Filed in District Court — Immunity of Attorney Assisting in Proceedings — Gillham Clarified: At the time of the decision in In re Gillham, 218 M 187, 707 P2d 1100 (1985), petitions for postconviction relief were addressed to the Supreme Court. Because the postconviction procedure has changed, pursuant to 46-21-105, petitions for postconviction relief are now initially filed in District Court. Thus, the Supreme Court clarified that petitions for postconviction relief alleging ineffective assistance of counsel may now be filed in the District Court where the postconviction proceeding is pending. The court affirmed that an attorney ordered to respond to a Gillham order issued by a District Court is not subject to a disciplinary proceeding before the Commission on Practice or subject to charges of malpractice. The immunity extends to all information, testimony, or documents necessarily provided in response to the allegations of ineffective assistance of counsel. Marble v. St., 2007 MT 98, 337 M 99, 169 P3d 1148 (2007).

Counsel Ready for Trial — Motion for Continuance Properly Denied: Molder asserted that a motion to continue trial should have been granted because his substitute counsel was unprepared for trial. The Supreme Court applied the factors in St. v. Sotelo, 209 M 86, 679 P2d 779 (1984), to determine whether the trial court abused its discretion in denying a continuance, including: (1) the length of the requested delay; (2) whether the state's case would be prejudiced; (3) reasons for the requested continuance; (4) whether defense counsel was diligent in preparing for trial; (5) whether defendant's right to a speedy trial would be violated; and (6) defendant's right to effective assistance of counsel. Despite Molder's assertion to the contrary, his counsel stated

that a trial strategy was in place and that counsel was prepared for trial. The Supreme Court held that the trial strategy was reasonable, that Molder suffered no prejudice, and that Molder's substantial rights were not affected. Denial of the motion for continuance was affirmed. St. v. Molder, 2007 MT 41, 336 M 91, 152 P3d 722 (2007).

No Prejudice From Trial Delay — Ineffective Assistance of Counsel Claim Properly Dismissed: Adams contended that he received ineffective assistance of counsel because neither original counsel nor subsequent counsel filed to dismiss on grounds that Adams did not receive a speedy trial. The Supreme Court analyzed the four speedy trial factors in Barker v. Wingo, 407 US 514 (1972), and concluded that because less than 275 days of the 372-day delay was attributable to the state, the burden was on Adams to demonstrate prejudice from the delay. The only prejudice claim that Adams raised was that he was unable to effectively assist in his defense because he was in jail. However, all the things that Adams claims that he would have done had he not been incarcerated were in fact done by his attorneys in preparation for trial, so Adams could not demonstrate how his inability to do those things impaired his ability to defend himself. Absent a showing of prejudice, the speedy trial claim failed, as did the claim of ineffective assistance for failure to file a speedy trial claim that did not exist. Adams v. St., 2007 MT 35, 336 M 63, 153 P3d 601 (2007).

No Ineffective Assistance of Counsel When Defendant Benefits From Nolo Contendere Plea for Sexual Offense: In a claim for postconviction relief, Hardin asserted that he was denied effective assistance when his counsel successfully negotiated a nolo contendere plea for a sexual offense because the plea was illegal pursuant to 46-12-204. The Supreme Court noted that just because a sentence is illegal does not necessarily mean that there is merit to a claim of ineffective counsel. Rather, the defendant must meet both prongs of the Strickland test, requiring a showing both that counsel was deficient and that the defendant was prejudiced by the deficient performance. Here, Hardin could not demonstrate prejudice. By being allowed to enter a nolo contendere plea, Hardin actually benefited from the plea agreement without an express acknowledgement of guilt. Hardin could not show that counsel's performance was deficient when he received a more lenient, albeit illegal, sentence. Hardin v. St., 2006 MT 272, 334 M 204, 146 P3d 746 (2006).

Counsel's Failure to Challenge Parole Search Not Ineffective Assistance of Counsel: Meza was stopped for a traffic violation and because of surrounding circumstances, later upheld by the trial court, the officer conducted a canine sniff search around Meza's truck that indicated the presence of drugs. Meza refused to allow the officer to search inside the truck and was allowed to leave the scene on foot. The officer was informed by dispatch that Meza was on parole and contacted the parole officer who agreed to a parole search of the vehicle. After being convicted, Meza argued that his attorney erred in not challenging the parole search. The Supreme Court ruled that Meza had received effective counsel because his attorney had challenged Meza's being stopped and the canine search on other grounds and that given the strong precedent for upholding parole searches, Meza's attorney was justified in not challenging that search. St. v. Meza, 2006 MT 210, 333 M 305, 143 P3d 422 (2006).

Defendant Not Considered Pro Se by Default: One year and three attorneys after being charged with several DUI-related offenses, Browning terminated the services of the third court-appointed attorney and indicated that he wished to hire private counsel. The trial court allowed Browning to proceed, but cautioned that under the circumstances, Browning was considered to be representing himself. Browning's attempt to secure private counsel failed for lack of funds. During subsequent proceedings, Browning asserted that he did not wish to proceed pro se because he did not know what he was doing, but the trial court refused to appoint a fourth attorney. Browning subsequently pleaded guilty and was sentenced to 20 years but then moved to withdraw the guilty plea on grounds that the plea was involuntary because he received ineffective assistance of counsel. The motion was denied, but on appeal, the Supreme Court reversed. Although a defendant has a right to appear pro se, every reasonable presumption is indulged in against waiver of the right to counsel, and waiver will be upheld only if a defendant made the decision knowingly, voluntarily, and intelligently. In this case, the record did not support a conclusion that Browning unequivocally requested to proceed pro se, and under the test in St. v. Langford, 267 M 95, 882 P2d 490 (1994), a defendant cannot be considered pro se by default. Thus, the trial court improperly denied Browning the assistance of counsel, and Browning's motion to withdraw the guilty plea was erroneously denied. St. v. Browning, 2006 MT 190, 333 M 132, 142 P3d 757 (2006).

Element of Crime Revealed Through Stipulation Entered for Strategic Reasons — No Ineffective Assistance of Counsel: At Auld's trial for witness tampering, defense counsel entered a stipulation revealing that Auld's parole officer, who was designated as a government employee,

had or was about to engage in an investigation to determine if Auld had violated a rule by consuming alcohol. Auld asserted that counsel provided ineffective assistance by entering the stipulation and conceding an element of the offense of witness tampering. The Supreme Court found Auld's argument unavailing. Counsel entered the stipulation for strategic reasons so that the jury would not hear that Auld was on parole at the time that the offense took place, and Auld could not use trial tactics and strategic decisions as a basis for an ineffective assistance of counsel claim. St. v. Auld, 2006 MT 189, 333 M 125, 142 P3d 753 (2006). See also St. v. Grixti, 2005 MT 296, 329 M 330, 124 P3d 177 (2005), and St. v. Worthan, 2006 MT 147, 332 M 401, 138 P3d 805 (2006).

Exclusion of Defendant From Pretrial Meeting to Determine Whether Defendant Be Allowed to Proceed Pro Se Violative of Right to Be Present and Defend Oneself —Reversible Error: An alleged violation of the constitutional right to be present and appear at all criminal proceedings does not warrant automatic reversal. Rather, the Supreme Court considers the effect that a violation has on a defendant to determine whether a defendant has suffered any conceivable prejudice. In this case, Mann was excluded from a pretrial meeting to determine whether Mann would be represented by counsel or proceed pro se at trial on burglary and misdemeanor assault charges. This important determination implicated a substantial issue in the scope of the criminal proceedings, and excluding Mann from the meeting, at which Mann's counsel portrayed Mann in a negative light, violated Mann's right to be present and defend himself and right to effective assistance of counsel. Violation of these fundamental constitutional rights was sufficiently prejudicial to constitute reversible error, and the case was remanded for a new trial. St. v. Mann, 2006 MT 160, 332 M 476, 139 P3d 159 (2006).

No Lack of Communication or Prejudice in Counsel's Representation — Motions of Counsel to Withdraw Properly Denied: Worthan's counsel twice moved to withdraw, but both motions were denied. Following conviction, Worthan asserted that denial of the motions was error because defense counsel had been ineffective. The Supreme Court disagreed and affirmed. There was no total lack of communication or prejudice that could be construed as ineffective assistance of counsel, nor was counsel's second motion to withdraw equivalent to a motion to continue. St. v. Worthan, 2006 MT 147, 332 M 401, 138 P3d 805 (2006).

No Ineffective Assistance of Counsel Because of Failure to Request Continuance of Aggravated Assault Trial: Trull contended that he received ineffective assistance of counsel because his attorney failed to request a continuance of Trull's aggravated assault trial when allegedly new medical testimony emerged at trial. The Supreme Court noted that medical records provided to counsel before trial showed that the victim did not have an orbital fracture and that the CAT scan presented at trial, which affirmed the medical records, did not constitute new evidence. Thus, counsel had no justifiable reason for requesting a continuance, and counsel's conduct could not be considered ineffective assistance. Counsel's decision to proceed with trial fell within the wide range of reasonable and professional assistance, and Trull's assertion failed. St. v. Trull, 2006 MT 119, 332 M 233, 136 P3d 551 (2006).

Lack of Proximate Cause Instruction Not Violative of Right to Fair Trial: In Dubois' deliberate homicide trial, defense counsel did not request a jury instruction on proximate cause. Dubois argued on appeal that without a proximate cause instruction, the jury lacked the means to make a factual finding regarding the central defense theory, which was that the victim died of morphine intoxication in the hospital following the assault rather than from the massive head injuries inflicted by Dubois that put the victim in the hospital, and that defense counsel offered ineffective assistance by failing to request a proximate cause instruction. The Supreme Court disagreed on both issues. The jury was properly and fully instructed that it did not need to find that Dubois intended to kill the victim, but only that Dubois caused the death. The lack of a proximate cause instruction thus did not result in a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of the trial or proceedings, or compromise the integrity of the judicial process. In addition, because a proximate cause instruction was not required for Dubois to have a fair trial, defense counsel was not ineffective for failing to offer the instruction. St. v. Dubois, 2006 MT 89, 332 M 44, 134 P3d 82 (2006).

Failure to Raise Ineffective Assistance of Appellate Counsel in Petition for Postconviction Relief — Petition Barred: In a petition for postconviction relief, Swan claimed ineffective assistance of trial counsel. The District Court determined that the petition was barred under 46-21-105. On appeal, Swan claimed that under Hagen v. St., 1999 MT 8, 293 M 60, 973 P2d 233 (1999), unpreserved appellate issues could be raised in the context of a postconviction relief petition that alleges ineffective assistance of counsel. The Supreme Court disagreed. In Hagen, the petitioner set forth an ineffective assistance claim related to appellate counsel, not trial counsel. Swan's

argument was without merit, and the petition for postconviction relief was properly denied. Swan v. St., 2006 MT 39, 331 M 188, 130 P3d 606 (2006).

Right to Substitute Judge Not Considered Structural Issue of Constitutional Dimension — No Ineffective Assistance of Trial Counsel for Failure to Move for Automatic Substitution of Trial Judge: In a petition for postconviction relief, Swan contended that trial counsel rendered ineffective assistance by failing to move for an automatic substitution of the trial judge and that this structural error entitled Swan to a new trial. However, structural error is typically of constitutional dimensions, precedes the trial, and undermines the fairness of the entire trial proceeding. Although lack of an impartial judge would be considered a structural error, failure to exercise the statutory right to substitute a trial judge is not of constitutional dimension and is not presumed prejudicial. Having failed to establish that counsel's failure to timely move for an automatic substitution of the trial judge was an error of constitutional dimension, Swan's postconviction argument failed. Swan v. St., 2006 MT 39, 331 M 188, 130 P3d 606 (2006), following St. v. Peplow, 2001 MT 253, 307 M 172, 36 P3d 922 (2001).

Former Prosecutor Appointed as Defense Counsel Not Ineffective Assistance Per Se: When Hendricks was arrested for attempted deliberate homicide and aggravated assault, his appointed defense counsel was also serving as city attorney in an overlapping jurisdiction, which Hendricks contended established a conflict of interest resulting in per se ineffective assistance of counsel. Hendricks asserted that the Supreme Court should adopt a rule that a city attorney should be disqualified from representing an indigent criminal defendant in a county of overlapping jurisdiction, but the court declined to adopt a per se rule. Instead, the court held that a defendant claiming ineffective assistance of counsel because of a conflict of interest must show that counsel actively represented conflicting interests and that a conflict of interest adversely affected counsel's performance. Hendricks could not show that counsel's work in two positions in the same jurisdiction created an actual conflict of interest that adversely affected the representation of Hendricks, so the ineffective assistance claim failed. Hendricks v. St., 2006 MT 22, 331 M 47, 128 P3d 1017 (2006). See also St. v. Deschon, 2002 MT 16, 308 M 175, 40 P3d 391 (2002).

Waiver of Right to Postconviction Challenge of Matters Occurring Prior to Guilty Plea and Unrelated to Nature of Plea: In a petition for postconviction relief, Herman raised numerous issues related to ineffective assistance of counsel that allegedly led to a guilty plea. However, by pleading guilty, Herman waived the right to challenge matters that occurred prior to the plea and that were unrelated to the voluntary or knowing nature of the plea or to the ineffective assistance claim, including: (1) a claim that Herman conducted, sought, or obtained independent legal research; (2) an assertion that Herman met the attachments requirement of 46-21-104(1)(c); (3) Herman's claim that he pleaded guilty because of the duress of incarceration; (4) counsel's failure to move for a bond reduction or pretrial release; and (5) a claim that counsel was ineffective by asserting a speedy trial violation. Herman v. St., 2006 MT 7, 330 M 267, 127 P3d 422 (2006), following Ellenburg v. Chase, 2004 MT 66, 320 M 315, 87 P3d 473 (2004).

Failure of Counsel to Request Unanimity Instructions on Two Counts of Criminal Endangerment Not Considered Ineffective Assistance: Gallagher was convicted of two counts of criminal endangerment and asserted on appeal that failure of defense counsel to request specific unanimity instructions on the two charges constituted ineffective assistance and denied Gallagher the right to a fair trial. Based on the record, the Supreme Court disagreed. Both defense and prosecution counsel argued each count to the jury in closing arguments, linking appropriate facts and specific victims to each count, so juror confusion was extremely unlikely, nor could the court conclude that the trial outcome was prejudiced by the lack of a specific unanimity instruction on the endangerment charges that denied Gallagher a fair trial. Gallagher's convictions were affirmed. St. v. Gallagher, 2005 MT 336, 330 M 65, 125 P3d 1141 (2005).

Attempted Impeachment of State's Witness — No Ineffective Assistance of Counsel: Grixti contended that a court-appointed counsel provided ineffective assistance by failing to sufficiently impeach the state's key witness. The Supreme Court held that although counsel could have chosen to cross-examine the witness differently, Grixti failed to show that counsel's trial tactics fell below an objectively reasonable standard—the first prong of the Strickland test—so Grixti's claim of ineffective assistance failed. St. v. Grixti, 2005 MT 296, 329 M 330, 124 P3d 177 (2005), followed in St. v. Worthan, 2006 MT 147, 332 M 401, 138 P3d 805 (2006). See also St. v. Turner, 2000 MT 270, 302 M 69, 12 P3d 934 (2000), and St. v. Thee, 2001 MT 294, 307 M 450, 37 P3d 741 (2001).

Ineffective Counsel Claims Insufficient to Invoke Plain Error Doctrine on Direct Appeal: On direct appeal, Novak contended that his counsel's failure to object to certain prejudicial, inadmissible evidence compromised his right to a fair trial and asserted that the Supreme Court

should apply the plain error doctrine to review counsel's failure. The Supreme Court held that all of the alleged errors were encompassed in Novak's effective assistance of counsel claim, which could be raised in postconviction proceedings, but were insufficient to invoke the plain error doctrine on direct appeal. St. v. Novak, 2005 MT 294, 329 M 309, 124 P3d 182 (2005).

Defense Counsel's Trial Tactics Not Basis for Ineffective Assistance Claim — Postconviction Relief Properly Denied: Garrett filed a petition for postconviction relief, asserting that trial counsel rendered ineffective assistance by lack of preparation and deficient presentation, failure to make timely hearsay objections, failure to obtain a defense expert and call witnesses, and failure to offer adequate jury instructions and to assert affirmative defenses. The District Court denied the petition, and on appeal, the Supreme Court considered each assertion and affirmed. The decision whether and when to make an opening statement is a matter of trial tactics that do not form the basis for an ineffective assistance claim, and decisions regarding the timing and number of objections also lie within trial counsel's tactical discretion. The decision not to call a handwriting expert for the defense was not ineffective assistance because Garrett admitted altering the documents on which the expert would have testified. The 10 jury instructions offered by defense counsel were consciously and tactically chosen to further the chosen defense theory. Counsel's decisions regarding the calling of potential witnesses and other tactical decisions at trial, did not fall below an objective standard of reasonableness required to find ineffective assistance of counsel, and the petition for postconviction relief was properly denied. Garrett v. St., 2005 MT 197, 328 M 165, 119 P3d 55 (2005).

Boot Camp Confessions — No Classic Penalty Situation Compelling Self-Incriminating Statements: Woods volunteered for boot camp. A qualification for successful completion of the camp was full disclosure of past crimes in order to receive a sentence reduction. Unsuccessful completion of boot camp required a return to prison. In an anger management class at boot camp and later to several other persons, Woods made self-incriminating statements regarding a prior double homicide, and Woods was subsequently arrested based on the statements. Woods asserted that he received ineffective assistance of counsel because his attorney failed to raise the classic penalty situation to explain that use of his statements were violative of his right against self-incrimination. The Supreme Court noted that the classic penalty situation did not apply because Woods volunteered for boot camp and volunteered the statements. However, the statements were uncoerced, so the information upon which the state relied for its homicide investigation was not compelled by any threat of penalty from the state, and because no classic penalty situation existed, Woods could not argue ineffective assistance of counsel for failing to argue that it did. Woods did not invoke self-incrimination protection at boot camp, and the privilege against self-incrimination could not be considered self-executing. Thus, Woods's petition for postconviction relief was properly denied. St. v. Woods, 2005 MT 186, 328 M 54, 117 P3d 152 (2005), following St. v. Fuller, 276 M 155, 915 P2d 809 (1996), and distinguishing Robbins v. St., 2002 MT 116, 310 M 10, 50 P3d 134 (2002).

Counsel's Failure to Interview and Call Witnesses Within Range of Reasonable and Sound Professional Decisions — Failure to Prove Ineffective Assistance of Counsel: Weaver contended that his defense counsel was ineffective in failing to interview and call certain witnesses and in not introducing an entomologist's report that might have created a reasonable doubt as to Weaver's role in a homicide. Under the first prong of the Strickland test, Weaver needed to overcome the strong presumption that counsel's defense strategies and trial tactics fell within a wide range of reasonable and sound professional decisions. The Supreme Court examined each of Weaver's contentions and determined that: (1) counsel's decision not to investigate potential witnesses did not fall below an objective standard of reasonableness; (2) Weaver failed to meet the burden of showing that counsel's failure to interview potential witnesses constituted ineffective assistance to the extent that it resulted in prejudice raising a reasonable probability that the trial outcome would have been different; (3) counsel's decision not to call every witness that Weaver identified actually carried fewer risks and promoted Weaver's best interest at trial; and (4) failure to introduce the entomologist's report was tactical and the result of a conscientious, weighed decision made after consultation with Weaver and thus was not erroneous. Weaver's ineffective assistance claim failed. Weaver v. St., 2005 MT 158, 327 M 441, 114 P3d 1039 (2005), following Clausell v. St., 2005 MT 33, 326 M 63, 106 P3d 1175 (2005).

Defense Counsel's Complaint to Media Not Considered Ineffective Assistance of Counsel: While Ford was incarcerated awaiting trial, a family member of Ford's homicide victim visited Ford and caused a disruption. Ford's counsel issued a news release to local media contending that jail officials violated Ford's constitutional rights by allowing the incident to occur, and the local newspaper ran a story that contained counsel's accusation. Ford contended that counsel's

conduct prejudiced the case by instigating negative media coverage that reduced Ford's chance of obtaining an impartial jury. However, Ford cited no authority in support of the claim that counsel's complaint to the media amounted to ineffective assistance of counsel. Absent support by legal authority and evidence of prejudice, Ford's postconviction claim for relief was properly denied. Ford v. St., 2005 MT 151, 327 M 378, 114 P3d 244 (2005).

Failure of Counsel to Present Evidence of Purported Negligent Rescue Efforts Not Considered Ineffective Assistance of Counsel: In a petition for postconviction relief, Ford contended that his counsel was ineffective in failing to present evidence that Ford's beating victim may have been injured through the negligent rescue efforts of emergency personnel who responded at the scene. However, the trial record contained no evidence to support the claim, and Ford's arguments were based on mere allegations. Counsel could not be found to be ineffective for failing to raise a defense that was unsupported in the record, and Ford's claim for postconviction relief was properly denied. Ford v. St., 2005 MT 151, 327 M 378, 114 P3d 244 (2005).

Failure of Counsel to Suppress Unintroduced Evidence Not Considered Ineffective Assistance of Counsel: In a petition for postconviction relief, Ford contended that his counsel was ineffective in failing to move to suppress evidence of a blood sample taken from Ford's hands before a search warrant was obtained. However, the state introduced no blood evidence at trial, so there was no evidence for Ford's counsel to move to suppress. Ford's ineffective assistance of counsel claim failed. Ford v. St., 2005 MT 151, 327 M 378, 114 P3d 244 (2005).

Speculative Postconviction Claim Properly Denied: In a petition for postconviction relief, Ford contended that his counsel was ineffective in failing to move to suppress testimony from Ford's neighbors regarding statements by the neighbors that were allegedly coerced by police. However, the claim was based on nothing more than Ford's allegation that officers coerced statements from the neighbors. Because Ford produced no evidence to support the allegation and the claim was not grounded on facts in the record, the claim for relief was properly denied. Ford v. St., 2005 MT 151, 327 M 378, 114 P3d 244 (2005).

Failure of Trial Court to Inquire About Satisfaction of Counsel at Hearing on Change of Plea Not Error — No Bearing Between Satisfaction With Counsel and Voluntariness of Plea: A court may permit withdrawal of a guilty plea upon a showing of good cause, including involuntariness of the plea or other criteria. In this case, defendant contended that good cause existed because the trial court failed to inquire regarding defendant's satisfaction with counsel and with counsel's advice when defendant had expressed dissatisfaction with counsel shortly before a change of plea hearing. The Supreme Court held that defendant's dissatisfaction with counsel had no bearing on whether defendant understood the consequences of the plea or whether the plea was induced by threats, misrepresentations, or an improper promise. Finding no other factors to bear upon voluntariness or implicate good cause, the trial court's denial of defendant's motion to withdraw the guilty plea was affirmed. St. v. Warclub, 2005 MT 149, 327 M 352, 114 P3d 254 (2005), distinguishing St. v. Bowley, 282 M 298, 938 P2d 592 (1997).

Failure of Counsel to Ensure Impartial Jury During Voir Dire Constituting Ineffective Assistance — Reversible Structural Error: A potential juror disclosed in a juror questionnaire that her daughter was a paralegal at the County Attorney's office. Defense counsel failed to take note of the disclosure, to question the juror regarding any potential bias during voir dire, or to challenge the juror for cause. Defense counsel acknowledged the error on the record. The juror was picked for the panel, and Lamere was convicted. On appeal, the Supreme Court applied the two-pronged Strickland test for ineffective assistance, and because the error was on the record, the court reviewed the ineffective assistance claim de novo on direct appeal. The court concluded that counsel failed to ensure that Lamere received a fair trial by an impartial jury and that counsel's performance fell below the reasonably required level, satisfying the first Strickland prong. In addition, counsel's deficient performance constituted a structural error that undermined the fairness of the entire trial and thus was presumed to be prejudicial, satisfying the second Strickland prong. Lamere did not receive effective assistance during voir dire, the verdict was reversed, and the case was remanded for a new trial. St. v. Lamere, 2005 MT 118, 327 M 115, 112 P3d 1005 (2005). See also St. v. Good, 2002 MT 59, 309 M 113, 43 P3d 948 (2002).

Failure of Counsel to Argue Included Offenses Under State Law Considered Ineffective Assistance of Counsel: Becker was convicted of criminal possession of dangerous drugs, accountability for criminal production or manufacture of dangerous drugs, and criminal possession of precursors to dangerous drugs. On appeal, Becker argued that he should have been convicted only of criminal production or manufacture by accountability because the other two charges were part of the manufacturing process and that failure to include the other charges violated his due process rights. The Supreme Court declined to address the double jeopardy issue

under the plain error doctrine because Becker raised it for the first time on appeal. However, the court found it appropriate to address the issue under Becker's ineffective assistance of counsel claim. Becker's counsel's failure to include all the relevant charges in a dismissal motion and to rely on the proper statutory grounds for dismissal constituted deficient performance under the first prong of the Strickland test. The second Strickland prong was also met because Becker was prejudiced by counsel's deficient performance, inasmuch as there was a reasonable probability that the result of the proceeding would have been different but for counsel's errors. The Supreme Court thus vacated the convictions and remanded for resentencing. St. v. Becker, 2005 MT 75, 326 M 364, 110 P3d 1 (2005), distinguished in St. v. Williams, 2010 MT 58, 355 Mont. 354, 228 P.3d 1127. See also St. v. White, 2001 MT 149, 306 M 58, 30 P3d 340 (2001).

Prosecutor's Comments Not Affecting Outcome of Trial — Failure to Prove Prosecutorial Misconduct: Clausell's defense in a deliberate homicide trial was that the victim's death was a "tragic accident". Because of Clausell's defense, his counsel failed to object to numerous comments by the prosecutor that focused on rebutting the "tragic accident" theory. On appeal, Clausell contended that the prosecutor's statements constituted prosecutorial misconduct and that his attorney's failure to object to the comments or to move to suppress evidence of the search of Clausell's apartment amounted to ineffective assistance of counsel. The Supreme Court disagreed on both issues. Given that the state presented sufficient evidence of deliberate homicide and that the jury was admonished to consider only the evidence, Clausell failed to show that the prosecutor's comments affected the trial's outcome. Because no prosecutorial misconduct occurred, defense counsel's failure to object to the comments could not be considered ineffective assistance, and defense counsel's trial tactics, including failure to seek to suppress evidence that was in plain view, fell within the wide range of reasonable and sound professional decisions. Clausell failed to establish that his attorney's lack of objections fell below the objective reasonableness standard or that he was prejudiced to the point that a reasonable probability existed that the result of the trial would have been different had counsel not performed ineffectively. The deliberate homicide conviction was affirmed. Clausell v. St., 2005 MT 33, 326 M 63, 106 P3d 1175 (2005), followed in St. v. Misner, 2007 MT 235, 339 M 176, 168 P3d 679 (2007). See also St. v. Gray, 207 M 261, 673 P2d 1262 (1983).

Failure to Meet Strickland Burden Demonstrating Ineffective Assistance of Counsel — Petition for Postconviction Relief Properly Denied: Following conviction for deliberate homicide and a failed direct appeal, Elliott filed a pro se petition for postconviction relief alleging 12 separate instances of ineffective assistance of counsel at trial and on direct appeal. The District Court held a hearing at which counsel testified and then denied the petition. On appeal, the Supreme Court applied the Strickland test for ineffective assistance of counsel, examined the alleged instances of counsel ineffectiveness, and concluded that Elliott failed to overcome the strong presumption that counsels' defense strategies and trial tactics fell within the wide range of sound professional decisions. Elliott also failed to demonstrate prejudice or a reasonable probability that the result of the proceedings would have been different had counsel not performed ineffectively. Failing the Strickland test, denial of Elliott's petition for postconviction relief was affirmed. Elliott v. St., 2005 MT 10, 325 M 345, 106 P3d 517 (2005), distinguished in Wilkes v. St., 2015 MT 243, 380 Mont. 388, 355 P.3d 755. See also St. v. Kougl, 2004 MT 243, 323 M 6, 97 P3d 2095 (2004), Ariegwe v. St., 2012 MT 166, 365 Mont. 505, 285 P.3d 424, St. v. Haldane, 2013 MT 32, 368 Mont. 396, 300 P.3d 657, and St. v. Greene, 2015 MT 1, 378 Mont. 1, 340 P.3d 551.

No Claim of Actual Innocence — Claim of Ineffective Assistance of Counsel Precluded: Oatman asserted that his counsel was ineffective in failing to bring a claim of Oatman's actual innocence during Oatman's first appeal. However, Oatman had no claim of actual innocence, so there was no need for counsel to bring the claim on appeal. Counsel diligently represented Oatman before and throughout trial and the first appeal, and Oatman's continued employment of counsel indicated that Oatman was satisfied with his representation. Oatman's ineffective assistance claim failed. Oatman v. St., 2004 MT 360, 324 M 472, 104 P3d 1048 (2004).

Failure to Object to Jury Instruction — Ineffective Assistance of Counsel Claim Unfounded — Plain Error Doctrine Inapplicable: The trial court instructed the jury that Gray could be convicted of assault on a peace officer if the state proved that Gray caused a reasonable apprehension of bodily harm in any of three police officers. Gray contended that the instruction erroneously allowed the jury to convict for assault of one or more of the officers without agreeing to one specific set of facts, in violation of the unanimity requirement that the jury must be in agreement as to the principal factual elements underlying the offense. Even though Gray's counsel acquiesced to the instruction, Gray contended that the fundamental right to a unanimous jury verdict is inviolate, so plain error review was appropriate. However, Gray not only failed to contemporaneously object to

the instruction, but specifically asked the trial court to add the language that he argued on appeal was insufficient. The Supreme Court declined to apply the doctrine, refusing to put the trial court in error for an action in which Gray acquiesced and actively participated. Additionally, Gray's claim of ineffective assistance of counsel based on his attorney's acquiescence and participation in the jury instruction for strategic purposes also failed. In light of the overwhelming evidence of guilt, Gray could not show that the trial outcome was prejudiced because of the lack of a specific unanimity instruction or that the result would have been different if the attorney had not engaged in the legal strategy. The conviction was affirmed. St. v. Gray, 2004 MT 347, 324 M 334, 102 P3d 1255 (2004), followed in St. v. Gallagher, 2005 MT 336, 330 M 65, 125 P3d 1141 (2005). See also St. v. Birthmark, 2013 MT 86, 369 Mont. 413, 300 P.3d 1140.

Only Record-Based Ineffective Assistance of Counsel Claim on Appeal: Frasure claimed on appeal that her attorney provided ineffective assistance at trial by failing to object to the introduction of certain evidence. However, the Supreme Court will determine that there was ineffective assistance of counsel only if that conclusion can be based on the record on appeal or if there is no plausible justification for counsel's actions or inactions. Frasure failed to establish that her ineffective assistance claim was record-based, so the claim was dismissed without prejudice to the filing of a petition for postconviction relief. St. v. Frasure, 2004 MT 305, 323 M 479, 100 P3d 1013 (2004). See also St. v. Jefferson, 2003 MT 90, 315 M 146, 69 P3d 641 (2003), and St. v. Baker, 2013 MT 113, 370 Mont. 43, 300 P.3d 696.

Counsel's Act or Omission Not Considered Trial Strategy Reviewable on Direct Appeal: Lucero contended that he received ineffective assistance of counsel because his attorney did not adequately explain the nature and terms of the state's plea bargain offer. Applying the Strickland test for ineffective assistance claims, the Supreme Court noted that before an ineffective assistance claim will be considered on direct appeal, the record must adequately document the reason why counsel acted in a particular manner, and if the record does not supply the reason, the claim is more appropriately raised in a petition for postconviction relief. However, the claimed act or omission in this case was not considered trial strategy because counsel's communication of the oral plea offer to Lucero was obligatory, not strategic. Thus, the question was not why counsel acted in a particular manner but whether counsel acted and, if so, whether counsel acted adequately, and review of an obligatory action may be reviewed on direct appeal. Lucero was fully informed of the offer and chose to go to trial anyway. Counsel's conduct in communicating the plea offer did not fall below the standard of reasonable representation,. Lucero's claim failed to meet the first prong of the Strickland test and was properly denied. St. v. Lucero, 2004 MT 248, 323 M 42, 97 P3d 1106 (2004). See also Hans v. St., 283 M 379, 942 P2d 674 (1997), St. v. Harris, 2001 MT 231, 306 M 525, 36 P3d 372 (2001), and St. v. Jefferson, 2003 MT 90, 315 M 146, 69 P3d 641 (2003).

Failure of Counsel to Request Instruction on Accomplice Testimony Constituting Ineffective Assistance of Counsel — Failure of Court to Give Instruction Prejudicial: Kougl was convicted of operating an unlawful clandestine laboratory and subsequently appealed on grounds of ineffective assistance of counsel. The state's case was based largely on the testimony on three accomplices. At trial, both the prosecution and defense counsel pointed out to the jury in closing arguments that accomplice testimony should be viewed with suspicion because of the accomplices' criminal conduct and the deals that they cut with the state. However, Kougl's counsel did not request a jury instruction that accomplice testimony ought to be viewed with distrust and that it must be corroborated. Applying the Strickland test for effective assistance of counsel, the Supreme Court found that Kougl's counsel's failure to request the instructions constituted a failure to use the law to strike at the heart of the state's case, and because there was no plausible explanation for not asking for the instructions, counsel's performance was deficient and the first prong of Strickland was satisfied. Further, the trial court failed its duty to instruct the jury on the law, which is a duty that may not be delegated to counsel because what the court tells the jury carries the force of law, while counsel's comments do not. Thus, the second prong of Strickland requiring a showing of prejudice was also satisfied because if the jury had been properly instructed, there was a reasonable probability that it would have arrived at a different outcome. Therefore, Kougl received ineffective assistance of counsel, and Kougl's conviction was reversed. St. v. Kougl, 2004 MT 243, 323 M 6, 97 P3d 1095 (2004), following St. v. Rose, 1998 MT 342, 292 M 350, 972 P2d 321 (1998), and followed in St. v. Johnston, 2008 MT 318, 346 M 93, 193 P3d 925 (2008), which was overruled in part in St. v. Maynard, 2010 MT 115, 356 Mont. 333, 233 P.3d 331, and followed in St. v. Johnston, 2010 MT 152, 357 Mont. 46, 237 P.3d 70.

Failure of Counsel to File Motion to Dismiss Not Considered Ineffective Assistance When Element of Offense Before Jury: Maki was arrested for DUI after being discovered slumped into the passenger seat of a running vehicle that was parked off the highway near a missile silo

access site. Maki claimed ineffective assistance of counsel because his attorney did not file a motion to dismiss based on the fact that Maki was not on a way of the state open to the public. However, Maki's location on a way open to the public was an element of a DUI offense, so the issue was before the jury and Maki had an opportunity to contest the point. Counsel did not need to offer a motion to dismiss in order to raise the issue, and failure to do so neither prejudiced nor deprived Maki of a fair trial, so the ineffective assistance claim failed, and the DUI conviction was affirmed. St. v. Maki, 2004 MT 226, 322 M 420, 97 P3d 556 (2004).

Admission by Counsel That Defendant Resisted Arrest When Defendant Charged With Assaulting Peace Officer — Not Ineffective Assistance of Counsel: Audet was charged with assaulting a peace officer and resisting arrest. At the time of trial, Audet told the court that he wished to plead guilty to the resisting arrest charge but to go to trial on the assault charge, even though his attorney had advised otherwise. The court entered not guilty pleas for both counts. Counsel informed the jury in opening and closing statements that Audet was not contesting the resisting arrest charge, but lacked the purposeful and knowing elements required to commit officer assault. The prosecutor then convinced the jury that Audet had essentially conceded the mental state by conceding guilt for resisting arrest, and Audet was convicted on both counts. On appeal, Audet contended that counsel's conduct constituted ineffective assistance, warranting reversal. The Supreme Court applied the Strickland test and dismissed the claim. The record did not reveal why counsel chose to concede the resisting arrest charge to the jury, so the court was unable to determine whether the decision constituted an unreasonable defense strategy that would overcome the presumption that counsel's actions fell within the range of reasonable professional conduct. Pursuant to St. v. Herrman, 2003 MT 149, 316 M 198, 70 P3d 738 (2003), Audet's direct appeal was dismissed without prejudice to the ineffective assistance issue being raised in a postconviction relief proceeding. St. v. Audet, 2004 MT 224, 322 M 415, 96 P3d 1144 (2004). See also St. v. Hendricks, 2003 MT 223, 317 M 177, 75 P3d 1268 (2003), and St. v. Greene, 2015 MT 1, 378 Mont. 1, 340 P.3d 551.

Failure of Counsel to Obtain Expert on General Tendencies of Mentally Ill Homeless Not Considered Ineffective Assistance: A trial on respondent's involuntary commitment was required within 7 days of the request for a jury trial. Respondent's counsel failed to secure a continuance in order to attempt to locate an expert to testify on the general ability of mentally ill homeless persons to care for themselves, and respondent asserted that counsel's conduct constituted ineffective assistance. Although the strict time constraints make advocacy challenging, evidence must be limited to a respondent's own particular set of circumstances, and in this case, any testimony given by an expert on the general tendencies of the mentally ill homeless would not have rebutted the state's testimony that respondent was unable to survive on his own. Thus, counsel's failure to procure the expert did not constitute ineffective assistance. In re Mental Health of T.M., 2004 MT 221, 322 M 394, 96 P3d 1147 (2004). See also In re K.G.F., 2001 MT 140, 306 M 1, 29 P3d 485 (2001).

No Prejudice to Defendant When Assistance of Counsel Not Deficient: Following conviction for deliberate homicide, Sellner filed a petition for postconviction relief based on ineffective assistance of counsel, contending that counsel was deficient in: (1) failing to investigate and present a case for justifiable use of force; (2) abandoning an attempted mitigated deliberate homicide defense; (3) pursuing a defense based on a civil suit filed against defendant; (4) failing to offer a "failure to agree" instruction to the jury; and (5) making other errors. The Supreme Court applied the Strickland test to determine whether counsel's performance was deficient and prejudicial, addressing each argument in turn, and concluded that Sellner's contentions of deficient counsel were unfounded. Absent a showing of deficient counsel, Sellner could not show prejudice, and the denial of the petition for postconviction relief was affirmed. Sellner v. St., 2004 MT 205, 322 M 310, 95 P3d 708 (2004), following St. v. Hubbel, 2001 MT 31, 304 M 184, 20 P3d 111 (2001).

Criteria of Effective Assistance of Defense Counsel — Prejudice From Ineffective Counsel Warranting Withdrawal of Alford Plea: In a petition for postconviction relief from a drug conviction, Henderson contended that he received ineffective assistance of counsel and should be allowed to withdraw his Alford plea, but the District Court denied the petition. On appeal, the Supreme Court applied the Strickland test to determine whether Henderson's counsel was ineffective. The first part of the test requires that defendant show that counsel's performance was deficient. The overarching duty of a criminal defense counsel is to advocate on behalf of the defendant and to meet, test, and refute the prosecution's case. Henderson met the first Strickland requirement by showing that counsel performed no investigation, research, or analysis, filed no pretrial motions, and spent only 4 hours on the case, which included clerical work, appearing in

court with Henderson on two occasions, and an hour persuading Henderson to plead guilty. The sum of counsel's actual legal work was asking the County Attorney to propose a plea bargain and then signing the prosecution's first offer. Counsel's utter failure to advocate for Henderson in a meaningful way constituted deficient performance. The second Strickland requirement is a showing by defendant of a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. Henderson also met this test by showing that the decision to enter the Alford plea was clearly influenced by counsel's lack of effective assistance and that, but for the ineffective assistance, he would not have entered the plea. Thus, the lack of effective assistance in this case constituted sufficient good cause to authorize Henderson to withdraw the Alford plea and proceed to trial. The Supreme Court granted the petition for postconviction relief and remanded for trial. St. v. Henderson, 2004 MT 173, 322 M 69, 93 P3d 1231 (2004).

Appointed Counsel — No Ineffective Assistance of in Postconviction Relief Proceedings: Kallowat contended that he received ineffective assistance from his appointed counsel who failed to represent him in postconviction relief proceedings and to follow Kallowat's instruction to file an appeal in federal court. The Supreme Court disagreed. Kallowat was appointed two different attorneys, one of whom withdrew because of an excessive workload, and another who withdrew citing no discernible basis entitling Kallowat to relief, so Kallowat was allowed to proceed pro se. There was no error in allowing counsel to withdraw. Further, attorneys in criminal cases are required to represent a client only until final judgment is rendered, including appeals to the Montana Supreme Court, so counsel was not required to represent Kallowat in appealing to the federal courts. Thus, Kallowat's argument that he did not receive effective assistance of counsel failed. Kallowat v. St., 2004 MT 152, 321 M 501, 92 P3d 1176 (2004).

Unfounded and Unpleaded Speculative Argument Not Considered for First Time on Appeal: Kallowat contended for the first time on appeal that if the jury in his DUI case had known that the arresting officer had been convicted of a felony and was employed under questionable status, the case would in all probability have had a different outcome. However, Kallowat failed to properly plead the issue as required in 46-21-104, nor was this speculative contention supported by the record. Therefore, the Supreme Court declined to address Kallowat's unsupported argument raised for the first time on appeal. Kallowat v. St., 2004 MT 152, 321 M 501, 92 P3d 1176 (2004).

No Showing That Representation by Former Deputy County Attorney Influenced by Actual Conflict of Interest: In postconviction relief proceedings, Thurston claimed that he received ineffective assistance of counsel when he was represented at trial by a former Deputy County Attorney who had allegedly exchanged information about the investigation of Thurston's case while employed by the County Attorney's office. Thurston's claim was denied, and on appeal, the Supreme Court affirmed. Under St. v. Deschon, 2002 MT 16, 308 M 175, 40 P3d 391 (2002), a defendant claiming ineffective assistance of counsel because of a conflict of interest must show that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected counsel's performance. Although bar association standards and 37-61-413 supported an argument that counsel should not have represented Thurston after supposedly gaining knowledge of the case while employed by the County Attorney's office, it was not a basis for reversal unless Thurston could establish that an actual conflict existed. Even though the conflict of interest was disclosed to Thurston, he did not request other counsel, nor did Thurston demonstrate how the conflict might have affected counsel's performance or resulted in prejudice. Therefore, the postconviction claim was properly denied. Thurston v. St., 2004 MT 142, 321 M 411, 91 P3d 1259 (2004).

Proper Consideration in Postconviction Relief Proceedings of Ineffective Assistance of Counsel Claims Based on Conversations off Record: In postconviction relief proceedings, Thurston contended that he was provided ineffective assistance of counsel because: (1) he had given counsel information needed to support at least seven criteria for designating Thurston as a nondangerous offender, but counsel failed to raise the mitigating information at the sentencing hearing; (2) counsel did not discuss with Thurston how to refute testimony by the state's witnesses until they were walking to the sentencing hearing and it was too late; and (3) counsel failed to provide Thurston with an accurate portrayal of the sentence contained in a plea agreement. The District Court dismissed the claims on grounds that they would have been reflected in the record and should have been raised on direct appeal. The Supreme Court disagreed. The basis for the claims rested on conversations that Thurston had with counsel outside the courtroom and thus by their very nature could not have been reflected in transcripts or the record. The Supreme Court therefore reversed and ordered the District Court to consider the issues on their merits

in accordance with the ineffective assistance test in Strickland v. Wash., 466 US 668 (1984). Thurston v. St., 2004 MT 142, 321 M 411, 91 P3d 1259 (2004).

Failure of Counsel to Rely on Statutory Definition of Guardian-Ward Relationship in Challenging Juror Employed by Law Enforcement Not Ineffective Assistance of Counsel: A potential juror was employed as a guard at Richeson's detention center. Defense counsel challenged the juror for cause, but the motion was denied, and Richeson had to use his last peremptory challenge instead. On appeal, Richeson claimed ineffective assistance of counsel because the attorney did not reference 46-16-115, which defines the guardian-ward relationship between a jailer and an inmate, asserting that the statutorily defined bias would have required removal of the juror for cause. The Supreme Court disagreed. Although the law requires certain standards from correctional facilities and individual guards and detention officers, those standards do not meet the requirements of a guardian-ward relationship or create an implied guardian-ward relationship between prisoners and individual guards. Thus, Richeson's counsel did not fall below an objective standard of reasonableness in failing to argue the guardian-ward relationship, and Richeson's ineffective assistance claim failed. St. v. Richeson, 2004 MT 113, 321 M 126, 89 P3d 958 (2004).

Allegation That Defendant Withheld Medical Information on Advice of Counsel to Be Eligible for Boot Camp Placement — No Ineffective Assistance of Counsel: Davis asserted ineffective assistance of counsel because his attorney allegedly told him not to mention a medical condition that might preclude Davis from qualifying for boot camp. Nevertheless, under the Strickland test, Davis did not meet the burden of showing ineffective assistance. Davis had disclosed the medical information earlier during a general health screening, and the District Court was aware of the information during sentencing. Further, Davis did not ground his proof on facts within the record rather than on conclusory allegations or show a reasonable probability that, but for counsel's deficient performance, Davis would not have pleaded guilty and insisted on going to trial. The ineffective assistance claim was properly denied. Davis v. St., 2004 MT 112, 321 M 118, 88 P3d 1285 (2004).

Cross-Examination of Child Witness Concerning Change in Testimony Not Considered Ineffective Assistance of Counsel: Following a break in trial, a child witness changed his testimony, and defense counsel questioned the child regarding who he talked to during the break and whether he was told to say anything different from what he had said before. On rebuttal, the state then introduced the child's prior consistent statements to others, and the trial court allowed the testimony about the child's prior statements over defendant's objections. On appeal, defendant contended that counsel's assistance was ineffective because defendant was prejudiced when counsel opened the door to rebuttal testimony regarding the child's prior consistent statements. The Supreme Court applied the Strickland test for effective assistance of counsel and disagreed that the tactic constituted deficient performance. Rather, counsel would have been remiss if the change in the child's testimony had been ignored. Questioning the child concerning possible improper influence by the state or persons associated with the state during the break was a proper trial strategy and could not be considered ineffective assistance of counsel. St. v. J.C., 2004 MT 75, 320 M 411, 87 P3d 501 (2004).

No Prejudice From Counsel's Failure to Notify Defendant of Minimum Sentence — Claim of Ineffective Assistance of Counsel Not Justifying Postconviction Relief — Petition Properly Denied as Matter of Law: In a petition for postconviction relief, Cobell asserted that he received ineffective assistance of counsel because his attorney did not inform him of the minimum 5-year imprisonment penalty for possession of a deadly weapon by a prisoner when Cobell entered a plea agreement wherein the state would recommend the minimum sentence in exchange for Cobell's guilty plea. The District Court summarily dismissed the petition, and the Supreme Court affirmed. The information charging Cobell informed him of the penalty, and Cobell accepted the plea agreement understanding that the sentencing court was free to reject the agreement and impose any appropriate sentence. Given the uncertainty in the agreement and the fact that Cobell received the benefit of the plea bargain, Cobell failed to show that he was prejudiced by counsel's alleged error. Absent a showing of prejudice, the District Court did not err in dismissing Cobell's petition for postconviction relief as a matter of law. St. v. Cobell, 2004 MT 46, 320 M 122, 86 P3d 20 (2004).

Use of Peremptory Challenge Rather Than Challenge for Cause to Remove Juror Not Considered Ineffective Assistance of Counsel: Deschon contended that he was deprived of a fair trial through defense counsel's failure to exercise challenges for cause to remove a juror who previously served on a jury that convicted a defendant on the same charge that Deschon was facing and another juror with a long involvement in law enforcement whose impartiality could be

questioned. However, evidence in a voir dire reconstruction hearing revealed why counsel used peremptory challenges to remove the jurors instead. Counsel was prohibited from challenging the first juror for cause under St. v. Russell, 73 M 240, 235 P 712 (1925), because the juror would have had to serve on a jury trying a related offense to the offense that Deschon was charged with. Regarding the second juror, the mere fact that the juror was connected with law enforcement did not necessitate a finding of impartiality, and because the juror maintained that he could be impartial, a peremptory challenge was the only available method of removing the juror from the panel. Deschon did not meet the first prong of the Strickland test for ineffective assistance of counsel, and the conviction was affirmed. St. v. Deschon, 2004 MT 32, 320 M 1, 85 P3d 756 (2004).

No Abuse of Discretion in Denial of Motion for Substitute Counsel Absent Substantial Complaints: Minez's first trial on drug charges ended in mistrial when a juror became sick and there were no alternates. Just before a subsequent trial, Minez moved for substitution of counsel. The District Court held a hearing to allow Minez to explain the motion. Minez contended that his court-appointed counsel had not provided effective assistance in several instances in the first trial. The court noted that it had observed counsel during the first trial and had seen nothing to indicate ineffective assistance or inadequate preparation. There was every indication that counsel was acting in Minez's best interests, and the court found that Minez presented no substantial complaints and denied the motion. On appeal, the Supreme Court affirmed. The District Court made an adequate initial inquiry into Minez's claims and properly exercised discretion in determining that Minez failed to present seemingly substantial complaints and in declining to hold an additional hearing on the motion for substitution of counsel. St. v. Minez, 2003 MT 344, 318 M 478, 82 P3d 1 (2003).

Nonprejudicial Preclusion of Expert Witness Not Violative of Right to Fair Trial or Effective Counsel: DeMary contended that the District Court's denial of a motion to endorse an expert witness 5 days before trial constituted ineffective assistance of counsel and denied DeMary's right to a fair trial. Under the Strickland test, a defendant must show that counsel's performance was deficient and that the performance prejudiced the defendant and deprived the defendant of a fair trial. However, DeMary failed to comply with 46-15-323 and failed to demonstrate prejudice in the disallowance of his expert's testimony because the state never called the witness that DeMary's proposed expert was to refute. Absent a showing of sufficient prejudice, DeMary could not show that the trial was unfair, and the assertion of ineffective assistance of counsel failed. St. v. DeMary, 2003 MT 307, 318 M 200, 79 P3d 817 (2003).

Misinterpretation of Suppressed Confession Order Not Considered Ineffective Assistance of Counsel: Harris alleged ineffective assistance based on defense counsel's cross-examination of Harris at trial concerning a time-of-arrest confession that had been suppressed for purposes of the state's case in chief. The District Court found that counsel misinterpreted the suppression order in assuming that the order suppressing the confession for purposes of the case in chief amounted to a ruling that the confession could be used on cross-examination. In postconviction proceedings, the court reviewed the law on use of suppressed confessions for impeachment and concluded that it would have allowed use of the confession for impeachment. Harris appealed, but the Supreme Court affirmed. Because the confession was suppressed only for purposes of the case in chief, its use by defense counsel on cross-examination did not amount to a due process violation. Harris v. St., 2003 MT 258, 317 M 406, 77 P3d 272 (2003).

Record-Based Claims of Ineffective Counsel for Failure to Object Considered on Direct Appeal and Denied: Daniels claimed on direct appeal that he was denied effective assistance of counsel because defense counsel failed to investigate and interview certain witnesses in order to present a case in chief and failed to object to certain trial testimony. The state responded that Daniels could not demonstrate that counsel's actions were not objectively reasonable or that there was a reasonable possibility that counsel's errors caused a prejudicial result. The Supreme Court noted that Daniels' claims concerning failure to investigate were not record-based and thus not subject to review on direct appeal, pursuant to Hagen v. St., 1999 MT 8, 293 M 60, 973 P2d 233 (1999), and St. v. White, 2001 MT 149, 306 M 58, 30 P3d 340 (2001). Regarding the record-based claims of failure to object, the court agreed with the state. The evidence in question was admissible, so counsel was not required to object and could not be considered ineffective for failing to do so. Absent a showing of counsel's deficient performance, Daniels' conviction was affirmed. St. v. Daniels, 2003 MT 247, 317 M 331, 77 P3d 224 (2003).

Record Devoid of Reasons for Counsel's Conduct During Voir Dire — Ineffective Assistance Claim Improperly Raised on Direct Appeal: Defendant's claims of ineffective assistance of counsel during voir dire could not be addressed without considering matters outside the record and were therefore inappropriate for direct appeal. The claims were thus dismissed without prejudice to

defendant's pursuit of the claims in postconviction proceedings. St. v. Vukasin, 2003 MT 230, 317 M 204, 75 P3d 1284 (2003), following St. v. Herrman, 2003 MT 149, 316 M 198, 70 P3d 738 (2003), and St. v. Turnsplenty, 2003 MT 159, 316 M 275, 70 P3d 1234 (2003).

Counsel Decision to Forego Certain Defense Considered Trial Strategy — Insufficient Record to Determine Effective Assistance of Counsel on Direct Appeal: On direct appeal, Hendricks contended that he was provided ineffective assistance of counsel in his assault trial because his attorney failed to raise the affirmative defense of justifiable use of force. However, in a disclosure statement filed prior to the omnibus hearing, Hendricks's counsel specifically noted that the defense of justifiable use of force would not be asserted. On the morning of trial, counsel stated that no jury instructions on the defense of justifiable use of force would be offered. Thus, the decision not to raise the defense was made consciously and was not the result of ignorance or neglect and was presumed to be sound trial strategy falling within the realm of reasonable professional conduct absent evidence to the contrary. Absent a sufficient record to address the issue of ineffective assistance, the direct appeal was dismissed, requiring Hendricks to raise the issue by a postconviction relief proceeding, if at all. The Supreme Court clarified that it will no longer use the approach in St. v. Hubbel, 2001 MT 31, 304 M 184, 20 P3d 111 (2001), to determine effective assistance of counsel, but rather the procedure set out in St. v. Herrmann, 2003 MT 149, 316 M 198, 70 P3d 738 (2003), and St. v. Turnsplenty, 2003 MT 159, 316 M 275, 70 P3d 1234 (2003). St. v. Hendricks, 2003 MT 223, 317 M 177, 75 P3d 1268 (2003), followed in St. v. Webster, 2005 MT 38, 326 M 112, 107 P3d 500 (2005), and St. v. Greene, 2015 MT 1, 378 Mont. 1, 340 P.3d 551.

No Reasonable Probability That Defendant Would Not Have Been Found Guilty but for Counsel's Actions — Ineffective Assistance Claim Denied: Morgan based a claim of ineffective assistance of counsel on three assertions: (1) counsel incorrectly advised Morgan that the state did not have to prove an essential element of the attempted homicide charge; (2) counsel incorrectly informed Morgan that the judge was looking favorably on Morgan and would render a light sentence if Morgan pleaded guilty; and (3) Morgan was inadequately represented by counsel at the sentence review hearing. The Supreme Court considered each argument and affirmed. On the first issue, Morgan's claim that the state would not have been able to prove Morgan's intent to kill a police officer because the shots were fired at the car door rather than through the window at the officer's head was incredible, and no reasonable probability existed that Morgan would not have been found guilty of attempted deliberate homicide. Second, Morgan's claim that counsel informed him of the judge's favorable disposition if Morgan pleaded guilty was negated by the clear language of the plea agreement. Finally, Morgan cited no specific instances of counsel's ineffectiveness at the sentence review hearing. Thus, none of Morgan's claims of ineffective assistance demonstrated a reasonable probability that, but for counsel's poor performance, Morgan would not have been convicted and sentenced as he was. St. v. Morgan, 2003 MT 193, 316 M 509, 74 P3d 1047 (2003). See also St. v. Haldane, 2013 MT 32, 368 Mont. 396, 300 P.3d 657.

Failure of Counsel to Suppress Letters Absent Showing That Letters Written Within Forty-Eight Hours of Arrest Considered Ineffective Assistance of Counsel: In Hope's trial for assault, Hope's counsel failed to move to suppress four letters written by Hope regarding Hope's relationship with the victim. The state did not show that any of the letters were written within 48 hours of Hope's arrest, so the District Court erred when it did not conclude that the letters should be suppressed, and counsel's failure to move to suppress the evidence resulted in the introduction of evidence that negated Hope's overall defense that he did not have an intimate relationship with the victim and did not assault her, constituting ineffective assistance of counsel. Counsel's failure was prejudicial reversible error, and the Supreme Court remanded for a new trial. Hope v. St., 2003 MT 191, 316 M 497, 74 P3d 1039 (2003).

Claim of Ineffective Assistance of Counsel During Voir Dire Dismissed on Direct Appeal — Chastain Overruled: Following a felony DUI conviction, Herrman appealed, claiming ineffective assistance of counsel during voir dire. Counsel failed to remove several jurors for cause, but later removed the jurors by peremptory challenge, effectively causing the loss of peremptory challenges to which Herrman was entitled. The Supreme Court noted that jury impartiality goes to the very integrity of the justice system and that the presence of even one juror who cannot fairly assess the credibility of witnesses must be presumed prejudicial and result in reversal. Herrman cited St. v. Chastain, 285 M 61, 947 P2d 57 (1997), for the proposition that ineffective assistance occurred because counsel failed to develop information in the record demonstrating an individual juror's bias and to exercise challenges for cause against those jurors expressing bias. However, the Supreme Court overruled Chastain because it was a mistake to determine that counsel was ineffective during voir dire based on the lack of a reason apparent on the

record. Although lawyers will state their reasons on the record for challenging a juror for cause, they do not state their reasons for not challenging a juror. Herrman's lawyer might have had tactical reasons for not challenging certain jurors for cause, but those reasons were not on the record, so the Supreme Court could not address Herrman's ineffective assistance claims without considering matters outside the record. Contentions based on matters outside the record are more appropriately raised in a petition for postconviction relief. Thus, Herrman's direct appeal was dismissed to allow a petition for postconviction relief that could address why counsel did not challenge certain jurors for cause. St. v. Herrman, 2003 MT 149, 316 M 198, 70 P3d 738 (2003), followed in St. v. Turnsplenty, 2003 MT 159, 316 M 275, 70 P3d 1234 (2003), and St. v. Olsen, 2004 MT 158, 322 M 1, 92 P3d 1204 (2004). See also St. v. Whitlow, 2001 MT 208, 306 M 339, 33 P3d 877 (2001), St. v. Racz, 2007 MT 244, 339 M 218, 168 P3d 685 (2007), and St. v. Greene, 2015 MT 1, 378 Mont. 1, 340 P.3d 551.

Defense Attorney's Remarks Constituting Entry of Plea Without Defendant's Consent and Undermining Plea Agreement — Prejudice Warranting New Trial: Jefferson indicated in a pretrial letter to the District Court that he wished to withdraw from a plea agreement to plead guilty to felony assault in order to have the opportunity to either be acquitted or be convicted of a lesser offense than felony assault. However, in both opening statements and in closing arguments, Jefferson's defense counsel admitted Jefferson's guilt to felony assault, undermining the very purpose for which Jefferson withdrew from the plea agreement and directly contravening the reason Jefferson accepted the risk involved in facing the more serious charge of attempted deliberate homicide in a jury trial. Counsel's statements had the effect of entering a plea for Jefferson without Jefferson's consent and by which the jury was not bound. The admission could not be considered a trial strategy or tactical decision under the circumstances, and counsel's conduct fell below the reasonable range of professional conduct required. The question under the Strickland test then became whether Jefferson was prejudiced by counsel's conduct. Counsel precluded Jefferson from making a case for a lesser offense by admitting Jefferson's guilt of felony assault, denying Jefferson of both the right to deny guilt and to have the benefit of the previous agreement to admit guilt. There would have been no reason for Jefferson to withdraw from the plea agreement or to go to trial if he had been aware that his counsel would initiate the trial with an admission of guilt to felony assault. This prejudicial conduct by counsel rendered the criminal proceeding fundamentally unfair, and the Supreme Court reversed for a new trial. St. v. Jefferson, 2003 MT 90, 315 M 146, 69 P3d 641 (2003).

Failure of Defense Counsel to Question Defendant's Mental Condition During Sentencing — Alleged Errors in Attorney Performance Properly Resolved in Postconviction Relief Proceeding: Watson petitioned for postconviction relief and claimed that defense counsel provided inadequate assistance at sentencing by not questioning whether Watson suffered from a mental disease or defect. The District Court denied the petition, determining that the ineffective assistance claim was record-based and should have been raised on direct appeal. In St. v. Harris, 2001 MT 231, 306 M 525, 36 P3d 372 (2001), the Supreme Court outlined a two-step process for determining whether ineffective assistance claims should have been raised on appeal or in a postconviction hearing. First, the trial record must adequately document a challenged act or omission of defense counsel for a defendant to raise an ineffective assistance claim on direct appeal. Second, the record on appeal must afford sufficient understanding of the reasons for counsel's act or omission to answer the threshold question of whether the alleged error expressed a trial strategy or tactical decision, and if the record does not supply the reason for counsel's act or omission, the claim must be raised by petition for postconviction relief. Here, the record was devoid of any evidence as to why counsel did not question Watson's mental condition, so Watson could not have properly raised an ineffective assistance claim on direct appeal. Therefore, the Supreme Court reversed and remanded for an evidentiary postconviction hearing to determine whether counsel's act or omission was a trial strategy or tactical decision. Watson v. St., 2002 MT 329, 313 M 209, 61 P3d 759 (2002), following Strickland v. Wash., 466 US 668 (1984). See also Soraich v. St., 2002 MT 187, 311 M 90, 53 P3d 878 (2002).

Failure of Counsel to Move for Mistrial When Defendant in Handcuffs Before Trial Not Considered Ineffective Assistance: When Porter entered the courtroom for trial, he was in handcuffs. Defense counsel requested that the handcuffs be removed, and Porter was not shackled during trial. Nevertheless, Porter contended that the failure of counsel to request a mistrial constituted ineffective assistance of counsel. The Supreme Court disagreed. In St. v. Baugh, 174 M 456, 571 P2d 779 (1977), the court addressed a similar situation and concluded that a defendant is not denied a fair trial or entitled to a mistrial solely because the defendant was momentarily and inadvertently seen in handcuffs. In St. v. Pendergrass, 189 M 127, 615 P2d

201 (1980), the court found that in the absence of an indication of prejudicial circumstances, such an occurrence does not warrant a new trial. In St. v. Schatz, 194 M 59, 634 P2d 1193 (1981), the court concluded that no showing of prejudice to a defendant results from a momentary viewing of a defendant in handcuffs. Despite these previous holdings, Porter suggested that Rhoden v. Rowland, 172 F3d 633 (9th Cir. 1999), should apply. The Rhoden court found that a defendant's shackling during trial amounted to a due process violation. The Supreme Court distinguished Rhoden because Porter was not shackled during trial, and only briefly appeared in handcuffs in front of a group of potential jurors. Porter failed to establish any prejudice, and counsel's failure to move for a mistrial did not constitute ineffective assistance. Porter v. St., 2002 MT 319, 313 M 149, 60 P3d 951 (2002).

Failure of Counsel to Preserve Defendant's Request for Appeal Prejudicial Per Se — Out-of-Time Appeal Appropriate Remedy: Despite a request to do so, Tweed's counsel failed to file a timely appeal of Tweed's sexual abuse conviction. Counsel did not intentionally abandon the appeal; rather, the failure was unintentional and resulted from a filing oversight and miscommunication. Nevertheless, the error was prejudicial per se and constituted ineffective assistance of counsel in violation of Tweed's constitutional rights. The failure to timely appeal was excusable, and because postconviction proceedings were considered an inadequate remedy, the Supreme Court decided that an out-of-time appeal was the appropriate remedy and, being in possession of a sufficient record, proceeded to consider the merits of the appeal. St. v. Tweed, 2002 MT 286, 312 M 482, 59 P3d 1105 (2002), following St. v. Rogers, 2001 MT 165, 306 M 130, 32 P3d 724 (2001).

Postconviction Relief Based on Claims of Newly Discovered Evidence Consisting of Defendant's Own Exculpatory Statements Properly Denied: Almost 2 years after pleading guilty to drug charges, Graham sought postconviction relief, contending that at the time that he pleaded guilty, he believed that he was admitting possessing only two drugs, not four, and that he was thus innocent of possessing the four drugs mentioned in the information. Graham also asserted that he received ineffective assistance of counsel because his attorney did not advise him that he was pleading guilty to possession of all four drugs, and that his plea was thus not made knowingly and voluntarily. Despite the untimely filing of the petition, the District Court considered the petition because the issues were significant and should be disposed of on the merits. Nevertheless, the petition was dismissed and Graham appealed. The Supreme Court noted that in order to waive the 1-year statute of limitations on petitions for postconviction relief, the petitioner must provide newly discovered evidence that demonstrates actual innocence, which must be a showing that no reasonable juror would have found the defendant guilty rather than a mere showing that reasonable doubt exists. Graham did not show a clear miscarriage of justice because his own exculpatory statements did not qualify as newly discovered evidence and were insufficient to establish Graham's actual innocence. Additionally, Graham's allegations that he received ineffective assistance of counsel were record-based and did not qualify as new evidence of actual innocence. Lastly, Graham's request to withdraw the guilty plea because it was not made knowingly or voluntarily was considered. The Supreme Court applied the factors in 46-16-105 and found that the trial court's interrogation was adequate, the motion to withdraw was not timely, and the plea bargain provided Graham a considerable benefit in exchange for dismissal of other charges. Therefore, the plea was knowing and voluntary and did not provide grounds for postconviction relief. The denial of Graham's petition for postconviction relief was affirmed. St. v. Graham, 2002 MT 237, 311 M 500, 57 P3d 54 (2002).

Failure of Counsel to Properly Withdraw or Preserve Direct Appeal — Denial of Postconviction Petition Erroneous: Adams filed a pro se petition for postconviction relief, alleging ineffective assistance of counsel because his original court-appointed attorney failed to move to dismiss for lack of a speedy trial and because his subsequently appointed trial counsel offered a lesser included instruction on aggravated assault to the jury and failed to appeal to the Supreme Court following Adams' conviction, despite Adams' request to do so. The petition was denied on grounds that Adams failed to file an appeal within 60 days of judgment as required by former Rule 5, M.R.App.P. (now superseded), and Adams appealed. The Supreme Court reversed. Under 46-8-103, appointed counsel is required to continue representation until final judgment, including appellate review, unless counsel is relieved by court order. Adams' counsel failed to comply with the requirements of 46-8-103 and effect a valid withdrawal, so the right to appeal was not preserved. When a defendant would have appealed but for counsel's deficient performance, the error is prejudicial. Thus, denial of Adams' petition for postconviction relief on procedural grounds was reversible error, and on remand, Adams was allowed to raise the issues that would have been raised on direct appeal but for counsel's abandonment of the appeal, as well as the issues raised in the petition for postconviction relief that were not previously raised. St. v. Adams,

2002 MT 202, 311 M 202, 54 P3d 50 (2002), following In re Petition of Hans, 1998 MT 7, 288 M 168, 958 P2d 1175 (1998), and St. v. Rogers, 2001 MT 165, 306 M 130, 32 P3d 724 (2001).

Partially Deficient Performance of Trial Counsel — Not Sufficient Prejudice to Warrant New Trial: The District Court found that Hagen's trial counsel could have done a better job of investigating and presenting testimony regarding an alleged reputation for violence and prior criminal record on the part of the victim of Hagen's aggravated assault and that counsel could have done a more thorough job of interviewing and preparing witnesses, but held that even though Hagen may have suffered some prejudice as a result of trial counsel's deficiencies, Hagen did not show that but for the deficiencies, the results of the trial would have been different. The District Court concluded that Hagen was provided reasonably effective assistance of counsel and received a fair trial. The court also concluded that Hagen failed to meet the heavy burden of showing that appellate counsel was ineffective. Hagen appealed on grounds of ineffective assistance, but the Supreme Court affirmed. Under the framework of Strickland v. Wash., 466 US 668 (1984), it is entirely possible to find attorney error that possibly prejudiced defendant, yet conclude that the error did not rise to a level serious enough to result in a verdict unworthy of confidence. After examining all the alleged shortcomings of Hagen's trial and appellate counsel's representations, the Supreme Court agreed that counsel's performance was reasonably effective and that the combined effect of all the acts and omissions was not sufficient to undermine confidence in the trial outcome. St. v. Hagen, 2002 MT 190, 311 M 117, 53 P3d 885 (2002), followed in St. v. Kearney, 2005 MT 171, 327 M 485, 115 P3d 214 (2005). See also St. v. Daniels, 210 M 1, 682 P2d 173 (1984).

No Ineffective Assistance Based on Defense Counsel's Personal Problems — Remand for Consideration of Issues in Amended Petition for Postconviction Relief: In an original petition for postconviction relief, Williams raised five issues of ineffective assistance of counsel, asserting that counsel: (1) failed to conduct proper discovery; (2) failed to obtain and call necessary witnesses at trial; (3) failed to properly question witnesses; (4) conducted inadequate trial preparation; and (5) allowed his personal problems to detract from his representation. The District Court allowed Williams to amend the petition to add two additional claims, contending that counsel failed to substitute the trial judge when requested to do so and failed to call necessary and beneficial witnesses at the sentencing hearing. The Supreme Court's review of the record revealed that the District Court did not erroneously address any of the original five claims, including the assertion that defense counsel's overall emotional state adversely affected Williams's representation. However, the record showed that the two issues added by Williams in the amended petition were never addressed, so the District Court's findings regarding those two material issues were insufficient. The case was remanded to allow further consideration of the additional claims. Williams v. St., 2002 MT 189, 311 M 108, 53 P3d 864 (2002).

Record Devoid of Pretrial Tactical Decisions — Evidentiary Hearing Required on Ineffective Assistance Claim: In St. v. Soraich, 1999 MT 87, 294 M 175, 979 P2d 206 (1999), the Supreme Court held that the prosecutor in Soraich's murder trial was entitled to comment on a theory suggested by defense counsel because the theory lacked evidentiary support and because the comments were plainly in response to defense counsel's opening statements. Soraich then filed a petition for postconviction relief, claiming that defense counsel rendered ineffective assistance by stating that counsel would prove that the state's key witness gave inconsistent statements, without first determining whether an investigator's statement could be introduced as impeachment evidence. The District Court denied the petition, holding that Soraich should have raised the ineffective assistance claim on direct appeal because the claim was based on facts of record in the underlying case, so the claim was procedurally barred from postconviction review. To determine whether the ineffective assistance claim should have been raised on direct appeal or in a postconviction hearing, the Supreme Court cited the two-part process in Strickland v. Wash., 466 US 668 (1984). First, the trial record must adequately document a challenged act or omission of defense counsel for the defendant to raise an ineffective assistance claim on direct appeal. Second, the record on appeal must afford sufficient understanding of the reason for counsel's act or omission to answer the threshold question of whether the alleged error expresses a trial strategy or tactical decision, and if the record does not supply the reason for counsel's act or omission, the claim must be raised by postconviction relief. The record here did not contain any information about why defense counsel promised the jury that the investigator's testimony would prove Soraich's defense, but then failed to call the investigator as a witness. Without an evidentiary hearing and direct questioning of defense counsel, any guesses on what led to the failure to call the investigator as a witness were purely speculative. Because the record was devoid of counsel's pretrial tactical decisions, Soraich could not satisfy the second prong of the Strickland test, so

46-21-105 did not bar Soraich's postconviction assertion of ineffective assistance at trial. An evidentiary hearing was necessary to address the second prong of the Strickland test, and the District Court improperly dismissed Soraich's petition for postconviction relief. Therefore, the case was remanded for an evidentiary hearing on the ineffective assistance claim. Soraich v. St., 2002 MT 187, 311 M 90, 53 P3d 878 (2002). On remand, the District Court again denied relief, holding that under the second prong of the Strickland test, any allegedly deficient performance of counsel did not prejudice Soraich. Soraich appealed again, asserting that counsel's failure to call a witness to impeach a state witness resulted in prejudice. The Supreme Court disagreed. The witness had already been impeached through the testimony of another defense witness and by cross-examination concerning all of the inconsistencies in the questionable testimony. Failure to call another witness to establish the same point did not create a reasonable probability that the trial result would have been different and did not constitute ineffective assistance of counsel. The District Court was affirmed. Soraich v. St., 2004 MT 215, 322 M 375, 97 P3d 529 (2004). See also St. v. Harris, 2001 MT 231, 306 M 525, 36 P3d 372 (2001).

No Error in Trial Court Refusal to Appoint Fourth Substitute Counsel Absent Substantial Complaint Against Attorney: Kaske sought replacement of his third court-appointed attorney, citing frustrations with delays and an inability to communicate. In the prior two instances, Kaske expressed displeasure with his counsel's representation, and the lawyer was replaced. However, the third time, the court declined Kaske's request, noting that Kaske would not be allowed additional spins of the roulette wheel of representation. In order for a court to replace a defense attorney, defendant bears the burden of presenting material facts establishing a total lack of communication or ineffective assistance of counsel. The District Court found that Kaske and the attorney carried on communications, albeit strained, but that the difficulties occurred because of Kaske's behavior. Here, the communication breakdown was not total, and the Supreme Court declined to allow Kaske to continue replacing counsel until he found one that he liked. A defendant's right to counsel does not include a right to a particular attorney or a right to a particular defense. It was within the District Court's discretion to conclude that Kaske had not raised a seemingly substantial complaint against counsel to warrant appointment of yet another substitute. St. v. Kaske, 2002 MT 106, 309 M 445, 47 P3d 824 (2002). See also St. v. Gallagher, 1998 MT 70, 288 M 180, 955 P2d 1371 (1998), and St. v. Gallagher, 2001 MT 39, 304 M 215, 19 P3d 817 (2001).

Complaints of Ineffective Counsel Not Seemingly Substantial — Gallagher Test: Under the test set out in St. v. Gallagher, 1998 MT 70, 288 M 180, 955 P2d 1371 (1998), when presented with allegations of ineffective assistance of counsel that purportedly require appointment of new counsel, a District Court must make an adequate initial inquiry into the nature of the complaints and determine if they are seemingly substantial. Only if the complaints are seemingly substantial, the court must appoint new counsel to represent defendant at a hearing on the merits of the motion for new counsel. Initial inquiries into allegations of ineffective assistance of counsel are considered adequate when the District Court considers defendant's factual complaints together with counsel's explanations addressing those complaints. Here, the initial inquiry included a hearing at which defendant gave a lengthy oral explanation of complaints about the public defender and substitute counsel, with an opportunity for substitute counsel to respond to the complaints, after which the District Court concluded that defendant's complaints were not seemingly substantial. The inquiry was adequate, and the Supreme Court affirmed that conclusion. St. v. Kellames, 2002 MT 41, 308 M 347, 43 P3d 293 (2002).

No Ineffective Assistance of Counsel When Attorney's Performance Not Affected by Actual Conflict of Interest in Representing Defendant and Defendant's Witness: Deschon claimed that his attorney provided ineffective assistance by representing competing interests when the attorney represented Deschon at his deliberate homicide trial while at the same time representing a key defense witness engaged in plea negotiations while Deschon's trial was in progress. The Supreme Court noted that under St. v. Jones, 278 M 121, 923 P2d 560 (1996), the constitutional right to effective assistance of counsel is composed of two correlative parts: (1) the right to counsel of reasonable competence; and (2) the right to counsel's undivided loyalty. The assistance of an attorney devoted solely to the interests of the client is perhaps the most basic of counsel's duties. A defendant claiming ineffective counsel because of a conflict of interest must show that counsel actively represented conflicting interests, and that an actual conflict of interest, not the mere possibility of a conflict, adversely affected counsel's performance (St. v. Christenson, 250 M 351, 820 P2d 1303 (1991)). A defense attorney has an actual conflict of interest when counsel is required to make a choice advancing another client's interests to the detriment of a defendant's interests (U.S. v. Gantt, 140 F3d 249 (D.C. Cir. 1998)). The conflict must be proved through a

factual showing on the record. Here, nothing in the record suggested that counsel's method of examination was in any way motivated by a desire to protect the witness's interests at Deschon's expense or that the witness considered not testifying in Deschon's trial at counsel's suggestion. In fact, the witness did testify in support of Deschon's defense, and even with different counsel, the witness would still have been in a position of testifying in one trial while negotiating a plea in another. Deschon could not show that counsel's performance was adversely affected by a conflict of interest. St. v. Deschon, 2002 MT 16, 308 M 175, 40 P3d 391 (2002), followed in Harris v. St., 2003 MT 258, 317 M 406, 77 P3d 272 (2003), Hendricks v. St., 2006 MT 22, 331 M 47, 128 P3d 1017 (2006), and St. v. Smerker, 2006 MT 117, 332 M 221, 136 P3d 543 (2006).

Possible Failure to Inform Defendant of Options and Rights Concerning Advisability of Plea — Remand for Evidentiary Hearing on Issue of Potential Ineffective Assistance of Counsel: Lawrence agreed to plead guilty pursuant to a plea agreement under which the state would recommend a 3-year suspended sentence for felony common scheme issuing a bad check. After informing Lawrence that the agreement was not binding, the sentencing court rejected the plea agreement and sentenced Lawrence to 5 years with 2 years suspended. Lawrence filed a pro se petition for postconviction relief, alleging ineffective assistance of counsel. The District Court, without holding an evidentiary hearing, denied the petition and found that Lawrence suffered no harm from anything that counsel did or did not do, because the judge who took the change of plea specifically advised Lawrence that a more severe sentence could be imposed. Lawrence appealed, arguing that counsel's failure to fully inform Lawrence that the judge intended to reject the plea agreement and sentence above the agreement amounted to deficient performance. The Supreme Court noted that a defendant is entitled to withdraw a guilty plea for good cause, including ineffective assistance of counsel. The court cited Hans v. St., 283 M 379, 942 P2d 674 (1997), for the proposition that failure to fully inform a defendant of the consequences of the options and rights concerning the advisability of a plea may constitute ineffective assistance of counsel. If counsel knew that the judge intended to reject the plea agreement and did not inform Lawrence of that fact, Lawrence might have a valid claim of ineffective assistance. However, because no hearing was held on the matter, the Supreme Court had no record to consult other than the allegations in Lawrence's petition. The case was remanded for an evidentiary hearing to resolve these factual issues. St. v. Lawrence, 2001 MT 299, 307 M 487, 38 P3d 809 (2001).

Claim That Guilty Plea to Deliberate Homicide Influenced by Alleged Ineffective Assistance of Counsel — Conviction Affirmed: Thee was convicted of deliberate homicide and sentenced to 100 years in prison. In a petition for postconviction relief, Thee contended that he was denied effective assistance of counsel prior to and during a change of plea hearing when defense counsel: (1) induced Thee to plead guilty by threatening Thee that he was going to die unless he pleaded guilty; (2) failed to address the alleged violent treatment that Thee received from inmates and guards during Thee's incarceration in the county jail; (3) failed to seek suppression of statements that Thee made during police interrogation that allegedly violated Thee's Miranda rights; (4) failed to have Thee's mental or emotional stress at the time of the homicide evaluated by a qualified mental health examiner to prove circumstances that could be used to mitigate the deliberate homicide charge; and (5) failed to inform Thee of a possibility of seeking conviction on a lesser included offense. The Supreme Court examined each claim in light of the Strickland test for ineffective assistance of counsel. First, defense counsel has a duty to inform a client of the elements of an offense, the possible punishment, and the advisability of a plea agreement. Discussion of a death penalty between an attorney and client in a capital case may well invoke extreme anxiety, but nevertheless relates directly, albeit painfully, to the genuine circumstances of the client. Counsel's reported statements to Thee regarding the possibility of a death sentence were within the wide range of reasonable and sound professional assistance of a competent attorney counseling a client facing capital punishment. Second, counsel investigated Thee's allegations of violence in the county jail, prepared a report of the findings, discussed the findings with Thee, and brought the matter to the attention of the appropriate authorities. Counsel's actions stemmed from informed professional deliberation rather than neglect or ignorance, and precluded a finding of deficient performance for failure to investigate Thee's allegations of physical assault. Third, counsel investigated all statements made by Thee to police investigators, conferred with Thee, and researched the legal bases for possible suppression of certain statements. Counsel's strategic choices made after thorough investigation of the law and facts relevant to plausible options were virtually unchallengable, and the fact that counsel reached a legal conclusion on an evidentiary challenge contrary to Thee's hopes provided no ground for finding deficient attorney performance. Fourth, despite Thee's claim to the contrary, counsel did seek and obtain a court-ordered mental health evaluation for Thee, and took the unequivocal findings

from the evaluation into account when advising Thee to accept the plea agreement. Finally, counsel had no duty to inform Thee about the possibility of a lesser included offense, because neither mitigated deliberate homicide nor negligent homicide is an included offense of deliberate homicide, so the possibility of conviction on a lesser included offense did not legally exist. The trial court's denial of Thee's petition for postconviction relief was affirmed. St. v. Thee, 2001 MT 294, 307 M 450, 37 P3d 741 (2001).

Alleged Ineffective Assistance of Counsel in Failure to Appeal Sentence and Withholding Exculpatory Evidence — No Showing of Deficient Performance of Counsel: Wright contended in a petition for postconviction relief that he received ineffective assistance of counsel when his attorney failed to appeal the sentence after indicating to Wright that the sentence would be appealed and when counsel withheld exculpatory evidence from Wright prior to a change of plea hearing. Wright contended that counsel failed to mention that two of Wright's sexual assault victims made second statements that contradicted their original statements, which would have cleared Wright of 2 of the 11 charges against him. The Supreme Court applied the Strickland test for ineffective assistance, which required Wright to first show that counsel's performance was deficient. By deposition, counsel in this case swore that he was never asked to appeal, and never indicated to Wright that the sentence would be appealed. The only evidence suggesting counsel's refusal to appeal was Wright's own affidavit. The District Court accepted counsel's statements, and that decision was not disturbed by the Supreme Court absent a showing of clear error. Further, the only support for Wright's contention that counsel withheld exculpatory evidence was Wright's own affidavit. Wright failed to produce the alleged revised statements or any records indicating that the victims even gave second statements; thus, Wright's affidavit was no more than a mere conclusory allegation unsupported by any evidence. The Supreme Court held that Wright failed to show that counsel's performance was deficient and declined to grant postconviction relief on the issue. St. v. Wright, 2001 MT 282, 307 M 349, 42 P3d 753 (2001).

Record Indicating Voluntary Nature of Guilty Plea — Postconviction Relief Barred When Ineffective Counsel Claim Could Have Been Raised on Direct Appeal: At a change of plea hearing, Wright pleaded guilty to 11 counts of sexual assault and was sentenced to 55 years in prison. The District Court suspended sentence on six counts. Wright did not file a direct appeal on any issue, but more than 1 year after sentencing, he filed a petition for postconviction relief on grounds of ineffective assistance of counsel, asserting that he was coerced into pleading guilty by his attorney. On the issue of the voluntariness of the guilty pleas, the Supreme Court looked to the record to determine whether this question of fact was documented in the District Court. In this case, there was ample indication in the record to determine that the issue of the voluntary nature of Wright's pleas and the propriety of counsel's representation were raised in District Court and documented. Wright could thus have raised the issue on direct appeal, but failing to do so, he was barred from raising the issue in a petition for postconviction relief pursuant to 46-21-105. St. v. Wright, 2001 MT 282, 307 M 349, 42 P3d 753 (2001).

Issue of Counsel's Effective Use of Peremptory Juror Challenges More Appropriate When Raised as Petition for Postconviction Relief Rather Than on Direct Appeal When Record Silent: Russell was convicted of attempted deliberate homicide and appealed claiming ineffective assistance of counsel during jury selection. Russell contended that counsel failed to challenge for cause a relative of the victim and used two peremptory challenges to strike jurors who were outside the jury pool. Under the Strickland test for ineffective assistance of counsel, challenged actions of counsel are presumed to be matters of trial strategy and a silent record cannot rebut the strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Pursuant to St. v. St. John, 2001 MT 1, 304 M 47, 15 P3d 970 (2001), when the record does not illuminate the basis for the challenged acts or omissions of counsel, a claim of ineffective assistance is more appropriately raised in a petition for postconviction relief so that a supplemental record may be made. Here, the record was silent as to why Russell's counsel acted or failed to act regarding the juror challenges. Thus, the Supreme Court declined to discuss the issue on direct appeal. St. v. Russell, 2001 MT 278, 307 M 322, 37 P3d 678 (2001).

Attorney's Actions Reasonable and Not Prejudicial — Strickland Test for Ineffective Assistance Not Met: Allen contended on appeal that he received ineffective assistance from trial counsel because counsel failed to: (1) conduct an adequate investigation of the underlying facts of the case; (2) call a witness at trial regarding Allen's possession of a gun; and (3) present evidence at the sentencing hearing that Allen had four rather than five prior felony convictions. The Supreme Court applied the Strickland test for ineffective assistance of counsel and affirmed. Nothing in the record showed that counsel failed to investigate; in fact, counsel's investigative choices were

reasonable. The decision not to call a witness to testify that Allen did not have a gun was also reasonable, given that the jury had already heard testimony from other witnesses that Allen did not have a gun before or after the offense, and counsel was not obligated to present cumulative evidence. Moreover, Allen failed to demonstrate how counsel's failure to investigate the number of Allen's prior felony convictions was prejudicial or would have affected the outcome of the trial because there was plenty of prior conviction information in Allen's record upon which to base the felony offender sentence, so even if the information was incorrect as to the number of convictions, it was not material to Allen's sentence. St. v. Allen, 2001 MT 266, 307 M 253, 37 P3d 655 (2001).

Failure of Trial Counsel to Request Ruling on Use of Suppressed Confession for Impeachment Purposes — Absence in Record of Understanding of Counsel's Course of Action — Remand for Determination of Reasonableness of Counsel's Actions: Harris claimed ineffective assistance of counsel because his attorney at trial never requested a ruling from the trial court on the prosecution's use of Harris's suppressed confession for impeachment purposes. The trial court's deferral of the ruling initially preserved the issue for appeal should the prosecution have referred to the confession at trial, but Harris's counsel decided to raise the issue of the suppressed confession on direct examination, which created an opening for the prosecution to further question Harris on cross-examination and made the appealable issue moot. The record did not reveal whether counsel's acts and omissions sprang from tactical decisions based on articulable trial strategies or reflected misunderstandings of the law and trial procedures. Because information outside the record was necessary to determine the merits of Harris's assistance of counsel claim, 46-21-105 did not bar a postconviction assertion of ineffective assistance of counsel at trial (see St. v. Whitlow, 2001 MT 208, 306 M 339, 33 P3d 877 (2001)). The Supreme Court refused to speculate on whether the alleged errors reflected a coherent trial strategy or whether they were reasonable and deserved deference, so the case was remanded for an evidentiary hearing to determine whether counsel's actions fell below an objective standard of reasonableness pursuant to the first prong of the Strickland test for ineffective assistance of counsel. St. v. Harris, 2001 MT 231, 306 M 525, 36 P3d 372 (2001), followed in St. v. Worthan, 2006 MT 147, 332 M 401, 138 P3d 805 (2006).

Lack of Seemingly Substantial Complaint Regarding Effectiveness of Counsel — Failure of Court to Make Initial Inquiry Not Erroneous: After several lawyers withdrew from his case, Frazier was assigned counsel to represent him at his sentencing hearing. At the hearing, Frazier alluded to a breakdown on the attorney-client relationship when he informed the court of difficulty communicating with counsel from his jail cell. However, there was no evidence in the record that Frazier complained about counsel's performance at any time prior to judgment, nor did he request a continuance to allow additional time for consultation, ask for substitute counsel, or object to representation by stand-in counsel. Absent a direct allegation of ineffective assistance of counsel or an expressed dissatisfaction with the attorney-client relationship, the District Court did not err in failing to hold an initial inquiry into Frazier's allusion to a breakdown of the relationship to determine whether there was a seemingly substantial complaint about inadequate counsel. St. v. Frazier, 2001 MT 210, 306 M 358, 34 P3d 96 (2001). See also St. v. Gallagher, 1998 MT 70, 288 M 180, 955 P2d 1371 (1998).

Inability to Document Claim of Ineffective Counsel From Record — Dismissal of Petition for Postconviction Relief Improper: Following conviction on numerous felony charges, Whitlow appealed his conviction and sentence, but did not raise concerns about ineffective assistance of counsel in the appeal. The conviction and sentence were upheld by the Montana Supreme Court, and Whitlow subsequently petitioned for postconviction relief, claiming that he was denied the right to effective assistance of counsel when his trial counsel failed to ask followup questions during voir dire. The District Court held that Whitlow's petition was barred under 46-21-105(2) because the claim of ineffective assistance should have been raised on direct appeal and that Whitlow's sole claim of ineffective assistance was to be found within the trial record. As set out in Hagen v. St., 1999 MT 8, 293 M 60, 973 P2d 233 (1999), when ineffective assistance of counsel claims are based on facts of record in the underlying case, they must be raised on direct appeal, but when those claims cannot be documented from the record, they must be raised by petition for postconviction relief. The state insisted that St. v. Chastain, 285 M 61, 947 P2d 57 (1997), established that ineffective assistance claims, such as Whitlow's, can reasonably be raised on direct appeal and that in order to conclude that Whitlow's ineffective assistance claim was not record-based, Chastain must be overruled. The Supreme Court disagreed, distinguishing Chastain instead. In contrast to the jurors' clear expressions for potential bias in Chastain, in Whitlow's case, the jurors all indicated that they could reserve judgment until the facts had been presented. It was possible that Whitlow's counsel could have known other facts that would lead

to the reasonable belief that, despite their possible prejudices, placing those jurors on the panel would be favorable to Whitlow. As stated in U.S. v. Taglia, 922 F2d 413 (7th Cir. 1991), when the only record on which a claim of ineffective assistance is based is the trial record, every indulgence will be given to the possibility that a seeming lapse or error by defense counsel was in fact a tactical move, flawed only in hindsight. Thus, in order to establish that his counsel's decision not to question or challenge the prospective jurors was not the product of sound trial strategy, Whitlow would have to go beyond the trial record. Because the ineffective assistance claims could not be documented from the record, they could not have been raised on direct appeal. The District Court erred in dismissing the petition for postconviction relief based on the bar in 46-21-105(2). Without commenting on the merits of Whitlow's claim, the Supreme Court reversed. St. v. Whitlow, 2001 MT 208, 306 M 339, 33 P3d 877 (2001).

Failure to Appeal Violative of Right to Counsel — "Anders" Procedure Applicable to Protect Defendant's Right to Effective Assistance of Counsel on Appeal: Rogers' counsel repeatedly refused Rogers' request to file a notice of appeal, asserting that there were no appealable issues. However, under Roe v. Flores-Ortega, 528 US 470 (2000), the failure to preserve defendant's right to appeal when requested is error, and when defendant would have appealed but for counsel's deficient performance, that error is prejudicial. In order to protect defendant's right to effective assistance of counsel on appeal, the Supreme Court has adopted the procedure in Anders v. Calif., 386 US 738 (1967), for when an attorney believes an appeal lacks meritorious issues. If counsel finds after conscientious examination that a case is wholly frivolous, counsel should so advise the court and request permission to withdraw. A defendant's right to appellate counsel must be safeguarded, and allowing appellate counsel to be the final judge of the merits of an appeal does not adequately safeguard this right. Thus, counsel's failure to appeal violated Rogers' right to counsel, constituting reversible error. St. v. Rogers, 2001 MT 165, 306 M 130, 32 P3d 724 (2001), following Smith v. Robbins, 528 US 259 (2000).

Ineffective Assistance of Counsel in Failure to Offer "Failure to Agree" Instruction — Prejudice Warranting Remand for New Trial: At Rogers' trial for attempted sexual intercourse without consent and felony assault, the District Court provided jury instructions with misdemeanor sexual assault and misdemeanor assault as lesser included offenses. Rogers' attorney requested the "acquittal first" instruction, which provided that the jury was not to consider the lesser included offenses unless they first acquitted on the greater offenses. Rogers contended that the failure of the attorney to request the "failure to agree" instruction allowed under 46-16-607, which provides that the jury may consider a lesser included offense if it is unable to reach a verdict on the greater offense, constituted ineffective assistance of counsel. The Supreme Court agreed. The "failure to agree" instruction was drafted to protect against the serious risk identified in U.S. v. Jackson, 726 F2d 1466 (9th Cir. 1984), which arises when jurors harboring a doubt as to defendant's guilt of the greater offense, but at the same time convinced that defendant had committed some offense, might wrongly yield to the majority and convict of the greater offense rather than not convict at all. The failure to offer this potentially beneficial instruction, when that failure is not part of counsel's trial strategy, is an error so serious that it falls outside the range of competence required of attorneys in criminal cases. Thus, when sufficient facts exist to support a conviction for a lesser included offense, defense counsel must offer the "failure to agree" instruction unless there is a tactical reason for not doing so, and failure to offer the instruction in such cases is prejudicial error. St. v. Rogers, 2001 MT 165, 306 M 130, 32 P3d 724 (2001).

Improper Grant of Motion to Dismiss Legal Malpractice Suit for Failure to State Claim Upon Which Relief Could Be Granted: Hauschulz faced criminal charges in Billings, and while awaiting trial, he was extradited to Idaho on unrelated charges and incarcerated. The Michael Law Firm was hired to represent Hauschulz in the Billings proceedings, which Hauschulz could not attend. Instead of moving for dismissal of the charges unless Montana extradited Hauschulz, the law firm professed not to know where Hauschulz was and negotiated an unauthorized plea agreement on behalf of Hauschulz. Upon learning of the law firm's actions, Hauschulz filed a legal malpractice complaint alleging constitutional violations and requesting damages. The District Court dismissed the action on grounds that Hauschulz had failed to state a claim upon which relief could be granted, reasoning that no damages could be awarded because Hauschulz's problems all stemmed from the failure to appear at trial. Hauschulz appealed, and the Supreme Court reversed. A complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief, and a dismissal will be affirmed by the Supreme Court only if plaintiff is not entitled to relief under any set of facts that would support the claim. As set out in Merzlak v. Purcell, 252 M 527, 830 P2d 1278 (1992), to recover damages in a legal malpractice claim,

plaintiff must establish that: (1) the professional owed plaintiff a duty of care; (2) the professional breached the duty of care through failure to use reasonable care and skill; (3) plaintiff suffered an injury; and (4) the professional's conduct was the proximate cause of the injury. In this case, the Supreme Court found that each element was satisfied. Hauschulz might be able to prove a set of facts that would entitle him to relief and has stated a sufficient claim to survive a challenge under Rule 12(b), M.R.Civ.P. (now superseded). Hauschulz v. Michael Law Firm, 2001 MT 160, 306 M 102, 30 P3d 357 (2001). See also Trankel v. St., 282 M 348, 938 P2d 614 (1997).

Record-Based or Nonrecord-Based Information Determinative of Appropriateness of Direct Appeal or Petition for Postconviction Relief — Direct Appeal Dismissed When Record Insufficient to Substantiate Effectiveness of Counsel: In 1999, White moved for an evidentiary hearing to allow the development of facts that were not part of the record but that were necessary to sustain a claim of ineffective assistance of counsel. The Supreme Court declared by order that a petition for postconviction relief would be the proper avenue for White's nonrecord-based ineffective assistance of counsel claim. Nevertheless, in late 2000, White appealed, contending that the claim of prejudicial error resulting from her trial counsel's various failures to provide representation, such as the failure to call witnesses, make an opening statement, or offer a theory of the case at any stage of the proceedings, was supported by the record and proper for direct appeal. The general rule set out in Hagen v. St., 1999 MT 8, 293 M 60, 973 P2d 233 (1999), is that when ineffective assistance claims are based on facts of record, they must be raised on direct appeal, while claims based on allegations not documented in the record must be raised by petition for postconviction relief. The underlying principle of the rule is that a silent record cannot rebut the strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. The two distinct classifications of on-record and off-record actions tend to overlap at times, and though not easily distilled into a formula, the definitive question that decides whether actions are on-record or off-record is whether the record fully explains why counsel took the particular course of action. Generally, an alleged failure to object to the introduction of evidence, to the testimony of a witness, or to prosecutorial misconduct at trial is considered record-based and appropriate for direct appeal. Likewise, counsel's own conduct in presenting the case, such as improperly eliciting damaging testimony from a witness or rendering an improper opening statement or closing argument, may be pointed to as record-based. Decisions regarding the timing and number of objections and whether to offer no opening statement at all lie within counsel's tactical discretion, indicating that nonrecord-based information explaining the tactic may be involved. Similarly, counsel's failure to adequately investigate, to prepare a defense, to become familiar with critical areas of the applicable law, to offer a particular jury instruction, to object to the trial court's failure to consider sentencing alternatives, to object to the admission of evidence that is evidenced by the record, or to fully inform defendant of the consequences of various options and rights, even though the prejudicial results of the ineffectiveness appear on the record, may constitute a nonrecord-based claim. In White's case, the record supplied some indicia of why a certain objection was raised at a particular time, but was still insufficient to determine to what extent counsel's actions were purely tactical or resulted from deficient representation. Thus, the information was considered nonrecord-based and should have been raised by petition for postconviction relief, so White's direct appeal was dismissed without prejudice. St. v. White, 2001 MT 149, 306 M 58, 30 P3d 340 (2001), followed in St. v. Earl, 2003 MT 158, 316 M 263, 71 P3d 1201 (2003), St. v. Daniels, 2003 MT 247, 317 M 331, 77 P3d 224 (2003), St. v. Notti, 2003 MT 296, 318 M 146, 79 P3d 289 (2003), St. v. Rinkenbach, 2003 MT 348, 318 M 499, 82 P3d 8 (2003), St. v. Novak, 2005 MT 294, 329 M 309, 124 P3d 182 (2005), Swan v. St., 2006 MT 39, 331 M 188, 130 P3d 606 (2006), St. v. Worthan, 2006 MT 147, 332 M 401, 138 P3d 805 (2006), St. v. Upshaw, 2006 MT 341, 335 M 162, 153 P3d 579 (2006), St. v. Fender, 2007 MT 268, 339 M 395, 170 P3d 971 (2007), St. v. Herman, 2008 MT 187, 343 M 494, 188 P3d 978 (2008), and St. v. Wright, 2011 MT 92, 360 Mont. 246, 253 P.3d 838. See also St. v. Turnsplenty, 2003 MT 159, 316 M 275, 70 P3d 1234 (2003), St. v. Adgerson, 2003 MT 284, 318 M 22, 78 P3d 850 (2003), for a similar application of the Hagen rule, St. v. Davis, 2003 MT 341, 318 M 459, 81 P3d 484 (2003), and St. v. Champagne, 2013 MT 190, 371 Mont. 35, 305 P.3d 61. See also St. v. St. Germain, 2007 MT 28, 336 M 17, 153 P3d 591 (2007), in which the Supreme Court declined to address a direct appeal of defense counsel's nonrecord-based reasons for making a double jeopardy argument and for failing to call a witness to testify in an incest case because the issues were appropriate for postconviction proceedings. See also St. v. Green, 2009 MT 114, 350 M 141, 205 P3d 798 (2009), in which an ineffective counsel appeal based on counsel's failure to request an accomplice instruction in a homicide trial was dismissed in favor of postconviction relief proceedings because

plausible justifications existed for counsel's conduct that could not be addressed on appeal since the record did not resolve the factual questions surrounding counsel's actions.

Right to Effective Assistance of Counsel for Person Subject to Involuntary Commitment Because of Mental Disorder — Strickland Test for Ineffective Assistance Inappropriate in Involuntary Commitment Proceedings: The right to counsel afforded by state law regarding the treatment of the seriously mentally ill provides a person who is subject to an involuntary commitment proceeding the right to effective assistance of counsel, which in turn provides that person the right to raise the allegation of ineffective assistance of counsel when challenging a commitment order. The test for ineffective assistance of counsel set out in Strickland v. Wash., 466 US 668 (1984), is inappropriate in involuntary commitment proceedings. However, the Strickland test simply does not go far enough to protect the liberty interests of persons involved in involuntary commitment proceedings who may or may not have broken any law but who, upon the expiration of a 90-day commitment, must indefinitely bear the badge of inferiority of a once involuntarily committed person with a proved mental disorder. Instead, upon a substantial showing of evidence to the issuing District Court or to the Supreme Court pursuant to 53-21-131 that counsel did not effectively represent the person's interests, an order of involuntary commitment should be vacated. The due process afforded individuals must serve to protect the fundamental liberty interests of dignity and integrity, and it is not only counsel, "but also courts, that are charged with the duty of safeguarding the due process rights of individuals involved at every stage of the proceedings". The Supreme Court identified five critical areas of representation that generally define the scope of effective counsel in involuntary commitment proceedings: (1) appointment of competent counsel; (2) the initial investigation; (3) the client interview; (4) the right to remain silent; and (5) counsel as an advocate and adversary. The statutory and constitutional standards must be rigorously adhered to in order to ensure the fundamental fairness of civil commitment proceedings, and it is imperative that the constitutional and legislated rights be formally and fairly balanced with the state's ultimate power to protect both the individual and the public from actual or perceived harm. In re K.G.F., 2001 MT 140, 306 M 1, 29 P3d 485 (2001), following Conservatorship of Roulet, 590 P2d 1 (Calif. 1979), and distinguishing In re Carmody, 653 NE 2d 977 (Ill. App. Ct. 1995).

Test for Ineffective Assistance:

The test for ineffective assistance of counsel in criminal proceedings that is set out in Strickland v. Wash., 466 US 668 (1984), is inappropriate in involuntary commitment proceedings because the Strickland test simply does not go far enough to protect the liberty interests of persons involved in involuntary commitment proceedings. Instead, the Supreme Court identified five critical areas of representation that generally define the scope of effective counsel in involuntary commitment proceedings: (1) appointment of competent counsel; (2) the initial investigation; (3) the client interview; (4) the right to remain silent; and (5) counsel as an advocate and adversary. Upon a substantial showing of evidence to the issuing District Court or to the Supreme Court pursuant to 53-21-131 that counsel did not effectively represent the person's interests according to these standards, an order of involuntary commitment should be vacated. In re K.G.F., 2001 MT 140, 306 M 1, 29 P3d 485 (2001).

In evaluating ineffective assistance of counsel claims, the Supreme Court uses the two-part test set forth in Strickland v. Washington, 466 US 668, 80 L Ed 2d 674, 104 S Ct 2052 (1984). First, counsel's performance must be deficient. To assess deficient performance, the court employs the "reasonably effective assistance test" of whether a defendant's counsel acted within the range of competence demanded of attorneys in criminal cases. Second, counsel's deficient performance must have so prejudiced defendant as to deprive him of a fair trial. The standard for evaluating prejudice is whether a reasonable probability exists that but for counsel's deficient performance, the trial's outcome would have been different. However, in evaluating a defense counsel's performance, the court will not second guess trial tactics and strategy. In this case, substantial evidence supports the trial court's conclusion that another lawyer would not have obtained a more favorable result for defendant considering the amount of evidence the state presented against him. St. v. Coates, 241 M 331, 786 P2d 1182, 47 St. Rep. 328 (1990), followed in St. v. Biehle, 251 M 257, 824 P2d 268, 49 St. Rep. 47 (1992), Bishop v. St., 254 M 100, 835 P2d 732, 49 St. Rep. 650 (1992), St. v. Rodgers, 257 M 413, 849 P2d 1028, 50 St. Rep. 335 (1993), Walker v. St., 261 M 1, 862 P2d 1, 50 St. Rep. 1115 (1993), St. v. Baker, 272 M 273, 901 P2d 54, 52 St. Rep. 735 (1995), Brown v. St., 277 M 430, 922 P2d 1146, 53 St. Rep. 692 (1996), St. v. Miller, 278 M 231, 924 P2d 690, 53 St. Rep. 861 (1996), and St. v. Campbell, 278 M 236, 924 P2d 1304, 53 St. Rep. 879 (1996). See also Bone v. St., 284 M 293, 944 P2d 734, 54 St. Rep. 890 (1997), St. v. Berg, 1999 MT 282, 296 M 546, 991 P2d 428, 56 St. Rep. 1138 (1999), St. v. St. John, 2001 MT

1, 304 M 47, 15 P3d 970 (2001), St. v. Weaver, 2001 MT 115, 305 M 315, 28 P3d 451 (2001), St. v. Morgan, 2003 MT 193, 316 M 509, 74 P3d 1047 (2003), Davis v. St., 2004 MT 112, 321 M 118, 88 P3d 1285 (2004), and St. v. Dubois, 2006 MT 89, 332 M 44, 134 P3d 82 (2006).

An allegation of ineffective assistance of counsel must be grounded on facts appearing in or easily deduced from the record, not mere conclusory allegations. It must be shown that counsel's errors were so serious that he was not functioning as the counsel guaranteed by the federal constitution and that the defense was prejudiced by the deficient performance. To prove prejudice, it must be shown that there is a reasonable probability that but for counsel's errors the result of the proceeding would have been different, and a reasonable probability is one sufficient to undermine confidence in the outcome. St. v. Robbins, 218 M 107, 708 P2d 227, 42 St. Rep. 1440 (1985), followed in St. v. Johnson, 221 M 384, 719 P2d 771, 43 St. Rep. 913 (1986), St. v. Leavens, 222 M 473, 723 P2d 236, 43 St. Rep. 1431 (1986), St. v. Strandberg, 223 M 132, 724 P2d 710, 43 St. Rep. 1591 (1986), St. v. Tome, 228 M 398, 742 P2d 479, 44 St. Rep. 1629 (1987), and in St. v. Hurlbert, 232 M 115, 756 P2d 1110, 45 St. Rep. 923 (1988). See also St. v. Docken, 222 M 58, 720 P2d 679, 43 St. Rep. 1058 (1986), St. v. Graves, 241 M 533, 788 P2d 311, 47 St. Rep. 483 (1990), St. v. Cleland, 246 M 165, 803 P2d 1093, 47 St. Rep. 2311 (1990), In re Petition of Lake, 252 M 443, 830 P2d 100, 49 St. Rep. 359 (1992), and St. v. Mahoney, 264 M 89, 870 P2d 65, 51 St. Rep. 160 (1994).

The burden on one seeking to reverse a conviction on the grounds of incompetency of counsel has historically been heavy. Reasonably effective counsel does not mean defendant is constitutionally guaranteed such assistance as will necessarily result in an acquittal, and in evaluating counsel's representation of the client it is not the court's function to second-guess trial tactics and strategy. The test is that persons accused of crime are entitled to effective assistance of counsel acting within the range of competence demanded of attorneys in criminal cases; and when the claim rests upon specific acts and omissions of counsel at trial, relief will be granted only if it appears that defendant was prejudiced by counsel's conduct. St. v. LaValley, 203 M 393, 661 P2d 869, 40 St. Rep. 527 (1983), followed in St. v. Coates, 241 M 331, 786 P2d 1182, 47 St. Rep. 328 (1990), St. v. Johnstone, 244 M 450, 798 P2d 978, 47 St. Rep. 1715 (1990), and in St. v. McColley, 247 M 524, 807 P2d 1358, 48 St. Rep. 290 (1991). See also St. v. Bradley, 262 M 194, 864 P2d 787, 50 St. Rep. 1511 (1993).

Persons accused of a crime are entitled to effective assistance of counsel acting within the range of competence demanded of attorneys in criminal cases. Claimed inadequacy of counsel must not be tested by a greater sophistication of appellate counsel or by that counsel's unrivaled opportunity to study the record at leisure and cite different tactics of perhaps doubtful efficacy. To sustain a claim of ineffective assistance, defendant must show that the attorney's alleged error resulted in prejudice to defendant and stemmed from neglect or ignorance rather than from informed, professional deliberation. St. v. Morigeau, 202 M 36, 656 P2d 185, 39 St. Rep. 2311 (1982). Morigeau and its progeny were overruled in Whitlow v. St., 2008 MT 140, 343 M 90, 183 P3d 861 (2008), to the extent that the "ignorance or neglect" test for ineffective assistance of counsel conflicts with the correct approach, which is the "objective standard of reasonableness" test set out in Strickland v. Wash., 466 US 668 (1984). Whitlow was followed in St. v. Wing, 2008 MT 218, 344 M 243, 188 P3d 999 (2008), distinguishing St. v. Parker, 2006 MT 258, 334 M 129, 144 P3d 831 (2006), and in Maldonado v. St., 2008 MT 253, 345 M 69, 190 P3d 1043 (2008).

The test to determine whether a defendant has been denied effective assistance of counsel may be stated as follows: "Persons accused of crime are entitled to the effective assistance of counsel acting within the range of competence demanded of attorneys in criminal cases." In order to find that failures of counsel require reversal, the Supreme Court must be able to say that they are errors a reasonable, competent attorney acting as a diligent, conscientious advocate would not have made. St. v. Rose, 187 M 74, 608 P2d 1074 (1980), followed in St. v. Kubas, 197 M 185, 642 P2d 147, 39 St. Rep. 456 (1982), St. v. Hall, 203 M 528, 662 P2d 1306, 40 St. Rep. 621 (1983), and St. v. Leavens, 221 M 384, 723 P2d 236, 43 St. Rep. 1431 (1986).

Summary Denial of Petition for Postconviction Relief — Defendant Entitled to Hearing to Present Nonrecord-Based Ineffective Assistance of Counsel Claims: Schaff was convicted of deliberate homicide and filed a petition for postconviction relief, contending that he received ineffective assistance of counsel when forced to decide whether to accept a plea agreement after considering the matter for less than 2 hours. He claimed that with the assistance of different counsel at the hearing to withdraw the guilty plea, he could have established that the plea was not voluntary. Schaff further argued that he could not have raised the precise issue of ineffective assistance because discussions between his attorney and him were not record-based and thus could be presented only through a petition for postconviction relief. The state argued that the

petition was defective because Schaff did not sufficiently specify the claim of ineffective assistance, offered no supporting information, and did not identify precisely why counsel was ineffective. The state also pointed out that Schaff had previously raised the issue of voluntariness in St. v. Schaff, 1998 MT 104, 288 M 421, 958 P2d 682 (1998), and that the issue had been decided and was barred from being raised again by the doctrine of res judicata. The Supreme Court disagreed that the voluntariness of Schaff's plea was not a proper subject for a postconviction proceeding. Although the issue of voluntariness was previously raised, Schaff did not raise the precise question of whether he had received competent advice prior to entering a plea or the question of whether he was misled to believe that he was required to proceed with the change of plea hearing with trial counsel when he was legally entitled to be represented by other counsel. The question of whether Schaff was properly advised necessarily touched on the voluntariness of the plea but was separate from it and was not part of the record in the direct appeal, nor was it the type of evidence that Schaff would be likely to present at a change of plea hearing. Rather than summarily dismiss Schaff's petition, the better course would have been for the District Court to appoint Schaff counsel and provide an opportunity for a hearing to present the ineffective assistance claims. Thus, the Supreme Court affirmed the part of the District Court's order with regard to any record-based voluntariness claims that had already been addressed by direct appeal, but reversed that part of the order that held that Schaff was procedurally barred from raising the issue of ineffective assistance of counsel in the nonrecord-based postconviction proceeding. St. v. Schaff, 2001 MT 130, 305 M 427, 28 P3d 1073 (2001). Following hearing on remand, the District Court again denied Schaff's petition for postconviction relief, and Schaff appealed on grounds of ineffective assistance of counsel, but the Supreme Court affirmed. Applying the Strickland test, the Supreme Court found that Schaff proved neither that counsel's assistance was deficient nor that counsel's performance was prejudicial to Schaff's case. An ineffective assistance claim must be grounded on facts in the record rather than on mere conclusory allegations. Schaff's claim was not supported by the record, so the petition for postconviction relief was properly denied. Schaff v. St., 2003 MT 187, 316 M 453, 73 P3d 806 (2003). See also Hagen v. St., 1999 MT 8, 293 M 60, 973 P2d 233 (1999), and Chyatte v. St., 2015 MT 343, 381 Mont. 534, 362 P.3d 854.

Claim of Ineffective Assistance Not in Record — Claim Must Be Brought by Petition for Postconviction Relief: When the record does not provide for the basis for the challenged acts or omissions of counsel, a defendant claiming ineffective assistance must raise that claim by petition for postconviction relief. St. v. Weaver, 2001 MT 115, 305 M 315, 28 P3d 451 (2001), following St. v. Black, 270 M 329, 891 P2d 1162 (1995), St. v. Bromgard, 273 M 20, 901 P2d 611 (1995), and St. v. St. John, 2001 MT 1, 304 M 47, 15 P3d 970 (2001). See also St. v. J.C., 2004 MT 75, 320 M 411, 87 P3d 501 (2004), and St. v. Heavygun, 2011 MT 111, 360 Mont. 413, 253 P.3d 897.

Failure of Counsel to Object to Introduction of Inconsistent Prior Statements on Confrontation Grounds Not Considered Ineffective Assistance: Jenkins was convicted of deliberate homicide, aggravated kidnapping, and robbery after having been implicated in the crimes based in part on statements made to police and at trial by his wife, Mary. Mary suffered from dementia related to Alzheimer's disease and periodic memory lapses. As a result, in some pretrial interviews, she answered questions with declarative statements while in other interviews, even when asked the same or similar questions, she responded that she didn't know or couldn't remember. Nevertheless, at a pretrial hearing, it was determined that she knew the difference between truth and falsity, could express herself in court, and was competent to testify. At trial, she exhibited the same behavior. On direct examination, the prosecutor asked many of the same questions asked during the pretrial interviews, and although she answered some questions definitively, most of her testimony was that she didn't know or couldn't remember. On cross-examination, she often retracted the definitive answers she gave on direct examination, saying again that she could not remember. Following her testimony, the trial court allowed the prosecution to introduce the content of Mary's pretrial interviews through the testimony of the interviewing officers pursuant to the prior inconsistent statement exception to the hearsay rule, as set out in Rule 801(d)(1)(A), M.R.Ev. (Title 26, ch. 10). Jenkins objected on evidentiary grounds, but not on confrontation grounds, so the issue was not preserved for appeal. In a petition for postconviction relief, Jenkins claimed that he was denied effective assistance of counsel because his attorney should have objected on confrontation grounds. The District Court denied the petition, holding that there was no confrontation clause violation and that even if the objection had been made, it would not have affected the outcome of the trial. Jenkins then appealed the denial of the petition for postconviction relief. The state contended that Jenkins' right to confront witnesses was satisfied by his opportunity to cross-examine Mary and demonstrate to the jury her poor and unreliable memory. The Supreme Court concurred. The implications of admitting prior inconsistent

statements was addressed in Calif. v. Green, 399 US 149 (1970), in which it was held that the confrontation clause is not violated by admitting a declarant's out-of-court statements as long as the declarant is testifying as a witness and is subject to full and effective cross-examination. Further, under U.S. v. Owens, 484 US 554 (1988), the confrontation clause guarantees only an opportunity for effective cross-examination, not cross-examination that is effective in a way that the defendant might wish. Even though Mary suffered from memory lapses, she was competent, appeared at trial, and was subjected to unrestricted cross-examination, giving Jenkins ample opportunity to demonstrate her inability to recall past events and giving the jury the opportunity to observe her testimony and judge the reliability of her memory as it pertained to both her in-court and out-of-court statements. Jenkins failed to show that an objection on confrontation grounds would have been sustained, therefore failing to demonstrate that his defense was prejudiced by his trial counsel's failure to preserve the issue for appeal. Jenkins was thus not denied effective assistance of counsel and his petition for postconviction relief was properly denied. St. v. Jenkins, 2001 MT 79, 305 M 95, 23 P3d 201 (2001).

Failure to Offer Alternative Jury Instruction on Aggravated Assault When Defendant Maintains Innocence on All Charges Not Considered Ineffective Assistance of Counsel: Despite a daunting evidentiary record of Aliff's commission of a rape and attempted murder, he maintained his innocence and claimed that he was home with his wife while the victim was fighting for her life. Aliff contended on appeal that he received ineffective assistance of counsel because no alternative jury instruction was offered regarding the offense of aggravated assault. However, Aliff never claimed that he intended only to assault the victim, but rather that he did not commit the crimes for which he was charged or any other offense in connection with the incident. Counsel did not provide inadequate assistance by failing to offer an instruction that was inconsistent with the defense. The instructions that were actually offered were based on trial strategy and did not stem from neglect or ignorance. Counsel's performance was not deficient in any way, and judgment was affirmed. St. v. Aliff, 2001 MT 52, 304 M 310, 21 P3d 624 (2001).

Counsel's Decision to Not Use Racial Bias Defense Preferred by Defendant: The lower court found that appointed counsel for a defendant who sought a pretrial substitution of counsel made a tactical decision not to present the racial bias defense preferred by defendant. The lower court heard testimony that counsel did not believe that he had the skills to present the defense, but counsel also testified that he thought that the defense simply was not viable. Although there was conflicting evidence, the Supreme Court would not substitute its judgment for that of the lower court, whose finding clearly had more than a scintilla of evidence to support it. St. v. Gallagher, 2001 MT 39, 304 M 215, 19 P3d 817A (2001).

Newly Appointed Attorney Necessary if Attorney-Client Relationship Completely Collapses: If the relationship between an appointed attorney and the attorney's client completely collapses in a criminal case, the refusal to substitute new counsel violates the client's right to effective assistance of counsel. St. v. Gallagher, 2001 MT 39, 304 M 215, 19 P3d 817A (2001).

Pretrial Motion for Substitution of Appointed Counsel — Counsel's Conduct at Trial May Be Considered: In evaluating defendant's pretrial motion for substitution of counsel, it was not error for the court to consider the counsel's conduct at trial. Although the Supreme Court has held that on a pretrial complaint the issue is whether defendant received effective assistance at that time, the court has not held that the lower court may not make logical inferences from its own observations at trial. St. v. Gallagher, 2001 MT 39, 304 M 215, 19 P3d 817A (2001).

Failure of Counsel to Exercise Right to Lesser Included Offense Instruction — Presumption of Effective Assistance — Failure to Provide Evidence of Ineffectiveness: Section 46-16-607(3) provides that upon a defendant's request, the court shall instruct the jury that the jury may consider a lesser included offense if the jury cannot reach a verdict on the greater offense after reasonable effort. Because of the strong presumption that counsel acted reasonably and defendant's failure to provide any evidence to the contrary, the court would not find that counsel provided ineffective assistance by failing to request the instruction. St. v. Hubbel, 2001 MT 31, 304 M 184, 20 P3d 111 (2001).

Failure to Present Medical Records and Failure to Move to Withdraw Guilty Plea — No Denial of Effective Assistance of Counsel: The appellant pleaded guilty to a possession of dangerous drugs charge. Sentencing was postponed so that the appellant could undergo drug and alcohol counseling and a hernia operation. At the time of sentencing, the appellant's partial medical records from Fort Harrison dealt only with the appellant's substance abuse issues and hernia problem and did not mention any psychiatric problems. Later reports received by the counsel would have indicated a need to request a psychiatric examination. The counsel's performance in allowing the District Court to sentence the appellant without presenting his medical records

from Fort Harrison was not deficient. When the counsel testified that the first time that an issue of schizophrenia or other mental illness arose was in the petition for postconviction relief and the District Court found that the trial counsel had not been informed of any psychiatric issues, it was not error for the counsel to not move to withdraw the guilty plea immediately after the plea hearing. The Supreme Court refused to disturb the District Court findings that were supported by substantial evidence and were not otherwise clearly erroneous. St. v. Cady, 2000 MT 353, 303 M 258, 15 P3d 479, 57 St. Rep. 1491 (2000).

Claims of Ineffective Assistance of Counsel Because of Prejudicial Error and Conflicts of Interest Not Proved — Request for New Trial Properly Denied: Petitioner failed to prove that the defense attorney's failure to use available impeachment evidence was so deficient that the attorney was not functioning as the counsel guaranteed the defendant by the sixth amendment to the U.S. Constitution. When there was an overwhelming abundance of accomplice testimony and corroborative evidence of petitioner's involvement in the crime, petitioner was not prejudiced by any alleged error of the defense counsel to fully challenge a witness's testimony or to fully investigate the witness's background. The fact that the defense attorney was a candidate for District Court Judge and County Attorney during the attorney's representation of petitioner does not establish an actual conflict without further support in the record. Petitioner's allegation that the defense counsel's publication of a book about an earlier murder prosecution reveals the counsel's bias against criminal defendants as a class and hostility to the use of legal technicalities in their defense was insufficient to establish the existence of an actual conflict of interest through a factual showing on the record. Petitioner's request for a new trial was properly denied. Kills On Top v. St., 2000 MT 340, 303 M 164, 15 P3d 422, 57 St. Rep. 1444 (2000).

Dismissal of Amended Petition for Postconviction Relief — Failure to Address New Claims in Order Harmless Error — Postconviction Relief Claims Civil in Nature: On remand, petitioner amended the petition for postconviction relief, adding claims 16-18. By remanding to the District Court to allow petitioner to add proposed claims 16-18, the Supreme Court necessarily required the District Court to address the merits of those claims. However, the District Court's failure to address the new claims in its Findings of Fact, Conclusions of Law and Order was harmless error. Petitioner's newly discovered evidence claims, Brady claim, and cumulative error claims were without merit. Postconviction relief proceedings are collateral attacks that are civil in nature and independent of the underlying criminal cause. If there is no showing of substantial injustice the error is harmless. Kills On Top v. St., 2000 MT 340, 303 M 164, 15 P3d 422, 57 St. Rep. 1444 (2000).

Postconviction Relief — Cumulative Error Doctrine Does Not Apply When There is No Error: Although cumulative error may serve as a basis for reversal, the court will not apply the doctrine when no errors have been shown. Kills On Top v. St., 2000 MT 340, 303 M 164, 15 P3d 422, 57 St. Rep. 1444 (2000).

Voluntariness of Guilty Plea Affirmed Notwithstanding Claims of Ineffective Assistance of Counsel — Strickland Test Not Met: Turner pleaded guilty to three counts of deliberate homicide, two counts of felony assault, and one count of aggravated burglary and was sentenced to three consecutive life sentences in prison. About 5 years after sentencing, Turner sought to withdraw his guilty plea, claiming that the plea was involuntarily given based on alleged ineffective assistance of counsel. A defendant may withdraw a guilty plea upon a showing of good cause, which may include a showing that counsel was inefficient, and the purpose of allowing withdrawal of a guilty plea is to prevent the possibility of convicting an innocent man. A plea is considered voluntary if it is made with knowledge of fundamental constitutional rights and an understanding of the nature of the crimes charged, but a plea is not involuntary simply because it was entered to avoid a greater punishment. The Supreme Court applies the two-part test in Strickland v. Wash., 466 US 668 (1984), when evaluating challenges to a guilty plea based on ineffective assistance of counsel. The purpose of the effective assistance of counsel guarantee is to ensure a fair trial, not to improve the quality of legal representation. The first part of the test requires a showing that counsel failed to act within the range of competence demanded of attorneys in criminal cases. Turner argued that his attorney failed to adequately investigate various defense options, used the wrong procedure in obtaining a mental evaluation, failed to adequately inform Turner of the constitutional right against self-incrimination prior to the mental evaluation, and could have used different tactics in preparing the case. The fact that some other lawyer would have done differently is not grounds for branding the appointed attorney as ineffective or incompetent, and claimed inadequacy of counsel must not be tested by a greater sophistication of appellate counsel or by appellate counsel's unrivaled opportunity to study the record at leisure and cite different tactics of perhaps doubtful efficacy. Judicial scrutiny of counsel's performance must be

highly deferential, and every effort must be made to eliminate the distorting effects of hindsight to reconstruct the circumstances of counsel's challenged conduct and to evaluate the conduct from counsel's perspective at the time. Although Turner showed a myriad of ways that the case could have been handled differently, that showing was nothing more than mere second-guessing of the attorney's strategy and did not equate with ineffectiveness. Turner failed to address the second prong of the Strickland test, which requires a showing that the deficient performance prejudiced the defense, arguing instead that errors under the first prong rendered the guilty plea involuntary and that if the case had been handled differently, Turner would have insisted on trial. However, that argument was contradictory to the record, which showed that Turner indicated a desire not to go to trial and even signed an acknowledgment of waiver of rights and guilty plea containing language that he did not want to put his family or the remaining members of the victims' family through a trial. The record showed that Turner's primary motivation for pleading guilty was to avoid further hurting the parties involved, and nothing counsel could have done would have altered the outcome of the case. Turner's plea was the product of a voluntary and intelligent choice among the alternative courses of action open to him, and the claim of ineffective counsel was properly rejected. St. v. Turner, 2000 MT 270, 302 M 69, 12 P3d 934, 57 St. Rep. 1127 (2000), followed, with regard to the fact that some other lawyer would have done differently is not grounds for branding the appointed attorney as ineffective or incompetent, in Stevens v. St., 2007 MT 137, 337 M 400, 162 P3d 82 (2007).

No Prejudice From Alleged Ineffective Assistance of Counsel During Pretrial Phase: Dawson was convicted of robbery, four counts of aggravated kidnapping, and three counts of deliberate homicide and sentenced to death for each of three counts of aggravated kidnapping that resulted in the death of the victim. His conviction was appealed and affirmed (St. v. Dawson, 233 M 345, 761 P2d 352 (1988)). Dawson filed for postconviction relief, alleging 30 separate grounds for relief, but all except one claim, ineffective assistance of counsel, were dismissed. Dawson's appellate counsel withdrew, and Dawson filed an amended petition adding a 31st ground for relief, which was ineffective assistance of appellate counsel, but that petition was also denied. On appeal, the Supreme Court considered Dawson's claim of ineffective assistance of counsel during the pretrial phase, applying the two-pronged test in Strickland v. Wash., 466 US 668 (1984). Dawson alleged that counsel was ineffective in failing to: (1) object to the procedure and use of Dawson's psychiatric evaluation; (2) advise him of his rights during the evaluation process; and (3) conduct an adequate pretrial investigation. On the first point, the procedure followed and the use of the psychiatric evaluation were consistent with the statutory procedure in effect at the time, and counsel had no reason to question it. On the second point, Dawson satisfied the deficiency prong of the Strickland test because he should have been informed of the potential consequences of participating in the evaluation; however, there was no evidence that Dawson was prejudiced at trial or sentencing. Dawson's version of the crimes was consistent with his defense theory, and at no time did he admit killing the victims, so counsel's failure to advise him of his Miranda rights was not prejudicial. On the third point, Dawson could not establish prejudice as a result of counsel's failure to obtain complete records and staff notes of the evaluation, to investigate Dawson's possible epilepsy, or to investigate or pursue Dawson's drug use—at trial or at sentencing as a mitigating factor. The District Court did not err when it found that Dawson did not receive ineffective assistance at the pretrial phase. Dawson v. St., 2000 MT 219, 301 M 135, 10 P3d 49, 57 St. Rep. 883 (2000). See also St. v. Armfield, 214 M 229, 693 P2d 1226 (1984), St. v. Smith, 217 M 453, 705 P2d 1110 (1985), and Hans v. St., 283 M 379, 942 P2d 674 (1997).

No Prejudice From Alleged Ineffective Assistance of Counsel During Trial Phase — Reasonable Trial Strategy: Dawson was convicted of robbery, four counts of aggravated kidnapping, and three counts of deliberate homicide and sentenced to death for each of three counts of aggravated kidnapping that resulted in the death of the victim. His conviction was appealed and affirmed (St. v. Dawson, 233 M 345, 761 P2d 352 (1988)). Dawson filed for postconviction relief, alleging 30 separate grounds for relief, but all except one claim, ineffective assistance of counsel, were dismissed. Dawson's appellate counsel withdrew, and Dawson filed an amended petition adding a 31st ground for relief, which was ineffective assistance of appellate counsel, but that petition was also denied. On appeal, the Supreme Court considered Dawson's claim of ineffective assistance of counsel during the trial phase. Dawson alleged that counsel was ineffective in: (1) agreeing to the procedure used to present the testimony of the state's key witness, which involved questioning of the witness by the guardian ad litem; (2) failing to corroborate the defense theory through examination of the witness; (3) failing to give an opening statement; (4) failing to object to guilt phase errors, including improper questions and comments by the state; (5) failing to obtain experts to testify regarding Dawson's drug ingestion, head injuries, and EEG tests; and (6)

failing to give a closing argument. On the first point, counsel's decision to use a special procedure to examine the fragile witness was reasonable, and Dawson agreed to the procedure. On the second point, counsel's decision not to subject the witness to further questioning after her very emotional testimony was also reasonable when counsel believed that further questioning would have been more damaging to the defense than helpful. Third, waiver of an opening statement was a reasonable trial tactic under the circumstances, and that decision could not form a basis for an ineffective assistance claim (see U.S. v. Rodrigues-Ramirez, 777 F2d 454 (9th Cir. 1985), and U.S. v. Nersesian, 824 F2d 1294 (2nd Cir. 1987)). Fourth, counsel's failure to object to certain prosecutorial questions and comments was reasonable and within the wide range of permissible professional legal conduct (see U.S. v. Necoechea, 986 F2d 1273 (9th Cir. 1993)). Fifth, counsel's decision not to call experts did not amount to ineffective assistance. Sixth, the decision not to give a closing statement did not constitute ineffective assistance per se and was a reasonable trial strategy that did not fall below the standard of what a minimally competent defense attorney would have done in the same circumstances (see St. v. Lee, 689 P2d 153 (Ariz. 1984)). The District Court did not err when it found that Dawson did not receive ineffective assistance at trial. Dawson v. St., 2000 MT 219, 301 M 135, 10 P3d 49, 57 St. Rep. 883 (2000), followed in Sartain v. St., 2012 MT 164, 365 Mont. 483, 285 P.3d 407. See also Rosling v. St., 2012 MT 179, 366 Mont. 50, 285 P.3d 486.

Failure to Raise Every Possible Issue on Direct Appeal of Death Sentence Not Considered Ineffective Assistance of Counsel: Dawson was convicted of robbery, four counts of aggravated kidnapping, and three counts of deliberate homicide and sentenced to death for each of three counts of aggravated kidnapping that resulted in the death of the victim. His conviction was appealed and affirmed (St. v. Dawson, 233 M 345, 761 P2d 352 (1988)). Dawson filed for postconviction relief, alleging 30 separate grounds for relief, but all except one claim, ineffective assistance of counsel, were dismissed. Dawson's appellate counsel withdrew, and Dawson filed an amended petition adding a 31st ground for relief, which was ineffective assistance of appellate counsel, but that petition was also denied. On appeal, the Supreme Court considered Dawson's claim of ineffective assistance of counsel during the direct appeal phase, applying the two-pronged test in Strickland v. Wash., 466 US 668 (1984). Dawson argued that appellate counsel failed to raise all possible issues on direct appeal. However, appellate counsel was highly qualified, thoroughly prepared, and narrowed the issues to those felt to be most meritorious, and Dawson was unable to show any prejudice as a result of counsel's failure to raise other issues. Dawson received a trial with reliable results, there was no breakdown in the adversarial process, and the evidence of guilt was overwhelming. Dawson's criticism of appellate counsel used the distorting effects of hindsight to reconstruct the circumstances of counsel's conduct and did not evaluate the conduct from counsel's perspective at the time, which is prohibited by Strickland. The District Court did not err when it found that Dawson did not receive ineffective assistance at the direct appeal phase. Dawson v. St., 2000 MT 219, 301 M 135, 10 P3d 49, 57 St. Rep. 883 (2000).

No Prejudice From Alleged Ineffective Assistance of Counsel During Sentencing Phase: Dawson was convicted of robbery, four counts of aggravated kidnapping, and three counts of deliberate homicide and sentenced to death for each of three counts of aggravated kidnapping that resulted in the death of the victim. His conviction was appealed and affirmed (St. v. Dawson, 233 M 345, 761 P2d 352 (1988)). Dawson filed for postconviction relief, alleging 30 separate grounds for relief, but all except one claim, ineffective assistance of counsel, were dismissed. Dawson's appellate counsel withdrew, and Dawson filed an amended petition adding a 31st ground for relief, which was ineffective assistance of appellate counsel, but that petition was also denied. On appeal, the Supreme Court considered Dawson's claim of ineffective assistance of counsel during the sentencing phase. Dawson alleged that counsel was ineffective in failing to: (1) present crucial mitigating evidence to the sentencing court; (2) conduct an adequate sentencing investigation; and (3) move the sentencing court for reconsideration of its conclusion that Dawson posed a substantial and continuing threat and had no chance for rehabilitation. On the first point, Dawson contended that counsel should have offered the statement of the state's key witness regarding another man whom she saw near the crime scene, which Dawson maintained would have bolstered his defense theory that he acted under duress or coercion. However, the statement was vague, and Dawson never offered information concerning the involvement of others. Neither the jury nor the sentencing court accepted the defense theory, and Dawson could not demonstrate prejudice because of counsel's failure to offer the statement. Counsel's decision not to present or argue evidence of Dawson's drug use as a mitigating factor did not constitute ineffective assistance, given counsel's determination that evidence of drug use would have been inflammatory and prejudicial and would have been an aggravating rather

than mitigating factor. Failure of counsel to present evidence at sentencing of Dawson's good behavior in jail also did not constitute ineffective assistance because that evidence was presented at the guilt phase and was thus considered at the sentencing phase as well. Second, Dawson's assertion that counsel overlooked demonstrations of remorse found in the records of the staff that conducted his psychiatric examination, which would have served to rebut the findings by the sentencing court regarding his lack of remorse, did not constitute prejudice because the court's finding was based on the court's own observations of Dawson throughout the lengthy proceedings. It was also reasonable for counsel not to investigate Dawson's medical and school records, absent any evidence that further investigation would have been beneficial. Dawson's argument that counsel erred in failing to interview boyhood friends to develop or determine the existence of mitigating evidence also failed. Counsel did present letters from Dawson's mother, sister, and former spouses, and the failure to further investigate boyhood friends did not constitute ineffective assistance. Third, counsel's failure to move the sentencing court for reconsideration of its conclusion that Dawson posed a substantial and continuing threat and had no chance for rehabilitation was not ineffective assistance given the findings in St. v. Dawson, 233 M 345, 761 P2d 352 (1988), that evidence supported the sentencing court's finding of aggravating factors and that the death sentence was appropriate. The District Court did not err when it found that Dawson did not receive ineffective assistance at sentencing. Dawson v. St., 2000 MT 219, 301 M 135, 10 P3d 49, 57 St. Rep. 883 (2000). See also St. v. Peart, 2012 MT 274, 367 Mont. 153, 290 P.3d 706.

Guilty Plea Constituting Waiver of Nonjurisdictional Defects and Defenses: Following Niederklopfer's omnibus hearing on charges of deliberate homicide, the state filed a notice to seek increased punishment of Niederklopfer as a persistent felony offender. Niederklopfer subsequently waived his rights, pleaded guilty to mitigated deliberate homicide pursuant to a plea agreement, and was sentenced to 80 years as a persistent felony offender. Niederklopfer later sought postconviction relief on grounds that the state did not give sufficient notice that it would seek persistent felony offender status. The Supreme Court affirmed the sentence. The District Court had jurisdiction to consider Niederklopfer a persistent felony offender when notice was filed to designate him as such, even though the notice was filed late. Timeliness of the notice was not jurisdictional, but rather the late notice was a procedural defect that Niederklopfer did not object to when filed. Niederklopfer's voluntary and intelligent guilty plea constituted a waiver of nonjurisdictional or procedural defects, including the timeliness of the notice. Because Niederklopfer failed to allege that he would have gone to trial but for his counsel's failure to object, the second prong of the Strickland test (466 US 668) for ineffective assistance of counsel was not met, and the District Court did not err in denying his petition for postconviction relief. St. v. Niederklopfer, 2000 MT 187, 300 M 397, 6 P3d 448, 57 St. Rep. 742 (2000).

Prosecutorial Comments During Closing Not Violative of Defendant's Right to Fair Trial: Raugust argued on appeal that the prosecutor's comments during closing arguments deprived Raugust of a fair trial, notwithstanding the failure of Raugust's attorney to object, which Raugust characterized as ineffective assistance of counsel. Under 46-20-104, review is barred of any alleged errors not objected to at trial, unless the error falls within the exceptions in 46-20-701(2), but Raugust nevertheless urged review under the plain error doctrine. The Supreme Court held that this case did not present the requisite exceptional case to invoke the plain error doctrine because the alleged errors were either misstatements of fact, taken out of context of the prosecutor's argument, constituted the state's analysis of the evidence, or were later cured by the jury instructions. Raugust's claim of ineffective assistance of counsel also failed because Raugust did not meet the first prong of the Strickland test by showing that his counsel's performance was deficient. St. v. Raugust, 2000 MT 146, 300 M 54, 3 P3d 115, 57 St. Rep. 570 (2000). See also St. v. Gladue, 1999 MT 1, 293 M 1, 972 P2d 827 (1999), St. v. Daniels, 2003 MT 247, 317 M 331, 77 P3d 224 (2003), and St. v. Wing, 2008 MT 218, 344 M 243, 188 P3d 999 (2008).

Failure to Present Motion to Withdraw Voluntary Guilty Plea, Based on Hope or Fear, Not Considered Ineffective Assistance of Counsel: Osterloth contended that he was denied effective assistance of counsel when his attorney failed to premise a motion to withdraw a guilty plea on Osterloth's having entered the plea out of hope of avoiding the mandatory minimum sentence for sexual assault by being admitted to a community-based sex offender treatment program and on Osterloth's fear of incarceration. Osterloth was relying on St. v. Schaff, 1998 MT 104, 288 M 421, 958 P2d 682 (1998), for the proposition that an assertion that a guilty plea was influenced by hope or fear is a proper basis for withdrawing a guilty plea. Under the two-prong Strickland test for evaluating effectiveness of counsel, a defendant must establish that counsel's performance was deficient and that the deficient performance prejudiced the defendant. A guilty plea is

not involuntary simply because it was entered to avoid a greater punishment, nor is counsel's performance deficient for failure to raise an issue that lacks merit. Thus, because Osterloth's plea was not involuntary, his counsel's performance was not deficient in failing to raise the issue of Osterloth's hope or fear in the motion to withdraw. Having failed to establish the first prong of the Strickland test, the Supreme Court did not address the second prong in finding that Osterloth was not denied the right to effective assistance of counsel. St. v. Osterloth, 2000 MT 129, 299 M 517, 1 P3d 946, 57 St. Rep. 533 (2000).

Out-of-Time Appeal Based on Claim of Ineffective Counsel Denied: An out-of-time appeal is a remedy that may be available to a defendant involved in a criminal proceeding who, through no fault of the defendant, misses a deadline for filing an appeal. Here, Garner moved for an out-of-time appeal on grounds of ineffective counsel. The trial court denied the motion after finding substantial factual evidence that Garner was fully advised of his right to appeal the postconviction relief order, as well as of the 60-day deadline for filing notice of appeal. The ineffective assistance argument was without merit, and the trial court was affirmed. St. v. Garner, 1999 MT 295, 297 M 89, 990 P2d 175, 56 St. Rep. 1180 (1999).

Abuse of Discretion Held Not to Deny Fair Trial — Second Prong of Strickland Test Unsatisfied: The Supreme Court had held that it was an abuse of discretion for the District Court to impose the heaviest possible sanction for the failure of Berg's counsel to comply with an order requiring the disclosure of witnesses but that the abuse of discretion did not deprive Berg of a fair trial. Because of this first holding, the Supreme Court also held that the second requirement of the Strickland test, that a defendant show that counsel's error prejudiced the defendant's right to a fair trial, could not be satisfied and that therefore Berg was not denied the effective assistance of counsel. St. v. Berg, 1999 MT 282, 296 M 546, 991 P2d 428, 56 St. Rep. 1138 (1999).

Presumption of Ineffective Counsel — Irreconcilable Conflict — Error in Failure to Investigate Timely Request for Substitution of Counsel: Generally, a defendant must establish both parts of the two-part test in Strickland v. Wash., 466 US 668, 80 L Ed 2d 674, 104 S Ct 2052 (1984), to prevail in showing ineffectiveness of counsel: (1) that counsel made errors so serious that counsel was not functioning as the counsel guaranteed by the constitution; and (2) that counsel's deficient performance prejudiced the defense and deprived defendant of a fair trial. However, in some cases, counsel's performance is so deficient that a presumption of ineffectiveness arises and the second part of the test becomes unnecessary. Only when surrounding circumstances justify a presumption of ineffectiveness can a constitutional claim of ineffective counsel be sufficient without inquiry into counsel's actual performance at trial. Here, a presumption of ineffectiveness could have arisen by an actual conflict of interest or by an irreconcilable conflict, but in either case, once the presumption was established, the second part of the test did not need to be satisfied. To establish an irreconcilable conflict, defendant must show a complete collapse of the attorney-client relationship. New counsel should be appointed if defendant shows by material facts that there is a total lack of communication or ineffective assistance of counsel, but bare unsupported allegations are insufficient to justify appointment of new counsel. In the present case, Wilson filed a pro se petition for postconviction relief, alleging ineffective assistance of counsel. The District Court found that it had erred by denying a hearing when Wilson requested substitution of counsel but denied the petition on grounds that Wilson had received a fair trial. On appeal, the Supreme Court applied St. v. Vessey, 967 P2d 960 (Utah Ct. App. 1998), holding that when reviewing an error in failing to investigate a defendant's timely request for substitution, the question is not whether the defendant received effective assistance of counsel at a subsequent trial, but whether the conflict with counsel was sufficient that it required substitution of counsel at the time that the request was made. In Wilson's case, it could not be determined whether the District Court gave adequate consideration to the merits of Wilson's substitution request based on the facts at the time that the request was made or whether denial of the petition for postconviction relief was based simply on the court's observation of counsel at the time of trial. The order denying the petition was vacated and the case remanded for further proceedings. Wilson v. St., 1999 MT 271, 296 M 465, 989 P2d 813, 56 St. Rep. 1096 (1999). See also St. v. Zackuse, 250 M 385, 833 P2d 142 (1991), St. v. Jones, 278 M 121, 923 P2d 560, 53 St. Rep. 864 (1996), St. v. Gallagher, 1998 MT 70, 288 M 180, 955 P2d 1371, 55 St. Rep. 284 (1998), and St. v. Molder, 2007 MT 41, 336 M 91, 152 P3d 722 (2007), in which it was held that because no request for new counsel was made, a separate hearing to consider a continuance motion was unnecessary. Molder was followed in St. v. Racz, 2007 MT 244, 339 M 218, 168 P3d 685 (2007).

Transfer of Youth Court Case to District Court Not Violative of Minor's Constitutional Rights: Spina argued that the statute allowing transfer of her Youth Court case to the District Court resulted in violation of her rights under Art. II, sec. 15, Mont. Const., which guarantees to minors

the same fundamental rights afforded to adults, and under this section, which guarantees the right to a fair trial. The Supreme Court considered alleged violations of the right against self-incrimination, the right to effective assistance of counsel, the right to a fair trial, and the right to a presumption of innocence, finding that Spina's arguments were without merit. The transfer statute did not violate Spina's constitutional rights. St. v. Spina, 1999 MT 113, 294 M 367, 982 P2d 421, 56 St. Rep. 467 (1999).

Petition for Postconviction Relief Filed With Supreme Court — No District Court Jurisdiction to Amend Pleadings on Remand: Boucher filed with the Supreme Court for postconviction relief. The Supreme Court remanded to District Court for an evidentiary hearing on whether Boucher was denied effective assistance of counsel because of counsel's failure to investigate and formulate a defense based on the victim's history of making false accusations of sexual assault. On remand, Boucher sought to offer additional evidence of ineffective counsel unrelated to the issue remanded. Although a District Court has the discretion to grant or deny a motion to amend a postconviction petition when the petition is filed with that court, in cases like this when the petition is originally filed with the Supreme Court and remanded, the District Court does not have authority to grant leave to amend the pleadings to include allegations not included in the original petition. St. v. Boucher, 1999 MT 102, 294 M 296, 980 P2d 1058, 56 St. Rep. 431 (1999), distinguishing Kills On Top v. St., 279 M 384, 928 P2d 182, 53 St. Rep. 1197 (1996), Hans v. St., 283 M 379, 942 P2d 674, 54 St. Rep. 654 (1997), and Bone v. St., 284 M 293, 944 P2d 734, 54 St. Rep. 890 (1997). See also Kills On Top v. St., 2000 MT 340, 303 M 164, 15 P3d 422, 57 St. Rep. 1444 (2000).

Petition for Postconviction Relief — Only Record-Based Claims Barred by Statute or Res Judicata: In 1993, Hagen was convicted of deliberate homicide and aggravated assault and appealed to the Montana Supreme Court, raising the issue of ineffective assistance of counsel. The Supreme Court affirmed the District Court. Hagen then filed a petition for postconviction relief, raising nine claims of ineffective assistance of counsel and argued that: (1) none of the claims could have been raised in his earlier direct appeal; (2) all claims were appropriate for his petition because an evidentiary hearing was required for all nine issues; (3) appellate counsel was ineffective in raising a particular issue in his previous direct appeal; and (4) if some or all of the claims relating to ineffective assistance of trial counsel should have been raised in his direct appeal but were not and were therefore barred, his appellate counsel provided ineffective assistance in failing to present those issues in his direct appeal. The state responded that six of Hagen's claims were procedurally barred by 46-21-105 because they could have been raised in his previous appeal, that one claim was barred by res judicata because it had been raised and decided in his previous appeal, and that three of Hagen's claims were not supported by the record or by the law and could therefore be decided on their merits without an evidentiary hearing. The District Court refused Hagen's request for an evidentiary hearing on his petition for postconviction relief and dismissed the petition, holding that the issue of ineffective assistance of counsel was raised in Hagen's direct appeal and had been decided by the Supreme Court, that Hagen's adequate remedy of appeal had been pursued, and that the petition for postconviction relief failed to state a claim for relief. Hagen appealed the dismissal of the petition to the Supreme Court. As an initial observation, the Supreme Court pointed out that although all of the issues raised by Hagen in his appeal of the District Court's denial of his petition for postconviction relief concerned ineffective assistance of counsel, not all of those claims were raised in the previous direct appeal and only those claims that were raised or that could have been raised in that previous direct appeal based upon the trial record were barred by 46-21-105(2) or the doctrine of res judicata. Citing In re Petition of Evans, 250 M 172, 819 P2d 156 (1991), and St. v. Bromgard, 273 M 20, 901 P2d 611 (1995), the Supreme Court further pointed out that those issues that are not record-based are properly brought to the Supreme Court by a petition for postconviction relief and that the District Court erred in failing to make that distinction and dismissing all of Hagen's ineffective assistance claims just because some of those claims may have been legitimately barred. The Supreme Court then individually reviewed each of Hagen's ineffective assistance claims and held that: (1) the manner in which mental evaluations of Hagen were disseminated during the trial was a matter of record and was therefore barred; (2) failure of Hagen's trial counsel to object to evidence introduced at trial was a matter of record and was therefore barred; (3) eliciting certain cross-examination testimony was based upon record evidence and was barred; (4) shifting the burden of proof during counsel's closing argument was a matter of record and barred by 46-21-105 and res judicata; (5) failure to investigate facts that could have provided a defense was properly raised in the postconviction relief petition because there could be no record evidence on this issue; (6) failure of trial counsel to present impeachment testimony was in part resolved

during the appeal and was therefore res judicata and, with regard to one potential witness, was a matter of failure of trial counsel to investigate, could not be a matter of record, and therefore was not barred; (7) failure of trial counsel to properly prepare witnesses for trial was not and could not be reflected in the trial record and therefore was not barred; and (8) failure of appellate counsel to raise the ineffective assistance of trial counsel could not have been a matter of record evidence by its very nature and was therefore not barred from consideration in the postconviction relief petition. Hagen v. St., 1999 MT 8, 293 M 60, 973 P2d 233, 56 St. Rep. 33 (1999), followed in St. v. Wright, 2001 MT 282, 307 M 349, 42 P3d 753 (2001), and St. v. Upshaw, 2006 MT 341, 335 M 162, 153 P3d 579 (2006). See also St. v. Schaff, 2001 MT 130, 305 M 427, 28 P3d 1073 (2001), in which the question of voluntariness of a plea because of ineffective assistance of counsel was remanded for a hearing, despite the previous disposition of other voluntariness claims on direct appeal, because discussions between defendant and counsel were not record-based and thus could be presented only through postconviction proceedings.

Failure of District Court to Hold Hearing After Initial Inquiry Indicated Possible Ineffective Assistance — Remand for Hearing: Gallagher was charged with one count of felony assault (now assault with a weapon). At a hearing intended to be a change of plea hearing, LaFountain, Gallagher's public defender, put Gallagher on the witness stand. Gallagher testified as to the conflicts between him and LaFountain, those conflicts being LaFountain's advice to Gallagher that Gallagher plead guilty when Gallagher did not want to do so and a personality conflict between Gallagher and LaFountain. Gallagher then requested the District Court to appoint different counsel, but no change of counsel was made. Shortly before trial, LaFountain filed a motion to withdraw, but the motion was denied. Citing Billings v. Smith, 281 M 133, 932 P2d 1058 (1997), the Supreme Court determined that the District Court did make an adequate initial inquiry into Gallagher's complaint of ineffective assistance when the District Court heard testimony by Gallagher, at what was supposed to be a change of plea hearing, concerning the conflicts between Gallagher and LaFountain. However, the Supreme Court also held that the first hearing put the District Court on notice that Gallagher's complaints were seemingly substantial and that the District Court should therefore have held a second hearing to further investigate those complaints. Because the District Court failed to hold a second hearing, the Supreme Court remanded the case to the District Court and required that the District Court hold a second hearing to determine if Gallagher's right to effective assistance of counsel was denied, saying that if his right was denied, then the judgment and sentence against him are vacated, including any fines and costs imposed, and that a new trial is ordered. St. v. Gallagher, 1998 MT 70, 288 M 180, 955 P2d 1371, 55 St. Rep. 284 (1998), followed in St. v. Weaver, 2001 MT 115, 305 M 315, 28 P3d 451 (2001), and in Halley v. St., 2008 MT 193, 344 M 37, 186 P3d 859 (2008).

Failure to Interview Witnesses Whose Statements Were Read by Counsel and Admitted by Defendant: Defense counsel did not render ineffective assistance by not interviewing witnesses whose written statements were reviewed by defense counsel and admitted to be accurate by defendant, who told defense counsel that he had killed the victim. St. v. Thomas, 285 M 112, 946 P2d 140, 54 St. Rep. 1068 (1997).

Failure to Investigate for Mental Problem — Absence of Evidence to Support One: Defense counsel did not render ineffective assistance of counsel by not investigating whether defendant's mental condition at the time that he killed the victim was a mitigating circumstance as to the death penalty. Defendant vehemently objected to the idea. Counsel's observations of defendant led him to believe that defendant was not suffering from a mental disease or defect. Defendant's history did not indicate a mental disease or defect at the time of the killing. St. v. Thomas, 285 M 112, 946 P2d 140, 54 St. Rep. 1068 (1997).

Potential for Emotional Involvement as Juror Bias — Omissions by Counsel During and as Result of Voir Dire as Ineffective Assistance Warranting Reversal: Two prospective jurors expressed reservations about their ability to judge a case fairly, yet counsel failed either to follow up with additional questions about whether the prospective jurors could set aside their feelings and render a fair verdict or to exclude the jurors by challenge for cause or peremptorily. When counsel, for no apparent reason, abandons a client's right to challenge a juror, error is attributed to counsel. The presence on a jury of even one juror who cannot fairly assess the credibility of witnesses is considered prejudicial. Counsel's failure to take steps to prevent the presence on the jury of two such jurors constituted ineffective assistance of counsel and reversible error. St. v. Chastain, 285 M 61, 947 P2d 57, 54 St. Rep. 1044 (1997), following U.S. v. Eubanks, 591 F2d 513 (9th Cir. 1979), overruled in St. v. Herrman, 2003 MT 149, 316 M 198, 70 P3d 738 (2003), to the extent that a claim of ineffective assistance of counsel for failure to challenge prospective jurors in voir dire can be determined from a record that is silent as to counsel's reasoning, and overruled

regarding whether claim of ineffective assistance of counsel for failure to challenge prospective jurors in voir dire can be determined from a record that is silent as to the counsel's reasoning in St. v. Vukasin, 2003 MT 230, 317 M 204, 75 P3d 1284 (2003).

Failure by Attorney to Investigate Effect of Defendant's Medication as Deficient Representation — Lack of Evidence of Effect of Medication on Defendant — No Prejudice: Defense counsel's failure to investigate the nature, effects, and amounts of defendant's medication was not a strategic decision based on professional deliberation and constituted deficient representation under the first prong of the Strickland test for ineffective assistance of counsel. However, in determining that the drug had no negative effect on defendant, the District Court considered the testimony of a psychiatrist who established that the drug in question could interfere with executive brain functions and have negative side effects on a person's judgment, and therefore the failure to investigate resulted in no prejudice to defendant. The fact that defendant expressed remorse did not excuse counsel's duty to investigate the amount and effects of the medication. The court's findings were not clearly erroneous and were supported by substantial evidence in the record, including defendant's own testimony that the drug did not affect him mentally. Bone v. St., 284 M 293, 944 P2d 734, 54 St. Rep. 890 (1997).

Failure to Object to Testimony — Choice of Trial Tactics in Presentation of Evidence Held Not Ineffective Assistance as Matter of Law — Failure to Object to Prosecutor Comment on Credibility Held Not to Be Denial of Effective Assistance of Counsel: Hanson was convicted of sexual assault and deviate sexual conduct. He retained different counsel and appealed his conviction, alleging ineffective assistance of counsel because his trial counsel failed to object to the testimony of three witnesses. The Supreme Court held that Hanson's trial counsel may have failed to object as a matter of trial strategy because his strategy was to disprove the credibility of the witnesses' testimony through cross-examination or through the testimony of other witnesses. The Supreme Court also held that one comment by the prosecutor on the believability of the testimony of an expert witness may have been improper but, in this case, did not rise to the level of ineffective assistance of counsel. St. v. Hanson, 283 M 316, 940 P2d 1166, 54 St. Rep. 678 (1997).

Counsel's Abandonment of Appeal — Postconviction Claims: All claims foreclosed from appeal because of counsel's abandonment of appeal may be raised in a postconviction petition. Hans v. St., 283 M 379, 942 P2d 674, 54 St. Rep. 654 (1997). In a subsequent proceeding, the state and Hans disagreed as to which claims were properly before the Supreme Court as part of the second amended petition for postconviction relief. Clarifying the 1997 Hans I decision, the court held that under this case scenario, Hans was entitled to raise two types of issues: (1) those issues that could have been raised in a direct appeal but for counsel's abandonment of the appeal; and (2) those issues properly raised in a petition for postconviction relief under 46-21-101 that had not already been raised. In the future, a defendant whose counsel has abandoned an appeal should raise, in one petition for postconviction relief, the claim that counsel was ineffective in abandoning the appeal, all claims that could have been raised on direct appeal, and all claims that would normally be appropriate in a petition for postconviction relief, including challenges to the validity of the sentence and other ineffective assistance claims. In this case, Hans's objections to sentencing procedures were not properly preserved but were properly brought under the postconviction relief proceeding pursuant to 46-21-101. Those objections, as well as the ineffective assistance claims not raised in the first petition for postconviction relief, were not subject to dismissal as requested by the state. In re Petition of Hans, 1998 MT 7, 288 M 168, 958 P2d 1175, 55 St. Rep. 21 (1998). See also In re Petition of Evans, 250 M 172, 819 P2d 156 (1991), and St. v. Nelson, 274 M 11, 906 P2d 663 (1995).

Ineffective Assistance Claims Denied — No Right to Miranda Warning When Defendant Requests Psychiatric Exam — Duty to Inform Defendant of Consequences of Participation in Evaluation: The defendant alleged that counsel failed to provide effective counsel based on lack of communication, adequacy of advice regarding mitigated deliberate homicide, adequacy of advice regarding mental illness, requesting and agreeing to the dissemination of mental health evaluations, ineffectiveness of the investigation and preparation for trial, and abandonment of the appeal. The Supreme Court denied the petition for postconviction relief except to allow the defendant to amend the petition to address appealable sentencing issues. The defense counsel's acquiescence to dissemination of the mental health report pursuant to 46-14-202 is not grounds for a finding of ineffective assistance of counsel. Subsequently decided case law cannot be used to judge an attorney's conduct at the time of representation. A defendant has no constitutional right to be informed of Miranda rights when, through the defendant's attorney, the defendant requests a psychiatric exam. Counsel has a duty to inform a defendant of the consequences of participation in a psychiatric evaluation. In this case, the defendant was not prejudiced by the

defense counsel's alleged failure to inform the defendant of the right to remain silent during the mental health evaluation. Hans v. St., 283 M 379, 942 P2d 674, 54 St. Rep. 654 (1997).

Postconviction Relief Denied — Counsel Not Ineffective — Guilty Plea Properly Entered — Mental Health Evaluators' Failure to Advise Defendant of Rights Not Violation of Due Process — Petition Allowed on Appealable Sentencing Issues: The defendant, who was 14 years old at the time of a school shooting incident, pleaded guilty to four counts and was sentenced to the Department of Corrections for 100 years. The defendant petitioned for postconviction relief based on the claims of ineffective assistance of counsel; that the guilty plea was not entered knowingly, voluntarily, and intelligently; and that the defendant was denied due process because the mental health evaluators did not advise the defendant of the right to counsel, of the right not to submit to evaluation, and that statements could be used against him. The Supreme Court denied the petition for postconviction relief except to allow the defendant to amend the petition to address appealable sentencing issues. Hans v. St., 283 M 379, 942 P2d 674, 54 St. Rep. 654 (1997).

Motion for Continuance Must Be Treated as Request for Substitution of Counsel: Smith moved the trial court for a continuance in order to have time to find new counsel. The trial court denied the motion without any inquiry as to Smith's reasons for his request, giving Smith only the choice of keeping his court-appointed counsel or representing himself. The Supreme Court held that regardless of the form of Smith's motion, the trial court should have treated it as a request for substitution of counsel and that the lower court had erred in not conducting at least an inquiry into whether Smith's complaints were substantial enough to warrant a hearing on the effectiveness of his counsel. Billings v. Smith, 281 M 133, 932 P2d 1058, 54 St. Rep. 96 (1997), followed in St. v. Gallagher, 1998 MT 70, 288 M 180, 955 P2d 1371, 55 St. Rep. 284 (1998).

Failure to Request Instruction on Nonaggressor Principle of Self-Defense — Claim That Victim Was Aggressor — No Ineffective Assistance: Assault defendant's defense was that the victim was the initial aggressor. No one testified that defendant was the aggressor. The court instructed on self-defense, including the rule that the person using the defense cannot have been the aggressor, but did not instruct on exceptions to the rule. Defense counsel decided as a tactical matter not to request an exceptions instruction because it would not be consistent with the defense that the victim was the aggressor. That decision was based on informed professional deliberation and was not the result of neglect or ignorance. Thus, there was no ineffective assistance of counsel. St. v. Gonzales, 278 M 525, 926 P2d 705, 53 St. Rep. 1015 (1996).

Motion for New Trial Properly Denied — Attorney Assistance Not Ineffective: Swan argued that he was ineffectively represented because his attorney failed to request an instruction on a lesser included offense, neglected to ensure Swan's presence at an in camera hearing at which the trial court considered and answered a note from the jury inquiring whether an assault instruction applied to a felony aggravated assault charge as well as a felony assault (now assault with a weapon) charge, and allowed joinder of felony assault (now assault with a weapon) and felony aggravated assault charges. Finding that Swan failed to meet the first prong of the Strickland test, the Supreme Court held that Swan was effectively represented because counsel's performance was within the range of competence demanded of counsel in such cases and did not prejudice Swan in a manner that would have resulted in a different trial result. St. v. Swan, 279 M 483, 928 P2d 933, 53 St. Rep. 1246 (1996).

Attorney's Disclosure of Information Without Client's Consent — Presumption of Prejudice: Prior to defendant's trial for felony assault (now assault with a weapon), a court-appointed attorney moved to withdraw as counsel based on Rule 1.16, Montana Rules of Professional Conduct, which requires an attorney to withdraw when continued representation would result in a violation of the rules of professional conduct. The attorney informed the court that the defendant, against the advice of counsel, had communicated an intent to testify falsely at trial. The District Court denied the attorney's motion to withdraw, and the defendant was subsequently convicted of assault. On appeal, the Supreme Court reversed and remanded, ruling that the attorney's disclosure of confidential information implicated the attorney's duty of loyalty and the defendant's constitutional right to effective assistance of counsel. St. v. Jones, 278 M 121, 923 P2d 560, 53 St. Rep. 864 (1996).

Effective Assistance of Appellate Counsel — Standards on Appeal: Brown was convicted of felony assault (now assault with a weapon), and the conviction was affirmed on appeal. Brown then filed a petition for postconviction relief, claiming ineffective assistance of his appellate counsel. The Supreme Court held, on Brown's various arguments why Hood, Brown's appellate counsel, was ineffective, that: (1) a proper interpretation of the law by counsel is, as a matter of law, not deficient performance; (2) Hood's analysis of trial counsel's reasons for not objecting to the admissibility of certain evidence was correct, given the Supreme Court's independent conclusion

that failure of trial counsel to object was a matter of trial strategy; and (3) the Supreme Court would not reweigh the evidence as to whether Hood allowed Brown to review and comment on the appellate brief. Brown v. St., 277 M 430, 922 P2d 1146, 53 St. Rep. 692 (1996).

Failure to Inquire Into Claims of Ineffective Assistance of Counsel as Reversible Error: Weaver entered a guilty plea to charges of misdemeanor assault, issuing bad checks, and domestic abuse. Weaver subsequently filed a pro se motion to change his plea and a "motion to relieve counsel". At a sentencing hearing, the District Court Judge stated that she had reviewed "most of the motions that have been filed in these matters" but did not "see where they will have anything to do with the sentencing in this matter". The state argued as if the motion to relieve counsel was denied, but the Supreme Court noted that the record was devoid of any indication that the District Court had made even a cursory inquiry into Weaver's complaints about his counsel's representation. Citing St. v. Finley, 276 M 126, 915 P2d 208, 53 St. Rep. 310 (1996), overruled, to the extent that it stands for the proposition that a criminal defendant has a right to a "meaningful attorney-client relationship", in St. v. Gallagher, 2001 MT 39, 304 M 215, 19 P3d 817A (2001), the Supreme Court held that when a defendant files a motion to remove the defendant's attorney because of claims of ineffective assistance of counsel, the District Court must make a critical analysis of the defendant's complaints and, if the defendant has presented seemingly substantial complaints, must hold a hearing to determine the validity of the defendant's claims. Therefore, the Supreme Court held that the District Court erred in failing to take these steps regarding Weaver's claims. St. v. Weaver, 276 M 505, 917 P2d 437, 53 St. Rep. 495 (1996), overruled, to the extent that it stands for the proposition that a criminal defendant has a right to a "meaningful attorney-client relationship", in St. v. Gallagher, 2001 MT 39, 304 M 215, 19 P3d 817A (2001).

Failure to Appoint New Counsel During Posttrial Hearing on Counsel's Effectiveness: Finley contended that the District Court denied him his right to counsel's undivided loyalty under 46-21-201 by failing to appoint new counsel to represent him at a posttrial hearing regarding his counsel's effectiveness, at which his counsel confronted him concerning the sufficiency of his allegations of ineffectiveness and then took the stand to rebut those allegations. Section 46-21-201 was not in effect at the time of the hearing and thus did not apply; however, under 46-21-101, a postconviction hearing is a separate proceeding that is available after sentencing and applies when there is no adequate remedy of appeal. Further, under this section, the right to counsel is composed of two correlative rights—the right to counsel of reasonable competence and the right to counsel's undivided loyalty. The Supreme Court applied St. v. Zackuse, 250 M 385, 833 P2d 142 (1991), in holding that when a defendant and counsel have a conflict so great that it results in a total lack of communication or that if counsel fails to render effective assistance, new counsel should be appointed. The potential for substantial prejudice to Finley existed at the posttrial hearing, qualifying the hearing as a critical stage in the proceedings. It was error for the trial court to fail to appoint new counsel, at least for purposes of the competency hearing. St. v. Finley, 276 M 126, 915 P2d 208, 53 St. Rep. 310 (1996), overruled, to the extent that it stands for the proposition that a criminal defendant has a right to a "meaningful attorney-client relationship", in St. v. Gallagher, 2001 MT 39, 304 M 215, 19 P3d 817A (2001).

Failure to Offer Jury Instruction on Lesser Offense — Tactical Decision — Assistance Not Deficient: Leyba contended that he was denied effective assistance because his counsel offered only a deliberate homicide jury instruction when Leyba's defense was based on mitigating circumstances and his counsel should have offered an instruction that would have allowed the jury to consider whether he was guilty of mitigated deliberate homicide. However, the record indicated a self-defense theory at trial and that Leyba and his counsel made a tactical trial strategy decision, based on informed professional deliberation, to seek absolute acquittal on the self-defense theory. The decision was not the result of neglect or deficient performance on the part of counsel and was within the range of competence demanded of attorneys in criminal cases. St. v. Leyba, 276 M 45, 915 P2d 794, 53 St. Rep. 7 (1996), following Bashor v. Risley, 730 F2d 1228 (9th Cir. 1984), and St. v. Sheppard, 270 M 122, 890 P2d 754 (1995).

Refusal to Cooperate With Court-Appointed Attorney and Refusal to Proceed Pro Se — No Error to Proceed With Trial: Before trial, the defendant made a motion for substitution of counsel, which the court denied. At trial, the defendant refused to cooperate with his court-appointed counsel or to proceed pro se. Trial continued with no defense being offered. The Supreme Court held that the District Court had not abused its discretion in denying the request for a new trial and did not deny the defendant's constitutional right to the assistance of counsel by refusing to substitute court-appointed counsel, thereby giving the defendant the option of proceeding to trial with his court-appointed counsel or appearing pro se. The Supreme Court found that by not cooperating with the court-appointed counsel and not proceeding pro se, the defendant attempted

to manipulate the District Court into appointing new counsel. The Supreme Court found that the court-appointed counsel did provide effective assistance and that only the defendant's noncooperation compromised the representation. The court cannot countenance manipulation of the sixth amendment in order to sabotage the criminal justice system. St. v. Craig, 274 M 140, 906 P2d 683, 52 St. Rep. 1158 (1995).

Ineffective Assistance of Counsel — Minute Entry of Defense Counsel's Comments Held Not Prejudicial on Charge of Bail-Jumping — Instruction on Notice to Attorney Not Prejudicial: Wereman was convicted of bail-jumping after a trial in which he testified that he failed to appear because he thought that the charge would be dismissed. The Supreme Court held that a comment by defense counsel, that counsel did not know where Wereman was, made earlier when Wereman failed to appear on a charge of aggravated assault, did not represent a conflict of interest between counsel and Wereman and did not constitute ineffective assistance of counsel. The Supreme Court stated that because Wereman himself stated that he failed to appear because he thought that the charges would be dismissed, not because he lacked notice, the comments by defense counsel contained in a minute entry did not impact on counsel's ability to represent Wereman and were not prejudicial. Citing St. v. Blackbird, 187 M 270, 609 P2d 708 (1980), the Supreme Court also held that the District Court's instruction imputing notice to Wereman from his defense counsel should not have been given but that in this case, the giving of the instruction was harmless error. St. v. Wereman, 273 M 245, 902 P2d 1009, 52 St. Rep. 958 (1995).

Ineffective Assistance Claims Denied — No Prejudice Shown Under Strickland Test: Applying the Strickland test for determining effectiveness of counsel, the Supreme Court dismissed defendant's claims that he was ineffectively represented at trial, during the penalty phase proceedings, and during the course of direct appeal, including claims based on: (1) failure to object to prosecutor's statements that defendant was intoxicated at the time of the crime, when that was in fact true, and to object to an intoxication instruction that was based on statutory language; (2) failure to object to closing arguments during which the prosecutor portrayed himself as the victim and narrated in the first person (following U.S. v. Necoechea, 986 F2d 1273 (9th Cir. 1993)); (3) failure to object to the lack of corroborating evidence regarding a witness's testimony when the objection lacked merit and would have been properly overruled (following St. v. Rodgers, 257 M 413, 849 P2d 1028 (1993)); (4) failure to investigate and pursue a mental defect defense after defendant's own psychologist of choice found him capable of going to trial (see Harris v. Vasquez, 949 F2d 1497 (9th Cir. 1990)); (5) failure to move for a substitute judge when there was no reasonable probability that the outcome of the trial would have differed with another judge presiding; (6) failure to request a change of venue absent evidence of juror bias and failure to adequately voir dire the jury when there was no reasonable probability that the outcome of the trial would have differed had voir dire been conducted more thoroughly; (7) ineffectiveness in investigating a witness's background when counsel's investigation fell within the wide range of competent assistance; (8) failure to investigate defendant's suicide attempt; (9) failure to object to certain jury instructions allowing inference of the existence of the requisite mental state from the acts of the accused (following St. v. Cowan, 260 M 510, 861 P2d 884 (1993)); (10) failure to object to instructions setting out the elements of aggravated kidnapping when defendant did not specify which of the alternatives in the instruction were objectionable (following Schad v. Ariz., 501 US 624, 115 L Ed 2d 555, 111 S Ct 2491 (1991)); (11) failure to object to the absence of Native Americans on the jury when, given recent census data, counsel could not have demonstrated that Native Americans were underrepresented on the panel; and (12) failure to object to the presence of armed officers in the courtroom (following Holbrook v. Flynn, 475 US 560, 89 L Ed 2d 525, 106 S Ct 1340 (1986)). Kills On Top v. St., 273 M 32, 901 P2d 1368, 52 St. Rep. 608 (1995).

Failure to Raise Claim of Erroneous Denial of Counsel Absent Legal Basis — Counsel's Trial Tactics — Not Deficient Performance: Counsel's failure to raise a claim of erroneous denial of counsel absent a legal basis for doing so does not constitute deficient performance. Further, decisions relating to presentation of the case, including whether to introduce certain evidence or to present witnesses, generally are matters of trial tactics and strategy and will not support a claim of ineffective assistance of counsel. St. v. Henry, 271 M 491, 898 P2d 1195, 52 St. Rep. 516 (1995).

Failure of Counsel to Take Certain Trial Actions for Strategic Reasons — Assistance Not Considered Ineffective: Trial counsel's failure to attempt to introduce inadmissible evidence, failure to make an objection that lacked merit, failure to object to admissible hearsay rebuttal testimony, failure to request a mistrial, and other actions taken for strategic reasons did not constitute ineffective assistance of counsel. St. v. Hildreth, 267 M 423, 884 P2d 771, 51 St. Rep.

1086 (1994). See also St. v. Langford, 248 M 420, 813 P2d 936 (1991), and St. v. Rodgers, 257 M 413, 849 P2d 1028 (1993), and Adams v. St., 2007 MT 35, 336 M 63, 153 P3d 601 (2007).

Failure to Meet Second Prong of Strickland Test — No Prejudice Shown — Claim of Ineffective Counsel Denied: Denny's counsel neglected to investigate and interview several witnesses in her case, which satisfied the first prong of the Strickland test for ineffective counsel. However, because the potential witnesses were never interviewed, it was impossible to determine whether their testimony would have produced a different result. The second prong of Strickland was not satisfied because Denny could not demonstrate that counsel's omission prejudiced the case to such a degree as to deprive Denny of a fair trial. Denny's motion for a new trial on grounds of ineffective assistance of counsel was properly denied. St. v. Denny, 262 M 248, 865 P2d 226, 50 St. Rep. 1537 (1993), following Nealy v. Cabana, 764 F2d 1173 (5th Cir. 1985), United States ex rel. Cross v. DeRobertis, 811 F2d 1008 (7th Cir. 1987), and Lawrence v. Armontrout, 900 F2d 127 (8th Cir. 1990), and cited in St. v. Hagen, 273 M 432, 903 P2d 1381, 52 St. Rep. 1048 (1995). Hagen was followed in St. v. Boucher, 1999 MT 102, 294 M 296, 980 P2d 1058, 56 St. Rep. 431 (1999), and St. v. Cady, 2000 MT 353, 303 M 258, 15 P3d 479, 57 St. Rep. 1491 (2000).

Failure to Oppose Admission of Evidence Absent Legal Basis — Not Deficient Performance: Counsel's failure to oppose the admission of evidence, absent a legal basis for doing so, does not constitute deficient performance. St. v. Bradley, 262 M 194, 864 P2d 787, 50 St. Rep. 1511 (1993), followed in St. v. Henry, 271 M 491, 898 P2d 1195, 52 St. Rep. 516 (1995).

Use of Psychiatric Report Not Violative of Right to Effective Counsel: Smith relied on Estelle v. Smith, 451 US 454, 68 L Ed 2d 359, 101 S Ct 1866 (1981), and Powell v. Tex., 492 US 680, 106 L Ed 2d 551, 109 S Ct 3146 (1989), in claiming that the state's use of a psychiatrist's report and testimony to establish aggravating factors and rebut mitigating evidence exceeded the scope of the examination as set by the trial court, violating Smith's constitutional right to effectively consult with his attorney prior to the examination. However, the court's citation to the report merely supplemented preceding citations to other evidence and did not serve as the court's sole support for any findings or exceed the scope of the examination. The state's use of the report and testimony was qualitatively different from the prosecution's use of psychiatric evidence in Estelle and Powell and did not violate Smith's right to effective assistance of counsel. St. v. Smith, 261 M 419, 863 P2d 1000, 50 St. Rep. 1388 (1993).

Defendant to Assert Desire to Appeal Conviction: The Supreme Court ruled that Walker had been informed of his right to an appeal and had not requested either of his counsel to file a notice of appeal and therefore had no basis for a claim of ineffective assistance of counsel. Walker v. St., 261 M 1, 862 P2d 1, 50 St. Rep. 1115 (1993).

Advice to Enter Alford Plea Not Ineffective Assistance of Counsel: Defendant contended that he was not provided with effective assistance of counsel with respect to his attorney's advice that he enter Alford pleas to the charged offenses rather than proceed to trial. The attorney was prepared to go to trial. On the morning of the trial, defendant asked him about an Alford plea, which the attorney explained to defendant and defendant understood. Thus, defendant did not meet the first prong of the Strickland test for proving ineffective assistance of counsel by showing that the attorney's performance fell below the range of competence reasonably demanded of attorneys. St. v. Cameron, 253 M 95, 830 P2d 1284, 49 St. Rep. 150 (1992).

Defendant Not Adversely Affected by Counsel's Drug Arrest: Defendant appealed his conviction for possession of drugs and drug paraphernalia, alleging that he was denied effective assistance of counsel arising from a conflict of interest because his attorney was subsequently charged with conspiracy to manufacture and distribute drugs and with tax fraud arising from the sale of drugs. The Supreme Court held that because the performance of defendant's attorney was not adversely affected by an actual conflict of interest, defendant was not denied effective assistance of counsel under the two-pronged standard established by the U.S. Supreme Court in Cuyler v. Sullivan, 446 US 335, 64 L Ed 2d 333, 100 S Ct 1708 (1980). St. v. Christenson, 250 M 351, 820 P2d 1303, 48 St. Rep. 1034 (1991).

Failure to Object to Substitution of Witness — Failure to Interview Witness: In order to prevail on a claim of ineffective assistance of counsel, a defendant must show that a reasonable probability exists that but for his counsel's deficient performance, the trial's outcome would have been different. Failure to object to the adding of a name to the list of witnesses 3 weeks before trial under the circumstances of this case was not deficient. Even if failure to interview a witness was deficient, in light of the overwhelming evidence against him, the defendant cannot make the required showing. St. v. McLain, 249 M 242, 815 P2d 147, 48 St. Rep. 664 (1991).

Ineffective Assistance Claim on Direct Appeal Res Judicata: An evidentiary hearing held on the issue of ineffective assistance of counsel resulted in a District Court decision that the

Supreme Court reviewed and affirmed. On direct appeal, the claim was held to have been fully litigated and reconsideration was barred because additional review of the same issue between the same parties would negate the intent of the doctrines of res judicata and law of the case. St. v. Black, 245 M 39, 798 P2d 530, 47 St. Rep. 1677 (1990), distinguished in St. v. Lindeman, 285 M 292, 948 P2d 221, 54 St. Rep. 1156 (1997).

When Ineffective Assistance Claims More Appropriately Addressed by Petition for Postconviction Relief: Relying on the decision in U.S. v. Birges, 723 F2d 666 (9th Cir. 1984), the Supreme Court held that ineffective assistance of counsel claims raised on direct appeal and involving the consideration of facts beyond the record would more appropriately be addressed by a petition for postconviction relief. A defendant whose claim of ineffectiveness was appropriately classified as a petition for postconviction relief was not constitutionally entitled to counsel because such petitions are civil in nature and are not governed by constitutional requirements for counsel. St. v. Black, 245 M 39, 798 P2d 530, 47 St. Rep. 1677 (1990), followed in Thurston v. St., 2004 MT 142, 321 M 411, 91 P3d 1259 (2004). See also St. v. Mallak, 2005 MT 49, 326 M 165, 109 P3d 209 (2005).

Denial of Motion to Withdraw Guilty Plea Based on Ineffective Counsel: As set out in Hill v. Lockhart, 474 US 52, 88 L Ed 2d 203, 106 S Ct 366 (1985), when a guilty plea rather than the result of a trial is at issue in determining effectiveness of counsel, the defendant must demonstrate that but for counsel's deficient performance, defendant would not have pleaded guilty and would have insisted on going to trial. Failure to present such evidence, coupled with a lack of evidence showing that counsel's performance fell below the range of competence reasonably demanded of attorneys in criminal cases, was adequate to substantiate denial of defendant's petition for postconviction relief based on ineffective representation. St. v. Senn, 244 M 56, 795 P2d 973, 47 St. Rep. 1389 (1990), followed in St. v. Jungers, 245 M 519, 802 P2d 615, 47 St. Rep. 2229 (1990), St. v. Mason, 253 M 419, 833 P2d 1058, 49 St. Rep. 506 (1992), St. v. Bradley, 262 M 194, 864 P2d 787, 50 St. Rep. 1511 (1993), St. v. Duff, 262 M 288, 865 P2d 238, 50 St. Rep. 1561 (1993), and In re Petition of Hinman, 271 M 167, 895 P2d 609, 52 St. Rep. 351 (1995).

Failure to Question Witness: The defendant argued that he had been denied effective assistance of counsel because his attorney did not question a witness concerning the witness's statements that the defendant had not had an opportunity to molest the victim. The Supreme Court noted that the defendant's attorney chose to develop the evidence tending to prove that the defendant was not present in the victim's home on the night of the alleged incident. The court stated that such a decision was in the sound discretion of counsel and did not constitute ineffective representation. St. v. Henderson, 242 M 384, 791 P2d 442, 47 St. Rep. 817 (1990).

Defendant-Attorney Relationship Need Not Be Meaningful: The defendant alleged that he had received ineffective assistance of counsel because the lower court had denied his motion for substitution of counsel. The Supreme Court held that the record indicated that while the defendant and his attorney may have had a conflict, it had not resulted in a total communication breakdown. St. v. Albrecht, 242 M 403, 791 P2d 760, 47 St. Rep. 800 (1990).

Counsel's Refusal to Attack Testimony of Defendant's Wife: The defendant argued that he had not received effective representation because his attorney refused to attack the testimony of the defendant's wife. The defense attorney filed an affidavit indicating that she had not questioned the wife because she did not want to open the door for evidence that might lead to the introduction of the defendant's previous conviction for killing his first wife. The Supreme Court held that the attorney's decision was one of trial tactics and did not result in prejudice to the defendant. Hawkins v. St., 242 M 348, 790 P2d 990, 47 St. Rep. 783 (1990).

Defendant Not Prejudiced by Counsel's Attempt to Impeach State Witness: Defendant contended that his counsel's performance was deficient because he failed to adequately present evidence to impeach the state's key witness against the defendant. Defendant's allegations of error amount to an attempt to second guess his counsel's trial tactics and strategies. When, as in this case, no prejudice to defendant is shown, the court will not question counsel's professional deliberations. St. v. Stewart, 235 M 239, 767 P2d 296, 45 St. Rep. 2350 (1988), followed in St. v. Paulson, 250 M 32, 817 P2d 1137, 48 St. Rep. 838 (1991).

Effective Assistance of Counsel — Two-Part Test: In holding that the record does not support the defendant's claim of ineffective counsel, the Montana Supreme Court followed the two-part test adopted in St. v. Boyer, 215 M 143, 695 P2d 829, 42 St. Rep. 247 (1985). The defendant had to show that counsel's performance was deficient and that the deficient performance prejudiced the defense. In this case, the defendant's attempts to disqualify the judge were disallowed due to the defendant's own procedural error before counsel became involved in the defense. St. v. Hoch, 234 M 405, 763 P2d 1119, 45 St. Rep. 2007 (1988).

Failure to Hold Hearing Regarding Effective Assistance of Counsel — Reversible Error: Defendant represented herself after requesting removal of counsel and being denied appointment of substitute counsel. The trial court determined defendant was competent to represent and that she had made a knowing and voluntary waiver of counsel. However, it was error for the court to fail to hold an independent hearing to establish whether defendant had received effective representation and to determine the validity of her complaints concerning counsel. Failure to make such determination deprived defendant of the opportunity to make a meaningful choice to proceed pro se, infringing the right to effective assistance of counsel and the right to a fair trial, and constituted reversible error. St. v. Enright, 233 M 225, 758 P2d 779, 45 St. Rep. 1442 (1988) (overruled, to the extent that it stands for the proposition that a criminal defendant has a right to a "meaningful attorney-client relationship", in St. v. Gallagher, 2001 MT 39, 304 M 215, 19 P3d 817A (2001)), distinguished in St. v. Morrison, 257 M 282, 848 P2d 514, 50 St. Rep. 270 (1993) (overruled, to the extent that it stands for the proposition that a criminal defendant has a right to a "meaningful attorney-client relationship", in St. v. Gallagher, 2001 MT 39, 304 M 215, 19 P3d 817A (2001)), and St. v. Craig, 274 M 140, 906 P2d 683, 52 St. Rep. 1158 (1995), and followed in St. v. Weaver, 276 M 505, 917 P2d 437, 53 St. Rep. 495 (1996). See also St. v. Finley, 276 M 126, 915 P2d 208, 53 St. Rep. 310 (1996) (overruled, to the extent that it stands for the proposition that a criminal defendant has a right to a "meaningful attorney-client relationship", in St. v. Gallagher, 2001 MT 39, 304 M 215, 19 P3d 817A (2001)), in which failure to hold an initial determination of the substance of defendant's pro se complaints about counsel was held to be harmless error because the District Court held a posttrial hearing regarding counsel's representation, and Billings v. Smith, 281 M 133, 932 P2d 1058, 54 St. Rep. 96 (1997).

Request for Substitution of Counsel Denied — No Incompetence or Prejudice: Defendant asserted it was error for the District Court to deny his motion for substitution of counsel based on claims of attorney incompetence in the field of criminal law and prejudice due to the attorney being influenced by his brother, who had previously prosecuted the defendant. It was within the court's discretion to deny new counsel after finding that the attorney had practiced law, including criminal law, for 30 years. Further, prejudice and conflict of interest would be present only if the attorney's brother's prior prosecution of defendant and the charges at issue overlapped; however, the proceedings were entirely different. St. v. Martz, 233 M 136, 760 P2d 65, 45 St. Rep. 1370 (1988), followed in St. v. Zackuse, 48 St. Rep. 858 (1991) (apparently not reported in Montana Reports).

Claims of Ineffective Assistance Insufficient to Show Prejudice: Defendant claimed he received ineffective assistance of counsel due to his attorney's decision: (1) not to extensively cross- examine certain witnesses; (2) not to submit a self-defense instruction to the jury; and (3) not to challenge a juror for cause when no partiality or prejudice was shown. Defendant also claimed counsel was not adequately prepared for the sentencing hearing. The Supreme Court found counsel was prepared and that the alleged failures in assistance could as easily be classified as trial tactics. The court refused to second-guess counsel's tactics absent a showing of prejudice. St. v. Hurlbert, 232 M 115, 756 P2d 1110, 45 St. Rep. 923 (1988), followed in St. v. McColley, 247 M 524, 807 P2d 1358, 48 St. Rep. 290 (1991).

Manifest Necessity for Mistrial and Retrial — Ineffective Assistance of Counsel — No Basis for Reversal by Subsequent Trial Judge: After 1 day of trial, a trial court on its own motion exercised sound discretion in finding manifest necessity for a mistrial based on the conclusion that counsel was too inexperienced to defend a major felony charge involving conspiracy and accountability theories. The court also properly found that manifest necessity dictated the matter be retried and that the bar of double jeopardy did not prevent a retrial. On appeal, the Supreme Court distinguished Strickland v. Washington, 466 US 668, 80 L Ed 2d 674, 104 S Ct 2052 (1984), in noting that the second prong of the Strickland test was established for the consideration of action taken in the course of a complete trial. Because there was no way of showing whether counsel's conduct deprived defendant of a fair trial unless the trial had been allowed to go to a conclusion, Strickland was inapplicable. There was no basis for reversal of the mistrial decision by a subsequent trial judge. St. v. Moran, 231 M 387, 753 P2d 333, 45 St. Rep. 79 (1988). Opinion withdrawn, but issue affirmed in St. v. Moran, 231 M 387, 753 P2d 333, 45 St. Rep. 703 (1988).

Failure to Object — Tactical Decisions Within Counsel's Discretion: Defendant contended he received ineffective assistance of counsel because his attorneys failed to object to his arrest without a warrant, to most of the "other acts" evidence, to the original information until closing arguments, and to opinion testimony regarding the credibility of witnesses. The Supreme Court noted that the decisions on the timing and number of objections lie within counsel's tactical discretion and found that defendant failed to specifically show how these alleged errors constituted

deficient performance. The court declined to allow unsupported allegations to brand counsel's performance as deficient. St. v. Matson, 227 M 36, 736 P2d 971, 44 St. Rep. 874 (1987), followed in St. v. Brown, 228 M 209, 741 P2d 428, 44 St. Rep. 1462 (1987), followed in St. v. Smith, 232 M 156, 755 P2d 569, 45 St. Rep. 955 (1988).

Waiver of Counsel at Sentencing Hearing — Pro Se Appearance Not Ineffective Assistance of Counsel: Prior to a sentencing hearing, defendant filed a pro se motion for a new trial with over 50 pages of supporting documents in which he claimed that his counsel was ineffective. The motion was discussed at the hearing, and defendant's counsel was relieved from further duty but was appointed as standby counsel for defendant's reference for the remainder of the hearing. Defendant requested new counsel to pursue the claims set out in the motion, and the District Court explained that the matters raised in the motion could properly be raised on appeal, but not at the sentencing hearing. These facts, coupled with defendant's obvious familiarity with the criminal justice system, led to the conclusion that defendant was not denied effective assistance of counsel at the sentencing hearing. St. v. Martin, 226 M 463, 736 P2d 477, 44 St. Rep. 804 (1987).

Effectiveness of Counsel Who Withdrew Self-Defense and Mental Disease Defenses: It was not error for counsel to withdraw defenses of justifiable use of force and mental disease or defect when the former was unsupported by the facts and the doctors who examined defendant stated he did not have a mental disease or defect and could have acted with the requisite mental state. St. v. Docken, 222 M 58, 720 P2d 679, 43 St. Rep. 1058 (1986).

Failure to Object to Hearsay Testimony: While it was error for defense counsel in assault trial to fail to object to hearsay testimony and introduction of certain irrelevant evidence, such error, in view of the other supporting evidence, was not so prejudicial as to amount to ineffective assistance of counsel. St. v. Probert, 221 M 476, 719 P2d 783, 43 St. Rep. 988 (1986).

Decision to Call Witnesses — Trial Tactic — Not Grounds for Determination of Inadequacy of Counsel: The decision to call or not to call witnesses is a matter of trial tactics and is not a ground for a determination that the lawyer's representation of the client was not adequate. St. v. Elliott, 221 M 174, 717 P2d 572, 43 St. Rep. 723 (1986).

Effective Assistance of Counsel — Potential Charges Against Counsel as Conflict of Interest: Defendant asserted he did not receive effective assistance of counsel where his retained trial counsel mishandled the murder weapon and neither his counsel, the District Court Judge, nor the prosecutor informed him of the possible charges against his counsel which could have resulted in a conflict of interest between defendant and his counsel. The Supreme Court found that the record and findings made after the evidentiary hearing may have demonstrated improper action of counsel. However, given his conduct during trial, his testimony at the evidentiary hearing that he was not aware of any impending charges, the prosecutor's decision not to press charges but only refer the matter for investigation, and the lack of charges until the trial was completed, defendant was not denied effective assistance because of any misconduct of defense counsel or any failure to inform him of the possible charges prior to completion of the trial. St. v. Grant, 221 M 122, 717 P2d 562, 43 St. Rep. 685 (1986).

Defendant Not Prejudiced by Counsel's Lack of Diligence: It appeared defendant had his plea bargain practically guaranteed before Houtz was appointed. Houtz, after reviewing the case against his client, determined the plea bargain to be reasonable and fair. He therefore pursued and achieved finalization of that bargain. The Supreme Court also found the plea bargain to be reasonable and fair. The court was not persuaded that had defendant been advised of the victim's and a witness' inconsistent statements, he would have opted to proceed to trial on the attempted deliberate homicide charge. Thus, counsel's failure to advise his client of the complete case against him did not undermine the court's confidence in the eventual outcome, the plea bargain. St. v. LaTray, 220 M 358, 715 P2d 52, 43 St. Rep. 429 (1986).

Failure to Show Incompetency: Defendant was charged with two felonies occurring at about the same time and had been convicted of a felony 5 years prior to the current charges. Defendant pleaded guilty to avoid increased punishment as a persistent felony offender. Later, defendant sought to withdraw the guilty plea on grounds of coercion and ineffective assistance of counsel. The District Court denied the motion, and the Supreme Court affirmed. The defendant failed to show that his attorney's counseling was inadequate, incompetent, or not within the range of competence demanded of attorneys in criminal cases. Counsel was not ineffective when the attorney consulted with other criminal counsel and did all things to properly defend. St. v. Williamson, 218 M 242, 707 P2d 530, 42 St. Rep. 1551 (1985).

Failure to Give Mandatory Accomplice Jury Instruction — Harmless Error — Not Ineffective Assistance of Counsel: In petitioner's trial on the charge of attempted deliberate homicide, his

lawyer withdrew a previous request, in a jury instruction mandated by 26-1-303, that testimony of an accomplice must be viewed with distrust. Petitioner's theory of defense was that his alleged accomplices had fabricated their testimony. The judge did instruct the jury that testimony of accomplices must be corroborated. In a proceeding for postconviction relief, the Supreme Court ruled that the court's failure to give the mandatory instruction was harmless error and that the withdrawal by petitioner's lawyer of the request for the mandatory instruction was not ineffective assistance of counsel under Strickland v. Wash., 466 US 668, 80 L Ed 2d 674, 104 S Ct 2052 (1984). In re Gillham, 218 M 187, 707 P2d 1100, 42 St. Rep. 1508 (1985).

Failure to Raise Weak Search and Seizure Issue — Not Ineffective Assistance of Counsel: No illegal search or seizure was made when a private citizen, after allegedly promising a Deputy Sheriff to do so, went to the home of the woman who hired petitioner to kill her husband and obtained a gun (evidence of the alleged crime) from her. Petitioner's lawyer was not negligent for not moving to suppress introduction of the pistol as evidence at the time of the trial and not making it a subject for appeal. In re Gillham, 218 M 187, 707 P2d 1100, 42 St. Rep. 1508 (1985).

Six and a Half Weeks to Prepare for Burglary-Theft Trial — Sufficient Time: There was nothing to indicate that, when counsel for defendant convicted of two counts of burglary and one of theft had 6 1/2 weeks to prepare for trial, the attorney had insufficient time to adequately prepare and nothing to indicate that effective assistance of counsel was denied. St. v. Robbins, 218 M 107, 708 P2d 227, 42 St. Rep. 1440 (1985).

Specific Acts or Omissions That Deny Fair Trial: In St. v. Boyer, 215 M 143, 695 P2d 829, 42 St. Rep. 247 (1985), the court adopted the test set forth by the U.S. Supreme Court in Strickland v. Wash., 466 US 668, 80 L Ed 2d 674, 104 S Ct 2052 (1984), for determining when ineffective assistance of counsel has occurred. Applying that test in the instant case, the court found no specific acts or omissions which would have denied the defendant a fair trial. St. v. Grant, 217 M 357, 704 P2d 1064, 42 St. Rep. 1248 (1985).

Ineffective Assistance of Counsel Claim — Effect on Attorney-Client Privilege: When a convicted person files a petition for relief based on grounds of ineffective assistance of counsel, the petitioner's comprehension of waiver of privilege or his knowledge and consent to waiver are irrelevant. The attorney in question has a duty to respond by affidavit or other sworn testimony to admit, deny, or qualify the allegations of fact made in the petition. In future cases, if a response from a defense attorney so charged is necessary, the Attorney General shall first apply to the Supreme Court for an order preserving the responding attorney from charges of discipline or malpractice for revealing necessary confidential information from such convicted person. Petition of Gillham, 216 M 279, 704 P2d 1019, 42 St. Rep. 806 (1985). Gillham was clarified in Marble v. St., 2007 MT 98, 337 M 99, 169 P3d 1148 (2007). See also Bone v. St., 284 M 293, 944 P2d 734, 54 St. Rep. 890 (1997), wherein it was held that failure to secure an order from the Supreme Court pursuant to Petition of Gillham did not constitute prejudice to defendant because the District Court that ruled on the petition did not rely on preliminary findings on the issue.

Remand to Determine Effective Assistance of Counsel:

Defendant was convicted of felony theft of a jackhammer. New counsel appealed on the grounds that defendant was denied a fair trial and effective assistance of counsel. The Supreme Court remanded for an evidentiary hearing. The Supreme Court agreed with the findings and conclusions the trial court made at the hearing. Defendant's claim of ineffective assistance of counsel was not supported by the evidence. First defense counsel's decision to not call a defense witness at trial was clearly within the range of competence demanded of attorneys in criminal cases. The witness supposedly could have testified that he gave the jackhammer to defendant, but the witness' statement was not only inconsistent with known facts but destructive to the defendant's case. St. v. Field, 215 M 361, 697 P2d 1339, 42 St. Rep. 431 (1985).

The defendant was convicted of two counts of sexual intercourse without consent, and after a failure to perfect his appeal, the defendant's original counsel was disbarred. On appeal taken by the defendant's second counsel, the Supreme Court reviewed the record of the original trial wherein the defendant's first lawyer was shown to have been put on notice of the existence and location of evidence he did not properly examine and wherein it was shown that the first appeal was not perfected. Because it could not determine from these facts whether the defendant had received effective assistance of counsel at trial, the Supreme Court remanded the case to the District Court for an evidentiary hearing on the issue. St. v. Boyer, 208 M 258, 676 P2d 787, 41 St. Rep. 321 (1984). On remand, it was found that counsel's efforts were effective and client was adequately represented. St. v. Boyer, 215 M 143, 695 P2d 829, 42 St. Rep. 247 (1985), followed in St. v. Aills, 250 M 533, 822 P2d 87, 48 St. Rep. 960 (1991), and St. v. Hanson, 283 M 316, 940 P2d 1166, 54 St. Rep. 678 (1997).

Failure to Procure Witness — Not Ineffective Assistance of Counsel: Defense counsel failed to procure a witness, and defendant contended that this action constituted ineffective assistance of counsel. However, defendant did not contend that counsel was generally ineffective. The Supreme Court held that considering the circumstances surrounding the failure to procure the witness and the record of the proceeding, there was no ineffective assistance of counsel violating the defendant's constitutional rights. St. v. Harris, 209 M 511, 682 P2d 159, 41 St. Rep. 866 (1984).

Denial of Continuance When Attorney Informed of Appointment 25 Days Before Homicide Trial — Fair Trial and Effective Assistance Rights Denied: Attorney for defendant charged with deliberate homicide was relieved of his duty on December 14, and the new attorney learned of his appointment on December 30. On January 3, trial was set for January 24, and the new attorney was notified of the trial date on January 5. He spoke with the trial Judge on January 10 about a continuance, and on January 17 a motion for continuance was heard and denied. In the 7 days before trial, the attorney was able to interview only 8 of the state's 12 witnesses and could not locate possible defense witnesses or interview the state's pathologist. Refusal of the continuance was an abuse of discretion and reversible error requiring a new trial. The attorney's diligence was unquestioned, and though the state had a right to a speedy trial, the defendant's right to a fair trial must take precedence, particularly since defendant waived his speedy trial right. Defendant's rights to a fair trial and effective assistance of counsel were denied. St. v. Sotelo, 209 M 86, 679 P2d 779, 41 St. Rep. 568 (1984).

Capital Cases — Standard of Review for Ineffective Assistance of Counsel: The defendant was convicted of aggravated kidnapping and deliberate homicide and appealed the District Court's denial of his petition for postconviction relief. The Supreme Court declined to adopt a standard of review for ineffective assistance of counsel for capital cases different from the standard used in other criminal cases. The court found that numerous practical problems would be presented by such an approach and instead reaffirmed the application of the standard set forth in Cooper v. Fitzharris, 586 F2d 1325 (CA 9, 1978). The court also found that the defendant had not met his burden of proof of showing ineffective assistance of counsel whether the court applied the standard set out in Cooper or another standard urged by the defendant and set out in Knight v. St., 394 So2d 997 (Fla. 1981), and U.S. v. DeCoster, 624 F2d 196 (D.C. Cir. 1979). Fitzpatrick v. St., 206 M 205, 671 P2d 1, 40 St. Rep. 1598 (1983).

Conflict of Interest of Defense Counsel Waived or Not Proven — Ineffective Assistance Not Shown: Where the defendant was convicted of aggravated kidnapping and deliberate homicide, the District Court did not err in dismissing the defendant's petition for postconviction relief alleging ineffective assistance of counsel. The conflict of interest alleged by defendant in his trial counsel allegedly arose because his counsel had represented a codefendant to whom the defendant wanted to shift suspicion for the crimes committed. However, as a result of the first trial, the codefendant was acquitted of the charges and any attempt to shift suspicion would be impossible because the codefendant may not be retried. Even had there been a conflict of interest, the defendant, under the rationale of U.S. v. Partin, 601 F2d 1000 (CA 9, 1979), waived his right to raise the issue by his agreement at his pretrial hearing to accept Mr. Adams as his defense counsel, knowing that Mr. Adams had also represented a codefendant, and by not raising the issue of a conflict of interest at trial. Fitzpatrick v. St., 206 M 205, 671 P2d 1, 40 St. Rep. 1598 (1983).

Failure to Present Evidence in Mitigation of Sentencing — Ineffective Assistance Not Shown: Where the defendant was convicted of aggravated kidnapping and deliberate homicide, the District Court did not err in dismissing the defendant's petition for postconviction relief alleging ineffective assistance of counsel. The failure of defense counsel to raise the issue, at sentencing, of defendant's headaches and dizzy spells does not amount to ineffective assistance, as the defendant has not shown the relevancy of those headaches and spells to the sentencing process. Moreover, defense counsel did inform the District Court at sentencing that a previous statement of his concerning a murder committed by the defendant in prison was made mistakenly; but in light of other testimony, this slip of the tongue placed the defendant in an even more favorable light than the prosecution could have presented if the facts had become a contested point and was therefore nonprejudicial and does not show ineffective assistance of counsel. Fitzpatrick v. St., 206 M 205, 671 P2d 1, 40 St. Rep. 1598 (1983).

Failure to Use Evidentiary Material and Witnesses — Ineffective Assistance Not Shown: Where the defendant was convicted of aggravated kidnapping and deliberate homicide, the District Court did not err in dismissing the defendant's petition for postconviction relief alleging ineffective assistance of counsel. Defense counsel was not ineffective simply because he did not present evidence used in the trial of an acquitted codefendant and because he did not call

witnesses urged by the defendant. The defendant overlooked the fact that in the trial of the codefendant, the state's key witness failed to appear. This fact alone explains the acquittal of the codefendant. There were also rational explanations for defense counsel's failure to call each of the witnesses urged by the defendant, such as the fact that the witnesses were hostile, had poor memories, or showed poor demeanor in the presence of the jury. A failure to call witnesses for these kinds of reasons does not show ineffective assistance of counsel. Fitzpatrick v. St., 206 M 205, 671 P2d 1, 40 St. Rep. 1598 (1983).

Insufficient Trial Preparation — Ineffective Assistance of Counsel Not Shown: Where the defendant was convicted of aggravated kidnapping and deliberate homicide, the District Court did not err in dismissing the defendant's petition for postconviction relief alleging ineffective assistance of counsel. The only item of evidence submitted by the defendant to support his claim of insufficient trial preparation by defense counsel was a caseload listing showing the criminal cases assigned to defendant's counsel. An examination of the exhibit showed that many of the cases had been dismissed or did not come to trial until after the trial of the defendant's case, and the exhibit did not otherwise show a preclusion of preparation time for defense counsel. An examination of the records also showed that the pace of court calendaring meant that cases filed after the defendant's could not mature into triable contested cases until after the conclusion of the defendant's trial. The defendant therefore failed to demonstrate that defense counsel was insufficiently prepared. Fitzpatrick v. St., 206 M 205, 671 P2d 1, 40 St. Rep. 1598 (1983).

Waiver of Portion of Record — Meaningful Appellate Review: Defendant contended he was denied the effective assistance of counsel because his trial attorney waived the recording of the voir dire and opening and closing statements. Defendant contended this failure to protect the record made it impossible to receive meaningful appellate review. The court held that more definitive allegations of error in the unreported portions were necessary to conclude that defendant was deprived of due process. St. v. Madera, 206 M 140, 670 P2d 552, 40 St. Rep. 1558 (1983).

Ineffective Assistance of Counsel Mooted by Waiver of Counsel: Where the defendant pleaded guilty to one count of rape and later brought a petition for federal habeas corpus relief, the federal District Court found that although the defendant was entitled to representation at his sentencing hearing beyond an attorney who was simply "standing in", the court's finding that the defendant intelligently waived his right to counsel made the issue of ineffective assistance moot. Haynie v. Crist, 40 St. Rep. 923 (D.C. Mont. 1983) (apparently not reported in Federal Supplement).

Failure to Cooperate With Court-Appointed Counsel — No Right of Defendant to "Meaningful Attorney-Client Relationship": Where the defendant had been convicted of arson and sought to have his second court-appointed counsel replaced by arguing the failure of his attorney to communicate with him concerning his (the defendant's) version of the facts of his case amounting to an alibi defense, the District Court did not err in refusing to replace the second appointed counsel and the defendant was not thereby denied his right to effective assistance of counsel. The District Court record shows that the court took the defendant's request seriously, but there was simply no evidence shown at the second hearing on the issue to warrant appointment of a third lawyer, as the defendant's claim that his first and second lawyers were partners was not true. In Morris v. Slappy, 461 US 1, 75 L Ed 2d 610, 103 S. Ct 1610 (1983), the U.S. Supreme Court denied the existence of the "meaningful attorney-client relationship" test urged by the defendant. Moreover, the record shows that if defendant's counsel failed to present the defendant's view of the facts at trial, it was not caused by lack of diligence on counsel's part but by failure of the defendant to cooperate with his attorney. Therefore, any lack of communication between the defendant and his lawyer did not prevent effective assistance of counsel. St. v. Long, 206 M 40, 669 P2d 1068, 40 St. Rep. 1493 (1983), followed in St. v. Johnson, 221 M 384, 719 P2d 771, 43 St. Rep. 913 (1986), and St. v. Craig, 274 M 140, 906 P2d 683, 52 St. Rep. 1158 (1995).

No Ineffective Assistance of Counsel — Appellate Brief Misleading: The Supreme Court refused to rule that the defendant had been denied effective assistance of counsel when in an effort to make the cumulative total of errors as high as possible, counsel for the defendant on appeal had misstated the trial record, had taken sentences from the trial transcript out of context, and had alleged as errors many items that were not errors at all or were trivial errors. The Supreme Court also pointed out that it is not ethical for a lawyer to advance an unwarranted claim on behalf of a client. St. v. Hall, 203 M 528, 662 P2d 1306, 40 St. Rep. 621 (1983).

Failure to Interview Witnesses or Argue Self-Defense or Lesser Offenses: Defendant, convicted of deliberate homicide and aggravated kidnapping, was rendered ineffective assistance of counsel and was prejudiced by counsel's conduct to the point that convictions were reversed when, among other things, counsel: (1) failed to talk to six character witnesses prior to presenting them at trial, and none of the witnesses had an opinion as to the character of the person involved and an

attack upon that person's character might have damaged the state's case; (2) failed to present competent jury instructions to the trial court, including defenses and particularly self-defense, and argued against the state's proposed self-defense instruction; and (3) failed to argue mitigating circumstances and in summation argued defendant did not act in self-defense or commit negligent homicide, leaving the jury with only one option — conviction or acquittal of deliberate homicide as charged. St. v. LaValley, 203 M 393, 661 P2d 869, 40 St. Rep. 527 (1983).

Ineffective Assistance — Questions on Prior Charges and Convictions: Defense counsel questioned defendant on prior felony convictions and charges, opening him up to cross-examination on those matters. As a result, the jury had evidence from defendant regarding his involvement in an alleged burglary in which the circumstances and defense were almost identical to the present case. This was extremely prejudicial, indicated neglect or ignorance on the part of counsel, and was not within the range of competence demanded of an attorney in a criminal case. Ineffective assistance of counsel was rendered, requiring vacation of the verdict and remand for a new trial. St. v. Morigeau, 202 M 36, 656 P2d 185, 39 St. Rep. 2311 (1982). Morigeau and its progeny were overruled in Whitlow v. St., 2008 MT 140, 343 M 90, 183 P3d 861 (2008), to the extent that the "ignorance or neglect" test for ineffective assistance of counsel conflicts with the correct approach, which is the "objective standard of reasonableness" test set out in Strickland v. Wash., 466 US 668 (1984). Whitlow was followed in St. v. Wing, 2008 MT 218, 344 M 243, 188 P3d 999 (2008), distinguishing St. v. Parker, 2006 MT 258, 334 M 129, 144 P3d 831 (2006), and in Maldonado v. St., 2008 MT 253, 345 M 69, 190 P3d 1043 (2008).

Ineffective Assistance of Counsel — Failure to Pursue Appeal: In 1972, the defendant was convicted of assault and rape. A Sandstrom-type instruction was given at his trial. After conviction, his counsel told him that a notice of appeal had been filed when no notice had been filed. The defendant wrote to a Justice of the Montana Supreme Court seeking a transcript and aid in appealing his conviction. Over the next few years, the defendant made several pro se attempts to get a transcript, which he believed was necessary in order to perfect an appeal. In 1981, a federal court ordered the Montana Supreme Court to review the defendant's conviction and to provide him with counsel. On appeal, the Montana Supreme Court found that use of the Sandstrom-type instruction rendered his trial unfair and his right to counsel was denied by the informal and summary disposition of his appeal. A new trial was ordered. St. v. Swan, 199 M 459, 649 P2d 1297, 39 St. Rep. 1522 (1982).

Failure to Seek Jury Instruction on Lesser Included Offense — Ineffective Assistance of Counsel: Counsel for a defendant charged with deliberate homicide failed to offer an instruction on negligent homicide and objected to an instruction on mitigated deliberate homicide. Because the decision not to seek jury instruction on lesser included offenses was reasoned and tactical, it did not amount to a denial of effective assistance of counsel as guaranteed by the 6th amendment to the United States Constitution (similar to Art. II, sec. 24, Mont. Const.). Bashor v. Risley, 539 F. Supp. 259, 39 St. Rep. 960 (D.C. Mont. 1982).

Effective Assistance of Counsel — Motion for Investigator Denied: Defendant moved for appointment of an investigator because the state's witnesses were located in several states and numerous counties. The motion was properly denied because witness statements had been provided, witness testimony had been summarized in various court documents, and the defendant's counsel had full opportunity to interview witnesses prior to trial. Defendant was not, on this basis, deprived of his right to effective assistance of counsel or fair trial by impartial jury. St. v. Powers, 198 M 289, 645 P2d 1357, 39 St. Rep. 989 (1982).

Effective Assistance — Claim Defense Wrong One and Not Based on the Evidence: Defendant convicted of felony theft and robbery could not have the convictions overturned on basis of alleged denial of effective assistance of appointed counsel where: (1) the defense was that the requisite "purposely or knowingly" mental state for the crimes could not have been formed due to defendant's heavy use of drugs and alcohol during the period prior to the crime; (2) defendant was convicted and a new attorney named; (3) defendant then claimed the defense was unfounded by the evidence and should have been based upon a discrediting of the witnesses testifying to defendant's identity; (4) the defense testimony on drug-alcohol usage did not appear to support the defense; and (5) the prosecution's identification evidence was so strong that the defense attorney had little choice but to choose not to base his defense upon discrediting it. St. v. Kubas, 197 M 185, 642 P2d 147, 39 St. Rep. 456 (1982).

Omissions of Counsel — Evidentiary Hearing: In his petition for postconviction relief, petitioner asserted that he was denied effective assistance of counsel. Many of the errors complained of involved failure to act and omissions rather than commissions. A mere review of the record cannot show that petitioner was entitled to no relief. He is entitled to an evidentiary

hearing on this issue. Fitzpatrick v. St., 194 M 310, 638 P2d 1002, 38 St. Rep. 1448 (1981), followed in Kills On Top v. St., 279 M 384, 928 P2d 182, 53 St. Rep. 1197 (1996), and distinguished in Hagen v. St., 1999 MT 8, 293 M 60, 973 P2d 233, 56 St. Rep. 33 (1999). See also Kills On Top v. St., 2000 MT 340, 303 M 164, 15 P3d 422, 57 St. Rep. 1444 (2000).

Effective Assistance of Counsel: Defendant sought to substitute counsel on the afternoon before his scheduled trial date on the charge of robbery. The defendant also sought a continuance. When considering the motion for substitution of counsel, the court specifically questioned the defendant, after making him aware that his motion for continuance would not be granted, as to whether he still wanted substituted counsel. The defendant said he did. Defendant now argues that by denying his request for a continuance his attorney was unprepared and he was denied effective assistance of counsel. In denying his petition for a Writ of Habeas Corpus, the federal court said that the defendant could have cooperated with his court-appointed counsel or he could have chosen his own counsel in sufficient time for that counsel to become prepared. He did neither. He was not deprived of a right; he failed to exercise the rights he had. Spurlock v. Risley, 520 F. Supp. 135, 38 St. Rep. 1339 (D.C. Mont. 1981).

Effective Assistance of Counsel — Failure to Challenge Constitutionality of Statute: Failure of defense counsel to object to testimony of a rebuttal witness on the grounds that he had not received notice of the witness' testimony, based on a U. S. Supreme Court decision holding that an Oregon statute which required a defendant utilizing an alibi defense to furnish notice and a witness list violated due process because it did not provide reciprocal discovery for the defendant of the State's rebuttal witnesses, does not fall outside the range of competent counsel. The decision to challenge the constitutionality of a statute is a matter of legal judgment. St. v. Rose, 187 M 74, 608 P2d 1074 (1980).

Effective Assistance of Counsel — Failure to Challenge Juror: Failure of defense counsel to challenge juror, who informed the District Court on the last day of trial that he had been mistaken in denying acquaintance with defendant's accomplice since the juror and the brother of the accomplice had been acquaintances for 15 years prior to the trial but that this would not influence him, was not error. St. v. Rose, 187 M 74, 608 P2d 1074 (1980).

Effective Assistance of Counsel — Failure to Object to Hearsay: Failure of defense counsel to object to hearsay testimony does not by itself fall outside the range of competent counsel. Defense counsel should have objected during trial, but the fact that prior to trial defense counsel had made a motion in limine to exclude the evidence indicated that counsel had prepared for the case and had made the correct motion. St. v. Rose, 187 M 74, 608 P2d 1074 (1980).

Effective Assistance of Counsel — Failure to Object to Inquiry of Witness' Criminal Record: Failure of defense counsel to object to an inquiry into a defense witness' prior criminal record did not appear to prejudice the defendant in a case involving at least a dozen witnesses and several days of testimony. St. v. Rose, 187 M 74, 608 P2d 1074 (1980).

Effective Assistance of Counsel — Showing of Prejudice Required: When the claim of ineffective assistance of counsel rests on specific acts and omissions of counsel at trial, relief will be granted only if it appears that the defendant was prejudiced by counsel's conduct. St. v. Rose, 187 M 74, 608 P2d 1074 (1980).

Reasonably Effective Assistance — Failure to Move to Quash Information: Defense counsel did not move to quash the information for lack of probable cause, based on Aguilar v. Texas, 378 US 108, 84 S Ct 1509 (1964), on the grounds that the statements contained in the information were not supported by facts tending to show their reliability. The Aguilar decision did apply, and it was not error for counsel not to move to quash the information. St. v. Rose, 187 M 74, 608 P2d 1074 (1980).

Fair Trial — Right to Effective Counsel — Acceptance of and Cooperation With Counsel: The right to counsel encompasses the right to effective assistance of counsel. To determine the adequacy of counsel, Montana uses the "farce and sham" test, which requires proof that the counsel's performance was so woefully inadequate as to shock the conscience of the court and make the resultant proceeding a farce and a mockery of justice. The right to counsel does not give the defendant the unbridled right to discharge counsel on the eve of trial. Nor does the indigent defendant have the right to choose his counsel. The appointed counsel must be accepted except for good cause shown or unless counsel is waived altogether. Further, a defendant who refuses to cooperate in the preparation of his own defense cannot complain of error therein. St. v. Lopez, 185 M 187, 605 P2d 178 (1980). See also St. v. Strandberg, 223 M 132, 724 P2d 710, 43 St. Rep. 1591 (1986).

Effective Counsel — Delay of Payment to Appointed Counsel: Defendant's claims that the failure of the court to provide funds in advance for appointed defense counsel created a "chilling

effect" and that by the time funds became available there was inadequate time in which to prepare a defense were rejected because defendant failed to show that the alleged lack of preparation prejudiced him in any way. St. v. Bretz, 185 M 253, 605 P2d 974 (1979).

Effective Counsel — Representation of Codefendants: When the same attorney represented both codefendants by employing strategies to achieve mitigation of sentences that did not appear to conflict, the lower court's factual determination that effective assistance of counsel was afforded lay undisturbed. St. v. Henry, 577 M 426, 582 P2d 321 (1978).

Effective Counsel — Failure to Meet Burden: Petitioner failed to sustain his burden of proving he was denied effective assistance of counsel. In re Jones, 176 M 412, 578 P2d 1150 (1978).

Effective Counsel — Actions Adequate: Under the "farce and sham test" for evaluating adequacy of counsel, defense counsel attempted to "discover all the facts and circumstances of the crime" through "thorough investigation of the persons and events involved in the crime" and adequately conferred with his client, advising him of his rights and eliciting all matters of defense or ascertaining that none existed. St. v. Maldonado, 176 M 322, 578 P2d 296 (1978).

Effective Counsel — Problems Caused by Defendant: Defendant was not denied effective assistance of counsel when the problems encountered at trial were the result of defendant's own actions. St. v. Miller, 173 M 453, 568 P2d 130 (1977).

Failure to Call Witnesses Who Would Determine Truth: In an alleged felony theft the search for truth was less than vigorous by counsel, and the judge had a duty to sua sponte demand that a search for the truth be exhausted before the matter be decided. Failure to call witnesses enumerated by defendant who could help determine the truth denied defendant a fair trial and due process. St. v. Mickelson, 172 M 489, 565 P2d 308 (1977).

Effective Counsel — Representation Adequate: A trial is not a "farce or a sham" when retained counsel informed the court he was ready to proceed and the record shows counsel provided the defendant with more than the minimum required for effective assistance of retained counsel. St. v. Brooks, 171 M 45, 554 P2d 753 (1976). See also St. v. Dess, 207 M 468, 674 P2d 501, 41 St. Rep. 31 (1984).

Effective Assistance — Tests: Right to counsel includes effective assistance of counsel to assure constitutional guarantee of assistance essential to a fair trial. Failure of appointed counsel to prepare for trial by making a thorough investigation to substantiate defendant's version of what transpired on the day of the crime, coupled with counsel's failure to object to inadmissible evidence at trial, requires a finding that defendant was without effective assistance of counsel. St. v. McElveen, 168 M 500, 544 P2d 820 (1975), followed in St. v. Johnson, 221 M 384, 719 P2d 771, 43 St. Rep. 913 (1986).

RIGHT TO CONFRONT WITNESSES

Error for District Court to Refuse to Admit Unauthenticated Documents During Revocation Hearing — Different Evidentiary Standard: During a revocation hearing, the defendant attempted to admit out-of-state documents to show that the state knew he was in Washington state after his escape from custody. The District Court admitted documents originating in Montana but refused to admit any documents from Washington state, including a postal receipt for registered mail. On appeal, the Supreme Court determined that both federal and state courts have allowed admission of similar unauthenticated documents in revocation proceedings and that the limitations courts place on the admissibility of documentary evidence in revocation proceedings arise solely out of concern for a defendant's sixth amendment confrontation rights. As such, the District Court's refusal to admit the unauthenticated documents was an error. However, the error was harmless, given that the defendant's substantive argument was rejected. St. v. Graves, 2015 MT 262, 381 Mont. 37, 355 P.3d 769.

Constitutional Right to Confrontation Not Violated by Admission of Skype Testimony: When the Municipal Court allowed a witness residing in California to testify via Skype, the defendant's constitutional right to confrontation was not violated because the technology allowed the court and jury to observe and hear the testimony of the witness in real time. Missoula v. Duane, 2015 MT 232, 380 Mont. 290, 355 P.3d 729.

Testimony From Civil Hearing Improperly Admitted at Criminal Trial — Motive to Develop Testimony Different: The defendant was charged with felony assault with a weapon and misdemeanor partner or family member assault after allegedly pointing a gun at his wife and firing to the side of her head. In a separate dissolution of marriage proceeding, the wife sought an order of protection and the District Court held a hearing on the matter. The defendant, unrepresented at this hearing, did not contest the order or cross-examine the wife. At the subsequent criminal trial, the wife did not appear; however, the District Court admitted her prior testimony under

Rule 804(b)(1)(B), M.R.Ev. (Title 26, ch. 10). On appeal, the defendant argued that this violated his confrontation clause rights. The Supreme Court agreed with the defendant, holding that in order to introduce former testimony, the defendant must have had an opportunity to examine the declarant and a similar motive to develop the declarant's testimony. While an opportunity to examine the wife existed, the order of protection hearing and the criminal trial were not similar motives to develop testimony. St. v. Pingree, 2015 MT 187, 379 Mont. 521, 352 P.3d 1086.

Defendant Prohibited From Questioning Incest Victim at Trial About Prior Rape Allegations Without Evidence: During discovery, the defendant obtained a single-page report written by a social worker that contained a reference to the incest victim's allegation of a prior rape. At trial, the District Court determined that the report was not admissible under St. v. Anderson, 211 Mont. 272, 686 P.2d 193 (1984), because the reported allegation had not been proven false or admitted to be false and prohibited the defendant from questioning the victim about the existence and veracity of prior allegations. The defendant appealed, arguing that the District Court had applied Anderson incorrectly. The Supreme Court affirmed, holding that a defendant is not entitled to question the victim on the stand about prior false allegations if there is no evidence that the victim had made a prior false accusation. St. v. Ring, 2014 MT 49, 374 Mont. 109, 321 P.3d 800, following St. v. Anderson, 211 Mont. 272, 686 P.2d 193 (1984), and State ex rel. Mazurek v. 14th Judicial District Court, 277 Mont. 349, 922 P.2d 474 (1996).

Right to Confrontation Not Applicable to Revocation Hearings: The right to confront adverse witnesses does not apply in a revocation hearing because it is a civil proceeding. Furthermore, the Montana Rules of Evidence, including the hearsay rules, do not apply in a revocation proceeding. St. v. Macker, 2014 MT 3, 373 Mont. 199, 317 P.3d 150.

Sufficient Latitude Provided for Cross-Examination of Informant's Bias or Motivation to Testify: Following a conviction for vehicular homicide while under the influence, the defendant argued that the District Court improperly limited her ability to inquire about an informant's bias or motivation to testify falsely by prohibiting her from cross-examining the informant about a potential persistent felony offender designation. The Supreme Court held that the defendant had sufficient latitude to cross-examine the informant about his bias and motivation to testify falsely and that there was insufficient evidence that the informant's plea agreement was motivated by a potential persistent felony offender designation. St. v. Garding, 2013 MT 355, 373 Mont. 16, 315 P.3d 912.

Admissibility of Intoxilyzer Certification Documents — District Court to Determine Adequate Foundation Regardless of Hearsay Rules — White Overruled: The defendant was charged with felony DUI after a breath test revealed his blood alcohol content exceeded the legal limit. At trial, in the course of the charging police officer's testimony, the state offered into evidence two field certification documents for the Intoxilyzer 8000. The defendant objected to the documents, claiming that because the officer was not the author or custodian of the documents, they were inadmissible hearsay under Rule 803(6), M.R.Ev. (Title 26, ch. 10). The District Court admitted the documents and the defendant appealed his subsequent conviction. The Supreme Court affirmed, ruling that the admissibility of certification documents is also subject to Rule 104(a), M.R.Ev., (Title 26, ch. 10). This rule allows a court to determine whether there is an adequate foundation for a document without regard to whether it is hearsay. In so ruling, the Supreme Court overruled St. v. White, 2009 MT 26, 349 Mont. 109, 201 P.3d 808, to the extent it is inconsistent with St. v. Delaney, 1999 MT 317, 297 Mont. 263, 991 P.2d 461. St. v. Jenkins, 2011 MT 287, 362 Mont. 481, 265 P.3d 643.

Statutes Allowing Child to Testify Outside Presence of Criminal Defendant Constitutional: During the defendant's jury trial on incest charges, the District Court allowed the 6-year-old alleged victim to testify via two-way electronic audio-video communication, rather than in the presence of the defendant and the jury. On appeal, the defendant challenged the use of the audio-video testimony, arguing that 46-16-226 through 46-16-229, which allow a child witness to testify outside the presence of a defendant, violate a criminal defendant's right to confront witnesses. The Supreme Court upheld the constitutionality of 46-16-226 through 46-16-229 on the basis that the statutes require an adequate showing of necessity and serve the compelling state interest of protecting a child witness from suffering further trauma. St. v. Stock, 2011 MT 131, 361 Mont. 1, 256 P.3d 899.

Videotaped Testimony of Pregnant Expert Witness Allowed: The defendant argued that the lower court erred in allowing the videotaped testimony of a pregnant DNA expert on the basis that the witness was unavailable. The Supreme Court, examining the totality of the circumstances, including the difficulty of rescheduling the trial due to the large number of witnesses, held that

the state had made a good faith showing of the witness's unavailability and that there was no error on the part of the District Court. St. v. Norquay, 2011 MT 34, 359 Mont. 257, 248 P.3d 817.

Motion In Limine Properly Denied — No violation of Confrontation Clause: In a Youth Court proceeding, the defendant was adjudicated a serious delinquent youth and committed to the custody of the Department of Corrections until age 18 for various crimes, including the breaking of approximately 75 car windows and firing shots at moving vehicles and at least one pedestrian. During the proceedings, the Youth Court denied the defendant's motion in limine to exclude 10 statements taken from the defendant's interview with police that the defendant alleged constituted inadmissible hearsay because the statements were attributable to witnesses who were not testifying at trial. The Supreme Court affirmed. The Youth Court's admission of the taped interview did not violate the defendant's confrontation rights because the statements constituted adoptive admissions or the witnesses were available for cross-examination. In re T.J.B., 2010 MT 116, 356 Mont. 342, 233 P.3d 341.

Hearsay Testimony Regarding Statements Made By Witnesses at Scene Permitted — No Assertion of Error When Introduced by Defense: Defense counsel introduced the amended information from the prosecution's case that recalled statements made by witnesses identifying Dewitz at the scene of a crime. The prosecution then elicited testimony from an officer recalling the witnesses' testimony. Dewitz asserted that the testimony was inadmissible hearsay and contended that because the witnesses were unavailable, his right to confront witnesses was violated. The Supreme Court agreed that the testimony was hearsay but held that Dewitz waived the right to allege error on appeal because the objectionable testimony was elicited by defense counsel's own action in introducing the testimony into evidence. St. v. Dewitz, 2009 MT 202, 351 M 182, 212 P3d 1040 (2009). See also St. v. Harris, 1999 MT 115, 294 M 397, 983 P2d 881 (1999), and St. v. Smith, 2005 MT 18, 325 M 374, 106 P3d 553 (2005).

No Showing That Allegedly Withheld State Evidence Constituted Brady Violation — Due Process Not Violated: Giddings moved that the state's case should be dismissed because the state withheld evidence in a homicide trial, which prohibited defense counsel from having sufficient time to analyze scientific evidence to find exculpatory evidence and from having the necessary information to effectively impeach the state witnesses, resulting in a due process violation. The District Court denied the motion, and Giddings appealed. The Supreme Court held that Giddings failed to meet the criteria for showing an improper withholding of information under Brady v. Maryland, 373 US 83 (1963), by failing to prove that any of the information was exculpatory or to demonstrate a reasonable possibility that the evidence would have changed the outcome. Instead, Giddings offered only sweeping generalizations and broad accusations rather than the specific elements necessary to prove a Brady violation. Giddings also failed to establish that the state's actions denied the right to effective assistance of counsel or the right to confront the accusers. Denial of Giddings' motion to dismiss was affirmed. St. v. Giddings, 2009 MT 61, 349 M 347, 208 P3d 363 (2009).

No Right to Confront Witness With Irrelevant Evidence: Dunning contended that his constitutional right to confront witnesses was violated when he was not allowed to question the friend of the victim of a kidnapping and sexual assault regarding the victim's allegedly untruthful statement that she was pregnant in order to establish the victim's propensity to lie. However, the testimony would have been an improper attack on the victim using irrelevant evidence, and the constitutional right does not allow a defendant to confront a witness with irrelevant evidence. The possibility of the friend's testimony prejudicing the jury outweighed the probative value of the testimony, so the testimony was properly excluded. St. v. Dunning, 2008 MT 427, 347 M 443, 198 P3d 828 (2008).

Admission of Note Written by Homicide Victim Not Violative of Right to Confront Witnesses — Forfeiture by Wrongdoing Doctrine: Sanchez argued that admission at trial of a note written by Sanchez's admitted deliberate homicide victim violated Sanchez's right to confront witnesses. The Supreme Court noted that the confrontation clause applies only to testimonial hearsay, and in this case, the note was considered testimonial because the purpose of the note was to explain the victim's untimely death or poisoning, the intended audience reasonably included law enforcement, and circumstances surrounding the note indicated that an objective declarant reasonably should have anticipated that the state would use the statement at trial. However, the U.S. Supreme Court set out an equitable exception to the confrontation clause in Crawford v. Wash., 541 US 36 (2004), known as the forfeiture by wrongdoing doctrine. The doctrine states that one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation. The Supreme Court agreed with the holding in U.S. v. Garcia-Meza, 403 F3d 364 (6th Cir. 2005), that a defendant whose intentional criminal act results in a victim-declarant's

death benefits from the defendant's wrongdoing if the defendant can use the death to exclude the victim-declarant's otherwise admissible testimony, regardless of whether the defendant specifically intended to silence the victim. Therefore, Sanchez forfeited his right to confront the victim when he killed her and could not claim that his constitutional right to confront witnesses was violated when his admittedly deliberate wrongdoing prevented the confrontation. Although the trial court admitted the note based on hearsay exceptions without addressing the confrontation clause, the court's decision was nevertheless legally correct, and the Supreme Court declined to disturb the trial court's decision. St. v. Sanchez, 2008 MT 27, 341 M 240, 177 P3d 444 (2008). See also Sanchez v. St., 2012 MT 191, 366 Mont. 132, 285 P.3d 540, in which the Montana Supreme Court held that the U.S. Supreme Court's holding in Giles v. California, 554 U.S. 353, 128 S. Ct. 2678 (2008), that the forfeiture by wrongdoing doctrine applies only when the defendant kills another person specifically to prevent the person from testifying, was not retroactive and did not apply to Sanchez's conviction, which had become final long before the Giles decision.

Limitation on Opening Statement on Issue Unrelated to Charged Offense Not Abuse of Discretion: At Wilson's trial for tampering with evidence in a vehicle allegedly used in a homicide, the trial court prohibited Wilson from referring in opening statements to evidence concerning a coconspirator's motives to kill the victim. The court did not address any similar limits on cross-examination, and Wilson did not bring up the subject of motivation on cross-examination of the coconspirator. Nevertheless, because of the limitation on opening statements, on appeal, Wilson argued an inability to develop evidence regarding the coconspirator's prior false statements and motive to cover up the homicide and to tamper with evidence of the homicide, which purportedly violated Wilson's right to confront the witness. The Supreme Court disagreed. The main purpose of the right to confront a witness is to secure an opportunity for cross-examination, including the opportunity to expose the witness's motivation for testifying. However, this does not mean that a defendant may cross-examine a witness on any subject in any manner whatsoever without limitations imposed by the trial judge. Rather, trial judges retain wide latitude to impose limits on cross-examination based on various concerns, including confusion of the issues. In this case, the trial court limited opening comments regarding motivation for murder because the trial was not a homicide trial, but rather a trial for tampering with evidence, and motive was outside the scope of the tampering charge and would confuse the jury. Thus, the court did not abuse its discretion by limiting opening comments, and Wilson suffered no prejudice. Wilson's conviction was affirmed. St. v. Wilson, 2007 MT 327, 340 M 191, 172 P3d 1264 (2007).

No Error in Prohibiting Impeachment of Witness With Another Person's Out-of-Court Statement: Defendant argued that he was not allowed to impeach the testimony of a detective during cross-examination by showing that the detective's characterization of a victim's statement was inconsistent with the victim's prior statement to the police. The state objected to the victim's out-of-court statement as hearsay, and the trial court sustained the objection. Defendant argued on appeal that because the prior statement was not offered to prove the truth of the matter asserted but rather to impeach the detective's testimony, the prior statement was not hearsay and contended that the ruling violated his right to confront the witness. The Supreme Court disagreed. Error may not be predicated upon a ruling that excludes evidence unless a substantial right of the party is affected and an offer of proof is made. In this case, no substantial right was affected and no offer of proof was made, so the District Court did not abuse its discretion by excluding the victim's prior statement. St. v. Skinner, 2007 MT 175, 338 M 197, 163 P3d 399 (2007).

Limit on Cross-Examination of State's Witness Not Violative of Right to Confront Witnesses: Doyle contended that the trial court violated Doyle's constitutional right to confront witnesses by limiting Doyle's cross-examination of a state witness regarding the witness's prior criminal history and character and benefit to the witness from a plea agreement granting a lighter sentence in exchange for testimony against Doyle. The Supreme Court found no constitutional violation. Evidence of the witness's prior convictions was inadmissible for purposes of impeachment. Evidence of the witness's character was inadmissible for purposes of proving action in conformity with that character. Last, Doyle cross-examined the witness extensively about the benefits of the plea agreement, and the jury was adequately apprised of the potential biases and motives behind the witness's testimony in light of the cross-examination. St. v. Doyle, 2007 MT 125, 337 M 308, 160 P3d 516 (2007). See also St. v. Wagner, 2013 MT 47, 369 Mont. 139, 296 P.3d 1142.

Failure of Counsel to Perfect Direct Appeal — Remand: Following conviction in Municipal Court for partner or family member assault, Woeppel's trial counsel filed a notice of appeal to District Court. Woeppel obtained new counsel, but counsel failed to file a brief to perfect the appeal, and the appeal was dismissed. The new counsel ultimately withdrew because of a conflict

of interest, and Woeppel's next new counsel filed a petition for postconviction relief on grounds that Woeppel was denied effective assistance of counsel and was denied the right to confront witnesses in the underlying case because the conviction was based on hearsay testimony. The petition was denied, and Woeppel appealed. The Supreme Court noted that trial counsel's notice of appeal objectively indicated Woeppel's intent to appeal and that it was only because appellate counsel failed to file a brief that the appeal was dismissed, resulting in prejudice to Woeppel. Denial of the petition for postconviction relief was reversed, and the case was remanded for consideration of any claims that Woeppel could have made on direct appeal, including the claim that because the conviction was based on hearsay, Woeppel's right to confront witnesses was violated. Woeppel v. Billings, 2006 MT 283, 334 M 306, 146 P3d 789 (2006).

Improper Extrinsic Evidence Delivered to Jury — Evidentiary Error Violative of Right to Confront Witnesses Warranting New Trial: At Parker's trial for assault with a weapon, the state introduced a tape of interviews with Parker's children containing the children's observations of the events in question. Unbeknownst to Parker, the tape also contained an interview with another party that implicated Parker. The tape was submitted to the jury during deliberations. Following conviction, Parker contended on appeal that the jury's exposure to the extrinsic evidence, which was never entered into evidence, violated Parker's right to confrontation. The Supreme Court agreed. The interview was of sufficient quality to prejudice Parker's defense and contribute to the conviction, so Parker's right to confront the witness against him was violated when the tape was delivered to the jury. The court remanded for a new trial. St. v. Parker, 2006 MT 258, 334 M 129, 144 P3d 831 (2006).

Admissibility of Hearsay Statements Made in Emergency Following Family Member Assault: During Mizenko's trial for partner or family member assault, the trial court admitted several hearsay statements made by the victim, Mizenko's wife, who did not testify. Mizenko contended that admitting the hearsay statements violated his constitutional right to confront witnesses against him, even though Mizenko had the opportunity to cross-examine the witnesses who related the hearsay statements, including a neighbor whom the wife had gone to for help, the emergency dispatcher who received the 9-1-1 call, and the investigating deputy. The dispatcher's testimony regarding the contents of the call was admitted without objection, and the deputy's testimony verified that the acts related on the call had occurred, so their testimony, even if objectionable, was cumulative and therefore harmless. The neighbor's testimony related statements that the wife made while in distress and while addressing a nongovernmental agent. The wife's cursory statements describing the circumstances, though evidence, were not created by the judicial process, and the wife had no reason to believe that her excited utterances would be used in court, so the statements were considered nontestimonial and properly admitted under the excited utterance exception of Rule 803, M.R.Ev. (Title 26, ch. 10). St. v. Mizenko, 2006 MT 11, 330 M 299, 127 P3d 458 (2006), followed in St. v. Paoni, 2006 MT 26, 331 M 86, 128 P3d 1040 (2006). See also St. v Cameron, 2005 MT 32, 326 M 51, 106 P3d 1189 (2005).

Testimonial Versus Nontestimonial Hearsay — Crawford Rule for Admissibility in Criminal Trial — Use of Emergency Calls: In Crawford v. Wash., 541 US 36 (2004), the U.S. Supreme Court bifurcated hearsay law from the constitutional confrontation clause (sixth amendment, U.S. Const.; and this section) by allowing hearsay against criminal defendants in only two instances: (1) if hearsay is testimonial, a defendant must have had an opportunity to cross-examine the declarant and the prosecution must show that the declarant is unavailable to appear at trial; or (2) if hearsay is nontestimonial, the hearsay must bear adequate indicia of reliability or particularized guarantees of trustworthiness. However, the Crawford court declined to define what constitutes testimonial hearsay. The Montana Supreme Court noted that the sixth amendment itself defines the indicia of reliability or particularized guarantees of trustworthiness necessary to admit testimonial hearsay by establishing confrontation through cross-examination as the minimally adequate index. Crawford characterizes a casual remark to an acquaintance as nontestimonial hearsay, and the word "casual" modifies the declarant's assumption as to what use, if any, the listener might make of the statement. When an objective declarant would reasonably expect the state to use a statement at trial, the sixth amendment demands that courts exclude such statements absent an opportunity for confrontation. When speaking to government agents or officials, a declarant should reasonably expect the government to seek to use those statements at trial, and when a declarant signs an affidavit or gives a recorded statement, the declarant should likewise expect the state to make use of those statements, so those statements are considered testimonial. However, a declarant who is alerting law enforcement of imminent and immediate danger, such as through a 9-1-1 emergency call, has much less of an expectation that the state will seek to make prosecutorial use of the statements at trial, depending on the

content of the conversation and the particular circumstances that led to the call. If the declarant has objective reason to believe that an emergency statement would serve only to avert or mitigate imminent or immediate danger and the agent who receives the statement had no intent to create evidence, then the statement is presumed to be nontestimonial. Alternatively, if a declarant has clear reason to believe that the statement would be used in court as substantive evidence against a defendant, statements to a nongovernmental agent are nontestimonial. St. v. Mizenko, 2006 MT 11, 330 M 299, 127 P3d 458 (2006), followed in St. v. Paoni, 2006 MT 26, 331 M 86, 128 P3d 1040 (2006).

Inadmissibility of Reverse 404(b) Evidence — No Prejudice to State Prosecution: Defendant contended that the trial court improperly excluded character evidence regarding another person, which could have been introduced under the seldom used "reverse 404(b) evidence" theory to identify the other person as the author of various threatening letters. Defendant claimed that exclusion of the evidence violated the right to present a defense and the right to confront witnesses. Even though there was little risk that admitting the reverse 404(b) evidence would prejudice the state, most of the evidence was propensity evidence, and the evidence in question did not meet the modified Just test for admissibility of character evidence, so the District Court did not err in refusing to admit the reverse 404(b) evidence. St. v. Clifford, 2005 MT 219, 328 M 300, 121 P3d 489 (2005).

Consultation Between Judge and Jurors Outside Presence of Defendant Not Violative of Defendant's Right to Be Present at All Stages of Trial: After consulting defense counsel, the judge in Riggs's criminal trial met with two jurors outside Riggs's presence to address the jurors' concerns. One juror was concerned because he recognized a witness, and the other was concerned that he would have to forfeit a nonrefundable airline ticket because of the length of the trial. The judge addressed each concern off the record and concluded the matters. Riggs contended on appeal that the meetings violated his constitutional right to be present at all stages of trial. The Supreme Court agreed that a defendant's right to appear and defend in person is a fundamental right and that a defendant must be present throughout the entire trial. However, the court relied on U.S. v. Gagnon, 470 US 522 (1985), for the holding that a defendant has a right to be present at a given proceeding whenever the defendant's presence has a reasonably substantial relation to the fullness of the opportunity to defend against the charges. In this case, both interactions were brief interludes in a complex trial, Riggs had no role to play at either meeting, defense counsel consented to the trial court's approach, and Riggs made no persuasive claim of prejudice arising out of the episodes, so the Supreme Court concluded that Riggs's constitutional rights were not infringed. St. v. Riggs, 2005 MT 124, 327 M 196, 113 P3d 281 (2005).

Test Whether Witness May Testify as Expert on Child Abuse: Factors in the three-part test set out in St. v. Scheffelman, 250 M 334, 820 P2d 1293 (1991), for whether a witness may testify as an expert on child abuse are: (1) the expert must have extensive first-hand experience with children who both have and have not been sexually abused; (2) the expert must have a thorough and current knowledge of the professional literature on child abuse; and (3) the expert must have objectivity and neutrality regarding individual cases. In Riggs's case, the state called a child abuse expert who met the qualifications but who had a therapeutic relationship with one of the victims to testify concerning interviewing techniques applied in a sexual abuse investigation. Riggs contended that the trial court erred by allowing the expert to testify and by limiting the defense's ability to cross-examine the expert. The Supreme Court disagreed on both issues. Given the limited scope of the expert's testimony, the objectivity with which the expert could testify regarding interviewing techniques was not susceptible to being compromised by the therapeutic relationship with one of the victims, so the trial court did not err in qualifying the witness as an expert. Additionally, Riggs was afforded a fair and full opportunity to expose any potential bias of the expert, so Riggs's right to confront witnesses was not infringed. St. v. Riggs, 2005 MT 124, 327 M 196, 113 P3d 281 (2005). See also St. v. Whitlow, 285 M 430, 949 P2d 239 (1997).

Use of Nontestimonial Intoxilyzer Certification Reports in DUI Trial Not Violative of Defendant's Right to Confront Witnesses — Crawford Rule: At Carter's DUI trial, the state introduced three certification reports in order to demonstrate that an Intoxilyzer 5000 was working properly when Carter was tested. The officers who prepared the reports did not testify at trial. Carter initially contended that the reports were hearsay, but on appeal, Carter asserted that admission of the reports violated his right to confront witnesses. Although the Supreme Court will generally not address new arguments raised on appeal, the court applied the exception in Cottrill v. Cottrill Sodding Serv., 229 M 40, 744 P2d 895 (1987), in this case because of the new confrontation clause jurisprudence set out in Crawford v. Wash., 541 US 36 (2004), which was decided while Carter's case was pending. In Crawford, the U.S. Supreme Court for the first time distinguished

testimonial and nontestimonial out-of-court statements, delineating testimonial statements, at a minimum, as applying to prior testimony at a preliminary hearing, before a grand jury, or at a former trial as well as to police interrogations. States are allowed flexibility in the development of hearsay law when nontestimonial hearsay is at issue. In Carter's case, the state asserted that the certification reports used at Carter's trial were nontestimonial evidence because they did not fall within the core group of statements that the confrontation clause was meant to address. The Supreme Court held that the certification reports were nontestimonial in that they were not substantive evidence of a particular offense, but rather constituted foundational evidence necessary for the admission of substantive evidence. Thus, Carter's confrontation right was not implicated despite the fact that the authors were not present to testify or be confronted. The court noted that a defendant is always free to subpoena authors of such reports if the defendant's pretrial investigation reveals that the reports are erroneous or are otherwise subject to attack. Therefore, in conformance with the Crawford rule, the Supreme Court exempted the certification reports from confrontation clause scrutiny and affirmed Carter's conviction. St. v. Carter, 2005 MT 87, 326 M 427, 114 P3d 1001 (2005).

No Constitutional Violation in Admission of Telephonic Testimony at Revocation Hearing — No Abuse of Discretion Upon Good Cause: To accommodate counsel, the state moved to allow the admission of telephonic testimony from two law enforcement officers who could not attend Megard's sentence revocation hearing in person. Megard objected, relying on Rule 611, M.R.Ev. (Title 26, ch. 10), and In re Marriage of Bonamarte, 263 M 170, 866 P2d 1132 (1994). The District Court held that neither the rule nor Bonamarte applied and that Megard's fundamental rights would be adequately protected, so the motion was granted. On appeal, Megard also contended that allowing the telephonic testimony violated his due process right and the right to confront witnesses. The Supreme Court affirmed. The District Court was familiar with the witnesses. Allowing telephonic testimony did not impede the ability to judge a witness's credibility in relation to other witnesses, who corroborated the testimony, because knowledge of a witness's identity and credentials may constitute a special circumstance under which telephonic testimony is allowed. Although telephonic testimony is generally not allowed in trials absent special circumstances or the parties' consent, evidentiary rules do not apply to revocation proceedings. Because a revocation hearing is not a criminal trial, Megard had no constitutional right to confront witnesses at the hearing. Further, Megard's due process rights were not violated because his counsel actually cross-examined the witnesses, and good cause existed for the District Court to admit the telephonic testimony to address scheduling conflicts. Even if error occurred, it was harmless, given Megard's failure to establish prejudice pursuant to St. v. Pedersen, 2003 MT 315, 318 M 262, 80 P3d 79 (2003). St. v. Megard, 2004 MT 67, 320 M 323, 87 P3d 448 (2004).

Discovery of Identity of Confidential Informant Properly Denied: DuBray contended that the identity of a confidential informant should have been disclosed in discovery. Applying the balancing test in Roviaro v. U.S., 353 US 53 (1957), the Supreme Court found nothing to persuade that disclosure of the informant's identity was warranted. The informant did not testify at trial, and DuBray offered nothing concrete or substantive to establish that disclosure was necessary to properly prepare for trial, that the informant might possess exculpatory information, or that the informant may have been involved in the crime. Mere speculation about possible relevancy of the informant's testimony was insufficient to warrant disclosure of the informant's identity. St. v. DuBray, 2003 MT 255, 317 M 377, 77 P3d 247 (2003). See also St. v. McLeod, 227 M 482, 740 P2d 672 (1987).

Improper Consideration of Hearsay Evidence Corroborating Testimony of Child Sexual Abuse Victim — Trustworthiness of Child's Statement Considering Totality of Circumstances: Defendant convicted of incest contended on appeal that the District Court erred in determining that the child victim's hearsay statements were admissible under the residual exception of Rule 804(b)(5), M.R.Ev. (Title 26, ch. 10), because the statements had comparable circumstantial guarantees of trustworthiness, in violation of defendant's constitutional right to confront witnesses. Citing Idaho v. Wright, 497 US 805 (1990), the Supreme Court noted that reliance upon exceptions to the hearsay rule is permissible if the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility. Factors often identified by courts as indicia of the reliability of statements made by child witnesses in sexual abuse cases, such as spontaneity, use of language unexpected of a child of similar age, and lack of motive to fabricate, all relate to whether the child was likely to be telling the truth when the statement was made, but do not include factors that may be added using hindsight. Thus, in child sexual abuse cases, a court may not consider corroborating evidence when making a determination about the admissibility of hearsay statements under the confrontation clause, and

the District Court in this case erred as a matter of law in doing so. However, after considering the totality of circumstances exclusive of the corroborating evidence, the Supreme Court found that the child's statements were supported by the particularized guarantees of trustworthiness necessary to withstand a confrontation clause challenge, so the District Court's admission of the child's hearsay statements was affirmed. St. v. S.T.M., 2003 MT 221, 317 M 159, 75 P3d 1257 (2003). See also St. v. Osborne, 1999 MT 149, 295 M 54, 982 P2d 1045 (1999).

Limitation on Cross-Examination Not Violative of Right to Confront Witnesses: Nelson was charged with five felony offenses, and as a result of a plea bargain, Nelson's accomplice testified for the state at trial. During cross-examination, the District Court prevented questioning about charges allegedly filed against the accomplice in another county. Nelson contended that restricting the scope of cross-examination violated his constitutional right to confront witnesses. The Supreme Court disagreed. Limiting the scope of cross-examination does not necessarily violate the right to confront an adverse witness. A District Court has discretion to exercise reasonable control over the mode and order of interrogating witnesses, and may limit the scope of cross-examination to those issues that the court determines to be relevant to the trial. The determination of relevance and admissibility is left to the sound discretion of the trial judge and will not be overturned absent a showing of abuse of that discretion. Nelson was afforded the constitutionally required level of inquiry, and the District Court did not violate the confrontation clause or abuse its discretion by limiting Nelson's questioning of the adverse witness concerning unrelated alleged but unsubstantiated charges in another county. St. v. Nelson, 2002 MT 122, 310 M 71, 48 P3d 739 (2002), distinguishing Alford v. U.S., 282 US 687 (1931), and Davis v. Alaska, 415 US 308 (1974), and followed in St. v. Garding, 2013 MT 355, 373 Mont. 16, 315 P.3d 912.

Denial of Writ of Habeas Corpus to Compel Attendance of Children in Abuse and Neglect Hearing Not Violative of Due Process Rights or Right to Confront Witnesses: The mother petitioned the District Court for a writ of habeas corpus demanding that her children be physically present for an abuse and neglect hearing because they were material witnesses and claiming that the writ was necessary to ensure her due process rights by having the children available to rebut allegations against her at the hearing. The petition was denied. On appeal, the Supreme Court affirmed. Although the mother was entitled to an opportunity for a meaningful hearing, that opportunity need not be provided at the expense of the children whose best interests were the paramount focus of the proceeding, and subjecting the children to direct and cross-examination could exacerbate the abuse that they had already experienced. Denial of the petition did not violate the mother's right to confront witnesses because the children were not her accusers and she had no right to confront them. Rather, the abuse and neglect case was brought by the state, and the mother had ample opportunity to confront and examine the state's witnesses and experts at the hearing, so her due process rights were met. In re B.P. & A.P., 2001 MT 219, 306 M 430, 35 P3d 291 (2001).

Failure of Counsel to Object to Introduction of Inconsistent Prior Statements on Confrontation Grounds Not Considered Ineffective Assistance: Jenkins was convicted of deliberate homicide, aggravated kidnapping, and robbery after having been implicated in the crimes based in part on statements made to police and at trial by his wife, Mary. Mary suffered from dementia related to Alzheimer's disease and periodic memory lapses. As a result, in some pretrial interviews, she answered questions with declarative statements while in other interviews, even when asked the same or similar questions, she responded that she didn't know or couldn't remember. Nevertheless, at a pretrial hearing, it was determined that she knew the difference between truth and falsity, could express herself in court, and was competent to testify. At trial, she exhibited the same behavior. On direct examination, the prosecutor asked many of the same questions asked during the pretrial interviews, and although she answered some questions definitively, most of her testimony was that she didn't know or couldn't remember. On cross-examination, she often retracted the definitive answers she gave on direct examination, saying again that she could not remember. Following her testimony, the trial court allowed the prosecution to introduce the content of Mary's pretrial interviews through the testimony of the interviewing officers pursuant to the prior inconsistent statement exception to the hearsay rule, as set out in Rule 801(d)(1)(A), M.R.Ev. (Title 26, ch. 10). Jenkins objected on evidentiary grounds, but not on confrontation grounds, so the issue was not preserved for appeal. In a petition for postconviction relief, Jenkins claimed that he was denied effective assistance of counsel because his attorney should have objected on confrontation grounds. The District Court denied the petition, holding that there was no confrontation clause violation and that even if the objection had been made, it would not have affected the outcome of the trial. Jenkins then appealed the denial of the petition for

postconviction relief. The state contended that Jenkins' right to confront witnesses was satisfied by his opportunity to cross-examine Mary and demonstrate to the jury her poor and unreliable memory. The Supreme Court concurred. The implications of admitting prior inconsistent statements was addressed in Calif. v. Green, 399 US 149 (1970), in which it was held that the confrontation clause is not violated by admitting a declarant's out-of-court statements as long as the declarant is testifying as a witness and is subject to full and effective cross-examination. Further, under U.S. v. Owens, 484 US 554 (1988), the confrontation clause guarantees only an opportunity for effective cross-examination, not cross-examination that is effective in a way that the defendant might wish. Even though Mary suffered from memory lapses, she was competent, appeared at trial, and was subjected to unrestricted cross-examination, giving Jenkins ample opportunity to demonstrate her inability to recall past events and giving the jury the opportunity to observe her testimony and judge the reliability of her memory as it pertained to both her in-court and out-of-court statements. Jenkins failed to show that an objection on confrontation grounds would have been sustained, therefore failing to demonstrate that his defense was prejudiced by his trial counsel's failure to preserve the issue for appeal. Jenkins was thus not denied effective assistance of counsel and his petition for postconviction relief was properly denied. St. v. Jenkins, 2001 MT 79, 305 M 95, 23 P3d 201 (2001).

What Form of Compliance of Instrument Used in Breath Test Required as Foundation for Breath Test Results: ARM 23.4.214 requires that all breath analysis equipment be sent to the state Forensic Sciences Division annually for laboratory certification. A person charged with an alcohol-related offense is entitled to the procedural safeguards contained in the administrative rule, so in order for the results of a defendant's breath test to be admissible, the state must lay a proper foundation by establishing that the instrument complied with ARM 23.4.214. During pretrial discovery, Delaney requested documentation that the instrument used to test his breath had been certified, and the state provided a copy of the laboratory certification form. At trial, Delaney moved to dismiss the results of the breath test, contending that the form was inadmissible hearsay that could not be used to lay the requisite foundation, and also maintained that failure to call the custodian of the annual certification records violated Delaney's right to confront witnesses. The state contended that it was not required to have the form admitted in order to lay a foundation for admissibility and that, consequently, it did not matter that the document was hearsay, but rather that all that was necessary was to establish to the satisfaction of the court that the certification had been performed. The District Court sided with the state and admitted the breath test results. On appeal, the Supreme Court affirmed, noting that the determination of whether adequate foundation exists is within the discretion of the District Court and that that determination is made pursuant to Rule 104(a), M.R.Ev. (Title 26, ch. 10), which authorizes the examination of any proffered evidence, regardless of its admissibility, in determining the admissibility of challenged evidence. Under the identical federal Rule of Evidence, federal courts have found that the plain language of the rule extends to consideration of hearsay and other evidence normally inadmissible at trial. (See Bourjaily v. U.S., 483 US 171, 97 L Ed 2d 144, 107 S Ct 1775 (1987), and its progeny.) Thus, the District Court was allowed to consider the certification form in determining whether an adequate foundation existed without regard to whether the form itself was hearsay, and consequently, the state was not required to call the records custodian to testify. St. v. Delaney, 1999 MT 317, 297 M 263, 991 P2d 461, 56 St. Rep. 1267 (1999), distinguishing St. v. Woods, 272 M 220, 900 P2d 320, 52 St. Rep. 762 (1995), and St. v. Clark, 1998 MT 221, 290 M 479, 964 P2d 766, 55 St. Rep. 919 (1998), and followed in St. v. White, 2009 MT 26, 349 M 109, 201 P3d 808 (2009), with regard to necessity of proper foundation for admission of results of alcohol concentration breath analysis. White was overruled, to the extent it is inconsistent with Delaney, in St. v. Jenkins, 2011 MT 287, 362 Mont. 481, 265 P.3d 643. See also St. v. Johnston, 2011 MT 184, 361 Mont. 301, 258 P.3d 417 (holding that a breath analysis instrument must be inspected and calibrated at least every 31 days pursuant to ARM 23.4.213, not every 7 days, or its results may be suppressed).

Admission of Prior Testimony of Unavailable Witness at Second Trial Not Violative of Confrontation Clause: Hall was acquitted of aggravated assault at his first trial. At his second trial, the District Court allowed testimony of a witness from the first trial to be read into evidence because the witness was unavailable at the second trial. Hall alleged error because admission of the testimony violated his right to confront the witness in violation of this section. Under Rule 804, M.R.Ev. (Title 26, ch. 10), prior testimony is a recognized exception to the hearsay rule, and the rationale behind the exception is that there is a guarantee of trustworthiness at the time that the testimony is given. Although evidence may have surfaced after the first trial regarding an alleged conversation in which the witness's prior testimony was possibly rendered suspect, the

reliability of the prior testimony was nevertheless inferred from the fact that the witness was under oath and subject to cross-examination at the time of the original testimony. Because the evidence was available for the jury to weigh when contemplating the weight to be given to the prior testimony, subsequent admission of the testimony at the second trial was not violative of Hall's right to confront the witness at the second trial. St. v. Hall, 1999 MT 297, 297 M 111, 991 P2d 929, 56 St. Rep. 1190 (1999). See also Hamilton v. Mavros, 284 M 46, 943 P2d 963, 54 St. Rep. 741 (1997).

Trial Court Discretion to Limit Scope of Cross-Examination — Not Violative of Right to Confront Witnesses: At trial, Beavers wanted to cross-examine the officer who wrote him a citation regarding whether charges other than those listed on the citation might have been more appropriate. The trial court did not allow the cross-examination. However, limiting the scope of cross-examination does not necessarily violate a defendant's right to confront an adverse witness. The trial court has broad discretion to limit the scope of cross-examination to those issues that it determines are relevant to the case. Because charging a defendant is a prosecutorial function rather than a function of the arresting officer, here Beavers had no basis for his line of questioning the officer on grounds of reckless driving. The questions were irrelevant; thus, the trial court did not violate Beavers' constitutional right or inhibit his ability to defend the case. St. v. Beavers, 1999 MT 260, 296 M 340, 987 P2d 371, 56 St. Rep. 1035 (1999). See also St. v. Sullivan, 266 M 313, 880 P2d 829, 51 St. Rep. 827 (1994), and St. v. Wagner, 2013 MT 47, 369 Mont. 139, 296 P.3d 1142.

Hearsay by Young Child — Evidence of Material Fact More Probative Than Other Evidence — Circumstantial Guarantees of Trustworthiness — No Abuse of Discretion Found: Heen became suspicious that his 33-month-old granddaughter, Cassie, had been sexually abused by her stepfather, Osborne, Heen's son-in-law. Heen and his daughter, Jamie, Cassie's mother, talked to Cassie, who said or indicated to either or both Heen and Jamie that she had played with "daddy's rubber duck" and that the rubber duck was Osborne's genitalia. Cassie also gave information tending to implicate Heen, whom she called "Papa", as opposed to Osborne, whom she called "Daddy". A medical examination showed that Cassie had physical injuries consistent with sexual abuse. The District Court interviewed Cassie and found her unable to testify because she was extremely shy and may have been intimidated by the courtroom. The state relied upon the hearsay testimony by Heen and Jamie, and based upon that hearsay evidence, Osborne was convicted of sexual intercourse without consent. The Supreme Court applied the requirements of St. v. J.C.E., 235 M 264, 767 P2d 309 (1988), in which the Supreme Court required that three findings be made by a trial court in order for hearsay by a child to be admissible, one of those findings being that the hearsay must be evidence of a material fact and be more probative than other evidence. Osborne objected to introduction of the hearsay testimony, claiming that it was not more probative than other evidence, that evidence being Cassie's testimony implicating Heen. The Supreme Court held that Cassie's testimony implicating Heen was evidence of a different fact and was not probative as to the same material fact and that Cassie implicated Osborne. For those reasons, the Supreme Court held that Cassie's hearsay testimony implicating Osborne was admissible. The Supreme Court also reviewed whether, even though the hearsay testimony was admissible under Rule 804(b)(5), M.R.Ev. (Title 26, ch. 10), the testimony nevertheless violated Osborne's confrontation clause rights and held that pursuant to its opinion in J.C.E., it would defer to the District Court's finding that there were sufficient indicia of trustworthiness, from the evidence taken as a whole, and that the District Court did not abuse its discretion in making that finding. St. v. Osborne, 1999 MT 149, 295 M 54, 982 P2d 1045, 56 St. Rep. 589 (1999).

Evidence of Rape Victim's Alleged Involvement in Prostitution Properly Excluded: Ahto sought to introduce evidence of a rape victim's involvement in prostitution, contending that evidence of prostitution established his defense to felony assault (now assault with a weapon) charges and that the evidence related directly to her credibility and veracity as a witness and motive to testify falsely. The Supreme Court disagreed, finding that Ahto's speculative and unsupported allegations were insufficient to tip the scales in favor of Ahto's right to present a defense and against the victim's rights under the rape shield statute. Moreover, Ahto was given sufficient opportunity to question the victim's credibility and potential motives to testify falsely. Therefore, the District Court did not abuse its discretion in precluding Ahto from cross-examining the victim about her involvement in prostitution because that evidence would not have established a lack of credibility on the victim's part. Ahto further alleged that the trial court denied his right to confront witnesses by disallowing cross-examination after the state opened the door by inquiring as to the victim's employment, but did not demonstrate how he was prejudiced by the ruling. The Supreme Court affirmed the trial court's discretion in determining the latitude of

cross-examination. St. v. Ahto, 1998 MT 200, 290 M 338, 965 P2d 240, 55 St. Rep. 851 (1998), distinguishing St. v. Scott, 257 M 454, 850 P2d 286 (1993).

Admission of Inadmissible Hearsay — Denial of Due Process Right: Allowing an employer to submit hearsay statements of witnesses with personal knowledge of alleged work misconduct without requiring that the witnesses testify in person at the eligibility hearing denied claimant of the right to confront and cross-examine the witnesses and was a violation of the constitutional right to due process, warranting reversal and remand. Bean v. Bd. of Labor Appeals, 1998 MT 222, 270 M 253, 891 P2d 516, 55 St. Rep. 927 (1998), distinguishing Richardson v. Perales, 402 US 389 (1971). See also In re Marriage of Bonamarte, 263 M 170, 866 P2d 1132 (1994).

Rule Governing Introduction of Crime Laboratory Reports Violative of Due Process and Confrontation Clause Provisions: Under the Montana Constitution, a criminal defendant is guaranteed the fundamental right to a face-to-face confrontation with an accuser, including the right to cross-examination. Further, the constitution's due process guarantee makes it the state's duty in a criminal prosecution to prove beyond a reasonable doubt every element of the crime charged. Rule 803(8), M.R.Ev. (Title 26, ch. 10), which governs the introduction of state crime laboratory reports, effectively requires a defendant to subpoena and produce the state's expert in order to rightfully take advantage of the confrontation clause. The rule also compels the defendant to produce evidence during the case in chief, which in many cases will be incriminating, should the defendant choose to test the state's case. Therefore, the portion of Rule 803 that governs the introduction of state crime laboratory reports violates both the confrontation clause in this section and the due process guarantee in section 17 of this article. St. v. Clark, 1998 MT 221, 290 M 479, 964 P2d 766, 55 St. Rep. 919 (1998), distinguished in St. v. Delaney, 1999 MT 317, 297 M 263, 991 P2d 461, 56 St. Rep. 1267 (1999).

Hearsay Statement by Witness Not Adopted by Defendant — Requirements for Finding Subpoenaed Witness "Unavailable": After having consumed drinks in Marysville, Widenhofer and Rothschiller were involved in a one-car accident on the Marysville Road. A car picked them up and took them to the closest business, the Silver City Bar. Because Widenhofer was injured, a highway patrol officer was called, who, upon arriving at the Silver City Bar, asked Rothschiller some questions about the accident. When he was in the patrol car with only the officer present, Rothschiller answered one of those questions by stating that Widenhofer was driving the vehicle. The officer then took both Widenhofer and Rothschiller to the hospital in Helena. After Widenhofer's injuries were cared for, the highway patrol officer continued to question Widenhofer; advised him that in the officer's opinion, alcohol was a factor in the accident; asked Widenhofer to submit to a blood-alcohol test; and read Widenhofer the implied consent form. Although Rothschiller was served with a subpoena by the Sheriff the night before a jury trial on Widenhofer's charge of DUI, Rothschiller failed to appear at trial. During the trial, the District Court allowed the highway patrol officer to repeat Rothschiller's answer, that Widenhofer was the driver of the vehicle. The Supreme Court reversed the decision of the District Court allowing the hearsay testimony. The Supreme Court held that the state's reliance on Rule 801(d)(2)(B), M.R.Ev. (Title 26, ch. 10), was misplaced because the District Court did not make an express finding that Rothschiller's statement was adopted by Widenhofer, as the District Court should have under the rationale of U.S. v. Schaff, 948 F2d 501 (9th Cir. 1991), and because the state did not present sufficient evidence that Widenhofer acquiesced in Rothschiller's statement. The Supreme Court noted that Widenhofer could not hear the conversation between the officer and Rothschiller and had no reason to know what Rothschiller was telling the officer. For these reasons, the Supreme Court held that Rothschiller's statement as to who was driving the vehicle was not adopted by Widenhofer and that Rothschiller's statement could therefore not be allowed under this exception to the hearsay rule. Widenhofer also objected to the hearsay testimony of the highway patrol officer because it violated Widenhofer's right under the sixth amendment to the United States Constitution and under this section to confront and cross-examine a witness. The Supreme Court held that the "unavailability" exception under Rule 804(a)(5), M.R.Ev. (Title 26, ch. 10), could not be invoked because under the analysis of Ohio v. Roberts, 448 US 56 (1980), that rule requires the prosecution to demonstrate the "unavailability" of a witness before hearsay evidence of the witness's statements may be introduced. The Supreme Court held that the state's "minimal" attempt to procure Rothschiller's testimony by serving a subpoena on him the night before trial did not constitute "reasonable means" of procuring his testimony. St. v. Widenhofer, 286 M 341, 950 P2d 1383, 54 St. Rep. 1438 (1997), followed, with regard to the standard of reasonable means of procuring witness's testimony, in St. v. Diaz, 2006 MT 303, 334 M 479, 148 P3d 628 (2006), and followed in St. v. McCollom, 2009 MT 257, 352 M 10, 214 P3d 1230 (2009).

Defense Interviews When Accompanied by Court Reporter Held Not to Be Depositions — No Right of Accused to Confront Witnesses in Interviews: After Robert's incarceration awaiting trial on forgery charges, defense counsel arranged to interview prosecution witnesses at the prosecutor's office. When defense counsel arrived, he was accompanied by a court reporter. Counsel told the prosecutor that the interviews were actually "depositions" and requested that Robert be brought from his jail cell, to which the prosecutor refused. The Supreme Court held that the "depositions" were only interviews, regardless of their characterization by defense counsel, because the prerequisites for a deposition provided in 46-15-201 had not been satisfied, no motion had been made to the court requesting the deposition, and notice had not been given of the time and place of the deposition. Citing St. v. Reynolds, 243 M 1, 792 P2d 1111 (1990), the Supreme Court held that Robert had no constitutional right to be present at the interviews because the right to confront witnesses is a right that applies at trial. St. v. Lane, 279 M 128, 927 P2d 989, 53 St. Rep. 1082 (1996).

Period of Conception — Rape Shield Statute Properly Used to Exclude Evidence of Sex With Other Family Members — Due Process Not Abridged: Weeks was convicted of sexual intercourse without consent with his stepdaughter. The conviction was based in part upon DNA evidence and in part upon the testimony of Weeks's stepdaughter. After an in camera hearing, the District Court excluded evidence of sexual acts with other members of her family that occurred outside the time of conception. Weeks argued that the District Court made it impossible for him to challenge the credibility of his stepdaughter. The Supreme Court held that the rape shield law was properly invoked by the District Court and that allowing only the evidence of sexual acts with other family members that occurred within the calculated time of conception was proper. Citing St. v. Van Pelt, 247 M 99, 805 P2d 549 (1991), the Supreme Court held that the limitations imposed by the District Court did not violate Weeks's right to due process of law. St. v. Weeks, 270 M 63, 891 P2d 477, 52 St. Rep. 78 (1995).

Failure to Object to Presentence Report — Right to Confrontation Not Precluded: Larson and his attorney received a presentence report but did not object, present witnesses, or offer other evidence to contradict the report, nor was a continuance requested to allow response and rebuttal to the report. Failure to exercise the affirmative duty to present evidence demonstrating inaccuracies precluded Larson's later claim that he was denied the right to meaningful confrontation. St. v. Larson, 266 M 28, 878 P2d 886, 51 St. Rep. 638 (1994). See also St. v. Trangsrud, 200 M 303, 651 P2d 37 (1982).

Evidence of Witnesses' Prior Crimes Inadmissible — No Violation of Right to Confront Witnesses: Gollehon contended that refusing to allow his questioning of the state's eyewitnesses, who happened to be state prison inmates, as to their prior crimes violated his constitutional right to confront the witnesses against him. However, proof of the witnesses' conduct would require examination of extrinsic evidence, which is inadmissible under Rule 608, M.R.Ev. (Title 26, ch. 10), and evidence of prior convictions, expressly prohibited under Rule 609, M.R.Ev. (Title 26, ch. 10). Balancing the probative value of the evidence with its potential prejudicial effect, the Supreme Court held that Gollehon's right to confrontation was not violated by the trial court's refusal to allow cross-examination of the witnesses' past criminal conduct. St. v. Gollehon, 262 M 1, 864 P2d 249, 50 St. Rep. 1250 (1993).

No Right to Discover Notes of Counselor Not Called or Used as Witness: Little was convicted of sexual intercourse without consent and sexual assault. During trial, Little moved for discovery of the notes of a counselor of one of the victims, which motion was denied by the District Court. The Supreme Court affirmed, citing St. v. Rhyne, 253 M 513, 833 P2d 1112 (1992). The Supreme Court held that Little had no right to discovery and no right to have the District Court examine in camera the notes of a counselor who was not a witness against Little and whose notes and opinions were not used by the prosecution. St. v. Little, 260 M 460, 861 P2d 154, 50 St. Rep. 1124 (1993).

No Right to Require Psychiatric or Medical Examination of Witness Not a Party: Little was convicted of sexual intercourse without consent and sexual assault. During trial, Little moved for psychiatric and medical examinations of one of the complaining witnesses, which was denied by the District Court. Citing St. v. Crist, 253 M 442, 833 P2d 1052 (1992), the Supreme Court held that Little had no right to force the psychiatric examination of a child victim of a sexual crime. Citing St. v. Goodwin 249 M 1, 813 P2d 953 (1991), the Supreme Court held that Little had no right to require a medical examination of one of the complaining witnesses. Citing St. v. Liddell, 211 M 180, 685 P2d 918 (1984), the Supreme Court also noted that former Rule 35(a), M.R.Civ.P. (now superseded), allows the mental or physical examination of a party not a witness. St. v. Little, 260 M 460, 861 P2d 154, 50 St. Rep. 1124 (1993).

Videotaped Testimony — Preliminary Showing of Necessity Not Required: When defendant was entitled to be present at videotaping of victim's testimony and to confront the accuser but chose not to, the essential elements required by the confrontation clause were present and, therefore, the procedure did not violate defendant's constitutional right to confrontation. St. v. Scott, 257 M 454, 850 P2d 286, 50 St. Rep. 353 (1993).

Failure to Allow Cross-Examination Concerning Separate Civil Trial Not Error: Stewart contended that the lower court had violated his right to confront a witness by not allowing him to cross-examine the witness concerning a separate civil action brought by the witness for wrongful discharge. The Supreme Court held that the lower court had not abused its discretion in ruling that the evidence of the civil trial could not be introduced to show bias on the witness's part and that therefore defendant's constitutional right to confront the witness had not been violated. St. v. Stewart, 253 M 475, 833 P2d 1085, 49 St. Rep. 540 (1992).

Screening of Child Witnesses at Trial — Conformity With Federal Constitution — Test — Failure to Raise State Constitutional Issue in Lower Court: Defendant argued that placement of a 6 1/2-foot high by 10-foot wide opaque screen between himself and two child witnesses at his trial for sexual assault violated his constitutional rights to confront the witnesses against him. Defendant's failure to argue or object in the trial court on the basis of the Montana Constitution precluded consideration of the state issue on appeal. However, the Supreme Court cited Md. v. Craig, 497 US 836, 111 L Ed 2d 666, 110 S Ct 3157 (1990), and Coy v. Iowa, 487 US 1012, 101 L Ed 2d 857, 108 S Ct 2798 (1988), in finding that defendant's lack of opportunity for personal observation of the witnesses was not dispositive. Confrontation rights are not absolute but may give way to other competing interests so as to permit the use of certain procedural devices necessary to shield a child witness from the trauma of courtroom testimony. The test for determining necessity is: (1) the trial court must hear evidence and determine whether use of a procedure other than face-to-face confrontation is necessary to protect the welfare of the child witness; (2) the court must also find that the child would be traumatized, not by the courtroom generally but by the presence of the defendant; and (3) there must be a finding that the emotional distress suffered by the child in the presence of the defendant is more than mere nervousness, excitement, or some reluctance to testify. Federal standards having been met in this case, use of the opaque screen was not violative of the U.S. Constitution. St. v. Davis, 253 M 50, 830 P2d 1309, 49 St. Rep. 342 (1992).

Search by Probation Officer Based on Information From Police — Right to Confront Informant: Smith told police that drugs could be bought from Davis. Police bought drugs from Davis, who went into defendant's residence to get the drugs that he sold police. Police told defendant's probation officer, who then searched the residence and found drugs in defendant's bedroom. The unavailability of Smith at trial did not deny defendant the right to confront and cross-examine Smith. Smith's statement did not form the basis for probation officer's knowledge or search or for the conviction. Furthermore, Smith's reliability was not at issue. St. v. Hall, 249 M 366, 816 P2d 438 , 48 St. Rep. 774 (1991).

Refusal of Immunity to Witness Invoking Fifth Amendment Privilege — Violation of Right of Confrontation: Defendant appealed his conviction of aggravated assault, contending that the District Court violated his right of confrontation by refusing to grant immunity to a witness to the assault who, following interrogation, invoked his fifth amendment privilege against self-incrimination before the defense counsel had completed full cross-examination. In reversing the conviction and remanding for a new trial, the Supreme Court held that because evidence relating to the assault, including statements about who instigated the fight and who fired the rifle, were in conflict, full examination was a critical aspect of the defendant's right of confrontation. St. v. Young, 249 M 257, 815 P2d 590, 48 St. Rep. 696 (1991).

Right to Confrontation Not Applicable to Revocation of Conditional Release — Civil Proceeding: The right to confrontation guaranteed by the sixth amendment to the U.S. Constitution (similar to this section) only attaches to criminal proceedings. The process established for the commitment, discharge, release, and recommitment of a person to the Warm Springs State Hospital, as established in 46-14-301, et seq., is civil in nature, and the confrontation clause does not apply to hearings held as part of that process. St. v. Edmundson, 246 M 241, 805 P2d 1289, 47 St. Rep. 1937 (1990).

Right to Confront Accusers Not Compelled Right of Pretrial Discovery: In determining whether a defendant was denied his right to confront witnesses because of the trial court's refusal to grant defendant's pretrial motion to obtain medical and psychological records of a sexual abuse victim, the Supreme Court adopted the reasoning in People v. Exline, 775 P2d 48 (Colo. App. 1988), holding that the right of a defendant to confront his accusers is not equivalent

to a constitutionally compelled rule of pretrial discovery. Rather, the right of confrontation is a trial right, guaranteeing an opportunity for effective cross-examination. Additionally, the court cited Pa. v. Ritchie, 480 US 39, 94 L Ed 2d 40, 107 S Ct 989 (1987), in holding that the ability to question adverse witnesses does not include the power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony. St. v. Reynolds, 243 M 1, 792 P2d 1111, 47 St. Rep. 1143 (1990), followed in St. v. Donnelly, 244 M 371, 798 P2d 89, 47 St. Rep. 1600 (1990), in St. v. Rhyne, 253 M 513, 833 P2d 1112, 49 St. Rep. 577 (1992) , and St. v. Lane, 279 M 128, 927 P2d 989, 53 St. Rep. 1082 (1996). See also St. v. Imlay, 249 M 82, 813 P2d 979, 48 St. Rep. 588 (1991), which overruled Donnelly with regard to augmentation of sentence for failure to admit guilt.

Right to Confront Witnesses When Witnesses Assert Fifth Amendment: In a criminal case, the defendant argued that his right to confront witnesses was violated because the affidavits of the witnesses were used in the information filed against him, but in the trial, when examined, the witnesses refused to answer questions, relying on their fifth amendment rights. The Supreme Court ruled that the defendant's rights had not been violated because the affidavits were not submitted as evidence against him at the trial. St. v. LaPier, 242 M 335, 790 P2d 983, 47 St. Rep. 760 (1990).

Exclusion of Witness's Earlier Crimes — Impeachment by Showing Bias — No Denial of Confrontation: Hone, a witness to an assault, was on parole from a homicide conviction at the time the assault occurred. It was not error for the District Court to grant a motion in limine to prevent defense counsel from using that conviction for impeachment under an offer of proof, supposedly showing bias, that "he, Hone, would personally see to it that [defendant] served time in prison because a year at the pen had done him, Hone, a lot of good". The exclusion of the testimony did not violate the defendant's right to confrontation of witnesses because the uncorroborated allegation had limited probative value in relation to the credibility of the witness, and thus it was a valid exercise of discretion by the District Court. Sloan v. St., 236 M 100, 768 P2d 1365, 46 St. Rep. 214 (1989), followed in St. v. Haskins, 255 M 202, 841 P2d 542, 49 St. Rep. 922 (1992), and St. v. Sullivan, 266 M 313, 880 P2d 829, 51 St. Rep. 827 (1994).

Examination of Social Worker's File Not Allowed — No Violation of Constitutional Rights: Defendant in a child abuse case claimed his constitutional rights were violated by the District Court's refusal to allow him to examine the file of the social worker assigned to his case. The Supreme Court relied on Pa. v. Ritchie, 480 US 39, 94 L Ed 2d 40, 107 S Ct 989 (1987), in holding that Montana's child abuse confidentiality statute, 41-3-205, as it applies to file review, does not violate a defendant's right to confront his accusers. Further, as long as the trial court has the statutory authority to review the file in camera and to release material information from the file to the accused, defendant's right to a fair trial is fully protected. St. v. Thiel, 236 M 63, 768 P2d 343, 46 St. Rep. 182 (1989), followed in St. v. Donnelly, 244 M 371, 798 P2d 89, 47 St. Rep. 1600 (1990), and in St. v. Glick, 2009 MT 44, 349 M 277, 203 P3d 796 (2009), with regard to a trial court's in camera review of a defendant's access to confidential presentence investigation reports on witnesses. See also St. v. Imlay, 249 M 82, 813 P2d 979, 48 St. Rep. 588 (1991), which overruled Donnelly with regard to augmentation of sentence for failure to admit guilt.

Expert's Testimony Allowable as to Credibility of Child Abuse Victim if Child Also Testifies: In determining whether the District Court properly refused to allow into evidence out-of-court statements made by a child abuse victim to a counselor, the Supreme Court held that testimony by an expert evaluating the credibility of a witness is inadmissible except when the witness is a child victim of sexual assault and the child also testifies. However, the expert may not identify the alleged perpetrator because identification requires only the common logic that is well within the capacity of a lay jury. St. v. J.C.E., 235 M 264, 767 P2d 309, 45 St. Rep. 2373 (1988), followed in part and distinguished in part in In re O.A.W., 2007 MT 13, 335 M 304, 153 P3d 6 (2007). See also St. v. Harris, 247 M 405, 808 P2d 453, 48 St. Rep. 62 (1991), St. v. McLain, 249 M 242, 815 P2d 147, 48 St. Rep. 664 (1991), and St. v. Riggs, 2005 MT 124, 327 M 196, 113 P3d 281 (2005).

Hearsay Admissible When Alleged Child Abuse Victim Unavailable as Witness — Child Hearsay Guidelines Established: In determining whether the District Court properly refused to allow into evidence out-of-court statements made by a child abuse victim to a counselor and a social worker, the Supreme Court held that Rule 804(b)(5), M.R.Ev. (Title 26, ch. 10), henceforth is the rule under which proferred hearsay, other than expert testimony, is considered for admissibility in cases of incest or other sexual abuse of children when the alleged victim is unavailable as a witness. The court also established guidelines for consideration by the trial judge in determining the admissibility of hearsay testimony proffered when the alleged child victim is unavailable. In using these guidelines, the question of admissibility remains in the discretion of the trial judge.

St. v. J.C.E., 235 M 264, 767 P2d 309, 45 St. Rep. 2373 (1988), followed in St. v. Osborne, 1999 MT 149, 295 M 54, 982 P2d 1045, 56 St. Rep. 589 (1999), and followed in part and distinguished in part in In re O.A.W., 2007 MT 13, 335 M 304, 153 P3d 6 (2007). See also St. v. Harris, 247 M 405, 808 P2d 453, 48 St. Rep. 62 (1991), and In re O.A.W., 2007 MT 13, 335 M 304, 153 P3d 6 (2007).

Medical Diagnosis and Treatment Exception — Applicable Only to Medical Doctors: In determining that the District Court properly refused to allow into evidence out-of-court statements made by a child abuse victim to a counselor, the Supreme Court declined to extend the medical diagnosis and treatment exception under Rule 803, M.R.Ev. (Title 26, ch. 10), beyond medical doctors. The counselor is not licensed to render medical diagnoses and therefore cannot testify about such diagnoses under this exception. St. v. J.C.E., 235 M 264, 767 P2d 309, 45 St. Rep. 2373 (1988), followed in St. v. Harris, 247 M 405, 808 P2d 453, 48 St. Rep. 62 (1991), and distinguished in St. v. Arlington, 265 M 127, 875 P2d 307, 51 St. Rep. 417 (1994), in which the medical diagnosis and treatment exception was extended to emergency medical technicians as first responders in a medical crisis. See also St. v. Thompson, 263 M 17, 865 P2d 1125, 50 St. Rep. 1683 (1993), in which child's statement to treating physician that identified stepfather as perpetrator was admissible.

Reasonable Restrictions on Confrontation of Child Witness: Defendant in an incest case contended his attorney could not conduct an effective interview unless defendant was present for consultation during the interview. The state argued that defendant's presence would harm the mental well-being of the minor victim. The Supreme Court held that the accused does not have a constitutional right to interview witnesses personally and that reasonable restrictions on the accused's access to the witness comports with the guarantees of the confrontation clause. A witness unwilling to be interviewed may be deposed, but an interview under circumstances directed by the witness would reflect unwillingness only if the attached conditions make it untenable for defense counsel to discover needed material. St. v. Smith, 235 M 99, 765 P2d 742, 45 St. Rep. 2190 (1988), followed in St. v. Sor-Lokken, 247 M 343, 805 P2d 1367, 48 St. Rep. 142 (1991). See also St. v. Pecora, 190 M 115, 619 P2d 173, 37 St. Rep. 1742 (1980).

Nondisclosure of Witness Proper: Defendant appeals from his conviction for criminal sale (now criminal distribution) of dangerous drugs, asserting that nondisclosure of the identity of a confidential informant was prejudicial. The court held that defendant did not meet the burden of showing that the informant would have been a material witness whose testimony might result in exoneration or that failure to disclose the identity of the informant would infringe defendant's constitutional rights. St. v. McLeod, 227 M 482, 740 P2d 672, 44 St. Rep. 1251 (1987).

Names of Anonymous Phone Callers Not Disclosed — Tips Not Essential Evidence — Right to Confront Witnesses Not Abused: The District Court allowed evidence and argument on the contents of two anonymous tips reporting defendant's speeding car, but the names of those giving the tips to police were not disclosed at trial. The defendant's right to confront witnesses was not impinged because the tips were corroborated by two investigating officers and were used in conjunction with evidence of the vehicle's excessive speed to effectuate a justifiable stop. The tips were not the essential evidence upon which defendant was convicted. St. v. Shaffer, 227 M 221, 738 P2d 491, 44 St. Rep. 1029 (1987), distinguishing Moore v. U.S., 429 US 20, 50 L Ed 2d 25, 97 S Ct 29.

Coconspirator Statements as Hearsay Exemption — Reliability Analysis: Coconspirator statements do not fall within a hearsay exception, but rather a hearsay exemption. Satisfaction of the requirements of Rule 801(d)(2)(E), M.R.Ev. (see Title 26, ch. 10), does not ipso facto satisfy the right of defendant to confront witnesses; rather, a separate Confrontation Clause Analysis designed to guarantee the reliability of the challenged coconspirator statements is required. Relevant criteria are: (1) the declarant's knowledge of the identity and role of defendant in the crime; (2) the possibility that declarant was relying on faulty recollection; and (3) the circumstances under which the statements were made, possibly indicating that declarant might be lying about defendant's involvement in the conspiracy. St. v. Stever, 225 M 336, 732 P2d 853, 44 St. Rep. 283 (1987).

Coconspirator Unavailable but Out-Of-Court Statements Admitted — Confrontation Rights Not Infringed: Where a material witness was made unavailable through a plea bargain agreement yet his statements as a coconspirator were admitted, the Supreme Court adopted the decision in U.S. v. Inadi, 475 US 387, 89 L Ed 2d 390, 106 S Ct 1121 (1986) in holding that defendant's right to confront witnesses under Art. II, sec. 24, Mont. Const., and the sixth amendment to the U.S. Constitution was not violated since the Confrontation Clause does not require a showing of unavailability as a condition of admission of the out-of-court statements of a nontestifying coconspirator. St. v. Stever, 225 M 336, 732 P2d 853, 44 St. Rep. 283 (1987).

Witness Questioned Concerning Prior Inconsistent Statement: If a witness testifies at trial and is cross-examined concerning a prior inconsistent statement, the statement at trial is not hearsay. The defendant's right to confront the witness is not denied because the defendant may cross-examine the declarant and ask him to explain why he is giving a statement inconsistent with his prior one. St. v. Bell, 225 M 83, 731 P2d 336, 44 St. Rep. 56 (1987).

Alleged Constitutional Violation: Concerning an alleged constitutional violation (failure to allow defendant to confront witnesses by allowing hearsay evidence) when the error was not objected to at trial, a party must show prejudicial error and must satisfy one of the three requirements listed in 46-20-702 before the claim will be noticed on appeal. St. v. Cain, 220 M 509, 717 P2d 15, 43 St. Rep. 568 (1986), followed in St. v. Rodgers, 257 M 413, 849 P2d 1028, 50 St. Rep. 335 (1993), and St. v. Enright, 2000 MT 372, 303 M 457, 16 P3d 366, 57 St. Rep. 1590 (2000).

Inspection of Medical and Youth Court Records Denied — No Prejudice: The defendant, convicted of sexual intercourse without consent, contended that the District Court's refusal to furnish him the minor victim's hospital and Youth Court records for use on cross-examination prejudiced his right to "be confronted with the witnesses against him" under the sixth amendment to the U.S. Constitution (similar to Art. II, sec. 24, Mont. Const.). The Supreme Court held that 50-16-314 (now repealed) and 53-24-306 exempt confidential health care information from compulsory legal process. In St. v. Camitsch, 192 M 124, 626 P2d 1250, 38 St. Rep. 563 (1981), the Supreme Court "confine[d] the permissible use of . . . juvenile records to demonstrating, by cross-examination, a witness' bias, prejudice, or motive". The defendant in this case failed to show how use of the records could have demonstrated this or how he could have built a defense based on their use. He had adequate opportunity to cross-examine the victim in an effort to damage her credibility. The Supreme Court ruled that the confrontation clause does not require that a criminal defendant be allowed to impeach the credibility of a victim by compromising the confidentiality of medical treatment or Youth Court records; therefore, the defendant's sixth amendment right was not infringed. St. v. Mendenhall, 219 M 328, 721 P2d 1255, 42 St. Rep. 2060 (1985).

Cross-Examination — Pending Charges Against Witness — Trial Court Discretion: When a prosecution witness admitted under cross-examination that he had failed to appear on bench warrants from the State of Washington and that the Washington charges involved an allegation that he had stolen defendant's property, the witness asserted his privilege against self-incrimination. The District Court's limiting of the extent of the cross-examination on the pending charges did not violate defendant's right to confront witnesses and was not an abuse of the trial court's discretion. The privilege against self-incrimination is not waived by testifying for the prosecution. St. v. Short, 217 M 62, 702 P2d 979, 42 St. Rep. 1026 (1985).

Confidentiality of Records on Child Abuse and Neglect — Not Violative of Confrontation Rights: An attorney being disciplined for violating the confidentiality provisions of 41-3-205 did not prevail in his contention that the section conflicted with the right of confrontation guaranteed by Art. II, sec. 24, Mont. Const., and the sixth amendment to the United States Constitution because the attorney, in his zeal to get information relevant to his client, did not make an application to the court for permission to disseminate the information. In re Wyse, 212 M 339, 688 P2d 758, 41 St. Rep. 1780 (1984).

Sex Crime Victim's Past Sexual Conduct and False Accusations — Admissibility — Veracity of Victim: Although there is a compelling interest in favor of preserving the integrity of a sex crime trial and preventing it from becoming a trial of the alleged victim and a general policy against sordid probes into a victim's sexual past, evidence on an alleged victim's past sexual conduct is admissible on the issue of veracity. To limit or bar cross-examination when there is evidence of prior false accusations by the alleged victim restricts the constitutional right to confront witnesses. The evidence is admissible only if the prior accusations were proven false or admitted to be false. If the prior charge was not adjudicated, the evidence is inadmissible. A separate hearing on the issue should be held outside the jury's presence. The evidence is properly barred when its only value is to prejudice the alleged victim's character and reputation. St. v. Anderson, 211 M 272, 686 P2d 193, 41 St. Rep. 1357 (1984), modifying St. v. McSloy, 127 M 265, 261 P2d 663 (1953), and followed in St. v. Fitzgerald, 238 M 261, 776 P2d 1222, 46 St. Rep. 1253 (1989), St. v. Rhyne, 253 M 513, 833 P2d 1112, 49 St. Rep. 577 (1992), St. v. Steffes, 269 M 214, 887 P2d 1196, 51 St. Rep. 1463 (1994), State ex rel. Mazurek v. District Court, 277 M 349, 922 P2d 474, 53 St. Rep. 678 (1996), and St. v. Ahto, 1998 MT 200, 290 M 338, 965 P2d 240, 55 St. Rep. 851 (1998).

Statements Attributed to Nontestifying Codefendant — Admissible Unless Blame Shifting: Defendant was convicted of deliberate homicide. On appeal, he contended that four statements attributed to his son, a nontestifying codefendant, were admitted in violation of the confrontation clause of the 6th amendment to the United States Constitution under the rule laid down in Bruton v. U.S., 391 US 123, 88 S Ct 1620, 20 L Ed 2d 476 (1968). In Bruton, the court reversed, based upon the fact that the statements were incriminating to Bruton and upon the recognized motivation of the codefendant to shift the blame to others. In this case the testimony was not crucial and did not involve the misuse of a confession. None of the statements contained an express assertion about past fact. The son's knowledge of defendant's role in the shooting was solidly established through other evidence. The chance that the son's statements were founded upon faulty recollection was remote to the extreme. The statements were spontaneous and were against the son's penal interest. There was no prejudice to defendant in the admission of the statements. St. v. Weinberger, 204 M 278, 665 P2d 202, 40 St. Rep. 844 (1983), followed in St. v. McCord, 251 M 317, 825 P2d 194, 49 St. Rep. 53 (1992), and St. v. Grimes, 1999 MT 145, 295 M 22, 982 P2d 1037, 56 St. Rep. 571 (1999).

Hearsay and Violation of United States Constitutional Right of Confrontation: Although the Confrontation Clause (sixth amendment, U.S. Const.) does not prevent the introduction of all hearsay statements, the federal District Court granted a Writ of Habeas Corpus to petitioner where, at his trial, testimony as to a prior inconsistent statement was admitted, but because of a genuine lapse of memory, the witness could not recall the basis for the statement, thus effectively denying the petitioner his right of cross-examination. Creekmore v. District Court, 571 F. Supp. 992, 40 St. Rep. 1638 (D.C. Mont. 1983).

Confrontation of Witnesses — Discretionary at Presentence Hearing: Defendant was convicted of aggravated assault for pointing a gun at another person during a barroom altercation. A presentence investigation was completed and provided to the defense. The presentence investigation contained a number of statements by witnesses whose names were ordered withheld by the court. Defendant objected to the consideration of those statements because he was not allowed to confront the makers thereof. The Supreme Court held that the right of cross-examination at a presentence hearing is a discretionary matter with the trial court and that defendant's due process right was protected because he was represented by counsel at the time the information was made known to him and he was given the opportunity to rebut the information. St. v. Trangsrud, 200 M 303, 651 P2d 37, 39 St. Rep. 1765 (1982).

Right of Confrontation — Harmless Error: A sheriff testified as to statements made by a defendant to the sheriff that incriminated codefendants. Because the defendant did not testify at trial, the codefendants' rights of confrontation were violated. However, because there was overwhelming independent admissible evidence of the facts contained in the defendant's statements, the error was harmless. St. v. Powers, 198 M 289, 645 P2d 1357, 39 St. Rep. 989 (1982).

Permissible Use of Records of Juvenile Crimes — Impeachment: Before his trial on charges of sexual intercourse without consent and sexual assault, the defendant filed a motion to allow his counsel to inspect the Youth Court records of any complaining witnesses on the grounds that the records might have a bearing on the competency and veracity of those witnesses. The motion was denied, and the judge said he would examine the records to determine if any of the girls should be examined by a psychologist before testifying. The Supreme Court found that the judge's ruling denying the defendant's motion to inspect denied him the right to confront the witnesses against him. However, its review of the juvenile records convinced the court that the error here was harmless. It declined to adopt a rule allowing evidence of prior juvenile convictions to be used as evidence to attack the general credibility of a witness. The permissible use of those juvenile records was confined to demonstrating, by cross-examination, a witness' bias, prejudice, or motive. It was within the discretion of the trial judge to determine competency, and his findings would not be overturned absent an abuse of discretion. St. v. Camitsch, 192 M 124, 626 P2d 1250, 38 St. Rep. 563 (1981), distinguished in St. v. Mendenhall, 219 M 328, 721 P2d 1255, 42 St. Rep. 2060 (1985).

Character of Victim — Right to Witness and Confrontation — Sexual Intercourse Without Consent: While the sixth amendment guarantees a criminal the right to testimony of witnesses in his favor, it does not guarantee him the right to any and all witnesses, regardless of their competency or knowledge. There is the competing interest of the fairness and reliability of the trial. Here, in a sexual intercourse without consent case, the defendant was precluded by these rules from calling witnesses to establish the victim's sexual views and from cross-examining the victim concerning a quote on her jacket ("Liquor in the front, poker in the back"). Since the

victim's character is not in issue and her sexual views are not probative of her truthfulness, and it is clearly within the judge's discretion to exclude this evidence if it is irrelevant or too prejudicial, the Supreme Court found no merit in defendant's argument that he was denied his right to confront witnesses. St. v. Higley, 190 M 412, 621 P2d 1043, 37 St. Rep. 1942 (1980), followed in State ex rel. Mazurek v. District Court, 277 M 349, 922 P2d 474, 53 St. Rep. 678 (1996).

Photographic Lineup — When Not Overly Suggestive — No Right to Have Counsel Present: A defendant appealed from a robbery conviction. He alleged that a motion to suppress evidence relating to pretrial photographic lineup procedures should have been sustained. The motion was based on contentions that the victim's ability to identify him was tainted by the fact the victim had seen him in police custody shortly after the robbery and that the victim may have seen another photograph of him that had been in the custody of a police officer. The defendant also challenged the suggestiveness of the lineup because his attorney was not present. If the photographic identification process was so suggestive as to present a "substantial likelihood of misidentification", an in-court identification of the defendant would not be permitted. Under the circumstances of this particular case, there was not a substantial chance of misidentification. Further, the reviewing court followed a U.S. Supreme Court decision and stated that the confrontation clause is not violated by a photo-array identification process and therefore the right to counsel does not attach. Accordingly, the motion to suppress was properly denied. St. v. Dahl, 190 M 207, 620 P2d 361, 37 St. Rep. 1852 (1980).

Hearsay Exceptions Not Violative of Right to Confront Witnesses When Declarant Subject to Cross-Examination: A defendant is not denied the right to confront the witnesses against him by the admission under Rule 801 of the Montana Rules of Evidence of a prior inconsistent statement made by a third person or a statement made by a coconspirator, implicating the defendant, when the declarant testified as a witness and was subject to full and effective cross-examination. St. v. Fitzpatrick, 186 M 187, 606 P2d 1343 (1980), followed in St. v. Pease, 222 M 455, 724 P2d 153, 43 St. Rep. 1417 (1986), and St. v. Charlo, 226 M 213, 735 P2d 278, 44 St. Rep. 597 (1987). See also St. v. Maier, 1999 MT 51, 293 M 403, 977 P2d 298, 56 St. Rep. 208 (1999), which was followed in St. v. Baker, 2013 MT 113, 370 Mont. 43, 300 P.3d 696, in which the Supreme Court noted that the right to confront includes only the opportunity for cross-examination, not any guarantee that it will elicit helpful evidence, and in St. v. Pound, 2014 MT 143, 375 Mont. 241, 326 P.3d 422.

Right to Fair Trial — Addition of Witnesses by State: Defendant was not denied a fair trial when the State was permitted to add to its list of witnesses after voir dire. One of the witnesses added had been listed by the defendant as one of his witnesses, and the court, at the time the witnesses were added, stated that it would grant a continuance to allow the defense to interview the new witnesses. This opportunity cured any prejudice that may have otherwise developed. St. v. Bretz, 185 M 253, 605 P2d 974 (1979).

Right to Confront Witnesses — Introduction of Out-of-Court Statements — United States Constitution: The sixth amendment to the United States Constitution, the right to confrontation (similar to Art. II, sec. 24, Mont. Const.), is effectively denied a criminal defendant when out-of-court statements, made outside a defendant's presence, are introduced at trial and the maker of the statement is not present, does not take the stand, or invokes a privilege so as to deprive the defendant of an opportunity to cross-examine him. U.S. v. Brady, 579 F2d 1121 (9th Cir. 1978).

Intimidation of Witnesses: When protection was immediately provided for two witnesses upon discovery that they were being intimidated and the jury had all the facts before it to weigh those witnesses' credibility, the District Court sufficiently guarded the defendant's rights and a mistrial was not warranted. St. v. Booke, 178 M 225, 583 P2d 405 (1978), followed in St. v. Ferguson, 2005 MT 343, 330 M 103, 126 P3d 463 (2005).

Defendant's Right to Be Present at Jury View: A defendant's constitutional right to be present at all stages of the trial and to meet his witnesses against him face to face includes the right to be present at a jury view. St. v. Musgrove, 178 M 162, 582 P2d 1246 (1978).

Extrajudicial Statements Implicating Codefendant: When a declarant testifies as a witness and is subject to full and effective cross-examination, the confrontation clause of the sixth amendment is not violated by admitting the declarant's out-of-court statements. St. v. Cripps, 177 M 410, 582 P2d 312 (1978), following Calif. v. Green, 399 US 149 (1970).

Access to Potential Defense Witnesses: Defendant was not deprived of due process or a fair trial by the State's investigatory procedure utilized in the questioning of potential defense witnesses who were initial criminal suspects. St. v. Baugh, 174 M 456, 571 P2d 779 (1977).

Reading of Nonadmitted Police Report to Jury: When jury deliberations were tainted by reading nonadmitted police report to the material prejudice of defendant's right to an impartial

jury, to confront witnesses, and to assistance of counsel at every critical stage of trial, a new trial was required. St. v. Davison, 173 M 510, 568 P2d 159 (1977).

Independent Questioning of Judge at Sentencing Hearing: When, at sentencing hearing, the trial judge referred to an incident involving the defendant not mentioned in the trial or presentence report but known to the judge and asked defendant if he had anything to say with regard to it, and defendant, with representation of counsel, admitted the incident but made no statement in mitigation of it, there was no denial of the right of confrontation, and the judge could properly consider the incident in passing sentence. St. v. Orsborn, 170 M 480, 555 P2d 509 (1976).

RIGHT TO COMPEL ATTENDANCE OF WITNESSES

Defendant's Right to Counsel and Right to Trial Not Violated During Four Prior DUI Prosecutions — Enhancement of New DUI Charge to Felony Proper: Walker's 2005 DUI arrest was enhanced to a felony charge when driving records indicated that Walker had six prior DUI convictions. Walker alleged that four of the prior convictions were constitutionally infirm because Walker had not been advised of the right to counsel, the right to compel attendance of witnesses, the right to a trial by a jury, and penalty enhancement provisions. The District Court concluded that the four convictions did not violate Walker's constitutional rights and held that the prior convictions could be used to enhance the 2005 DUI to a felony. Walker appealed, and the Supreme Court considered each assertion in turn to determine whether Walker's waiver of the right to counsel and right to trial during the prior prosecutions was made knowingly, intelligently, and voluntarily. The initial appearance arraignment documents that Walker signed after being charged with the prior DUI offenses adequately informed Walker of the right to counsel, and Walker indicated an understanding of that right and that an attorney was not desired. A waiver of rights form and a waiver of counsel form that Walker signed evidenced that understanding. It was also sufficient that Walker was informed of the right to call witnesses to attend the proceedings, even though the Constitution does not confer a right to compel witnesses to testify. Walker was also adequately informed of the right to a trial by jury and to a unanimous verdict, but it was unnecessary for the District Court to explain all the nuances or effects of waiving the right to a trial by jury. Lastly, the documents informed Walker that there might be indirect consequences of a guilty plea, including the possible loss of driving privileges and the use of the conviction in the event Walker was convicted of a crime in the future, but the District Court was not required to specifically inform Walker of the indirect consequence that a fourth or subsequent DUI might result in a felony charge, because whether Walker committed a fourth or subsequent DUI was clearly within Walker's sole control and was an indirect consequence of guilty pleas to the prior DUI offenses. Thus, Walker's prior guilty pleas were entered knowingly, intelligently, and voluntarily, and the District Court did not err in allowing the use of the prior convictions to elevate Walker's 2005 DUI to a felony. St. v. Walker, 2008 MT 244, 344 M 477, 188 P3d 1069 (2008).

No Prejudice or Ineffective Assistance in Failure of Counsel to Procure Witness: At Diaz's trial for attempted deliberate homicide and robbery, the defense counsel was unable to procure the testimony of a witness who had allegedly confessed to the crimes, and Diaz asserted that this failure amounted to ineffective assistance of counsel. The Supreme Court disagreed. Despite the absence of the witness, Diaz still succeeded in addressing the alleged confession through the testimony of the state's lead investigator, who referenced the confession during cross-examination. The jury was thus apprised of the testimony, and the defense counsel was able to argue in closing that the confession exonerated Diaz. Because Diaz was not prejudiced when the witness did not appear, the ineffective assistance claim failed. St. v. Diaz, 2006 MT 303, 334 M 479, 148 P3d 628 (2006).

Exclusion of Testimony by Newspaper Editor and Reporter — Harmless Error: Defendant subpoenaed a newspaper editor and a reporter who had interviewed defendant's assault victim, but the District Court quashed the subpoenas pursuant to the Media Confidentiality Act, Title 26, ch. 1, part 9. Defendant contended that the District Court's action deprived him of the right to compel the attendance of witnesses and that his constitutional right should prevail over the media shield statutes. However, the state met its burden of showing that defendant was not prejudiced by the trial error because defendant was able to introduce the same evidence during cross-examination of the victim and made no additional offer of proof demonstrating the additional evidence that defendant sought to introduce through the editor and reporter. The media testimony would have added little or nothing to the report in the newspaper and other evidence introduced at trial. Absent a reasonable possibility that excluding the testimony contributed to

defendant's conviction, quashing of the subpoenas was affirmed. St. v. Slavin, 2004 MT 76, 320 M 425, 87 P3d 495 (2004), followed in St. v. Kolb, 2009 MT 9, 349 M 10, 200 P3d 504 (2009).

Motion to Disclose Identity of Confidential Informer Denied — Overriding State Interest: The state may claim the privilege to refuse to disclose the identity of a confidential informant, subject to the balancing test in Roviaro v. U.S., 353 US 53 (1957). Under Roviaro, a defendant must show the need for disclosure and the need must be one that overrides the government's interest in preserving confidentiality. Here, Ayers did not meet the burden. The confidential information was based on third-hand knowledge, and the informant: (1) was neither present at the crime scene nor witness to any criminal activity, negating any hearsay exception; (2) had no continuous, active, or primary role in the alleged crime, negating the need for disclosure because of a possible entrapment defense; and (3) was not a material witness. Ayers was given the investigative report that summarized all relevant information provided by the informant. The report included the identity of all of the informant's sources, whom Ayers had the opportunity to call as witnesses. Denying disclosure of the informant's identity had little if any impact on Ayers' ability to prepare a defense, and denial of the disclosure motion was not error. St. v. Ayers, 2003 MT 114, 315 M 395, 68 P3d 768 (2003).

Denial of Writ of Habeas Corpus to Compel Attendance of Children in Abuse and Neglect Hearing Not Violative of Due Process Rights or Right to Confront Witnesses: The mother petitioned the District Court for a writ of habeas corpus demanding that her children be physically present for an abuse and neglect hearing because they were material witnesses and claiming that the writ was necessary to ensure her due process rights by having the children available to rebut allegations against her at the hearing. The petition was denied. On appeal, the Supreme Court affirmed. Although the mother was entitled to an opportunity for a meaningful hearing, that opportunity need not be provided at the expense of the children whose best interests were the paramount focus of the proceeding, and subjecting the children to direct and cross-examination could exacerbate the abuse that they had already experienced. Denial of the petition did not violate the mother's right to confront witnesses because the children were not her accusers and she had no right to confront them. Rather, the abuse and neglect case was brought by the state, and the mother had ample opportunity to confront and examine the state's witnesses and experts at the hearing, so her due process rights were met. In re B.P. & A.P., 2001 MT 219, 306 M 430, 35 P3d 291 (2001).

Mere Loss of Potential Witness Not Sufficiently Prejudicial to Implicate Due Process Rights: The mere loss of a potential witness does not constitute actual and substantial prejudice sufficient to implicate a defendant's due process rights, and defendant's bare speculation that a lost witness's testimony would have been exculpatory is insufficient to prove actual prejudice. However, in the present case, the testimony of two doctors who would have provided a key discussion on the mechanics of a workers' compensation incident, in the context of defendant Taylor's overall history and symptoms, but for their deaths during a lengthy preindictment period, was critically important to Taylor's defense. Without the doctors' testimony, Taylor was actually and substantially prejudiced in his ability to defend himself, warranting dismissal of the information. St. v. Taylor, 1998 MT 121, 289 M 63, 960 P2d 773, 55 St. Rep. 481 (1998).

Lack of Notice of Changed Testimony — Continuance Proper: It was not revealed to defendant until trial that the initial story of an alleged sexual assault victim had changed. Prior to the victim's in-court testimony, defendant was unaware that the victim had made more than one statement to the investigating officer. Nevertheless, on the grounds that the court's calendar was full and defendant should have subpoenaed the witnesses before trial, the trial court denied defendant's motion for continuance until other witnesses could be subpoenaed to test the victim's credibility. The Supreme Court noted that the credibility of a witness is of utmost importance between a sexual abuse victim and a denying defendant, often constituting the only defense available, and that a change in testimony goes to the credibility of the victim. A reasonable continuance would have satisfied defendant's constitutional rights with regard to compulsory process, due process, and fair trial, and denial of the motion was an abuse of discretion warranting reversal and a new trial. St. v. Timblin, 254 M 48, 834 P2d 927, 49 St. Rep. 617 (1992).

Compulsory Process — Non-American Witness: A defendant's right to compulsory process is not violated by the absence of a witness when an American court lacks the power to compel the attendance of a witness who is not a citizen of the United States. St. v. Twoteeth, 219 M 101, 711 P2d 789, 42 St. Rep. 1873 (1985).

Disclosure of Informant's Identity and Whereabouts — Balancing Test Required: Defendant was charged with sale of dangerous drugs (now criminal distribution of dangerous drugs). Defendant contended that he had been entrapped because a paid informant had used persistent

and harassing techniques to get him to obtain drugs for him over a period of a month and a half. The informant left town after defendant's arrest. Defendant did not know the whereabouts or true identity of the informant. The District Court refused defendant's request to require the State to disclose the identity and whereabouts of the informant. On appeal, the Supreme Court relied on the balancing test set forth in Offerdahl v. District Court, 156 M 432, 481 P2d 338 (1971), to determine whether the defendant's interest in preparing his defense outweighed the government's interest in protecting the flow of information from the informant. The court found that the informant's identity should have been disclosed because his testimony was relevant to the issue of entrapment and because, based on the facts in this case, the balance weighed heavily in defendant's favor. St. v. Chapman, 209 M 57, 679 P2d 1210, 41 St. Rep. 550 (1984).

Basis for Subpoenas: The quashing of defendant's subpoenas did not violate defendant's right to compulsory process where the defendant failed to establish a foundation and basis for the subpoenas. St. v. Bretz, 185 M 253, 605 P2d 974 (1979).

Evidence Properly Excluded for Lack of Foundation: Defendant charged with larceny by bailee was not denied the right to compulsory process even though the trial court excluded his offered testimony that money he retained out of his client's workers' compensation settlement was an offset for a fee the client owed him for other services. Defendant attempted to introduce this evidence through the testimony of a former Deputy County Attorney when it could only have been established by the testimony of the client or the defendant. In the absence of proper foundation testimony, the evidence was properly excluded. St. v. Bretz, 185 M 253, 605 P2d 974 (1979).

Irrelevant Testimony: Defendant was not denied his right to compulsory process because of the exclusion of certain testimony when the testimony excluded was not relevant. St. v. Bretz, 185 M 253, 605 P2d 974 (1979).

Requiring Demonstration of Materiality to Subpoena Out-of-State Witnesses: Requiring a showing of materiality before subpoenaing out-of-state witness, which requirement was the result of the submission by the defense of 40 out-of-state witnesses from such places as Alaska, Nevada, Illinois, and West Germany 2 weeks before trial, did not violate defendant's right to compulsory process. The purpose of the inquiry was to determine whether these were legitimate witnesses, and the defendant made no showing of prejudice with respect to his inability to obtain any of these witnesses. St. v. Bretz, 185 M 253, 605 P2d 974 (1979).

SPEEDY TRIAL

Speedy Trial Applies to Delay Before Disposition of Case — Due Process Applies to Delay Between Disposition and Sentencing: The right to a speedy trial applies from arrest to the date the case is disposed of by either the date of the beginning of a trial or a plea. The right to a speedy trial does not apply to sentencing; rather, due process protects a defendant from unreasonable delay in sentencing. St. v. Maloney, 2015 MT 227, 380 Mont. 244, 354 P.3d 611, following St. v. Betterman, 2015 MT 39, 378 Mont. 182, 342 P.3d 971.

Sentencing Not Included in Right to Speedy Trial — Sentencing Delay Possible Violation of Due Process if Purposeful or Oppressive: Fourteen months elapsed between the defendant's pleading guilty and being sentenced. Prior to sentencing, the defendant filed a motion to dismiss, claiming that the delay in sentencing violated his right to due process, which the District Court denied. On appeal, the Supreme Court affirmed. The court concluded that the constitutional right to a speedy trial does not extend from conviction to sentencing and that a sentencing delay that is either sufficiently purposeful or oppressive may constitute a due process violation but that neither factor was substantial or demonstrable in this case. St. v. Betterman, 2015 MT 39, 378 Mont. 182, 342 P.3d 971. See also St. v. Maloney, 2015 MT 227, 380 Mont. 244, 354 P.3d 611.

No Waiver of Speedy Trial Until Court Accepts Guilty Plea — Consideration of Speedy Trial Argument Warranted: The defendant was initially charged with a DUI in Municipal Court. Later, an additional charge was added and the case was transferred to District Court. The defendant moved to vacate the trial date and set a change-of-plea hearing in District Court. However, before the plea hearing was held, the state dismissed the additional charge and the case was transferred back to the Municipal Court, which again arraigned the defendant and set a trial date. The defendant filed a motion to dismiss based on the lack of a speedy trial. The Municipal Court denied the motion to dismiss, citing that the defendant had filed a motion to vacate the trial date with the District Court. After conviction, the District Court affirmed denial of the motion to dismiss. On appeal, the Supreme Court reversed, holding that a defendant does not waive the right to a speedy trial until the defendant pleads guilty and the court accepts the guilty plea. The Supreme Court, further noting that 375 days had passed between the defendant's arrest and his

plea, remanded the matter for the Municipal Court to consider the defendant's constitutional speedy trial claim. Helena v. Heppner, 2015 MT 15, 378 Mont. 68, 341 P.3d 640.

Speedy Trial Violated by 289-Day Delay in Motor Vehicle Trial — State's Obligation: Following his arrest for felony driving under the influence and misdemeanor traffic offenses, the defendant was incarcerated for 3 days and submitted to alcohol monitoring that cost $56 a week. The defendant made an initial appearance and a preliminary hearing was scheduled. This hearing was later vacated at the request of the defendant's counsel, but it was never rescheduled. The state did not take action until 178 days later, and the District Court scheduled a trial date that amounted to a 289-day delay. On appeal, the Supreme Court held that the defendant was under no obligation to ensure diligent prosecution of his case and that, considering all of the factors, the delay amounted to a violation of his speedy trial rights. St. v. Zimmerman, 2014 MT 173, 375 Mont. 374, 328 P.3d 1132.

Constitutional Right to Speedy Trial Distinct From Right to Speedy Trial Under Interstate Agreement on Detainers Act: The defendant moved to dismiss an information filed against him arguing a denial of his right to a speedy trial under the sixth amendment to the U.S. Constitution and Art. II, sec. 24, Mont. Const. The District Court denied the motion based on the Interstate Agreement on Detainers Act (IAD) without considering the constitutional arguments. The Supreme Court held that the constitutional right to a speedy trial is distinct from the right to a speedy trial under the IAD and remanded for consideration of defendant's constitutional speedy trial rights. State v. Nickerson, 2014 MT 83, 374 Mont. 354, 322 P.3d 421.

Rescheduling of Trial Due to Defendant's Absence From Pretrial Conference — Good Cause for Delay — No Speedy Trial Violation: The defendant, charged with DUI, failed to appear in person for his pretrial conference even though two previous court documents notified him that his presence was required. Accordingly, the Justice's Court vacated the jury trial the defendant had requested and scheduled a bench trial. The bench trial, however, was scheduled 8 days after the 6-month deadline. On the day of the trial, the defendant moved to dismiss the charges because the trial was held beyond the deadline. The Justice's Court denied the motion and ruled that the defendant's failure to appear at his pretrial conference had caused the delay. After his conviction, the defendant appealed to the District Court, which affirmed the denial of the motion to dismiss. The defendant then appealed to the Supreme Court, which agreed that the defendant had been advised beforehand that his absence at the pretrial conference would vacate his jury trial, and therefore good cause existed for the delay in his trial date. St. v. Luke, 2014 MT 22, 373 Mont. 398, 321 P.3d 70.

Trial Delay of 662 Days — No Denial of Speedy Trial Given Balance of Circumstances: When much of the delay attributed to the state was institutional delay and the defendant failed to exhibit the timeliness, sincerity, and persistence indicative of an actual desire for speedy trial, there was no error on the part of the District Court. St. v. Morsette, 2013 MT 270, 372 Mont. 38, 309 P.3d 978.

Original Felony Charge Dismissed By Court and Refiled With Misdemeanor Charge in Justice's Court: The District Court dismissed a felony partner or family member assault (PFMA) charge against the defendant. Based on the same underlying incident, the state filed a new misdemeanor PFMA charge against the defendant in Justice's Court. Because the new filing marked the beginning of a new criminal proceeding, the 6 months allowed for a speedy trial commenced at the time of the new filing. St. v. Case, 2013 MT 192, 371 Mont. 58, 305 P.3d 812, following St. v. Topp, 2003 MT 209, 317 Mont. 59, 75 P.3d 330.

Substantial Pretrial Delay Attributable to State — Lack of Prejudice to Defendant — No Speedy Trial Violation: Although the defendant suffered substantial pretrial delay that was largely attributable to the state under institutional delay, the District Court did not err in denying the defendant's motion to dismiss for speedy trial violations because the defendant failed to demonstrate that the delay substantially prejudiced his ability to defend himself or aggravated his anxiety beyond the anxiety level expected of an individual accused of a crime. St. v. Steigelman, 2013 MT 153, 370 Mont. 352, 302 P.3d 396.

Balancing Factors Causing and Caused by Delay — No Speedy Trial Violation: There was a 519-day delay between the accusations against the defendant and the initial trial date. The state failed to make a highly persuasive showing of no prejudice, but the District Court correctly analyzed each period of delay and considered the speedy trial factors set out in St. v. Ariegwe, 2007 MT 204, 338 Mont. 442, 167 P.3d 815. The Supreme Court balanced the factors finding no speedy trial violation and, like the District Court, determined that the majority of the pretrial delay was the result of the defendant's actions and that this caused at least some of the prejudicial

impact on the defendant. St. v. Houghton, 2010 MT 145, 357 Mont. 9, 234 P.3d 904. See also St. v. Maloney, 2015 MT 227, 380 Mont. 244, 354 P.3d 611.

Medical Reasons for Witness Unavailability — Motion for Continuance Properly Granted: Roan moved to dismiss a reckless driving charge based on speedy trial grounds because the city failed to bring the case within 6 months of arraignment. The city moved for a continuance based on the fact that one prosecution witness was unavailable for medical reasons. The City Court granted the motion, the trial was delayed, and Roan was found guilty. Roan sought a trial de novo in District Court and again raised the speedy trial issue. The District Court denied the motion, concluding that the medical unavailability of the witness established good cause to justify the delay, and Roan appealed. The Supreme Court affirmed. The fact that one witness was going through a difficult pregnancy and the other was caring for her and their two small children while continuing to work constituted good cause for the delay, and under the totality of circumstances, Roan's dismissal motion was properly denied. Helena v. Roan, 2010 MT 29, 355 Mont. 172, 226 P.3d 601, distinguishing St. v. Ronningen, 213 Mont. 358, 691 P.2d 1348, and St. v. Bertolino, 2003 MT 266, 317 Mont. 453, 77 P.3d 543.

Pretrial Delay of 3,137 Days — No Speedy Trial Violation: Lacey was aware of rumors and allegations that he had engaged in inappropriate sexual behavior in Gallatin County in 1997. About 6 months after Lacey left Montana, Gallatin County began investigating, but he could not be located. Nevertheless, an information and warrant were issued in 1999, and Lacey was located and arrested in 2007, 3,137 days after charges were filed. Lacey moved for dismissal based on lack of a speedy trial, but the District Court denied the motion, so Lacey appealed. The Supreme Court applied the speedy trial factors set out in St. v. Ariegwe, 2007 MT 204, 338 Mont. 442, 167 P.3d 815, and affirmed. The length of delay was undisputed. Although the District Court failed to consider whether any of the delay should be attributed to the state as required by Ariegwe, the delay was nevertheless properly attributed to Lacey. The District Court also erred in addressing Lacey's acquiescence to and objections to pretrial delays, but the error was not grounds for reversal under the totality of the circumstances because Lacey's actions indicated that he did not want a speedy trial even though his dismissal motion was timely. Lastly, Lacey admitted that he could show no direct prejudice to his defense and focused on the other speedy trial factors, and absent a showing of direct prejudice, Lacey's speedy trial claim failed. The District Court was affirmed. St. v. Lacey, 2010 MT 6, 355 Mont. 31, 224 P.3d 1247. See also St. v. Stops, 2013 MT 131, 370 Mont. 226, 301 P.3d 811.

Institutional Delays in Trial Not Chargeable Against Requesting State Absent Notice of Request for Speedy Trial: While in federal custody in Texas, Dodson filed a speedy trial request under the Interstate Agreement on Detainers Act (IAD) with officials in Texas after Montana filed a warrant for Dodson's arrest. However, Texas officials failed to forward the speedy trial request, so Dodson moved to dismiss the Montana charges based on Montana's failure to bring him to trial in Montana within 180 days of filing the charges. The dismissal motion was denied and Dodson was ultimately convicted on the Montana charges. Dodson appealed on grounds that the Montana charges should have been dismissed for lack of a speedy trial pursuant to the IAD. The Supreme Court disagreed. The speedy trial clock provisions are not triggered until the prosecutor and court receive the prisoner's request pursuant to the IAD. In cases where delay is occasioned by the custodial state's failure to forward the request, causing harm or detriment to the prisoner, the institutional delays against the custodial state should not be charged against the requesting state that had no notice of the delay or control over the institution causing the delay. St. v. Dodson, 2009 MT 419, 354 M 28, 221 P3d 687 (2009), following Fex v. Mich., 507 US 43 (1993). See also St. v. Seadin, 181 M 294, 593 P2d 451 (1979), and St. v. Wolfe, 250 M 400, 821 P2d 339 (1991).

Trial Delay of 432 Days Without Showing of Compelling Reason — Case Dismissed: Hardaway was arrested for criminal possession of dangerous drugs with intent to distribute. After more than 200 days without trial, Hardaway moved to dismiss for lack of a speedy trial. The majority of delay was attributed to the state as institutional delay, and because Hardaway was not prejudiced, dismissal was denied. Subsequently, after 432 days had elapsed without trial, Hardaway again moved to dismiss on speedy trial grounds. This time the District Court analyzed the delay pursuant to St. v. Ariegwe, 2007 MT 204, 338 M 442, 167 P3d 815 (2007), and concluded that the state failed to meet its burden to provide compelling justification for the delay, so Hardaway's motion to dismiss was granted. The state appealed, but the Supreme Court affirmed. The District Court weighed the length of delay, the state's failure to provide a compelling reason for the delay, Hardaway's two timely speedy trial complaints, and the presumption of prejudice and correctly concluded that Hardaway was deprived of a speedy trial,

and on appeal the state failed to demonstrate that the District Court's conclusions were wrong. St. v. Hardaway, 2009 MT 249, 351 M 488, 213 P3d 776 (2009).

Trial Delay of 1,168 Days — No Denial of Speedy Trial Given Balance of Circumstances: Morrisey suffered a delay of 1,168 days between arrest and trial and asserted that the delay violated the right to a speedy trial, warranting dismissal. The District Court denied Morrisey's dismissal motion and Morrisey appealed. The Supreme Court applied the balancing test provided in St. v. Ariegwe, 2007 MT 204, 338 M 442, 167 P3d 815 (2007), and found that on one hand the pretrial delay was substantial and that Morrisey wanted to proceed to trial as expeditiously as possible, but on the other hand Morrisey requested or waived much of the delay in order to properly prepare a defense, and that there was no evidence of negligence or bad faith delaying tactics on the part of the prosecution. Given these circumstances and the lack of significant prejudice caused by the delay, the court concluded that Morrisey was not denied the right to a speedy trial. St. v. Morrisey, 2009 MT 201, 351 M 144, 214 P3d 708 (2009).

No Grounds Asserted for Speedy Trial Argument — Motion Properly Dismissed: Cybulski filed a pretrial motion to dismiss a DUI case for lack of a speedy trial, but the motion was denied. On appeal, the Supreme Court affirmed. Cybulski's motion consisted of one paragraph and no brief in support of the motion. The statutory requirements for filing pretrial motions are that a motion must state with particularity the grounds for the motion and the order or relief sought. Cybulski's motion consisted of only an assertion that because more than 1 year had elapsed, a speedy trial analysis was required. Without more, the requirements for pretrial motions were not met and the motion was properly dismissed. St. v. Cybulski, 2009 MT 70, 349 M 429, 204 P3d 7 (2009). See also St. v. Yecovenko, 2004 MT 196, 322 M 247, 95 P3d 145 (2004).

Delay of 507 Days From Accusation to Trial — Greater Delay Caused by Defendant — No Speedy Trial Violation: Following a 507-day delay between accusation and trial, Rose contended that his right to a speedy trial was violated. Applying the speedy trial analysis set out in St. v. Ariegwe, 2007 MT 204, 338 M 442, 167 P3d 815 (2007), the Supreme Court examined the well-developed record and found no violation. Of the 507 days, 199 days were attributable to the state, but all of that delay was institutional delay, and it was Rose that caused the greater portion of the delay while the state was concerned with protecting Rose's right to a speedy trial, so the length of delay did not in itself violate the speedy trial right. Although Rose suffered some discomfort while in jail, that discomfort was not oppressive, nor was Rose's ability to defend himself impaired by the delay between arrest and trial. Pursuant to the Ariegwe criteria, the District Court did not abuse its discretion by dismissing Rose's speedy trial argument. St. v. Rose, 2009 MT 4, 348 M 291, 202 P3d 749 (2009). See also St. v. Burns, 2011 MT 167, 361 Mont. 191, 256 P.3d 944, and St. v. MacGregor, 2013 MT 297, 372 Mont. 142, 311 P.3d 428.

Applicability of Speedy Trial Statute to Potential Misdemeanor Partner or Family Member Assault Charge: Martz was convicted of partner or family member assault in 2002. In January 2006, Martz was charged with misdemeanor second offense and felony third offense partner or family member assault, and in May 2006 Martz was charged with felony fourth offense partner or family member assault. The second and third offense charges were dismissed in August 2006 and were subsequently refiled in September 2006. The refiling had the effect of Martz being tried for the felony fourth offense before trial for the misdemeanor second and felony third offenses. Martz contended that the order in which the charges came to trial meant that the fourth offense charge was in fact the second offense tried and that because second offense partner or family member assault is a misdemeanor, the speedy trial provisions of 46-13-401 should apply. The state argued that because Martz was charged with felony partner or family member assault, the speedy trial statute did not apply. The District Court held that if Martz was convicted on the fourth charge but not on the second and third charges, the fourth offense would be treated as a misdemeanor for sentencing purposes, and denied the speedy trial motion. Martz was subsequently convicted on the fourth charge and, the following day, on the second charge. On appeal, the Supreme Court noted that although Martz was first found guilty of the fourth offense, he was not convicted of that charge and sentenced until March of the following year, after sentence for the second offense was imposed, which made the charged fourth offense a felony conviction, so the speedy trial provisions did not apply. However, the state's argument that the speedy trial provisions could never apply was clarified by the Supreme Court. The speedy trial statute could have applied because the fourth offense had the potential of being reduced to a misdemeanor depending on the outcome of the trial on the second and third offenses. Because that contingency did not occur, dismissal of the speedy trial motion was affirmed. St. v. Martz, 2008 MT 382, 347 M 47, 196 P3d 1239 (2008).

Length of Speedy Trial Interval When Dismissal Granted: The date that a court grants a speedy trial dismissal motion becomes the date of the case's disposition and the end date of the speedy trial interval for purposes of appeal. St. v. Billman, 2008 MT 326, 346 M 118, 194 P3d 58 (2008).

Prejudice From 278-Day Delay Warranting Speedy Trial Dismissal: Billman was incarcerated 278 days awaiting trial for felony DUI and misdemeanor driving charges. His motion for dismissal on speedy trial grounds was granted and the state appealed. The Supreme Court applied the Ariegwe speedy trial analysis and affirmed on the following grounds: (1) the entire 278-day delay was attributable to the state; (2) Billman never waived the right to a speedy trial and sincerely wanted a speedy trial; (3) lengthy incarceration coupled with relatively simple charges against Billman established prejudice from the pretrial delay; (4) pretrial incarceration unduly prolonged the disruption to Billman's life and aggravated Billman's anxiety and concern; (5) Billman's memory faded during incarceration, impeding his ability to accurately recall past events and to prepare a defense. Because all the speedy trial factors weighed in Billman's favor and the state failed to persuasively show that the pretrial delay did not prejudice Billman, the District Court's conclusion that Billman was denied a speedy trial was correct. St. v. Billman, 2008 MT 326, 346 M 118, 194 P3d 58 (2008).

Speedy Trial Decision Remanded for Ariegwe Analysis: The District Court held that a delay of 894 days, without the state disproving prejudice, violated Madplume's right to a speedy trial. The state appealed, but before Madplume responded to the state's opening appeal brief and the state replied, the Supreme Court announced a new speedy trial analysis in St. v. Ariegwe, 2007 MT 204, 338 M 442, 167 P3d 815 (2007). In Madplume's case, the parties had applied the test in Billings v. Bruce, 1998 MT 186, 290 M 148, 965 P2d 866 (1998), which was partially overruled in Ariegwe. In order to allow the District Court to apply the new Ariegwe test, the case was remanded without prejudice for further speedy trial analysis. St. v. Madplume, 2008 MT 37, 341 M 321, 176 P3d 1071 (2008).

Revised Speedy Trial Balancing Test: Although acknowledging the general approach for analyzing speedy trial claims articulated in Barker v. Wingo, 407 US 514 (1972), and the subsequent clarification of the Barker framework in Billings v. Bruce, 1998 MT 186, 290 M 148, 965 P2d 866 (1998), the Supreme Court noted that Bruce does not actually involve a balancing test, but rather that the first three factors, i.e., length of delay, reason for the delay, and defendant's timely assertion of the right to a speedy trial, act to channel the focus of the analysis to the issue of the fourth factor of prejudice, rendering the second and third factors relatively inconsequential. Because an actual balancing test of the four factors is more likely to produce an accurate assessment of a speedy trial claim, the court revisited the process and revised the analytical framework. None of the factors deserves greater consideration in the balancing. Rather, each factor's significance varies from case to case, and because of the case-specific nature of speedy trial claims, a given factor may outweigh all the others in one case but be of little consequence in another. St. v. Ariegwe, 2007 MT 204, 338 M 442, 167 P3d 815 (2007), followed in St. v. Howard, 2008 MT 173, 343 M 378, 184 P3d 344 (2008), St. v. Sartain, 2010 MT 213, 357 Mont. 483, 241 P.3d 1032, St. v. Burns, 2011 MT 167, 361 Mont. 191, 256 P.3d 944, and St. v. Stops, 2013 MT 131, 370 Mont. 226, 301 P.3d 811. See also St. v. MacGregor, 2013 MT 297, 372 Mont. 142, 311 P.3d 428.

Revised Speedy Trial Balancing Test — Factor One: Factor one of a speedy trial analysis is the length of the delay, which requires two inquiries, and until there is some delay that is presumptively prejudicial, there is no necessity for inquiry into the other three factors. The first inquiry, a threshold matter, is whether the interval between accusation and trial is sufficient to trigger a speedy trial analysis, which is measured without regard to the fault for the delay and is necessarily dependent on the particular circumstances of the case. A speedy trial claim lacks merit if the interval is less than 200 days, and the interval runs not to the date on which the accused's motion is considered by the court, but rather to the scheduled trial date or the date on which a guilty plea is entered, whichever date represents the date of the disposition of the case. If the interval is 200 days or more, the second inquiry is the extent to which the delay stretches beyond the trigger date. In Billings v. Bruce, 1998 MT 186, 290 M 148, 965 P2d 866 (1998), the court adopted a bright-line 275-day rule of presumptive prejudice beyond which the state was required to provide evidence that the delay was not prejudicial, and if shown, the accused was then required to show evidence of prejudice. However, the Supreme Court decided not to retain the Bruce 275-day rule and instead concluded that the presumption of prejudice exists as of the 200-day trigger date, at which point prejudice is minimal, and escalates over time. Both parties should come forward with evidence regarding prejudice or the lack thereof, and the trial

court must weigh each party's evidence. The state's burden to justify the delay increases with the length of the delay. St. v. Ariegwe, 2007 MT 204, 338 M 442, 167 P3d 815 (2007), following Doggett v. U.S., 505 US 647 (1992), and followed in St. v. Sartain, 2010 MT 213, 357 Mont. 483, 241 P.3d 1032.

Revised Speedy Trial Balancing Test — Factor Two: Under the second factor of the speedy trial test, the court first identifies each period of delay in bringing the accused to trial, without considering any actions by the accused or the state that did not result in a postponement of the trial date, and then attributes each period of delay to the appropriate party. The state bears the burden of explaining pretrial delays. Any delay not demonstrated to have been caused by the accused or affirmatively waived by the accused is attributed to the state by default. After identifying and attributing each period of delay in bringing the accused to trial, the court assigns weight to each period based on the specific cause and motive for the delay, depending on the party's culpability in causing it. Thus, the function of factor two in the overall balancing is no longer to conclusively establish a burden shift for the determination of prejudice, but rather the significance is in the specific cause and culpability for each delay. Because the primary burden to ensure that cases are brought to trial is on the courts and prosecutors, the further the delay stretches beyond the 200-day trigger date, the more compelling the state's justification for the delay must be. St. v. Ariegwe, 2007 MT 204, 338 M 442, 167 P3d 815 (2007), following McNeely v. Blanas, 336 F3d 822 (9th Cir. 2003), and followed in St. v. Sartain, 2010 MT 213, 357 Mont. 483, 241 P.3d 1032.

In St. v. Couture, 2010 MT 201, 357 Mont. 398, 240 P.3d 987, the court followed and clarified Ariegwe, holding that: (1) it is essential that a firm trial date be set at arraignment and maintained all the way to trial in order to identify the reasons for and attribute delay under the second factor; and (2) a motion for a continuance must disclose the basis for the requested continuance and demonstrate that a continuance is justified. When a continuance has already been granted for certain tasks, justification must be provided for why additional time is needed for the same tasks, and a District Court should deny a motion for a continuance that is not supported by good cause, which does not include defense counsel's heavy workload.

Revised Speedy Trial Balancing Test — Factor Three: The third factor in the speedy trial balancing test is the accused's assertion of the right to a speedy trial. In Billings v. Bruce, 1998 MT 186, 290 M 148, 965 P2d 866 (1998), the Supreme Court established a bright-line rule that no further analysis of this factor was necessary as long as the accused asserted the right to a speedy trial at any time prior to the commencement of trial. However, the court determined here that the overall accuracy of the balancing test is enhanced when the totality of the accused's responses to pretrial delays is considered, thus departing from the nonweighted Bruce approach and restating the factor as the accused's responses to the delay. Whether the accused actually wanted to be brought to trial promptly is an important consideration in ascertaining whether the right to a speedy trial has been violated. Useful indicators of whether and how the accused asserted the speedy trial right are the frequency and force of the accused's objections to pretrial delays and the reasons for any acquiescence by the accused in pretrial delays. Factor three will no longer be considered a procedural formality, but rather will serve as an indicator of whether the accused actually wanted a speedy trial, which in turn informs the inquiry into whether there has been a deprivation of the right. Therefore, under factor three, a trial court must evaluate an accused's responses to the delay, and the totality of the various responses to delays in trial should then be considered together with the other three balancing factors, including the timeliness and persistence of an accused's objections to pretrial delays in determining whether prejudice occurred. St. v. Ariegwe, 2007 MT 204, 338 M 442, 167 P3d 815 (2007), followed in St. v. Sartain, 2010 MT 213, 357 Mont. 483, 241 P.3d 1032.

Revised Speedy Trial Test — Factor Four: The fourth factor in a speedy trial analysis is prejudice to the accused, which should be assessed in light of the interests of defendants that the speedy trial right was designed to protect. In Billings v. Bruce, 1998 MT 186, 290 M 148, 965 P2d 866 (1998), the Supreme Court expressed those interests as: (1) to prevent oppressive pretrial incarceration; (2) to minimize anxiety and concern of the accused; and (3) to limit the possibility that the defense will be impaired by dimming memories and loss of exculpatory evidence. Here, the Supreme Court reaffirmed those considerations as pertinent when evaluating prejudicial delay to an accused and reaffirmed that prejudice may be established based on "any or all" of those considerations. In assessing whether pretrial incarceration is oppressive, the court must consider all circumstances of incarceration. The longer the pretrial incarceration, the more likely it is oppressive and prejudicial, but the complexity of the charged offense is also relevant, and the length of pretrial incarceration that is oppressive is less for a relatively simple offense than

for a more complex charge. However, there is no bright-line date on which pretrial incarceration becomes oppressive because that determination varies from case to case based on the specific circumstances of the incarceration. Minimizing anxiety and concern is more subjective and difficult to demonstrate but is nevertheless an interest protected by the speedy trial right and is a pertinent consideration under factor four. The crucial question is whether the delay in bringing the accused to trial has unduly prolonged the disruption of the accused's life or aggravated the anxiety and concern inherent in being accused of a crime. Last, impairment of one's defense is the most difficult form of speedy trial prejudice to prove, so in the absence of affirmative proof that a delay has impaired the accused's ability to present an effective defense, impairment must be assessed based on other analytical factors, such as length of delay, the accused's responses to the delay, and the duration of pretrial incarceration. St. v. Ariegwe, 2007 MT 204, 338 M 442, 167 P3d 815 (2007), followed in St. v. Sartain, 2010 MT 213, 357 Mont. 483, 241 P.3d 1032.

Failure to Demonstrate Prejudice Aggravated by Trial Delay — Speedy Trial Claim Properly Denied: Doyle asserted that he was prejudiced by a trial delay, but failed to establish prejudice aggravated by the delay. Doyle complained of prejudicial pretrial incarceration, but the complaints were only about living conditions at the jail that bore no relationship to the delay. Doyle contended that his level of anxiety and concern was deepened by the jail's failure to provide medical care for his preexisting back injury, yet he testified that he was treated for his ailing back at least six times while in jail. Doyle asserted that his defense was prejudiced because his girlfriend was pressured by state family services to testify against Doyle in order to keep their children at home and because one witness died and two others were unavailable at trial. However, Doyle and his girlfriend were under supervision for months before Doyle's crime, and even if pressure occurred, Doyle could not show that it resulted from the trial delay. Last, the three unavailable witnesses were witnesses for the state and could not have aided Doyle's defense. Doyle's speedy trial claim was properly denied. St. v. Doyle, 2007 MT 125, 337 M 308, 160 P3d 516 (2007).

No Prejudice Shown by 338-Day Delay — Speedy Trial Motion Properly Denied: A 426-day delay triggered review of LaGree's speedy trial claim, even though only 338 days were properly attributed to the state. LaGree properly asserted the right to a speedy trial, and the burden was on the state to demonstrate that LaGree was not prejudiced by the delay. In this case, the state met its burden. LaGree did not demonstrate that his pretrial incarceration was extraordinarily prejudicial, that his anxiety was more than marginal, or that defense was prejudiced by the delay. The District Court's denial of LaGree's motion to dismiss for lack of a speedy trial was affirmed. St. v. LaGree, 2007 MT 65, 336 M 375, 154 P3d 615 (2007), following Billings v. Bruce, 1998 MT 186, 290 M 148, 965 P2d 866 (1998), and followed in St. v. Sartain, 2010 MT 213, 357 Mont. 483, 241 P.3d 1032.

No Prejudice From Institutional Delay — No Speedy Trial Violation: Spang contended that he did not receive a speedy trial because he was prejudiced by pretrial incarceration, anxiety, and impairment of the defense on a DUI charge. The Supreme Court examined the evidence related to the prejudice considerations in light of the Barker-Bruce tests and disagreed. Spang first asserted that his pretrial incarceration was prejudicial because it prevented employment as an interstate truck driver. However, Spang had been previously declared a habitual traffic offender and could not legally drive during the period of incarceration. Next, the record supported the trial court's finding that there was no evidence that the trial delay had exacerbated the inevitable anxiety and concern connected to the DUI charge. Last, the defense impairment argument failed because Spang's alleged witness problems and car problems were unrelated to the charge. The state successfully carried the burden of demonstrating that Spang was not prejudiced by institutional delay, and the trial court correctly concluded that Spang's right to a speedy trial was not violated. St. v. Spang, 2007 MT 54, 336 M 184, 153 P3d 646 (2007).

No Prejudice From Trial Delay — Ineffective Assistance of Counsel Claim Properly Dismissed: Adams contended that he received ineffective assistance of counsel because neither original counsel nor subsequent counsel filed to dismiss on grounds that Adams did not receive a speedy trial. The Supreme Court analyzed the four speedy trial factors in Barker v. Wingo, 407 US 514 (1972), and concluded that because less than 275 days of the 372-day delay was attributable to the state, the burden was on Adams to demonstrate prejudice from the delay. The only prejudice claim that Adams raised was that he was unable to effectively assist in his defense because he was in jail. However, all the things that Adams claims that he would have done had he not been incarcerated were in fact done by his attorneys in preparation for trial, so Adams could not demonstrate how his inability to do those things impaired his ability to defend himself. Absent a showing of prejudice, the speedy trial claim failed, as did the claim of ineffective assistance for

failure to file a speedy trial claim that did not exist. Adams v. St., 2007 MT 35, 336 M 63, 153 P3d 601 (2007).

Absence of Record Prevents Review of Defendant's Claim of Lack of Speedy Trial Under Plain Error Doctrine: The state charged Lewis with certain drug-related crimes on May 19, 2004, and on October 12, 2004, informed the trial court that it intended to charge Lewis with an additional offense, whereupon the trial court vacated the trial date. The state did not amend the charges until March 10, 2005, and Lewis was convicted after a 3-day trial in June of 2005. Lewis did not assert the right to a speedy trial until appeal. The Supreme Court agreed that the right to a speedy trial is not necessarily waived by failure to assert the right at trial and that the Supreme Court could review the issue under the plain error doctrine. However, the Supreme Court held that the review must be based upon the facts of the case, and in the present instance, no record existed upon which to review the matter. St. v. Lewis, 2007 MT 16, 335 M 331, 151 P3d 883 (2007).

Silent Trial Court Record Fails to Rebut Presumption of Effective Assistance of Counsel Regarding Defendant's Right to Speedy Trial: The defendant, Lewis, argued that the 13-month delay in being brought to trial had to be interpreted as ineffective assistance of counsel in that her attorney failed to object to the delay. The Supreme Court stated that the trial court record was silent as to any tactical consideration that Lewis's counsel may have had in not objecting to the delay and because the record was silent, it could not be used to rebut the strong presumption of effective assistance of counsel. St. v. Lewis, 2007 MT 16, 335 M 331, 151 P3d 883 (2007).

Defendant Unable to Show Prejudice by 408-Day Trial Delay — Speedy Trial Claim Denied: The time between Harlson's arrest and the beginning of trial was 408 days, 306 of which were attributable to Harlson, so the burden was on Harlson to show that the delay was prejudicial. The District Court's holding that Harlson's claim that a total of 83 days of pretrial incarceration and anxiety and concern did not rise to the level of prejudice was reviewed for correctness by the Supreme Court and affirmed. St. v. Harlson, 2006 MT 312, 335 M 25, 150 P3d 349 (2006).

Trial Delay Properly Charged to Defendant Because of Contact With Witness: Diaz asserted that the trial court improperly charged 91 days of trial delay to the defense and placed the burden on Diaz to show that the delay was prejudicial. However, the state's inability to locate a witness was attributable to Diaz's communication with the witness and Diaz's attempt to solicit the witness to prevent the witness from testifying. The Supreme Court cited St. v. Tilly, 227 M 138, 737 P2d 484 (1987), in holding that speedy trial delay will not be charged to the state when a material witness with a valid reason is not available because of a defendant's unlawful acts, so the delay was properly charged to Diaz. Because only 249 days of the delay were chargeable to the state, Diaz had the burden of showing prejudice. Diaz's general assertions of anxiety, concern, inability to seek employment, and witnesses' fading memories were insufficient to rise to the level of prejudice, and the speedy trial claim was rejected. St. v. Diaz, 2006 MT 303, 334 M 479, 148 P3d 628 (2006).

Right to Speedy Trial Applicable Through Sentencing — No Speedy Trial Violation Absent Showing of Prejudice: Mooney asserted that he was denied the right to a speedy trial on a DUI charge. Mooney contended that the time applicable to a determination of a speedy trial should include the time from filing an appeal until sentencing. The Supreme Court agreed that because sentencing is part of the trial, the period between trial and sentencing applies to speedy trial calculations when the speedy trial right is asserted prior to sentencing. However, the Supreme Court then applied the revised Barker test set out in Billings v. Bruce, 1998 MT 186, 290 M 148, 965 P2d 866 (1998), to determine whether Mooney was prejudiced by the delay. Mooney was not incarcerated between trial and sentencing, nor was there any indication that the delay impaired Mooney's defense or that he experienced inordinate anxiety because of the delay. Failing to satisfy the prejudice prong of the Barker test, Mooney's speedy trial claim failed. St. v. Mooney, 2006 MT 121, 332 M 249, 137 P3d 532 (2006), overruled in St. v. Betterman, 2015 MT 39, 378 Mont. 182, 342 P.3d 971.

No Impairment of Defense Following Pretrial Delay of 802 Days: Bowser contended that his defense to drug charges was impaired after a pretrial delay of 802 days and moved to dismiss. The District Court denied the motion, and Bowser appealed. In this case, the state preserved all physical evidence, all of Bowser's witnesses were available to testify at trial, and the state memorialized its evidence through written reports, videotape, and photographs. Bowser offered no evidence and cited no instances in which the pretrial delay impaired his defense, other than a general allegation that witness memory is impaired and a claim of increasing paranoia. The Supreme Court affirmed. St. v. Bowser, 2005 MT 279, 329 M 218, 123 P3d 230 (2005).

Trial Delay of 273 Days Attributable to State — Speedy Trial Claim Dismissed Absent Showing of Prejudice by Defendant: Blair was arrested on September 10, 2002, and his trial was eventually held August 18 and 19, 2003. Following conviction, Blair argued that more than 275 days of delay between arrest and trial were attributable to the state, requiring the state to prove that Blair was not prejudiced by the delay, and that the state's failure to carry that burden of proof violated Blair's right to a speedy trial. The Supreme Court applied the test in Barker v. Wingo, 407 US 514 (1972), to analyze the speedy trial claim. The second Barker factor is the reason for the delay, which attributes delay to either the state or the defendant on a case-by-case basis and determines which party carries the burden to prove prejudice. In this case, the state was responsible for 273 days of delay. The bright line rule established in Billings v. Bruce, 1998 MT 186, 290 M 148, 965 P2d 866 (1998), is 275 days, and although the difference was nominal, the burden to show prejudice nevertheless rested with Blair. Blair was unable to prove that he was prejudiced by the pretrial incarceration, that his anxiety and concern were prejudicial, or that the delay impaired his defense, so his speedy trial claim failed. St. v. Blair, 2004 MT 356, 324 M 444, 103 P3d 538 (2004), followed in St. v. Bowser, 2005 MT 279, 329 M 218, 123 P3d 230 (2005).

No Speedy Trial Violation Absent Showing of Prejudice to Defense: A complaint was filed against Peterson for careless driving and DUI on August 30, 2001, but a trial did not occur until April 1, 2002. Peterson moved to dismiss based on violation of the constitutional right to a speedy trial, focusing on the fact that his defense was prejudiced. The Supreme Court held that Peterson failed to meet the burden of showing prejudice. Peterson's missed work, repeated court appearances, and anxiety were insufficient to constitute the prejudice necessary to establish sufficient prejudice to warrant reversal. Billings v. Peterson, 2004 MT 232, 322 M 444, 97 P3d 532 (2004).

Failure of State to Demonstrate Good Cause for Trial Delay in Misdemeanor Case — Reversible Error: Defendant was charged with misdemeanor DUI and pleaded not guilty. At the omnibus hearing, a trial date was set, and the Justice's Court set a date for production of evidence and a deadline for defendant to file a jury waiver. Defendant filed nothing in response to the deadlines. Ten days before the trial date, the state moved to vacate and reset the trial date because the County Attorney would be out of town. Efforts to contact defense counsel were unsuccessful, so the court sent a letter to counsel advising of the state's motion and extending the deadline for waiver of a jury trial. More than 7 months after defendant was charged, the case came to trial. Defendant gave no opening statement and presented no evidence or testimony in defense, but instead moved for dismissal for failure to prosecute within 6 months as required in 46-13-401. The motion was denied on grounds that any delay was caused by defendant and defense counsel. On appeal to District Court, the motion was again denied. On appeal to the Supreme Court, defendant contended that denial of the dismissal motion was in error because defendant never asked for a trial postponement and because the state did not show good cause for the delay. The state argued that good cause was shown in defendant's lack of compliance with court orders, including the failure to file a waiver of a jury trial and to comply with discovery requests. However, the record revealed no connection between defendant's failure to comply with the court's orders and the failure to prosecute the case within 6 months. The state's request for continuance did not reference defendant's failure to comply with court orders or that the failure to do so necessitated a continuance beyond the 6-month deadline. Thus, because the state failed to show good cause for the delay, the motion to dismiss should have been granted, so the Supreme Court reversed the District Court and dismissed the charge. St. v. Bertolino, 2003 MT 266, 317 M 453, 77 P3d 543 (2003).

Deprivation of Right to Private Counsel Through Denial of Continuance Motion Warranting Reversal: About 18 days before Garcia's criminal trial, Garcia moved for a continuance so that his prospective private counsel could prepare for trial. Here, the District Court denied the continuance because: (1) retention of private counsel 2 weeks prior to trial was not a sufficient reason to grant a continuance; (2) Garcia's court-appointed counsel was competent; (3) if the motion was granted, Garcia would remain in jail for a lengthy period because of the inability to post bail; and (4) a new trial could not be scheduled for several months because of the court's congested docket. The case proceeded, and Garcia was convicted. On appeal, Garcia contended that denial of the continuance motion was error, and the Supreme Court agreed. The right to counsel contemplates the right to effective assistance of counsel, and the right to effective assistance in turn encompasses the right to retain counsel of one's choosing. Regardless of whether a defendant is entitled to appointed counsel, the right to be heard through the defendant's own counsel is unqualified. Pursuant to St. v. Craig, 274 M 140, 906 P2d 683 (1995), a defendant may not insist upon appointment of specific

counsel or demand dismissal or substitution of appointed counsel as long as effective assistance is rendered. However, for individuals with the means to secure private representation, the right to decide who can best conduct the case must be respected whenever feasible. A District Court must consider a motion for continuance in a criminal trial in light of the diligence shown by the moving party and may grant the continuance if, in its discretion, the interests of justice so require. Here, Garcia exercised sufficient diligence in acquiring independent representation and in seeking a continuance, and the District Court abused its discretion in denying the continuance motion. Questions of the competency and effective assistance of court-appointed counsel were irrelevant and should not have been considered in addressing the continuance. Although the denial of a continuance motion cannot be reversed absent a showing of resultant prejudice to a defendant, in this case, despite the legitimacy of the subsequent proceedings, a deprivation of this magnitude warranted reversal in the interests of justice. St. v. Garcia, 2003 MT 211, 317 M 73, 75 P3d 313 (2003), distinguished in St. v. Holm, 2013 MT 58, 369 Mont. 227, 304 P.3d 365.

Original Misdemeanor Charges Dismissed and Refiled With Felony Charge — Joinder of Charges Establishing New Case: Following an automobile accident, Topp was charged in Justice's Court with two misdemeanors to which he pleaded not guilty. The charges were subsequently dismissed, and the state filed a new information in District Court recharging Topp with the misdemeanors plus felony criminal endangerment. Topp argued that the misdemeanor charges should be dismissed because they were not prosecuted within 6 months, as required by 46-13-401. The Supreme Court held that 46-13-401 did not apply in this case. When the original misdemeanor charges were dismissed, there were no longer charges pending against Topp, so there was no requirement for prosecution. As set out in St. v. Bullock, 272 M 361, 901 P2d 61 (1995), as long as Justice's Court jurisdiction is exhausted within 6 months by some action that authorizes appeal de novo to the District Court, 46-13-401 is satisfied. Thus, when the charges were joined in District Court, the action became a case de novo, so the District Court did not err in denying Topp's motion to dismiss the misdemeanor charges on speedy trial grounds. St. v. Topp, 2003 MT 209, 317 M 59, 75 P3d 330 (2003). See also St. v. Case, 2013 MT 192, 371 Mont. 58, 305 P.3d 812.

Burden of Proof Erroneously Applied to Speedy Trial Analysis — Remand: The District Court improperly attributed less than 275 days of trial delay to the state and then erroneously held that the burden was on defendant to prove that the delay was prejudicial. On appeal, both parties conceded that the state was responsible for more than 275 days, thus the burden should have shifted to the state to show that defendant was not prejudiced by the delay. The Supreme Court was unable to conduct a meaningful review of the evidence when the burden was erroneously applied by the trial court, so the case was remanded so that the trial court could reconsider its speedy trial analysis after properly acknowledging that the burden of proof was with the state rather than with defendant. St. v. Ray, 2003 MT 171, 316 M 354, 71 P3d 1247 (2003), following Barker v. Wingo, 407 US 514 (1972).

Defendant's Pretrial Incarceration and Hardships Inevitable Given Pending Federal Probation Violation Prosecution — Right to Speedy Trial Not Violated: Jefferson asserted that he had been denied the right to a speedy trial following a pretrial incarceration of 413 days. Supreme Court analysis was triggered by a delay in excess of 200 days, and because the delay exceeded 275 days, the burden of proving that Jefferson was not prejudiced shifted to the prosecution. The court found that Jefferson had asserted the right to a speedy trial in a timely manner because the motion to dismiss was made 203 days after the charges were filed—well before the trial was conducted. The court also noted that the right to a speedy trial is not intended to prevent all pretrial incarceration, but rather is designed to prevent oppressive pretrial incarceration. In this case, the state satisfied its burden of proving that Jefferson's defense was not impaired by the pretrial delay and incarceration when it was shown that Jefferson's incarceration was inevitable. Jefferson would have been incarcerated for that time period regardless of the state's delay because he was subject to a petition by the federal government to revoke his probation, and even though only 7 months remained on Jefferson's federal probation, he would have been resentenced for probation violations pursuant to statute. Thus, any hardships that Jefferson suffered as a result of the pretrial incarceration were also inevitable and were aggravated only in part by the state's delay. St. v. Jefferson, 2003 MT 90, 315 M 146, 69 P3d 641 (2003).

Trial Delay of 342 Days — No Speedy Trial Violation Given Sufficient Rebuttal of Presumption of Prejudice: Following a delay of at least 342 days, Stiffarm moved to dismiss assault charges on grounds that his right to a speedy trial was violated. Applying Billings v. Bruce, 1998 MT 186, 290 M 148, 965 P2d 866 (1998), the Supreme Court analyzed the four factors used in determining whether a defendant is denied the constitutional right to a speedy trial. The first three factors

were conceded or undisputed, so the court considered the fourth factor—whether the defense was prejudiced by the delay. Regarding pretrial incarceration, the court agreed that most of any prejudice Stiffarm suffered was due to the natural consequences of Stiffarm's prior and alleged conduct. Stiffarm had to remain in jail because of the inability to meet the $150,000 bail, which was set at that amount because of the severity of the charged offense, because Stiffarm was on probation for a prior felony when the alleged offense occurred, and because of Stiffarm's extensive prior criminal record. Any presumption of prejudice from pretrial anxiety was adequately rebutted by testimony that Stiffarm had been depressed prior to incarceration and that with medication and counseling received in jail, the depression had actually improved. Finally, with respect to impairment of defense based on the alleged unavailability of witnesses, the state presented affidavit testimony of witnesses who indicated that their memories of the alleged incident were intact and that all evidence held by the state was preserved. Thus, the state adequately rebutted the presumption of prejudice, and absent any demonstration of further prejudice by Stiffarm, denial of the motion to dismiss on speedy trial grounds was affirmed. St. v. Stiffarm, 2003 MT 70, 314 M 499, 67 P3d 249 (2003).

Defendant Out of State for Six Years — Speedy Trial Right Preserved by Diligent Good Faith Prosecution: Longhorn was charged with felony sexual assault, and a warrant was issued for his arrest. However, Longhorn was in Oklahoma, and the warrant was not served until 6 years later. At trial, Longhorn moved to dismiss on speedy trial grounds, but the motion was denied, and Longhorn was convicted. On appeal, the Supreme Court applied the test in Barker v. Wingo, 407 US 514 (1972), and Billings v. Bruce, 1998 MT 186, 290 M 148, 965 P2d 866 (1998), to determine if Longhorn's speedy trial rights were violated. The court noted that the right to a speedy trial commences when a defendant becomes an accused, and if an accused is out of state, the state must act diligently and in good faith to acquire jurisdiction. The District Court found that the state acted diligently, and the Supreme Court concurred. The prearrest time was properly attributed to Longhorn, and he bore the burden of showing that he was prejudiced by the delay. The Supreme Court applied St. v. Boese, 2001 MT 175, 306 M 169, 30 P3d 1092 (2001), in evaluating the potential prejudice based on the three interests that speedy trials are designed to protect: (1) prevention of oppressive pretrial incarceration; (2) minimization of the defendant's anxiety and concern; and (3) avoidance of impairment of the defense. The court concluded that Longhorn did not prove prejudice, so the speedy trial motion was properly denied. St. v. Longhorn, 2002 MT 135, 310 M 172, 49 P3d 48 (2002).

Delay of 391 Days Attributable to State — Speedy Trial Analysis Triggered — Remand for Determination of Whether State Can Prove Lack of Prejudice: A.G., a juvenile charged with felony vehicle theft, being a runaway, and curfew violation, moved to dismiss the charges for lack of a speedy trial 2 months before a scheduled hearing. The District Court subsequently attributed 229 of 392 days of delay to the state, concluded that the right to a speedy trial was not violated, and placed the burden on A.G. to show that the delay was prejudicial. Applying the criteria in Billings v. Bruce, 1998 MT 186, 290 M 148, 965 P2d 866 (1998), the Supreme Court found that the District Court incorrectly calculated the length of delay, which was actually 455 days. As established in Billings v. Bruce, any delay over 200 days triggers further speedy trial analysis. Because of a miscommunication between the juvenile probation office and the County Attorney, the state neglected to diligently move the case toward prosecution, and A.G. was under no obligation to ensure diligent prosecution of the case or to help the state avoid dismissal for failure to timely prosecute. Further, the District Court mistakenly placed the burden of proving prejudice on A.G., when in actuality, the burden was on the state to prove a lack of prejudice. The Supreme Court remanded for a hearing to determine whether A.G. was prejudiced by the 455-day delay. In re A.G., 2002 MT 111, 309 M 491, 47 P3d 831 (2002).

Sufficient Proof of Lack of Prejudice to Defendant Caused by 362-Day Trial Delay — Claim of Lack of Speedy Trial Properly Denied: Good satisfied three of the four speedy trial factors in Barker v. Wingo, 407 US 514 (1972), and Billings v. Bruce, 1998 MT 186, 290 M 148, 965 P2d 866 (1998): (1) more than 200 days of delay were attributable to the state, triggering speedy trial analysis; (2) the delay was caused by the state's failure to locate Good's motions, trial court institutional delay, and failure of the state to diligently prosecute; and (3) Good properly asserted his speedy trial right 7 days before trial. However, the fourth factor, a showing that Good was prejudiced by the delay, was not met. Good suffered no pretrial incarceration and conceded that the defense was not impaired by the delay. Good's pretrial anxiety and concern stemmed from the nature of the charges, rather than the delay. Thus, the District Court did not err in holding that Good was not denied a speedy trial. St. v. Good, 2002 MT 59, 309 M 113, 43 P3d 948 (2002).

Burden of Showing Lack of Prejudice in Trial Delay Met by State — Dismissal of Speedy Trial Motion Affirmed: Price was convicted in City Court in July 1994 for DUI and resisting arrest and appealed to District Court. The District Court ruled that the notice of appeal was untimely and dismissed the appeal. Price appealed that dismissal to the Supreme Court, which ruled in 1995 that the appeal was timely and remanded to District Court for trial (see St. v. Price, 271 M 409, 897 P2d 1084 (1995)). Following remand, trial was delayed until April 1997. Five days before trial, Price moved to dismiss for lack of a speedy trial. On the day of trial, the District Court considered the motion, denied it, and proceeded to trial, and Price was convicted of DUI. Price subsequently appealed denial of the speedy trial issue. The Supreme Court applied the revised Barker test set out in Billings v. Bruce, 1998 MT 186, 290 M 148, 965 P2d 866 (1998), to determine whether Price was prejudiced by the delay. Because of the length of delay attributable to the state, the burden shifted to the state to show that Price was not prejudiced by the delay. Applying the Bruce standard, the Supreme Court evaluated prejudice based on the presence of oppressive pretrial incarceration, Price's level of anxiety and concern, and impairment of the defense. In this case, the state met its burden of showing that Price was not prejudiced by the delay. Price was not incarcerated prior to trial, so pretrial incarceration was not a factor. Price's original City Court sentence was stayed pending the de novo appeal to District Court, which prevented the DUI conviction from appearing on Price's driving record and adversely affecting Price's driving privileges or ability to obtain insurance. Thus, Price's life affairs were protected from the impact of the pending charge and conviction, so Price did not suffer more than the normal anxiety and concern associated with the charge. Last, the state reinterviewed the witnesses several times over the course of the proceeding, so witness memories were not diminished, and Price conducted much of the case pro se, so it was obvious that his memory was not diminished either. This constituted sufficient evidence that Price's defense was not impaired by the delay, so the District Court did not err in dismissing the speedy trial claim. St. v. Price, 2001 MT 212, 306 M 381, 34 P3d 112 (2001).

Failure to Show Prejudice in Delayed DUI Trial Based on Pretrial Anxiety: Stuart was arrested for DUI, and after a delay of more than 200 days, moved for dismissal on grounds of denial of a speedy trial. The motion was denied, and Stuart ultimately was convicted, but timely asserted the right to a speedy trial on appeal. The Supreme Court applied the analysis set out in Billings v. Bruce, 1998 MT 186, 290 M 148, 965 P2d 866 (1998), to determine if prejudice occurred. No single factor is determinative, and each must be weighed in light of the facts of the case. The only disputed factor was the possible anxiety caused by the pretrial delay that might have placed Stuart's employment as a commercial driver in limbo; however, Stuart conceded that he had received full-time employment as a commercial truck driver about 6 months after the DUI charge. Affidavits from Stuart and his wife addressed the anxiety factor, but did not transcend the generic anxiety inherent in being accused of a crime. Stuart failed to establish prejudice once the state met its burden of showing a lack of prejudice, and the District Court did not err in denying the motion to dismiss for lack of a speedy trial. St. v. Stuart, 2001 MT 178, 306 M 189, 31 P3d 353 (2001).

Trial Delay of 761 Days on Bad Check Charges — Facts Discharging State's Burden of Disproving Prejudice: Boese's trial for issuing bad checks was delayed 761 days, sufficient to bring about a speedy trial analysis. A total of 176 days was attributable to the state because the arresting officer failed to return the served arrest warrant, and 289 days were institutional delay, also attributable to the state. Boese asserted the right to a speedy trial in a timely manner, so the burden shifted to the state to show that the delay was not prejudicial. Boese contended that the burden was not properly shifted, but the order regarding Boese's motion to dismiss demonstrated otherwise. Thus, the Supreme Court applied the analysis set out in Billings v. Bruce, 1998 MT 186, 290 M 148, 965 P2d 866 (1998), to determine if prejudice occurred, examining pretrial incarceration, anxiety caused by the pretrial delay, and whether Boese's defense was damaged by the delay. Because Boese was incarcerated on other charges for most of the time prior to trial, the pretrial incarceration was not oppressive based on the charges in this case. The likelihood of anxiety from delay was contraindicated by the frequency with which Boese changed his plea, adding to the delay, and any increased anxiety was more likely caused by the other, more serious unrelated charges facing Boese. Finally, the nature of the bad check case was not fact-sensitive and depended primarily on documentary evidence and interpretation of that evidence, which was not evanescent and not likely to change because of the trial delay. These facts were sufficient to discharge the state's burden of disproving prejudice, and the District Court did not err in denying Boese's motion to dismiss for lack of a speedy trial. St. v. Boese, 2001 MT 175, 306 M 169, 30 P3d 1092 (2001).

555-Day Delay Attributable to State Not Grounds for Dismissal for Lack of Speedy Trial Without Showing of Prejudice to Defendant: Keyes argued that charges against him should have been dismissed by the lower court because of a 555-day delay in bringing his case to trial that was attributable to actions of the state. The Supreme Court pointed out that Keyes had fled Montana's jurisdiction and remained a fugitive for nearly 2 years, thereby demonstrating no interest in obtaining a speedy trial, preserving evidence, or advancing his legal defenses. The Supreme Court also pointed out that Keyes conceded that the state's delay had not prejudiced him but instead argued that the delay by itself was enough to warrant a dismissal of the charges. The Supreme Court held that a delay attributable to the state was not enough to warrant a dismissal for lack of a speedy trial without a showing of prejudice to the defendant resulting from the delay. St. v. Keyes, 2000 MT 337, 303 M 147, 15 P3d 443, 57 St. Rep. 1435 (2000).

Failure to Show That Pretrial Delay Impaired Defense Based on Unavailability or Loss of Exculpatory Evidence — No Prejudice: Ellenburg asserted that his defense was impaired as a result of the delay caused by his incarceration from arrest until trial, which prevented his access to business documents that would have been exculpatory, and that the delay prejudiced him as a result of the state's loss or destruction of the documents seized from his office. However, Ellenburg failed to describe the documents that he could not access or to explain how they could help in his defense, nor did he ask his attorney or anyone else to procure the documents for him, thus also failing to meet the burden of proving that the documents, if they existed, were material and exculpatory. Any delay in bringing the case to trial based on a loss or unavailability of exculpatory evidence was not a prejudicial impairment of the defense. St. v. Ellenburg, 2000 MT 232, 301 M 289, 8 P3d 801, 57 St. Rep. 958 (2000).

Barker Analysis Satisfied:

A pretrial delay of 230 days having triggered a speedy trial analysis, the Supreme Court examined the delay for prejudice to Johnson and found that all 230 days were attributable to the state: 190 days of unintentional delay because of two continuance motions necessary to secure the appearance at trial of prosecution witnesses, and 40 days of institutional delay because of the District Court's sua sponte continuance because of calendar conflicts. Docket delays weigh less heavily against the state than purposeful delays, of which there was no evidence. The delay was not the result of intentional or purposeful foot-dragging on the part of the state, nor was there any indication that the state harbored any motive for delaying Johnson's trial; therefore, the degree of fault of the state was minimal. Johnson was thus not unduly prejudiced by the pretrial delay in and of itself, so the state did not bear the burden of rebutting presumptive prejudice, proof of which fell on Johnson. After weighing the four prongs of the Barker test (407 US 514), the Supreme Court affirmed denial of Johnson's motion to dismiss on speedy trial grounds, holding that Johnson failed to show adequate proof of prejudice because of pretrial incarceration, economic hardships, or impairment of defense. St. v. Johnson, 2000 MT 180, 300 M 367, 4 P3d 654, 57 St. Rep. 727 (2000), following Billings v. Bruce, 1998 MT 186, 290 M 148, 965 P2d 866 (1998), and distinguishing St. v. Bailey, 201 M 473, 655 P2d 494 (1982).

Applying the four-factor balancing test of Barker, defendant was not prejudiced in her defense by a 543-day delay between arrest and trial, 265 days of which were attributable to the state and 222 days of which were attributed to defendant because of incarceration in another state, whether the delays were attributable to the state or defendant. Notwithstanding St. v. Robbins, 218 M 107, 708 P2d 227 (1985), regarding the failure of the state to rebut the presumption of prejudice arising from a delay of more than 200 days, the District Court did not err in denying the motion to dismiss on speedy trial grounds. St. v. Williams-Rusch, 279 M 437, 928 P2d 169, 53 St. Rep. 1224 (1996).

Under the four-factor balancing test of Barker, defendant was not denied his right to a speedy trial when: (1) a 269-day delay occurred between arrest and trial; (2) 164 days of the delay were attributable to institutional delay, 36 days were attributable to defendant Weeks because he had waived his right to a speedy trial, and 69 days were attributable to Weeks because although the state moved to reschedule the trial, the rescheduling was made necessary because an evidentiary hearing was required on Weeks's motion to exclude DNA evidence; (3) Weeks moved to dismiss for lack of speedy trial prior to the trial date; and (4) incarceration was necessary to ensure Weeks's presence at trial, his evidence of anxiety was marginal, and Weeks offered no explanation as to how his defense was impaired as a result of the delay. St. v. Weeks, 270 M 63, 891 P2d 477, 52 St. Rep. 78 (1995), followed in St. v. Deavila, 285 M 530, 949 P2d 1185, 54 St. Rep. 1300 (1997).

Under the four-factor balancing test of Barker, defendant was not denied his right to a speedy trial when at most 81 days of a 307-day delay were attributable to the state but were not the result of bad faith or oppressive tactics and when the total length of delay did not prejudice

the defendant, regardless of how various periods of delay were attributed. St. v. Mooney, 248 M 115, 809 P2d 591, 48 St. Rep. 367 (1991), followed in St. v. Thompson, 263 M 17, 865 P2d 1125, 50 St. Rep. 1683 (1993). Thompson was followed in St. v. Hagberg, 277 M 33, 920 P2d 86, 53 St. Rep. 528 (1996).

Under the four-factor balance test of Barker, defendant was not denied his right to a speedy trial when: (1) a 256-day delay occurred between arrest and trial; (2) defendant was responsible for 117 days of the delay, and the state was responsible for the remaining 139-day delay, which was primarily inherent and institutional in nature; (3) defendant properly moved to dismiss on speedy trial grounds before the case was brought to trial; and (4) there was no evidence of oppressive prejudicial pretrial incarceration, no conclusive proof of anxiety or concern caused to defendant, and no finding that the delay hampered, impaired, or prejudiced the defense. St. v. Heffernan, 248 M 67, 809 P2d 566, 48 St. Rep. 327 (1991), followed in St. v. Jenkins, 262 M 117, 863 P2d 438, 50 St. Rep. 1471 (1993).

Defendant's right to a speedy trial was not denied under the Barker test when: (1) the state produced a reasonable excuse for delay due to absence of a material witness caused in large part by defendant's unlawful acts; (2) 192 days of the 312-day delay could be attributed to defendant's procedural maneuvers; (3) the defendant waived his right to a speedy trial but made a timely assertion of his right by raising the issue about 4 months later; and (4) defendant was not prejudiced by the state's delay since his pretrial incarceration was appropriate, nothing in the record indicated he was unduly anxious or concerned, and the presentation of his defense was not hampered. St. v. Tilly, 227 M 138, 737 P2d 484, 44 St. Rep. 945 (1987), followed in St. v. Reynolds, 243 M 1, 792 P2d 1111, 47 St. Rep. 1143 (1990). Under the four-factor balancing test of Barker, defendant was not denied his right to a speedy trial when: (1) a 269-day delay occurred between arrest and trial; (2) 164 days of the delay were attributable to institutional delay, 36 days were attributable to defendant Weeks because he had waived his right to a speedy trial, and 69 days were attributable to Weeks because although the state moved to reschedule the trial, the rescheduling was made necessary because an evidentiary hearing was required on Weeks's motion to exclude DNA evidence; (3) Weeks moved to dismiss for lack of speedy trial prior to the trial date; and (4) incarceration was necessary to ensure Weeks's presence at trial, his evidence of anxiety was marginal, and Weeks offered no explanation as to how his defense was impaired as a result of the delay. St. v. Weeks, 270 M 63, 891 P2d 477, 52 St. Rep. 78 (1995).

Anxiety During Preindictment Period Insufficient to Trigger Prejudice Establishing Due Process or Speedy Trial Violation: In January 1996, Burt's former employer filed suit to recover more than $250,000 that Burt allegedly stole while employed as office manager and bookkeeper for the business. In January 1997, the state filed an information charging Burt with five counts of felony theft. In October 1998, Burt was convicted on all counts and later appealed, alleging that the preindictment delay between the time when the state could have filed charges and the time when the information was actually filed violated her due process rights and that she suffered actual prejudice in the effect of the delay on her health and emotions. Applying the two-step analysis in St. v. Taylor, 1998 MT 121, 289 M 63, 960 P2d 773 (1998), the Supreme Court held that, without more, Burt was not prejudiced by the preindictment delay simply because of her anxiety. Anxiety, no matter how real, does not in itself impair the accused in defending against a charge and thus does not qualify as prejudice in the due process context. The delay did not cause a loss of witnesses or evidence, nor did requiring Burt to stand trial violate the fundamental conceptions of justice that lie at the base of our civil and political institutions and that define the community's sense of fair play and decency. Burt was not incarcerated. Her stress was not excessive. Her economic hardship, the stigma of being charged with a crime for the first time, and her recourse to a psychiatrist could not be considered consequences of the pretrial delay. Although a total of 208 days of institutional delay was chargeable to the state, the remainder was chargeable to Burt. Absent a showing of prejudice, the convictions were affirmed. St. v. Burt, 2000 MT 115, 299 M 412, 3 P3d 597, 57 St. Rep. 482 (2000), following Billings v. Bruce, 1998 MT 186, 290 M 148, 965 P2d 866 (1998). See also St. v. Mouser, 806 P2d 330 (Alaska Ct. App. 1991).

Reasonable Delay Because of Complex "Eve of Trial" Motion Attributable to Defendant — Court Delay Attributable to State — 433-Day Delay Prejudicial: When a defendant files an "eve of trial" motion that raises a complex legal issue or requires an evidentiary hearing, making the original trial date impracticable, the reasonable period of delay caused thereby is attributable to the defendant. Here, Kipp's motion to quash was heard 19 days before the original trial date. At that time, the District Court vacated the trial date and stated that another date would be set after the motion to quash was considered. The court set a briefing schedule, but no new trial date. When a trial court, for its own reasons, vacates a trial date and does not set a new date, the

delay is attributable to the state; therefore, the delay from the motion to quash until the court issued its decision was institutional delay attributable to the state. Further, the 5-month delay between the court's decision and the state's request for a new trial date was also attributable to the state. With a total of 433 days of institutional delay, the burden shifted to the state to prove that Kipp was not prejudiced. The state offered no evidence to rebut Kipp's contention that she was prejudiced by anxiety and concern because: (1) she was the custodial parent of two minor children; (2) she was faced with potential incarceration; (3) she was denied employment because of the charges; and (4) her defense was impaired because of the loss of a main witness as a result of delay attributable to the state. Kipp's right to a speedy trial was thus violated, so the Supreme Court reversed the conviction and dismissed the charges. St. v. Kipp, 1999 MT 197, 295 M 399, 984 P2d 733, 56 St. Rep. 762 (1999), following Billings v. Bruce, 1998 MT 186, 290 M 148, 965 P2d 866, 55 St. Rep. 750 (1998). Kipp was distinguished, as to impairment of defense, in St. v. Highpine, 2000 MT 368, 303 M 422, 15 P3d 938, 57 St. Rep. 1573 (2000).

Six-Month Speedy Trial Limit Inapplicable by Its Terms to Trials De Novo in District Court on Appeal: Stanko was convicted in Justice's Court of reckless driving and appealed to the District Court. Before the Supreme Court, Stanko argued that his case should have been dismissed by the District Court because more than 6 months had elapsed between the time that he filed his appeal to District Court and the time of his trial. The Supreme Court pointed out that the limitation in 46-13-401 applies only "after the entry of a plea" and that because there is no plea entered in an appeal to District Court, the statute and its 6-month limit was not intended to be applied to those appeals held as a trial de novo. The Supreme Court also held that Stanko's argument that application of the 6-month limit is outmoded because of the requirement for one jury trial contained in 46-17-201 was not persuasive because the method of disposition of the case in Justice's Court is immaterial to the application of the 6-month speedy trial limitation. (Annotator's note: The requirement contained in 46-17-201 for one jury trial was held unconstitutional in Woirhaye v. District Court, 1998 MT 320, 292 M 185, 972 P2d 800, 55 St. Rep 1298 (1998).) For these reasons, the Supreme Court said that it would continue to adhere to the rule of St. v. Mantz, 269 M 135, 887 P2d 251 (1994), that the 6-month speedy trial limitation does not apply to trials de novo on appeal from Justice's Court to District Court. St. v. Stanko, 1998 MT 323, 292 M 214, 974 P2d 1139, 55 St. Rep. 1313 (1998).

Revised Speedy Trial Analysis — Barker Test Clarified: In an attempt to harmonize numerous disparate rulings on the right to a speedy trial, the Supreme Court held that the general guidelines for review of claims of denial of a speedy trial contained in Barker v. Wingo, 407 US 514, 33 L Ed 2d 101, 92 S Ct 2182 (1972), are to be applied on a case-by-case basis to the unique circumstances of each claim. The factors to be considered do not have talismanic qualities, and courts must still engage in a difficult and sensitive balancing process. There is not some magical time for assertion of the right to a speedy trial that should be weighed more favorably to the defendant than some other time. As long as the defendant files a motion to dismiss prior to trial, the right to a speedy trial is properly asserted. To initially calculate the length of delay, the period from the time that charges are filed until the trial date is determined without assignment of fault to either party for the various delays. If the delay is 200 days or more, further speedy trial analysis is triggered. In determining the reasons for the delay, time of delay is assigned to either the state or the defendant. Then the determination is made as to whether the delay attributable to the state is 275 days or more, at which point the burden shifts to the state to demonstrate that the delay has not prejudiced the defendant. The state's proof should take into consideration but need not include the three traditional bases for determining prejudice: (1) pretrial incarceration; (2) anxiety and its attendant considerations; and (3) impairment of the defense. In determining whether the state has met its burden, the court should consider the fact that direct proof of a defendant's state of mind may not always be possible and that the state's ability to anticipate the nature of the defense varies from case to case. The third consideration is whether the right to a speedy trial is properly invoked before trial, either by demand of a speedy trial or by motion to dismiss for failure to provide a speedy trial. Once that motion is made, the District Court must rule on it prior to trial; however, any delay directly attributable to a motion to dismiss that is filed less than 10 days before trial is assignable to the defendant. The fourth consideration, whether the defense was prejudiced, includes the three traditional bases for determining prejudice stated above. In the present case, the city of Billings was responsible for prosecuting the defendant, and a 447-day delay attributable to the state sufficiently prejudiced the defense to warrant reversal of defendant's conviction on speedy trial grounds. The defendant was under no obligation to ensure diligent prosecution of the case against him or to help the city avoid dismissal for failure to timely prosecute. Billings v. Bruce, 1998 MT 186, 290 M 148, 965 P2d 866, 55 St. Rep. 750 (1998),

followed in St. v. Hardaway, 1998 MT 224, 290 M 516, 966 P2d 125, 55 St. Rep. 936 (1998), in which the Supreme Court clarified the second speedy trial factor set out in Billings v. Bruce in holding that if the state can only show lack of prejudice on one of the three traditional bases of prejudice, it must, at a minimum, address the question of whether there has been an impairment of the defense. If the state satisfies its burden of demonstrating that defendant has not been prejudiced by the delay, the burden shifts to defendant to show prejudice. Billings v. Bruce was also followed in St. v. Olmsted, 1998 MT 301, 292 M 66, 968 P2d 1154, 55 St. Rep. 1235 (1998), St. v. Stanko, 1998 MT 323, 292 M 214, 974 P2d 1139, 55 St. Rep. 1313 (1998), St. v. Maier, 1999 MT 51, 293 M 403, 977 P2d 298, 56 St. Rep. 208 (1999), St. v. Kipp, 1999 MT 197, 295 M 399, 984 P2d 733, 56 St. Rep. 762 (1999), St. v. Johnson, 2000 MT 180, 300 M 367, 4 P3d 654, 57 St. Rep. 727 (2000), St. v. Taylor, 2000 MT 202, 300 M 499, 5 P3d 1019, 57 St. Rep. 794 (2000), St. v. Ellenburg, 2000 MT 232, 301 M 289, 8 P3d 801, 57 St. Rep. 958 (2000), St. v. Highpine, 2000 MT 368, 303 M 422, 15 P3d 938, 57 St. Rep. 1573 (2000), St. v. Boese, 2001 MT 175, 306 M 169, 30 P3d 1092 (2001), St. v. Stuart, 2001 MT 178, 306 M 189, 31 P3d 353 (2001), St. v. Price, 2001 MT 212, 306 M 381, 34 P3d 112 (2001), St. v. Good, 2002 MT 59, 309 M 113, 43 P3d 948 (2002), and In re A.G., 2002 MT 111, 309 M 491, 47 P3d 831 (2002). See also St. v. Tweedy, 277 M 313, 922 P2d 1134 (1996). Hardaway was followed in St. v. Highpine, 2000 MT 368, 303 M 422, 15 P3d 938, 57 St. Rep. 1573 (2000). The 10-day rule in Billings v. Bruce, providing that any delay directly attributable to a motion to dismiss based on denial of a speedy trial that is filed less than 10 days prior to trial will be assigned to the defendant, was modified in St. v. Ariegwe, 2007 MT 204, 338 M 442, 167 P3d 815 (2007), to provide that any delay directly attributable to the filing of a speedy trial motion less than 30 days prior to a scheduled trial date is chargeable to the accused. The requirement that a motion to dismiss on speedy trial grounds must be ruled on prior to trial was reaffirmed in Ariegwe, and an additional requirement added that the trial court must enter findings of fact and conclusions of law with respect to each of the four speedy trial balancing factors and how the factors were balanced against each other.

Decision Regarding Preindictment Delay as Constitutional Question: A speedy trial analysis, which focuses on postindictment delay, involves an inquiry similar to that which the Supreme Court engages in when analyzing preindictment delay. Therefore, on appeal, the Supreme Court will review a District Court decision regarding preindictment delay as a question of constitutional law. The District Court's conclusions of law are reviewed to determine whether its interpretation of the law is correct. St. v. Taylor, 1998 MT 121, 289 M 63, 960 P2d 773, 55 St. Rep. 481 (1998). However, see St. v. Goltz, 197 M 361, 642 P2d 1079 (1982), in which the Supreme Court held that speedy trial guarantees do not extend to the period prior to formal accusation or arrest.

Motion for Continuance Denied — No Speedy Trial Violation: The 6-month period for trial of a misdemeanor charge is the general rule. When, as here, a defendant moves for a continuance, the 6-month trial deadline does not apply. St. v. Chesarek, 1998 MT 15, 287 Mont. 215, 953 P.2d 698. See also St. v. Ronningen, 213 Mont. 358, 691 P.2d 1348 (1984), St. v. Crane, 240 Mont. 235, 784 P.2d 901 (1989), and St. v. Christensen, 2014 MT 294, 377 Mont. 7, 338 P.3d 45.

Admissibility of Preliminary Alcohol Screening Test Results for Probable Cause Purposes Only — Clarification and Effect of Orders Suppressing Evidence — Grant of Motion to Exclude Inadmissible Evidence Not Considered Order Suppressing Evidence: The state sought to have the results of a preliminary alcohol screening test admitted into evidence in a DUI case. The City Court denied the motion, and the state immediately appealed to District Court, contending that in denying the motion, the City Court had suppressed evidence and that the statutory 6-month limit on trial of misdemeanors in 46-13-401 was thus exhausted. The Supreme Court noted that the results of a preliminary alcohol screening test pursuant to 61-8-409 are not substantive evidence of the amount of alcohol present in a person's body but instead are an estimate of alcohol concentration only for the purpose of establishing probable cause to believe that a person is under the influence of alcohol prior to making an arrest. An order that suppresses evidence is an order that excludes evidence on the grounds that the evidence was illegally obtained and does not include a pretrial order that excludes evidence based on rules of evidence, such as relevancy, probative value, or statutory inadmissibility. Thus, the City Court order excluding preliminary alcohol screening test results was not an order suppressing evidence but rather an order determining that the results were not substantive evidence at all; therefore, there was no statutory basis under 46-20-103(2)(e) for appeal to District Court. Because City Court jurisdiction was not exhausted by some action authorizing appeal to the District Court, 46-13-401(2) was not satisfied and defendant, who made no move to postpone, was entitled to dismissal of the DUI charge with prejudice pursuant to 46-13-401(2) on grounds that he had not received a timely trial. St. v. Strizich, 286 M 1, 952 P2d 1365, 54 St. Rep. 1241 (1997), following St. v. Carney,

219 M 412, 714 P2d 532 (1986), and St. v. Bullock, 272 M 361, 901 P2d 61 (1995), overruling inconsistent holdings in St. v. T.W., 220 M 280, 715 P2d 428 (1986), and St. v. Yarns, 252 M 45, 826 P2d 543 (1992), and followed, with regard to limited admissibility of preliminary breath test evidence, in St. v. Weldele, 2003 MT 117, 315 M 452, 69 P3d 1162 (2003). See also St. v. Crawford, 2003 MT 118, 315 M 480, 68 P3d 848 (2003).

Failure of Justice's Court Clerk to Timely Transmit Case File to District Court — No Speedy Trial Violation: Sol appealed his DUI conviction in the Justice's Court to the District Court. The Justice's Court Clerk failed to transmit the case file within the time provided by 46-17-311. The District Court Clerk scheduled the trial 110 days after Sol filed his notice of appeal from Justice's Court. Sol argued that the clerk's failure caused a violation of his right to a speedy trial. The Supreme Court noted that the 1-day delay in transmittal of the file probably resulted in the District Court Clerk's scheduling the trial 1 day later, in 110 days rather than in 109 days. Because a delay must be presumptively prejudicial before other speedy trial factors will be analyzed and because a delay of less than 6 months is not presumptively prejudicial, the Supreme Court held that it would not apply the other speedy trial criteria and held that Sol's right to a speedy trial had not been violated. St. v. Sol, 282 M 69, 936 P2d 307, 54 St. Rep. 246 (1997).

Delay of 363 Days, With 217 Attributable to Defendant Who Suffered Minor Prejudice From Delay: If denial of a speedy trial is claimed in a case appealed by the state from Justice's Court to the District Court, the time for calculating the length of the delay commences on the date on which the state files its notice of appeal. The state filed its appeal on November 30, 1993, trial was scheduled for May 2, 1994, and the motion to dismiss for lack of a speedy trial was denied on April 25, 1994, 153 days after the state's appeal was filed. Trial was held 363 days after the state's appeal was filed. Defendant was responsible for the last 217 days of the delay because of his motion to dismiss. Moreover, he failed to object to the order vacating the trial date and continuing the evidentiary hearing. However, his motion to dismiss was timely filed. He was not subjected to pretrial incarceration, and the record did not show that he suffered undue anxiety or concern over the delay or that his defense was impaired. The District Court correctly denied the motion to dismiss for lack of a speedy trial. St. v. Romero, 279 M 58, 926 P2d 717, 53 St. Rep. 1050 (1996).

186-Day Delay Combined With Incarceration Held Presumptively Prejudicial — Barker Analysis Applied — No Prejudice Found: Robert was arrested on forgery charges on April 15, 1994, and was incarcerated until trial on October 18, 1994. The Supreme Court noted that it had previously held in St. v. Stewart, 266 M 525, 881 P2d 629 (1994), citing St. v. Bartnes, 234 M 522, 764 P2d 1271 (1988), that a less than 200-day incarceration could, when combined with other factors, be found presumptively prejudicial, thus triggering analysis of other factors required to be analyzed under the Barker analysis. In this case, the Supreme Court held that Robert's 186-day incarceration was, when combined with the fact that Robert was incarcerated for the entire period, presumptively prejudicial. However, in analyzing the other three Barker factors, the Supreme Court found that the delay was institutional delay, that Robert did not timely assert his right to a speedy trial, and that Robert was not prejudiced by the delay. St. v. Lane, 279 M 128, 927 P2d 989, 53 St. Rep. 1082 (1996).

Failure of State to Finalize Plea Agreement — 511-Day Delay Apportioned to State: On July 25, 1994, the state charged Small with one count of felony assault (now assault with a weapon). Small pleaded not guilty, and a trial was scheduled for November 14, 1994. On that day, the state moved for a continuance on the basis that a plea agreement had been negotiated. On June 27, 1995, the District Court reset the trial for August, and in August, the trial was reset for November, when Small moved to dismiss for lack of a speedy trial. The Supreme Court applied the four Barker test factors and found that the first delay was institutional. However, citing St. v. Fuller, 276 M 155, 915 P2d 809, 53 St. Rep. 325 (1996), and St. v. Tweedy, 277 M 313, 922 P2d 1134, 53 St. Rep. 656 (1996), the Supreme Court found that although Small had orally agreed in principle to plead guilty to a misdemeanor charge, the responsibility rested with the state to see that the agreement was implemented, that the reduced charge was in fact pleaded to, or that the state proceeded with trial on the felony charge. Small also argued that he suffered anxiety and concern as the result of the pending charge, and the Supreme Court found that the District Court failed to consider all of the Barker factors and failed to apportion the delays between Small and the state. For all of these reasons, the Supreme Court reversed and remanded with orders that the charge be dismissed. St. v. Small, 279 M 113, 926 P2d 1376, 53 St. Rep. 1074 (1996).

Appeal to District Court From Justice's Court — State Under Mistaken Assumption Regarding Burden to Prosecute Appeal — Delay of Over Five Years: Tweedy perfected the appeal of his

misdemeanor conviction to the District Court. After Tweedy asked for and received a continuance and was substituted for his counsel, to act pro se, nothing further happened in the case until 5 years later, when the state moved to dismiss Tweedy's appeal because of his lack of diligence in pursuing it. Tweedy then moved to dismiss for lack of speedy trial. The Supreme Court examined the delay, using the traditional four-part Barker analysis, and charged all of the delay against the state. The Supreme Court found that the state had not rebutted the presumption of prejudice to the defendant by its allegation that none of the witnesses had died, and therefore, the Supreme Court dismissed the case. St. v. Tweedy, 277 M 313, 922 P2d 1134, 53 St. Rep. 656 (1996).

Factors to Be Considered: In determining whether a defendant's right to a speedy trial has been violated, a court must adopt a balancing test in which the conduct of both the prosecution and the defendant are weighed. Four factors must be considered: (1) length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant. St. v. Atkins, 277 M 103, 920 P2d 481, 53 St. Rep. 561 (1996); St. v. Weeks, 270 M 63, 891 P2d 477, 52 St. Rep. 78 (1995); St. v. Dahms, 252 M 1, 825 P2d 1214, 49 St. Rep. 106 (1992); St. v. Van Voast, 247 M 194, 805 P2d 1380, 48 St. Rep. 160 (1991); St. v. Hall, 244 M 161, 797 P2d 183, 47 St. Rep. 1501 (1990); St. v. Buckingham, 240 M 252, 783 P2d 1331, 46 St. Rep. 2102 (1989); St. v. Bretz, 185 M 253, 605 P2d 974 (1979); St. v. Keller, 170 M 372, 553 P2d 1013 (1976).

Half of 280-Day Delay Attributable to Defendant — Inexperienced Counsel — Lack of Proof of Prejudice and Impairment of Defense: Collier was arrested and charged with solicitation of deliberate homicide, which was reduced to criminal endangerment by a plea bargain. After being in jail for approximately 280 days, Collier moved to dismiss for lack of a speedy trial. The Supreme Court affirmed the District Court's denial of the motion, finding that one-half of the 280-day delay was attributable to Collier. The Supreme Court noted that Collier failed to state exactly what it was that her defense counsel failed to do for her or, even if the delay was attributable to the state for assignment of an inexperienced defense counsel, how the delay prejudiced her case. Even though Collier was jailed throughout the entire period and therefore could not be with her children, the Supreme Court noted that because she was under a restraining order to stay away from her husband, who had custody, she could not have been with her children in any event. The Supreme Court held that Collier's assertions were only that and were unaccompanied by proof of any prejudice. St. v. Collier, 277 M 46, 919 P2d 376, 53 St. Rep. 534 (1996).

Delay of 399 Days Held Not to Be Denial of Speedy Trial — Time Attributable to Defendant for Subsequent Arrest on Separate Charges, Bail Revocation, and Entry Into Chemical Dependency Treatment Program — No Impairment of Defense: Hagberg was jailed after his initial arrest for felony assault (now assault with a weapon) but was released on bail. Thereafter, Hagberg's bail was revoked and he was again jailed after the state discovered that he had violated the terms of an earlier probation. At the time of the bail revocation, Hagberg also voluntarily entered a treatment program for his alcoholism. The trial was delayed twice for these reasons and because the District Court Judge retired. The Supreme Court held that because many of the days of delay were caused by institutional delays and were not caused by impermissible trial tactics of the prosecution, the state had not violated Hagberg's right to a speedy trial. The Supreme Court also noted that the delay had no effect upon Hagberg's ability to prepare his defense because the incident was still fresh in the minds of Officer Mantooth and Hagberg. St. v. Hagberg, 277 M 33, 920 P2d 86, 53 St. Rep. 528 (1996).

Delay of 177 Days by State for Institutional Reasons Inherent in System Found Reasonable: Of the 419-day delay in the trial, defendant was responsible for 242 days and the state was responsible for 177 days. The primary purpose of the speedy trial right is to protect defendant against oppressive, deliberate prosecution tactics. Instead, the delay attributable to the state in this case was institutional delay inherent in the system, which weighs less heavily against the state, and the state showed a reasonable explanation for the delay. Not counting the first 56 days after defendant was charged, the delay was due mainly to continuances granted the state. St. v. Gould, 273 M 207, 902 P2d 532, 52 St. Rep. 930 (1995).

Oppressiveness to and Recall of Defendant Already in Custody for Prior Offense: Incarceration for 419 days while awaiting trial was not oppressive or prejudicial because during that time, defendant was under sentence for a prior, unrelated crime and would have been in the custody of the state in some manner during the 419 days. In addition, 242 of the days were attributable to defendant. Anxiety and concern of defendant during the 419 days were thus not specifically related to the offense charged in this case. A certain amount of anxiety is inherent in being charged with a crime, and defendant put forth no evidence of anxiety and concern beyond that inherent in being charged. As to accurate witness recall of events, defendant was his only witness

and his trial testimony showed no problem with recall. St. v. Gould, 273 M 207, 902 P2d 532, 52 St. Rep. 930 (1995), followed in St. v. Bowser, 2005 MT 279, 329 M 218, 123 P3d 230 (2005).

Waiver for Specific Time Period Not Waiver for Time After or Before: Two different waivers of the right to a speedy trial, each for a specific time period, did not constitute a total waiver preventing the Supreme Court from considering, on appeal, a claim of denial of the right to a speedy trial. St. v. Gould, 273 M 207, 902 P2d 532, 52 St. Rep. 930 (1995).

Delay of 214 Days or More Triggers Examination of Denial of Right: It is indisputable that a 214-day delay in a trial is sufficient to trigger a speedy trial examination. St. v. Wombolt, 231 M 400, 753 P2d 330, 45 St. Rep. 714 (1988) (citing four cases in which delays of 214 to 257 days triggered an examination), followed in St. v. Dahms, 252 M 1, 825 P2d 1214, 49 St. Rep. 106 (1992), St. v. Hembd, 254 M 407, 838 P2d 412, 49 St. Rep. 788 (1992), and St. v. Gould, 273 M 207, 902 P2d 532, 52 St. Rep. 930 (1995). See also St. v. Kipp, 1999 MT 197, 295 M 399, 984 P2d 733, 56 St. Rep. 762 (1999).

Criminal Defendant Entitled to Interest Earned on Cash Deposited as Bail Bond — Constitutional Issues: Richland County sought to retain the interest earned on a defendant's $50,000 cash bail bond that had been deposited with the court in an interest-bearing account and to apply the money to the county's general fund. Applying the general rule in Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 US 155, 66 L Ed 2d 358, 101 S Ct 446 (1980), the Supreme Court held that, absent a statutory provision allowing retention of the interest, the county is no more entitled to retain interest on a cash bail bond than it would be to retain accruing dividends on a deposit of stocks or bonds or the appreciated value on a pledge of real estate under 46-9-401. Retention of interest by the county would also violate several constitutional provisions as well, including: (1) the guarantee in Art. II, sec. 17, Mont. Const., that a citizen cannot be deprived of property without due process of law; (2) the guarantee in Art. II, sec. 29, Mont. Const., that property cannot be taken for public use without just compensation; and (3) a potential thwarting of this section, which guarantees a speedy trial, through the incentive by the county to prolong a criminal prosecution as long as possible in order to earn more interest on a bond deposit. Therefore, if the Clerk of Court deposits bond money in an interest-bearing account, then interest earned on the deposit belongs to the owner of the funds that generated the interest. Siroky v. Richland County, 271 M 67, 894 P2d 309, 52 St. Rep. 343 (1995), distinguishing Fresno Firefighters' Local 753 v. Jernagan, 222 Cal. Rep. 886, 177 Cal. App. 3d 403 (Cal. Ct. App. 5th Dist. 1986).

Right to Speedy Trial Violated — Dismissal Correct: Defendant was charged with alternate counts of forgery or theft. After a 298-day delay, attributable solely to the state, defendant moved to dismiss for lack of speedy trial, and the District Court granted the motion. The state appealed, and the Supreme Court affirmed. When the delay resulted from the court's failure to arraign the defendant, from its failure to rule on the defendant's pretrial motions, and from the prosecution's lack of diligence, the District Court was correct in granting the defendant's speedy trial motion and in dismissing the charges with prejudice. The Barker v. Wingo factors applied. St. v. Matthews, 271 M 24, 894 P2d 285, 52 St. Rep. 305 (1995), followed in St. v. Keating, 285 M 463, 949 P2d 251, 54 St. Rep. 1250 (1997).

District Court Review of Denial of Right to Speedy Trial in Justice's Court — Exception to Trial De Novo: As a general rule, the District Court must try all appeals from Justice's Court de novo and may not sit as a court of review. To ensure a defendant's adequate remedy at law, there is an exception to the general rule if the error complained of is lack of a speedy trial in Justice's Court because that error cannot be cured by trial de novo. Thus, the District Court may rule on a Justice's Court's denial of a motion to dismiss for lack of a speedy trial in the event that the defendant timely appeals the Justice's Court conviction and sentence to the District Court and raises the speedy trial issue as part of the appeal. State ex rel. Wilson v. District Court, 270 M 449, 893 P2d 318, 52 St. Rep. 264 (1995).

Six-Month Rule Applicable Only to Initial Trial in Justice's Court: Mantz was found guilty of misdemeanor assault in Justice's Court and appealed to the District Court for a trial de novo on January 22, 1993. On December 7, 1993, Mantz filed a motion to dismiss for lack of a speedy trial, maintaining that under 46-13-401, a defendant cannot be brought to trial on a misdemeanor charge after 6 months. As set out in St. v. Sunford, 244 M 411, 796 P2d 1084 (1990), 46-13-401 is inapplicable to situations in which a case comes from Justice's Court to a trial de novo in District Court. Because the District Court in this case properly applied the Barker v. Wingo test for determining speedy trial in finding that 46-13-401 applies only to the initial trial in Justice's Court, the motion to dismiss was properly denied. St. v. Mantz, 269 M 135, 887 P2d 251, 51 St. Rep. 1527 (1994). Sunford and Mantz were followed in St. v. Stanko, 1998 MT 323, 292 M 214, 974 P2d 1139, 55 St. Rep. 1313 (1998).

Delay of 692 Days With Two Appeals by State — No Damage to Defendant Shown: The delay of 692 days between arrest and trial was presumptively prejudicial to defendant. However, the delays caused by the state's two interlocutory appeals should not weigh heavily against the state because the appeals were meritorious and not in bad faith or for dilatory purposes. Defendant was incarcerated only about 90 of those days and did not show that his anxiety and concern over the deliberate homicide charge were aggravated by the delay or that his defense was prejudiced or impaired. St. v. Moore, 268 M 20, 885 P2d 457, 51 St. Rep. 1151 (1994).

Speedy Trial — Failure to Petition for Disposal of Charges Properly Considered by District Court in Attributing Delay to Defendant: Stewart was convicted on state theft and forgery charges and appealed his sentence to the Supreme Court, which stayed execution of the state sentence. Conspiracy and mail fraud charges were then filed by the United States, and Stewart was tried, convicted, and incarcerated. After Stewart's state conviction was overturned by the Supreme Court, a warrant was issued for his arrest on other state charges and a detainer was sent to the federal prison. Stewart was informed of his right to request final disposition of the state charges under Article III of the Interstate Agreement on Detainers, but he did not file a petition. Stewart was then released from federal prison and brought to Lincoln County, Montana, to face the state charges. He moved to dismiss the charges for lack of a speedy trial. The District Court denied the motion. The Supreme Court held that the District Court properly analyzed Stewart's speedy trial claim under the four-part test set forth in Barker v. Wingo, 407 US 514 (1972). The record shows that 245 days elapsed from the filing of the detainer to Stewart's release to state officials for trial in Montana. Stewart was aware of his right to petition for disposition of the state charges during that time but failed to do so. The Supreme Court held that those days were therefore properly charged to Stewart and were not the fault of the state. The Supreme Court also found that Stewart was not prejudiced by the delay. St. v. Stewart, 266 M 525, 881 P2d 629, 51 St. Rep. 910 (1994).

Delay of 197 Days — Failure to Show Prejudice: When Eklund was arrested for charges of sexual intercourse without consent, he was already incarcerated on an unrelated charge. He was arraigned about 2 months later and had a jury trial 197 days after his arrest, having been incarcerated the entire time. Eklund moved for a mistrial, claiming denial of a speedy trial. The motion was properly denied because although the first three elements of the Barker test were met, Eklund failed to meet the fourth element—evidence that he was prejudiced by pretrial incarceration, anxiety or concern, or impairment of defense. St. v. Eklund, 264 M 420, 872 P2d 323, 51 St. Rep. 335 (1994).

Defendant's Eligibility for Prerelease and Parole Prejudiced by Lack of Speedy Trial: Barker was arrested and charged with felony theft. While awaiting arraignment, he was transferred and incarcerated in the state for an unrelated offense. The trial date was postponed several times by the trial court, and Barker's motion to dismiss on the grounds that he had been denied a speedy trial was denied by the trial court on the basis that the delays were caused by "institutional difficulties". Subsequently, the trial court again delayed the trial. The record was not clear as to the reason for the delay. Barker appealed his conviction on the basis that he had not received a speedy trial and the delay had prejudiced his eligibility for prerelease and parole. The Supreme Court ruled that the state had not satisfied its burden of rebutting the presumption of prejudice due to the delay and that the remedy when a defendant's right to speedy trial is violated is reversal and dismissal of the conviction. St. v. Barker, 261 M 379, 862 P2d 1112, 50 St. Rep. 1368 (1993).

Material Witness Unavailable — No Prejudice to Defendant — Delay Not Unconstitutional: The unavailability of counseling for a child sexual assault victim for 4 1/2 months and the need to obtain such counseling before the victim would be able to testify constitutes a valid excuse for a 256-day delay. When defendant's pretrial incarceration was not oppressive, when there was no record that defendant was unduly anxious or concerned during the delay, and when the defense was not impaired by the state's delay, defendant's constitutional right to a speedy trial was not violated. St. v. Scott, 257 M 454, 850 P2d 286, 50 St. Rep. 353 (1993), followed in St. v. Williams-Rusch, 279 M 437, 928 P2d 169, 53 St. Rep. 1224 (1996).

Defendant Required to Show Prejudice Caused by Trial Delay: The Supreme Court refused to accept the defendant's argument that he had been prejudiced by a delay of 461 days in going to trial because the defendant failed to show that the delay exacerbated his anxiety and concern and failed to show that his defense was impaired by the delay. St. v. Hembd, 254 M 407, 838 P2d 412, 49 St. Rep. 788 (1992), followed in St. v. Foshee, 282 M 326, 938 P2d 601, 54 St. Rep. 370 (1997).

Delay Insufficient to Trigger Speedy Trial Analysis: A delay of 161 days between arrest and trial was held insufficient to trigger a prejudicial presumption requiring a speedy trial analysis. St. v. Dahms, 252 M 1, 825 P2d 1214, 49 St. Rep. 106 (1992).

Client Bound by Attorney's Waiver of Right to Speedy Trial — Purpose of Statute: After defendant's attorney orally waived defendant's rights to a speedy trial in Justice's Court, defendant argued in his trial de novo appeal to District Court that he, the defendant, was not bound by his attorney's waiver. Defendant asserted that 37-61-401 makes the waiver binding only if it was entered with the defendant's knowledge or upon the record in open court. Citing Bush v. Baker, 46 M 535, 129 P 550 (1913), the Supreme Court ruled that 37-61-401 has been applied only as to agreements between attorneys and that the purpose of that section is to relieve the presiding judge of the burden of determining disputes between attorneys concerning their unexecuted agreements. The Supreme Court stated that it would not apply 37-61-401 literally as to agreements between an attorney and the court; to do so would lead to absurd consequences and greatly retard the business of the courts. The Supreme Court held that the defendant was thus bound by his counsel's waiver. St. v. Nelson, 251 M 139, 822 P2d 1086, 48 St. Rep. 1129 (1991).

Speedy Trial Clock to Start With Date of De Novo Appeal From Justice's Court to District Court: After defendant's attorney orally waived defendant's rights to a speedy trial in Justice's Court, defendant argued in his trial de novo appeal to District Court that his right to a speedy trial was violated because the clock should have started with the date of his arrest, not the date of appeal to District Court. Citing St. v. Sanders, 163 M 209, 516 P2d 372 (1973), the Supreme Court noted that it had adopted Standard 12-2.2(c) of the American Bar Association Standards for Criminal Justice. The standard provides that in cases of appeal or an order for a new trial, the time for trial should begin running with the order granting the new trial or, in this case, the date of appeal to District Court. The Supreme Court determined not to abandon that standard and therefore held that defendant's trial was within the 6-month limitation of 46-13-401. St. v. Nelson, 251 M 139, 822 P2d 1086, 48 St. Rep. 1129 (1991).

Speedy Trial Not Denied by Application of Six-Month Speedy Trial Limitation to De Novo Appeal From Justice's Court to District Court: After defendant's attorney orally waived defendant's rights to a speedy trial in Justice's Court, defendant argued in his trial de novo appeal to District Court that his right to a speedy trial was violated because it is prejudicial to apply the speedy trial standards of 46-13-401 to an appeal from Justice's Court to District Court. The Supreme Court held that the argument was without merit because the 6-month limit was met in this case, both in the time for trial in Justice's Court and in the time for trial de novo in District Court. St. v. Nelson, 251 M 139, 822 P2d 1086, 48 St. Rep. 1129 (1991).

Uncertain Testimony of Defense Counsel Insufficient to Disprove Oral Waiver of Right to Speedy Trial: At the time scheduled for defendant's trial in Justice's Court on a DUI charge, the Justice of the Peace called defense counsel into his chambers and informed him that a different date for trial was necessary because of another trial then in progress. The Justice of the Peace then issued a written order reciting the fact that an oral motion for a continuance was made by defense counsel, along with an oral waiver of defendant's right to a speedy trial. Trial was then set for a date beyond the 6-month limitation provided for in 46-13-401. In a de novo appeal to District Court, defendant raised the issue of his right to a speedy trial, and defense counsel testified he could not remember whether he made an oral motion for continuance and a waiver. The Supreme Court found that the Justice's Court's order was presumed correct under 26-1-602(17) and that the testimony of defense counsel did not demonstrate that the order was in error in reciting the waiver. St. v. Nelson, 251 M 139, 822 P2d 1086, 48 St. Rep. 1129 (1991).

Defendant Not Adversely Affected by Counsel's Drug Arrest: Defendant appealed his conviction for possession of drugs and drug paraphernalia, alleging that he was denied effective assistance of counsel arising from a conflict of interest because his attorney was subsequently charged with conspiracy to manufacture and distribute drugs and with tax fraud arising from the sale of drugs. The Supreme Court held that because the performance of defendant's attorney was not adversely affected by an actual conflict of interest, defendant was not denied effective assistance of counsel under the two-pronged standard established by the U.S. Supreme Court in Cuyler v. Sullivan, 446 US 335, 64 L Ed 2d 333, 100 S Ct 1708 (1980). St. v. Christenson, 250 M 351, 820 P2d 1303, 48 St. Rep. 1034 (1991).

Failure to Trigger IAD Speedy Trial Provision: Wolfe argued that he had been denied a speedy trial because the state had failed to try him within 180 days as required by the Interstate Agreement on Detainers (IAD). The Supreme Court held that Wolfe had failed to file with the

District Court the papers required by the IAD and therefore had failed to trigger the 180-day provision. St. v. Wolfe, 250 M 400, 821 P2d 339, 48 St. Rep. 1001 (1991).

Speedy Trial — Time to Run From Date Defendant Accused in Youth Court: Daniels argued that he had been denied a speedy trial because the total amount of the delay was 322 days from the date of his appearance in Youth Court. The state contended that the period ran from the date the trial was transferred to the District Court. The Supreme Court held that the time started to run from the date of the appearance in the Youth Court but that the defendant was responsible for a majority of the delay because he resisted transfer of the case to the District Court. St. v. Daniels, 248 M 343, 811 P2d 1286, 48 St. Rep. 464 (1991).

Chargeable Delay of Ninety-Six Days Not Prejudicial: Of 193 days between trial in Justice's Court and trial de novo in District Court, 97 were attributable to defendant and 96 to the state. A delay of 96 days was held not sufficiently prejudicial to defendant to constitute a violation of the right to a speedy trial. St. v. Sunford, 244 M 411, 796 P2d 1084, 47 St. Rep. 1684 (1990), followed in St. v. Jenkins, 262 M 117, 863 P2d 438, 50 St. Rep. 1471 (1993).

Proof of Prejudice Occasioned by Delay Required to Raise Due Process Concern: Delay alone is not adequate to raise a due process concern absent some proof of prejudice occasioned by the delay. In alleging prejudice due to appellate delay, defendant must show that he: (1) is unable to present an adequate appeal because of the delay; or (2) will be unable to defend adequately in the event a retrial is ordered. St. v. Black, 245 M 39, 798 P2d 530, 47 St. Rep. 1677 (1990), following U.S. v. Alston, 412 A2d 351 (D.C. 1980), St. v. Chapple, 660 P2d 1208 (Ariz. 1983), and St. v. Hall, 487 A2d 166 (Vt. 1984), and followed in Bone v. St., 284 M 293, 944 P2d 734, 54 St. Rep. 890 (1997).

Computing Delay When Defendant Tried Twice: The defendant's first trial ended in a mistrial. Prior to the second trial, the defendant moved for dismissal on the grounds that he had been denied a speedy trial. The motion was denied, and he was convicted at the second trial. The Supreme Court acknowledged that in St. v. Sanders, 163 M 209, 516 P2d 372 (1973), it had adopted the rule that the time for trial commences to run following a mistrial. However, the court stated that the present case was distinguishable because the defendant only claimed the delay prior to his first trial to be unreasonable. In examining the reasons for the delay, the court held that although the delay was mostly attributable to the state, it was not purposeful and the defendant did not show that he was prejudiced. St. v. Marquardt, 243 M 133, 793 P2d 799, 47 St. Rep. 1078 (1990).

Delay of 281 Days in Complex Trial Not Prejudicial: A delay of 281 days was sufficient to be presumptively prejudicial and to trigger further analysis of assertions of prejudice. The Supreme Court failed to specify the number of days of delay attributable to each party, noting the state, the defendant, and the court all contributed to the delay. However, this was an extremely complex case, with over 40 witnesses and 94 state exhibits, and included the filing of numerous motions by defendant and a delay of 5 months before he filed the bulk of his pretrial motions. The record showed no dilatoriness on the part of the state, and the defendant failed to demonstrate that he was prejudiced by the delay or that his defense was impaired. The delay of 281 days, viewed against the complexity of the case and relevant factors, did not deny defendant's right to a speedy trial. St. v. Kills On Top, 243 M 56, 793 P2d 1273, 47 St. Rep. 984 (1990).

Delay Not Prejudicial: The Supreme Court attributed 66 days of the trial date delay to the state. The court held that the delay was long enough to trigger a speedy trial inquiry but that the defendant had not demonstrated that he was prejudiced in any way by the delay. St. v. Sorensen, 243 M 321, 792 P2d 363, 47 St. Rep. 873 (1990).

Delay Raises Presumption of Prejudice: The Supreme Court held that the goal of a speedy trial guaranty is not simply speed but the orderly disposition of criminal proceedings while preventing oppressive tactics by the prosecution. The court stated that a 291-day delay was sufficient to raise a presumption of prejudice requiring further inquiry. In the case before it, the court ruled that 252 days of the delay were chargeable to the state and were incurred as the result of the election of a new judge. The court stated that such institutional delays are weighed against the state but not as heavily as delays resulting from oppressive tactics. St. v. Curtis, 241 M 288, 787 P2d 306, 47 St. Rep. 277 (1990).

Institutional Delays Chargeable to State: The Supreme Court held that the election of a new judge was responsible for 252 days of delay in the commencement of the defendant's trial. The court stated that such institutional delays are weighed against the state but not as heavily as delays resulting from oppressive tactics. St. v. Curtis, 241 M 288, 787 P2d 306, 47 St. Rep. 277 (1990), followed in St. v. Atkins, 277 M 103, 920 P2d 481, 53 St. Rep. 561 (1996).

Prejudice Claim Based on Speculation: The defendant claimed that she had been prejudiced by the delay in obtaining a trial because the victim, who had become incompetent, could have testified on her behalf at an earlier time. The Supreme Court held that the facts of the case indicated that, when competent, the victim may have testified against the defendant rather than for her and therefore the claim of prejudice was based on speculation and was not grounds for dismissal. St. v. Curtis, 241 M 288, 787 P2d 306, 47 St. Rep. 277 (1990).

Six-Month Time Limit for Misdemeanor Trial Not Violated When Defendant Requested Delay: The defendant in a DUI case asked for a continuance to enter a guilty plea so that the 5-year period would run on a prior DUI conviction before his guilty plea on the second violation. Subsequently, the defendant pleaded not guilty and moved for dismissal on the basis that the statutory 6-month period to try a misdemeanor had elapsed. The Supreme Court held that the 6-month period did not run when it was the defendant rather than the state who was responsible for the delay. St. v. Crane, 240 M 235, 784 P2d 901, 46 St. Rep. 2082 (1989).

Delay Resulting From Defendant's Motion to Substitute Judge: The defendant was held responsible for 82 days of a 201-day delay on the basis that his motion to substitute a new judge accounted for that portion of the delay. St. v. Wiman, 236 M 180, 769 P2d 1200, 46 St. Rep. 279 (1989).

Time Necessary to Adjudicate Pretrial Motions — Delay Justified: Defendant contended that a delay caused by the state mandated dismissal because his speedy trial rights were violated. Part of the delays associated with pretrial controversies regarding appointment of counsel, request for transcript, motion to dismiss, and change of venue motion was properly attributable to the state; however, the delay caused by the pretrial motions and appeals was justified by the complexity and need for evidence in the counsel issue and by the lack of a showing that the prosecution acted intentionally to delay. St. v. Forsyth, 233 M 389, 761 P2d 363, 45 St. Rep. 1577 (1988), distinguishing St. v. Bailey, 201 M 473, 655 P2d 494 (1982).

Institutional Delay Chargeable to State: Institutional delay in an arson case was caused by a separate suit brought by a newspaper to test the constitutionality of 46-10-201 (now repealed), which defendant invoked to close the proceedings to the press and public, and by the state's inaction in the face of that suit, resulting in a 214-day delay in prosecution. Although institutional, the delay was chargeable to the state, which had the power to choose the method of prosecution but also had a concomitant duty to bring the accused to trial. The delay was excessive and unjustified, and the information was properly dismissed by the trial court. St. v. Wombolt, 231 M 400, 753 P2d 330, 45 St. Rep. 714 (1988).

Affirmative Attempt by Defendant to Get to Trial Required to Trigger Speedy Trial Protection: The right to a speedy trial does not protect a defendant who makes a transparent assertion of the right or sleeps on his rights during the course of a proceeding only to belatedly claim injustice as the day of reckoning draws near. Defendant could not cry denial of a speedy trial when he never affirmatively attempted to force the issue to a trial on the merits, but rather engaged in a continued course of tactics designed to delay trial. St. v. Wirtala, 231 M 264, 752 P2d 177, 45 St. Rep. 596 (1988).

Anxiety and Concern Not Violative of Right to Speedy Trial: Defendant contended he suffered anxiety and concern sufficient to violate his right to a speedy trial. A defendant's anxiety and concern are not dispositive. It is but a factor to be considered in determining prejudice. The crucial factor in determining prejudice is whether the defense has been impaired. Absent impairment and in light of lack of excessiveness of defendant's anxiety and concern beyond that inherent in being accused of a crime, the District Court properly denied defendant's motion to dismiss for denial of a speedy trial. St. v. Waters, 228 M 490, 743 P2d 617, 44 St. Rep. 1705 (1987), followed in St. v. Van Voast, 247 M 194, 805 P2d 1380, 48 St. Rep. 160 (1991). See also St. v. Kipp, 1999 MT 197, 295 M 399, 984 P2d 733, 56 St. Rep. 762 (1999).

Period of Delay Following Grant of Continuance Chargeable Against Defendant: Where trial would have occurred within 6 months of the filing of the charge had defendant not moved for continuance, the period of delay was chargeable to defendant and the state did not have the burden of explaining the delay or showing absence of prejudice to defendant. St. v. Moehr, 227 M 253, 738 P2d 499, 44 St. Rep. 1058 (1987).

Speedy Trial — Incarceration in Another State — Delays Attributable to Defendant: Eleven days after his arraignment in Montana for burglary, defendant was arrested in Idaho for burglary and felony theft, convicted, and sentenced to the Idaho State Prison for 5 years. On January 22, 1985, Montana filed a detainer in Idaho. Defendant asserted his right to a speedy trial in Montana by requesting final disposition of the charges against him on June 19, 1985. Defendant requested a delay of his trial on September 3, 1985, and trial was held on October 22,

1985. Defendant appealed his conviction in Montana on the grounds that his right to a speedy trial had been violated and the charges against him should have been dismissed. The Supreme Court found that a total of 196 days of the 393-day delay were attributable to defendant. The presumption that defendant did not receive a speedy trial, which was raised by the 393-day delay between defendant's arrest and his trial, was satisfactorily overcome. Defendant's own conduct prevented the state from bringing him to trial within 180 days. He cannot now complain that he was not given a speedy trial. St. v. Grant, 227 M 181, 738 P2d 106, 44 St. Rep. 994 (1987), followed in St. v. Stewart, 266 M 525, 881 P2d 629, 51 St. Rep. 910 (1994).

Defendant Liable for 83 of 189 Days — Motion on Day of Trial — No Unfair Prejudice Shown From Denial: The time between arrest and trial was 189 days, and defendant's two granted motions for continuance accounted for 83 days, making the remaining 106 days well within Montana's acceptable delay limit. Asserting the right to a speedy trial on the day of the trial was not timely. No unfair prejudice was shown to result from denial of the motion. The court properly denied a motion to dismiss for lack of a speedy trial. St. v. Walker, 225 M 415, 733 P2d 352, 44 St. Rep. 363 (1987).

Denial of Speedy Trial — Failure to Meet Threshold Test: Kerns appealed his forgery conviction, arguing that the District Court's denial of motions to dismiss for lack of speedy trial constituted institutional delay and violated his right to a speedy trial. The Supreme Court ruled that unless there is a period of delay long enough to be presumptively prejudicial, no inquiry is required. Since Kerns failed to meet Montana's four-part threshold test, no presumption of delay attaches. St. v. Kerns, 223 M 172, 725 P2d 1190, 43 St. Rep. 1632 (1986), followed in St. v. Smith, 232 M 156, 755 P2d 569, 45 St. Rep. 955 (1988), and in St. v. Wiman, 236 M 180, 769 P2d 1200, 46 St. Rep. 279 (1989).

Institutional Delay — No Prejudice When Defendant Already Incarcerated: A 256-day delay triggered the four-part Barker test and shifted the burden to the prosecution to give a reasonable excuse for the delay or show why the delay did not prejudice the defendant. Sixty-one days of the delay were attributable to defendants; the remaining 195 days were attributable to institutional delay, which weighs less heavily against the state in the Barker balancing process. Defendant was not prejudiced by the delay because he was already incarcerated on another charge and there was no evidence of additional or unusual anxiety. St. v. Palmer, 223 M 25, 723 P2d 956, 43 St. Rep. 1503 (1986).

Delay Charged to Defendant: No denial of defendant's right to speedy trial occurred where defendant had previously filed multiple waivers of his right to speedy trial, pending a great number of motions and voluminous supporting briefs, and subsequently was granted an extension to allow substitution of counsel, which resulted in an additional 2-month delay. St. v. Harvey, 219 M 402, 713 P2d 517, 43 St. Rep. 46 (1986).

Denial of Right to Speedy Trial — When Presumption of Prejudice Arises: Defendant was not tried on DUI charge for nearly 13 months after being charged. The Supreme Court held that the delay of 13 months was sufficient to shift burden to the prosecution to explain reason for delay and to create a presumption that the delay had prejudiced the defendant. Here the prosecution neither explained the delay nor offered evidence to rebut the presumption of prejudice. Hamilton v. Hayden, 218 M 425, 709 P2d 156, 42 St. Rep. 1708 (1985).

Delay for Transfer to Answer Another County's Charges — No Violation: For speedy trial purposes, a 52-day delay during which defendant was transferred to another county to answer charges filed in that county could not be charged against the state. St. v. Robbins, 218 M 107, 708 P2d 227, 42 St. Rep. 1440 (1985).

General Extradition Delay Rules: For speedy trial purposes, those days during which an accused resists extradition will be included in the period of delay, and only those days will be charged against the accused. Those days during which the prosecution either does not diligently demand extradition or diligently pursue it will be included in the period of delay and charged against the prosecution. Those days during which the prosecution diligently pursues extradition and the accused does not resist it will not be included in the period of delay, and inclusion of those days, as in St. v. Ackley, 201 M 252, 653 P2d 851, 39 St. Rep. 2091 (1982), is no longer the rule. St. v. Robbins, 218 M 107, 708 P2d 227, 42 St. Rep. 1440 (1985).

No Presumption of Prejudice in Acceptable Delay: For speedy trial purposes, a 104-day delay was well within the guidelines for acceptable length of delay and was not presumptively prejudicial. Thus, the other three parts of the Barker test need not be considered. St. v. Robbins, 218 M 107, 708 P2d 227, 42 St. Rep. 1440 (1985).

Right to Speedy Trial Separable From Claim of Double Jeopardy — Speedy Trial Issue to Await Retrial: Following mistrial because of a jury deadlock, defendant petitioned for a Writ

of Supervisory Control, claiming double jeopardy and lack of speedy trial. The court refused to take jurisdiction, but proceeded to reject defendant's claim of double jeopardy. The court held, however, that defendant's claim of denial of right to speedy trial was generically different from his claim of double jeopardy. The speedy trial issue could not be considered until the retrial was held and all of the facts presented to the Supreme Court on appeal. At that time, the issue would be ready for decision. State ex rel. Forsyth v. District Court, 216 M 480, 701 P2d 1346, 42 St. Rep. 965 (1985).

Barker Analysis Triggered — Right to Speedy Trial Not Violated: Although defendant's trial was significantly delayed, insufficient valid reason was given for the delay, and defendant asserted his right to a speedy trial in a timely manner, the fourth factor in Barker v. Wingo, 407 US 514, 33 L Ed 2d 101, 92 S Ct 2182 (1972), prejudice to the defendant, was not demonstrated when no showing was made of excessive incarceration, significant anxiety, or impairment of defendant's defense. St. v. Sanderson, 214 M 437, 692 P2d 479, 42 St. Rep. 94 (1985).

Defendant Not Prejudiced by Institutional Delay: Defendant was not denied his right to a speedy trial. He was ready for trial, and the State indicated its readiness for trial in a timely fashion. There were no oppressive tactics employed. The cause for the 214-day delay is narrowed to pure institutional delay, and only that may be balanced against the defendant's prejudice. The State carried its burden of showing lack of prejudice, and, when the burden shifted, the defendant failed to present evidence that he was prejudiced by the delay. St. v. Chavez, 213 M 434, 691 P2d 1365, 41 St. Rep. 2219 (1984), followed in St. v. Haskins, 220 M 199, 714 P2d 119, 43 St. Rep. 290 (1986). See also St. v. Bartnes, 234 M 522, 764 P2d 1271, 45 St. Rep. 2101 (1988).

Delay of 396 Days — 360 Days of Institutional Delay: Defendant was tried 396 days after filing the complaint in Justice's Court. The Supreme Court held that 360 to 368 days of that time were caused by state "institutional delays", primarily caused by prosecutorial inaction, and thus, because a defendant has no duty to prosecute himself, the state failed in its duty to speedily try the defendant. In analyzing the four factors adopted in Barker v. Wingo, the court held that the state failed in its burden relating to the length and reason of delay, that the state failed to sufficiently rebut the presumption that the delay resulted in prejudice to the defendant, and that the assertion requirement by the defendant is fulfilled when a defendant asserts his right to a speedy trial at any time before the trial. St. v. Britton, 213 M 155, 689 P2d 1256, 41 St. Rep. 2018 (1984), followed in St. v. Haskins, 220 M 199, 714 P2d 119, 43 St. Rep. 290 (1986), and St. v. Tweedy, 277 M 313, 922 P2d 1134, 53 St. Rep. 656 (1996). See also St. v. Kipp, 1999 MT 197, 295 M 399, 984 P2d 733, 56 St. Rep. 762 (1999).

"Speedy Trial" Tests to Apply Only to Felony Cases: The defendant was charged with a misdemeanor offense. As the State did not prosecute within the 6-month statutory deadline, the charge was dismissed. The State contends that a speedy trial constitutional analysis should be applied in determining whether the State has demonstrated good cause for its failure to meet the 6-month deadline. However, the speedy trial constitutional tests apply only in the case of felonies and will not be applied in misdemeanor cases if, as here, the statutory deadline is more strict than any constitutional analysis would be required to be. The statute contains the sole standard for determining whether good cause for the delay has been shown. St. v. Ronningen, 213 M 358, 691 P2d 1348, 41 St. Rep. 2168 (1984).

Delay Chargeable to Defendant — Barker Analysis Not Triggered: Although there was a 401-day time lapse between the day of the homicide and the start of the trial, the Supreme Court said the delay was largely attributable to the defendant. There was insufficient time elapsed chargeable to the state to trigger the analysis required under Barker v. Wingo, 407 US 514, 33 L Ed 2d 101, 92 S Ct 2182 (1972). St. v. Daniels, 210 M 1, 682 P2d 173, 41 St. Rep. 880 (1984).

Delay by Stand-By Counsel — Attributable to Defendant: Defendant was charged with criminal mischief relating to tire-slashing. A complaint was filed on October 27, 1982. Defendant was arrested the next day and remained in custody until the date of his trial, 182 days later. Defendant contended he was denied his right to a speedy trial. A delay of 182 days is sufficient to trigger the inquiry into the right to a speedy trial. Defendant argued that the 56 days consumed by motions to set trial date and for continuance, made by stand-by counsel while defendant was proceeding pro se, are not chargeable to him. The court held defendant could not gain advantage by jockeying between use and nonuse of defense counsel. The counsel's actions were part of the defense. Although the court found the remaining 126-day delay troublesome, it found that the prosecution was reasonably diligent. Defense preparation was not hindered. The delay was within permissible limits. St. v. Brown, 209 M 502, 680 P2d 582, 41 St. Rep. 852 (1984).

Legislative Implementation of Constitution: While this section does not specify the exact period of time that must elapse before the right to a speedy trial has been violated, the Legislature

did implement this section by specifying that unless good cause is shown, a misdemeanor must be dismissed if not brought to trial within 6 months. See 46-13-401. St. v. Knox, 207 M 537, 675 P2d 950, 41 St. Rep. 126 (1984).

Delays Resulting From Defendant's Refusal to Waive Extradition — Right to Speedy Trial Not Violated: The defendant was arrested on burglary and other charges on April 21. He decided on May 18 not to waive extradition to Montana. A Governor's warrant was issued on June 15, and defendant waived extradition on June 30. He had his initial appearance on July 6, an information was filed against him on July 22, and he was arraigned on July 29. The trial was begun after several delays, on November 2. The District Court did not err in denying the defendant's motion to dismiss the charges because his right to a speedy trial was violated. The delay caused by the extradition proceedings was a delay of the defendant's own making, so the time period of that delay, 60 days, must be subtracted from the time of total delay. Under the rationale of Barker v. Wingo, 407 US 514 (1972), and St. v. Fife, 193 M 486, 632 P2d 712, 38 St. Rep. 1334 (1981) (concluding that a delay of 194 days was presumptively prejudicial to the defendant's right to a speedy trial), the court could not say that the remaining delay of 135 days was prejudicial to the defendant, and under those cases, his right was therefore not violated. St. v. Smith, 206 M 99, 670 P2d 96, 40 St. Rep. 1533 (1983).

Prejudice Required to Be Shown: Defendant escaped from prison and was recaptured. There was a 184-day delay from arrest to trial and conviction on the escape charge. Although the delay was significant, the court, relying on St. v. Burtchett, 165 M 280, 530 P2d 471, certiorari denied, 420 US 974 (1974), stated that a case may not be dismissed for a violation of the right to a speedy trial unless prejudice to the defendant is shown. St. v. Allen, 203 M 290, 663 P2d 690, 40 St. Rep. 455 (1983).

Attributable Delay: Defendants escaped from the Montana State Prison on February 15, 1982, and were apprehended February 20, 1982. From the date the defendants were arrested until their trial 207 days elapsed. This delay was sufficient to trigger a speedy trial inquiry and shift the burden of explanation to the state. Of the 207 days, 108 days were attributable to defendants' motions for substitution of judge and change of venue. Although merely asserting their procedural rights, the delay caused by the defendants does not weigh against the state. The 99 days attributable to the state are clearly within the permissible limits set by the Supreme Court. St. v. Kelly, 203 M 159, 661 P2d 26, 40 St. Rep. 364 (1983).

Economic Damage as Prejudice: Defendant quit a job in Indiana to return to Montana to face criminal charges. Economic hardship is recognized as one form of prejudice that can flow from the deprivation of a defendant's speedy trial right. St. v. Bailey, 201 M 473, 655 P2d 494, 39 St. Rep. 2242 (1982), distinguished in St. v. Johnson, 2000 MT 180, 300 M 367, 4 P3d 654, 57 St. Rep. 727 (2000).

Length of Delay Between First and Second Information: The defendant was charged with attempted sale of dangerous drugs (now criminal distribution of dangerous drugs). The information was dismissed for failure to follow 46-11-203. Several attempts were made by the State to reinstate the information. A new information was eventually filed. Defendant alleged that he was denied a speedy trial and argued that the time between the first and second information should be included in the length of delay. The Supreme Court agreed. During that time the defendant was an accused, thus the right to a speedy trial attaches. St. v. Bailey, 201 M 473, 655 P2d 494, 39 St. Rep. 2242 (1982), distinguished in St. v. Forsyth, 233 M 389, 761 P2d 363, 45 St. Rep. 1577 (1988).

Speedy Trial — Preindictment Delay: Speedy trial guarantees in criminal cases do not extend to the period prior to the formal accusation or arrest. However , see St. v. Taylor, 1998 MT 121, 289 M 63, 960 P2d 773, 55 St. Rep. 481 (1998), in which the issue is raised to a level of constitutional scrutiny for analysis of preindictment delay. St. v. Goltz, 197 M 361, 642 P2d 1079, 39 St. Rep. 613 (1982), followed in St. v. Bartnes, 234 M 522, 764 P2d 1271, 45 St. Rep. 2101 (1988).

Delay Causing No Prejudice: Creekmore's trial for felony deceptive practices was delayed for 11 months for various reasons. The court focused on the fourth part of the four-part Barker test in addressing the issue of a lack of a speedy trial and held that the defendant was not prejudiced by the delay. The court quoted from the Barker case while discussing the possible prejudice caused by the delay. The three interests to be protected are: (1) to prevent oppressive incarceration; (2) to minimize anxiety; and (3) to limit the possibility that the defense will be impaired. The court found that none of these interests were impaired in this case. St. v. Creekmore, 196 M 187, 640 P2d 439, 39 St. Rep. 22 (1982).

Speedy Trial — Four-Part Test: The defendant was first tried and convicted of robbery on April 17, 1979. His conviction was reversed on appeal and remanded for a new trial. Remittitur

was ordered April 10, 1980. The State took no further action until Sept. 11, 1980, when the District Court granted an order authorizing the return of the defendant from prison to the county jail. On Oct. 17, 1980, defendant moved for dismissal based on a deprivation of his right to a speedy trial. The motion was denied, and defendant was again convicted at trial that began on Oct. 21, 1980. The Supreme Court ordered reversal and dismissal of this cause because defendant's guarantee to a speedy trial had been violated. The court applied the four-part standard of review stated in Barker v. Wingo, 407 US 514, 92 S Ct 2182, 33 L Ed 2d 101 (1972). St. v. Fife, 193 M 486, 632 P2d 712, 38 St. Rep. 1334 (1981). See also St. v. Kipp, 1999 MT 197, 295 M 399, 984 P2d 733, 56 St. Rep. 762 (1999).

Right to Speedy Trial — When Right Attaches: Appellant claimed unnecessary delay deprived him of his right to a speedy trial, and he blamed the Supreme Court for its delay in the resolution of his first appeal. No new trial had been specifically ordered when the court heard his first appeal and reversed his conviction. The Supreme Court disagreed, saying its supporting opinion made its holding clear. The crucial time frame, accordingly, began at the time of the remittitur. In this case, the elapsed time between the remittitur and the appellant's second trial was 33 days. Speedy trial right was not violated. St. v. Cardwell, 191 M 539, 625 P2d 553, 38 St. Rep. 451 (1981), following St. v. Sanders, 163 M 209, 516 P2d 372 (1973), and followed in St. v. Wiman, 236 M 180, 769 P2d 1200, 46 St. Rep. 279 (1989).

Right to Due Process and Speedy Trial Denied — When Defendant Becomes "Accused" — Insufficient Reason for Delay — Prejudice to Defendant: Where 376 days elapsed between the filing of a complaint in Justice's Court charging the defendant with arson and the filing of an information in District Court and 423 days elapsed between the defendant's arrest and the defendant's scheduled trial, the court did not err in dismissing with prejudice for lack of a speedy trial the information charging the defendant with arson. Because the defendant became an "accused" on the day the complaint was filed against him in Justice's Court, because the State failed without good reason to diligently pursue the charges against the defendant, and because the defendant had asserted the denial of his right to a speedy trial and had shown prejudice in his plausible claims that he was no longer able to recall facts constituting an alibi and was no longer able to discover physical evidence for use in his defense independently of that evidence found by the prosecution, the defendant satisfied the requirements to prove a violation of his constitutional right to a speedy trial. St. v. Larson, 191 M 257, 623 P2d 954, 38 St. Rep. 213 (1981), followed in St. v. Jenkins, 262 M 117, 863 P2d 438, 50 St. Rep. 1471 (1993).

Speedy Trial — Time in Federal Court Not Counted: Armstrong maintained that his right to a speedy public trial was denied. One factor to be considered when addressing this issue is the length of the delay in trial. Armstrong asserts that there was a 3 1/2-year delay. The court, however, did not count over 3 years of that delay because Armstrong's appeal to the federal courts removed the case from the jurisdiction of the District Court. After subtracting the time during which this case was in the appellate courts, the period of delay, 108 days, is not long enough to be considered presumptively prejudicial. St. v. Armstrong, 189 M 407, 616 P2d 341, 37 St. Rep. 1563 (1980).

Long Delay Without Show of Prejudice — Denial of Dismissal: When defendant presented no defense at trial and demonstrated no prejudice whatsoever from delay of robbery trial, there was no error in District Court's denial of motion to dismiss for lack of speedy trial, even though: (1) there had been a delay of 319 days (although the defendant had been incarcerated on other charges elsewhere during this time); (2) most of the delay was the fault of the State unrelated to the complexity of the case; and (3) defendant asserted his right to a speedy trial on six separate occasions. A balance of all factors demonstrated defendant was not prejudiced by a lack of a speedy trial. St. v. Worden, 188 M 94, 611 P2d 185 (1980).

Assertion of the Right: The defendant's assertion of his right to a speedy trial is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right. However, even though the defendant moved to dismiss for lack of a speedy trial prior to the trial's commencement, the fact that the defendant had previously indicated that he intended to call 120 witnesses, expected the trial to last 2 months, and had at various times asserted to the judge that because of the complexity of the case he could not possibly be prepared to defend himself weighs heavily against any prejudice in the time lapse between filing and trial. St. v. Bretz, 185 M 253, 605 P2d 974 (1979).

Defendant's Desire for Speed Not Shown: When defendant's speedy trial objections were commingled with periodic claims that he could not be ready for trial up to the day the trial commenced, the court could not find in the record a genuine desire for a speedy trial, making any prejudice minimal. St. v. Bretz, 185 M 253, 605 P2d 974 (1979).

Length of Delay: In utilizing the balancing test to determine whether a defendant's right to a speedy trial has been violated, the length of the delay is a triggering mechanism; unless there is some delay that is presumptively prejudicial, there is no necessity for inquiry into other factors. The length of delay that will provoke inquiry into other factors is dependent on the particular circumstances of each case. If the case is a complex one, the delay that can be tolerated is considerably more than for an ordinary street crime. Even in a complex case, the passage of 517 days from the filing of the information and defendant's motion to dismiss for lack of a speedy trial is sufficient under the circumstances to trigger an inquiry into other factors to determine if the defendant's right to a speedy trial has been violated, especially when 205 days must be charged to the State because of its appeal of a change of venue order. St. v. Bretz, 185 M 253, 605 P2d 974 (1979).

No Delay in Filing Second Information: The dismissal of a first information and the filing of a second information constituted no delay when three individuals were dropped from the information and six individuals were added, but the basic motions of the defendant against either information remained the same. St. v. Bretz, 185 M 253, 605 P2d 974 (1979).

Prejudice: Defendant's claim that a delay prejudiced him through economic hardship, death of witnesses, pretrial publicity of a long duration, difficulty of finding and interviewing State's witnesses, and emotional stress and strain was insufficient to show prejudice when the defendant's economic hardship, emotional stress and strain, and the consumption of time were commingled with several other legal proceedings involving the defendant and no credible evidence was ever given as to when witnesses had died and what their testimony would have been. The defendant must make a showing of prejudice, and mere self-serving assertions are insufficient. St. v. Bretz, 185 M 253, 605 P2d 974 (1979).

Weight of Reasons for Delay: A deliberate attempt to hamper the defense should be weighed heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighed less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances rests with the government rather than the defendant. A valid reason, such as a missing witness, should serve to justify an appropriate delay. When the most serious delay on the part of the prosecution is 205 days taken up for an appeal of a change of venue order and there is no showing or attempt to show in the record that the delay was a deliberate attempt to delay the trial in order to hamper the defense, even though it appears that the delay may have been the result of crowded courts and some negligence on the part of the State, the time should be weighed less heavily but nevertheless considered. St. v. Bretz, 185 M 253, 605 P2d 974 (1979).

Retrial Because of Lost Transcript Notes: Defendant did not oppose an order granting him a new trial because the court reporter lost his trial notes but alleged double jeopardy when he failed to get acquitted at the second trial. No valid double jeopardy claim existed because the defendant was not forced to accept retrial. He had available to him procedures under 46-20-304, albeit not totally sufficient, to appeal without benefit of an actual verbatim transcript. Allegations of violation of the right to a speedy trial were unfounded since the initial trial was timely. St. v. Hodgson, 184 M 394, 603 P2d 246 (1979).

Determining Factors — Burden — Unintentional Delay: The length of the delay, the reason for the delay, the defendant's assertion of his speedy trial rights, and prejudice to the defendant are factors all of which must be considered together with other relevant circumstances. The court must engage in a difficult and sensitive balancing process. A delay of 249 days between arrest and trial shifts the burden of explaining the reason for the delay and the absence of prejudice to the State. Unintentional delay, such as the inability of the State to provide a judge to hear the case and the inadvertent scheduling of the trial on a holiday, must be weighed less heavily than intentional delay in determining the validity of a speedy trial claim. Prejudice to the defendant because of delay is ascertained with a consideration of the following interests of a claimant: (1) prevention of oppressive pretrial incarceration; (2) minimization of anxiety or concern of the accused; and (3) limitation of the possibility the defense will be impaired. St. v. Dess, 184 M 116, 602 P2d 142 (1979).

Not Applicable to Parole Revocation Proceeding: Since a speedy trial under the sixth amendment to the United States Constitution and Art. II, sec. 24, Mont. Const., is guaranteed only in "criminal prosecutions", it does not apply in proceeding for revocation of probation. St. v. Oppelt, 184 M 48, 601 P2d 394 (1979), followed, as to suspended sentence revocation proceedings, in St. v. Watts, 221 M 104, 717 P2d 24, 43 St. Rep. 670 (1986).

Accrual of Right: To determine whether a defendant has been denied due process because of a lack of a speedy trial, the time begins to run from the day of arrest and not the day the amended

information was filed. He was accused of a crime on the day of his arrest, and his right to a speedy trial accrued as of that date. A pretrial delay of 207 days is sufficiently long to trigger a speedy trial inquiry and shift to the State the burden of explaining the delay and showing absence of prejudice. St. v. Freeman, 183 M 334, 599 P2d 368 (1979).

Lack of Prejudice: A showing that the defendant was incarcerated from the time of his arrest until his trial without a showing that he lost essential witnesses or that his right to a fair trial was impaired is not sufficient evidence of prejudice to him. The delay was due, in large part, to the filing and consideration of numerous defense motions. Since no prejudice has been shown and most of the delay is attributable to the defendant, the court finds that he was not denied due process because of a lack of a speedy trial. St. v. Freeman, 183 M 334, 599 P2d 368 (1979), followed in St. v. Boyer, 208 M 258, 676 P2d 787, 41 St. Rep. 321 (1984).

Factors to Consider — Delay of 317 Days: There are four factors to be considered in determining whether the right to a speedy trial is violated: (1) length of delay; (2) reason for delay; (3) defendant's assertion of the right; and (4) prejudice to the defendant. Length of delay is a triggering mechanism, and a delay of 317 days is sufficient to trigger an inquiry into the other factors. A delay due to the operation of the system is chargeable to the State. An accused must take some affirmative action to obtain a trial to be entitled to a discharge for delay. This burden is satisfied by making an appropriate motion. The incarceration of the defendant for the period of the delay demonstrates affirmative prejudice against him. St. v. Puzio, 182 M 163, 595 P2d 1163 (1979).

Defendant Responsible for Majority of Delay: Defendant was not denied his right to a speedy trial even though a substantial delay of 330 days occurred. The reasons for the delay were the normal initial period to allow the defense to prepare its case and a longer period to allow the defendant to leave the state to work. United States ex rel. Collins v. Crist, 473 F. Supp. 1354 (D.C. Mont. 1979), followed in St. v. Pease, 227 M 424, 740 P2d 659, 44 St. Rep. 1203 (1987).

Adoption of Balancing Test: In determining whether a particular defendant had been deprived of his right to a speedy trial, the court would adopt balancing test to be applied on a case-by-case basis, taking into account the length and reasons for delay, defendant's assertion of his right, and any prejudice resulting from the delay. St. v. Tiedemann, 178 M 394, 584 P2d 1284 (1978); State ex rel. Sanford v. District Court, 170 M 22, 551 P2d 1005 (1976); St. v. Steward, 168 M 385, 543 P2d 178 (1975), followed in St. v. Jenkins, 262 M 117, 863 P2d 438, 50 St. Rep. 1471 (1993).

Question of Speedy Trial Not Proper Issue in Extradition Proceeding: The issue of lack of speedy trial is not properly cognizable by a court of the asylum state in a habeas corpus proceeding in that court contesting extradition to another state. In re Hart, 178 M 235, 583 P2d 411 (1978).

Failure of Defendant to Meet Burden: Defendant failed to meet the criteria necessary to show he had been denied a speedy trial as set forth in Barker v. Wingo, 407 US 514, 92 S Ct 2182 (1972). St. v. Collins, 178 M 36, 582 P2d 1179 (1978).

Motion for Dismissal Granted: The court properly granted defendant's motion to dismiss on the ground defendant had been denied his right to a speedy trial, after weighing conduct of the prosecution and the defendant. As a guide to the application of the balancing test, four factors from Barker v. Wingo, 407 US 514 (1972), were utilized: (1) length of delay; (2) reason for delay; (3) assertion of the right by defendant; and (4) prejudice to the defendant. St. v. Cassidy, 176 M 385, 578 P2d 735 (1978).

Dismissal for Excessive Delay: When there has been an excessive delay in prosecution with no viable justification demonstrated and defendants' assertion of the right to a speedy trial was proper and timely, the case must be dismissed because of the resulting prejudice. State ex rel. Briceno v. District Court, 173 M 516, 568 P2d 162 (1977).

Federal Standard Adopted: Montana has adopted and applied the four-factor balancing test applied in Barker v. Wingo, 407 US 514, 92 S Ct 2182 (1972), in determining the speedy trial issue: (1) length of delay; (2) reasons for the delay; (3) assertion of the right by defendant; and (4) prejudice to defendant. St. v. Carden, 173 M 77, 566 P2d 780 (1977), distinguished in St. v. Matthews, 271 M 24, 894 P2d 285, 52 St. Rep. 305 (1995). See also St. v. Keating, 285 M 463, 949 P2d 251, 54 St. Rep. 1250 (1997).

Justifiable Delay of 350 Days: Despite delay of 350 days between filing of charges and beginning of trial, defendant was not denied his right to a speedy trial. The State's explanation for the delay, which included defendant's several appearances in court, the defendant's refusal to plead, and the difficulties that arose because this was the first homicide committed under the new Criminal Code and under the new capital punishment scheme, was satisfactory. St. v. McKenzie, 171 M 278, 557 P2d 1023 (1976).

Delay of 326 Days: A delay of 326 days from arrest until trial denied the defendant of his right to a speedy trial. St. v. Keller, 170 M 372, 553 P2d 1013 (1976).

Remedy for Denial of Right: Dismissal of the charges against the defendant is the proper remedy for the denial of the right to a speedy trial. St. v. Keller, 170 M 372, 553 P2d 1013 (1976).

Delay of 299 Days Prima Facie Denial — Demand: A delay of 299 days from the time of a defendant's arraignment establishes a prima facie case of denial of the right to a speedy trial. However, when the defendant made no specific demand that his case be set for trial but did nothing that could be construed as a waiver of his right to a speedy trial, he was entitled to have charges against him dismissed. State ex rel. Sanford v. District Court, 170 M 22, 551 P2d 1005 (1976).

Seven-Month Delay: When accused was held in maximum security without counsel and there was a 7-month delay between his demand for a speedy trial and the trial itself, the rights of the accused were prejudiced and the conviction and sentence were vacated with prejudice. Fitzpatrick v. Crist, 165 M 382, 528 P2d 1322 (1974), followed in St. v. Pease, 227 M 424, 740 P2d 659, 44 St. Rep. 1203 (1987).

IMPARTIAL JURY

Failure of Juror to Disclose Experience of Incest — No Grounds for New Trial: The defendant was convicted of incest. After the trial, the defendant's attorney learned that one of the jurors had been a victim of incest. The District Court held a hearing on the issue and concluded the defendant was not entitled to a new trial because the juror had not been asked if she was an incest victim during voir dire, so her failure to disclose was not intentional concealment. The District Court also concluded that there was no evidence that the juror exhibited ill will or bias toward the defendant. On appeal, the defendant argued that the District Court should have granted his motion for a new trial because the juror's past experience produced an inherent bias. The Supreme Court disagreed, holding that the defendant failed to show any evidence beyond his own speculation that the juror had any bias or ill will toward him and that being a victim of a sex crime does not produce inherent bias any more than does having been a victim of burglary or physical assault. St. v. Ring, 2014 MT 49, 374 Mont. 109, 321 P.3d 800, following St. v. Woods, 221 Mont. 17, 716 P.2d 624 (1986), and St. v. Dunfee, 2005 MT 147, 327 Mont. 335, 114 P.3d 217.

Sleeping Jurors Not Observed by District Court — Motion for New Trial Properly Dismissed Without Hearing: After a jury found him guilty of 10 sexual crimes, the defendant moved for a new trial on multiple grounds, including an allegation that several jurors may have been asleep during portions of the trial testimony. The District Court received briefs and denied the motion without conducting a hearing. On appeal, the Supreme Court affirmed and determined that the defendant's allegations were inconsistent with the District Court's own personal observations. Moreover, it was not an abuse of discretion for the District Court to deny the motion for a new trial based on the briefing of the parties without conducting a hearing. St. v. Geren, 2012 MT 307, 367 Mont. 437, 291 P.3d 1144.

No Presumption of Prejudice From Pretrial Publicity — Motion for Change of Venue Correctly Denied: Defendant was acquitted of attempted deliberate homicide and convicted of aggravated assault related to a bar fight that left the victim with extensive facial fractures requiring reconstructive surgeries. Media coverage following the altercation included the dissemination of portions of a voice message the defendant had left for a friend shortly after the fight, and various fundraising events occurred in Gallatin County on behalf of the victim. Prior to trial, the defendant filed a motion to change venue, alleging he would not receive an impartial trial in Gallatin County due to the "inflammatory nature" of publicity that presumed his guilt. The court held a hearing on the motion and decided to base its ruling, in part, on the results of a questionnaire sent to 150 prospective jurors, which showed that while the majority of the prospective jurors had heard about the case, they retained their ability to serve as impartial jurors. Based on these results, the District Court denied the motion for a change of venue, and the defendant was convicted of aggravated assault. The defendant appealed, contending that the facts demonstrated a presumption of prejudice that required his motion to change venue be granted. The Supreme Court outlined several relevant factors in evaluating whether pretrial publicity warrants a presumption that an impartial jury cannot be drawn, including the size and diversity of the jury pool, community sentiment, the nature of the pretrial publicity, the amount of time between the alleged crime and the trial, and, in a posttrial scenario, whether the jury's decision on guilt is contrary to a presumption of guilt (i.e., whether the defendant was convicted of the original charge or of a lesser offense). The court concluded that the District Court did not abuse its discretion in denying the defendant's motion because he did not demonstrate that the

pretrial publicity had displaced the judicial process and because he was acquitted of attempted deliberate homicide. St. v. Kingman, 2011 MT 269, 362 Mont. 330, 264 P.3d 1104.

Repetitive Questioning on Single Word in Element of Crime: It was not error for the District Court to require defense counsel to cease his juror-by-juror inquiry in voir dire as to the interpretations of a readily understandable word. The prohibition did not foreclose questioning on possible bias but instead invoked the District Court's great latitude in controlling voir dire and prevented further questioning that was taking on the elements of argument that could have been made during trial. St. v. Grant, 2011 MT 81, 360 Mont. 127, 252 P.3d 193.

Dismissal for Cause Based on Juror's Work in Law Enforcement Properly Denied: A potential juror stated that she worked in law enforcement as a 9-1-1 dispatcher but could not recall if she was on duty the night of the incident in question. She also had a relationship with a police officer and recalled the case being discussed among her coworkers. For these reasons Dewitz moved that the juror be dismissed for cause, but the motion was denied. Dewitz appealed on grounds that the trial court erred by not dismissing the juror for cause. The Supreme Court disagreed. The juror stated that she could be impartial and had not formed an opinion regarding Dewitz's innocence or guilt. The juror's involvement in law enforcement was not, in itself, sufficient to grant dismissal for cause, nor did discussing the case with coworkers and remembering a brief generalization of what occurred prove that the juror was exposed to information that was inadmissible at trial. The trial court did not abuse its discretion by denying the motion to dismiss for cause and was therefore affirmed on the issue. St. v. Dewitz, 2009 MT 202, 351 M 182, 212 P3d 1040 (2009).

Pretrial Publicity Test for Change of Venue — Inflammatory Publicity Defined: Devlin moved for a change of venue for his bail-jumping trial on grounds of inflammatory publicity. The District Court denied the motion, and on appeal the Supreme Court considered what constitutes inflammatory publicity. The pertinent question is not simply whether media reports contain editorializing, whether the reports were calculated to achieve a sinister purpose, or whether the reports contained factual information. Although those are relevant factors, the focus must be on the publicity's likely effect on the jury pool. Therefore, inflammatory publicity is defined as publicity that, by its nature, has the tendency to stir up in the community pervasive and strong passions of anger, hatred, indignation, revulsion, and upset to such an extent that there are reasonable grounds to believe that jurors chosen from that community could not determine a defendant's guilt or innocence in a fair and unbiased manner based solely on the evidence at trial. This determination must be made based on extant circumstances, including but not limited to the size of the jury pool, the nature of the offense charged, the type and character of the media reports, readership of the publication, the relative size of the radio or television audience, the time lapse between the publicity and the trial, whether the reports contain extrajudicial statements by prosecutors or law enforcement personnel that are prejudicial to the defendant, and whether there is any ostensible adverse community reaction to the publicity. Considering the entire record, the Supreme Court concluded that the pretrial publicity was not inflammatory. Devlin failed to demonstrate, by surveys or affidavits or by individual voir dire, that the publicity actually inflamed the prejudice of the community to such an extent that a reasonable possibility existed that Devlin would not receive a fair and impartial trial. Thus, Devlin failed to meet the standard, and the District Court did not err in denying Devlin's motion for change of venue. St. v. Devlin, 2009 MT 18, 349 M 67, 201 P3d 791 (2009). See also St. v. Link, 194 M 556, 640 P2d 366 (1981), St. v. Moore, 268 M 20, 885 P2d 457 (1994), St. v. Fuhrmann, 278 M 396, 925 P2d 1162 (1996), and St. v. Kingman, 2011 MT 269, 362 Mont. 330, 264 P.3d 1104.

Defense Counsel's Conduct During Voir Dire Not Considered Ineffective Assistance: Notti asserted that defense counsel's failure to elicit information from or to challenge two jurors for cause during voir dire amounted to ineffective assistance. The District Court found that counsel did not challenge the jurors because counsel believed that there was no basis for a challenge for cause and because counsel believed that the jurors would be fair. On appeal, the Supreme Court examined counsel's conduct toward each juror during voir dire and affirmed. Counsel made informed strategic decisions not to challenge the jurors, and counsel's failure to challenge the jurors did not fall below the range of competence expected of attorneys in criminal cases. Notti's claim of ineffective counsel failed. Notti v. St., 2008 MT 20, 341 M 183, 176 P3d 1040 (2008).

Failure of Defense Counsel to Question Jurors Regarding Ethnic and Racial Bias Not Considered Ineffective Assistance Warranting New Trial: Defendant was convicted of distribution of dangerous drugs and appealed on grounds that because of defendant's ethnicity, defense counsel's failure to question potential jurors regarding ethnic or racial bias constituted ineffective assistance of counsel and deprived defendant of a fair trial. The Supreme Court found no indication that: (1) ethnic or racial issues were intertwined with the drug offense; (2) the

offense was racially motivated; (3) an ethnic issue was connected with the trial in any way; and (4) any witness, an attorney, the trial judge, a member of the court staff, or any member of the venire panel was ethnically or racially biased. Thus, defendant was not denied the right to an impartial jury. Defense counsel's performance did not fall below the range of competence required of attorneys in criminal cases simply because jurors were not questioned about ethnic or racial bias, so defendant was not denied effective assistance of counsel. St. v. Ibarra-Salas, 2007 MT 173, 338 M 191, 164 P3d 898 (2007). See also Rosales-Lopez v. U.S., 451 US 182 (1981).

No Abuse of Discretion in Denying Mistrial for Ordering Continued Jury Deliberations: Doyle moved for a mistrial after the trial court ordered the jury to continue deliberating after the jurors notified the court that they were at an impasse. Doyle contended that the trial court improperly pressured the jury to reach a decision and created the impression that the jury could return only a unanimous verdict rather than a hung jury and that the court failed to explain to the jurors that they should never give up their honest opinion concerning Doyle's guilt or innocence. The motion was denied. On appeal, the Supreme Court affirmed. The transcript showed that the jury was in fact instructed that it should not surrender an honest opinion as to the weight or effect of the evidence or the guilt or innocence of the defendant. The court sent the jury home the first day after 10 hours of deliberations when the jury informed the court that it could not reach a decision. At the end of the second day, the jury sent a note to the court informing the judge that the jury was at an impasse. The court asked the jury if it wished to go home or continue deliberations, and the jury opted to go home. The third day, the jury returned a unanimous guilty verdict. Based on the transcript, the trial court never forced deliberations, and the court did not abuse its discretion in denying Doyle's mistrial motion. St. v. Doyle, 2007 MT 125, 337 M 308, 160 P3d 516 (2007).

Constitutionality of Waiver of Jury Trial by Defendant Over State's Objection — Writ of Supervisory Control Granted: Defendant Courville was charged in Justice's Court with speeding, DUI, and possession of an open container. Courville requested a waiver of a jury trial, and the state objected. The Justice's Court granted the waiver, finding that the statute violated this section. The state filed an application for a writ of supervisory control and a motion for stay of proceedings pending the Supreme Court's review of the application. Courville argued that only a defendant, and not the state, has the constitutional right to a jury trial and the corresponding ability to waive the right despite statutory language to the contrary in 46-17-201. The Supreme Court vacated the waiver of a jury trial, holding that Art. II, sec. 26, Mont. Const., provides a right of a jury trial to the state and that both parties in a criminal trial must consent to waiver. State ex rel. Long v. Justice's Court, 2007 MT 3, 335 M 219, 156 P3d 5 (2007), overruling State ex rel. Nelson v. District Court, 262 M 70, 863 P2d 1027 (1993).

Failure to Dismiss Partial Juror for Cause — Structural Error Warranting New Trial: On voir dire, a juror revealed a belief that defendant would not be on trial unless there was something tying defendant to the crime and that only if there was evidence presented that proved defendant's innocence would the juror be convinced that the defendant was not guilty. The trial court declined to grant defendant's motion to dismiss the juror for cause, and following conviction, defendant appealed. The Supreme Court reversed, reiterating the preference for dismissal for cause when voir dire reveals a serious question about a juror's ability to afford a defendant a presumption of innocence. The trial court's refusal to dismiss the juror was an abuse of discretion that resulted in structural error warranting a new trial. St. v. Hausauer, 2006 MT 336, 335 M 137, 149 P3d 895 (2006).

Elimination of Prospective Jury Members Based on Alphabetized Jury List Not Violative of Random Jury Selection: The Clerk of the District Court was instructed to prepare a jury pool of 80 prospective jurors for Azure's trial. The clerk had three smaller pools available and combined two entire pools plus the first 21 names from the other pool. Because the names had been chosen and alphabetized by computer, only people with names beginning with A through K were chosen from the 21 names in the third pool. Azure contended that eliminating persons from a jury pool based on the first letter of their names did not constitute a random sample of prospective jurors and violated his right to a fair trial. The Supreme Court disagreed. Mere alphabetization of a randomly selected list of names and the elimination of some of those names based exclusively on where they fell in the alphabet did not constitute a systematic exclusion of a distinct identifiable class of the community and did not taint the random jury selection process. Because Azure could not establish that the selection method constituted a substantial failure to comply with jury procurement statutes, the trial court's decision to deny Azure's challenge to the venire was correct, and the Supreme Court affirmed. St. v. Azure, 2005 MT 328, 329 M 536, 125 P3d 1116 (2005), following St. v. Taylor, 168 M 142, 542 P2d 100 (1975), and distinguishing St. v. Lamere, 2000 MT 45, 298 M 358, 2 P3d 204 (2000).

Denial of Motion to Remove Juror for Cause Not Error Absent Showing of Juror Bias: During voir dire in Marble's trial for sexual intercourse without consent, defense counsel asked the panel whether the act of anal intercourse between two males would be considered so abhorrent as to affect their ability to view and weigh the evidence fairly. One juror responded that his religious convictions made the idea of such an act morally repugnant. Defense counsel moved to remove the juror for cause, but the motion was denied. After further questioning, counsel again moved to remove the juror for cause, but the motion was again denied. Counsel ultimately used a peremptory challenge to remove the juror. On appeal, Marble asserted that the trial court abused its discretion in denying the motions to remove the juror for cause. Analyzing the juror challenges in light of the statutory language and the totality of the circumstances, the Supreme Court held that the juror did not exhibit an actual bias during voir dire that would have prohibited the juror from acting with impartiality and without prejudice. Absent a showing of bias, denial of the motion to remove the juror for cause was not an abuse of discretion, and the Supreme Court affirmed. St. v. Marble, 2005 MT 208, 328 M 223, 119 P3d 88 (2005), following St. v. Freshment, 2002 MT 61, 309 M 154, 43 P3d 968 (2002).

Error in Excusing Juror for Cause Before Voir Dire — Error Harmless Absent Showing of Prejudice: Prior to voir dire in defendant's trial for sexual intercourse without consent and incest, the prosecutor requested that juror no. 43 be excused. The juror had recently worked in the County Attorney's office and had access to a wide range of information relating to issues that defendant had been involved in, and the prosecutor had recently fired the juror for unsatisfactory performance. The trial judge dismissed the juror because of concerns that the juror might have feelings or predilections for one side or the other and because of the possibility of the juror communicating with other prospective jurors. Following conviction, defendant appealed the decision to excuse the juror for cause prior to voir dire. The Supreme Court concluded that the trial court erred in excusing the juror without an in-court examination to determine actual bias; however, the error was not a material failure to substantially comply with statutes governing procurement of a trial jury, so the dismissal was subject to harmless error review. Defendant could not demonstrate prejudice because even if juror no. 43 had not been dismissed, the juror would not have been on the jury because the last juror empaneled was juror no. 36. The Supreme Court affirmed. St. v. Bearchild, 2004 MT 355, 324 M 435, 103 P3d 1006 (2004), distinguishing St. v. Lamere, 2000 MT 45, 298 M 358, 2 P3d 204 (2000), and St. v. Blem, 610 NW 2d 803 (S. Dak. 2000).

Shackling of Defendant at Trial to Ensure Security of Courtroom — No Due Process Violation: At Herrick's attempted deliberate homicide trial, the trial court agreed to provide additional security measures, including leg shackles, reasoning that the jury was not likely to see the shackles while Herrick was seated. Following conviction, Herrick appealed on grounds that the use of shackles violated his due process right to a fair trial. The Supreme Court noted that the due process clause of the U.S. Constitution entitles a criminal defendant to appear before a jury free of shackles and other physical restraints and concluded that the Montana Constitution does not provide more protection with regard to shackling than the U.S. Constitution. However, that right is not absolute, and a trial judge's decision to shackle a defendant is not unconstitutional per se (see Morgan v. Bunnell, 24 F3d 49 (9th Cir. 1994)). The Supreme Court adopted the two-part test in Morgan for determining whether a trial court has abused its discretion in restraining a defendant at trial. Under that test, the trial court must be persuaded by compelling circumstances that some measure is needed to maintain the security of the courtroom and must pursue less restrictive alternatives before imposing physical restraints. In this case, the trial court satisfied both parts of the test. The facts presented compelling circumstances to support the court's exercise of its broad discretion in determining that additional security was necessary, and the court took great care to prevent the jury from being aware that Herrick's ankles were shackled. Nothing indicated that the jury saw the leg restraints at any time, so Herrick's rights to individual dignity, a fair trial, and due process were not violated. St. v. Herrick, 2004 MT 323, 324 M 76, 101 P3d 755 (2004), followed in St. v. Merrill, 2008 MT 143, 343 M 130, 183 P3d 56 (2008), to the extent that keeping a defendant shackled during trial without establishing compelling circumstances for security measures constitutes a violation of the defendant's constitutional due process rights, and distinguishing St. v. Finch, 975 P2d 967 (Wash. 1999). See St. v. Hartsoe, 2011 MT 188, 361 Mont. 305, 258 P.3d 428. See also Ill. v. Allen, 397 US 337 (1970).

Bailiff's Instructions to Split Jury to Continue Deliberations Not Reversible Error: Steele was charged with eight offenses and conceded guilt on all but one charge. During deliberations on the remaining charge, the jury became deadlocked and notified the bailiff. Outside the presence of the parties and without the court's approval, the bailiff told the jury that they needed to keep

working on it and needed to find common ground. Steele contended that the bailiff's action denied the parties and counsel the opportunity to consult with the court in violation of 46-16-503 and moved for mistrial. The motion was denied, and Steele appealed. It is not the prerogative of any court officer except the trial judge to give instructions to the jury regarding deliberations. However, without condoning the bailiff's actions, the Supreme Court held that the bailiff's instructions did not misadvise the jury but merely asked the jury to continue deliberating, the same instruction that the District Court would have offered, so a mistrial was not warranted on those grounds. Further, the jury did not disagree as to any testimony received or desire any information regarding the law, so 46-16-503 was not triggered. Although not given or condoned by the trial judge, the bailiff's instructions did not attempt to pressure the jurors into reaching a verdict or assert to the minority jurors that their positions should change, as was the case in St. v. Randall, 137 M 534, 353 P2d 1054 (1960), so denial of the mistrial motion was proper. St. v. Steele, 2004 MT 275, 323 M 204, 99 P3d 210 (2004), distinguishing St. v. Herron, 169 M 193, 545 P2d 678 (1976). See also St. v. George, 219 M 377, 711 P2d 1379 (1986).

Failure of Trial Court to Hold Hearing Regarding Juror's Acquaintance With Witness — Waiver Absent Timely Objection — Plain Error Doctrine Inapplicable: During voir dire at Davis's trial, several jurors indicated that they were acquainted with two witnesses but stated that their acquaintance would not affect their ability to sit as jurors. Immediately after the first witness was called, a juror stated to the court that he knew the witness. Without objection from Davis, the court noted the statement and the witness proceeded to testify. Following conviction, Davis appealed on grounds that the court should have held a hearing to determine whether the juror was biased and that failure to do so violated Davis's right to an impartial jury. The Supreme Court disagreed. Davis's failure to object at trial constituted a waiver of appellate review of the issue. Further, Davis did not meet the narrow criteria in St. v. Daniels, 2003 MT 247, 317 M 331, 77 P3d 224 (2003), to warrant plain error review. Judgment was affirmed. St. v. Davis, 2003 MT 341, 318 M 459, 81 P3d 484 (2003), followed in St. v. Taylor, 2009 MT 161, 350 M 447, 208 P3d 422 (2009).

Claim of Juror to Be Psychic Not Violative of Due Process Rights: On the second day of jury deliberations, two jurors brought forward concerns that another juror with strong opinions in the case claimed to be a psychic. With counsel present, the trial court questioned the jury foreman as to whether that particular juror would be able to base a decision on the law and the evidence. The court and counsel ultimately determined that no problem existed, and deliberations continued. On appeal, DuBray argued that allowing a psychic juror constituted a due process violation. The Supreme Court noted that DuBray's counsel helped formulate the response to the situation and, finding nothing in the record to indicate that the juror's strong opinions were based on psychic powers or that the juror would not be able to lay aside the opinions and render a fair verdict, held that DuBray's right to a fair and impartial jury was not violated. St. v. DuBray, 2003 MT 255, 317 M 377, 77 P3d 247 (2003). See also St. v. McMahon, 271 M 75, 894 P2d 313 (1995).

Failure to Summon Jurors in Statutory Manner — Lamere Per Se Rule Retroactively Applied — Rule of Law Inapplicable Considering Substantial Change in Law: In St. v. Robbins, 1998 MT 297, 292 M 23, 971 P2d 359 (1998), Robbins moved to quash the jury panel because prospective jurors had been summoned by telephone instead of by mail or personal service, as required in 3-15-505. The motion was denied because Robbins failed to introduce any evidence that he was prejudiced, rendering the error harmless. The Supreme Court subsequently decided St. v. Lamere, 2000 MT 45, 298 M 358, 2 P3d 204 (2000), holding that improper jury summons constituted denial of the fundamental right to a fair trial and thus was per se prejudicial. Robbins then petitioned for postconviction relief on grounds that Lamere should be retroactively applied. The District Court denied the petition, concluding that under the law of the case doctrine, Lamere was not retroactively applicable. The Supreme Court disagreed and reversed. The law of the case doctrine provides that when a decision is rendered by the Supreme Court, the decision is binding and cannot be relitigated in the trial court or on a subsequent appeal. However, a court may reconsider the issue in postconviction proceedings when there has been a substantial change in applicable law. Lamere specifically overruled the opinion in Robbins' 1998 direct appeal to the extent that a violation of 3-15-505 could be harmless error, which constituted a substantial change in the law, so the law of the case doctrine did not preclude the application of Lamere to Robbins' 2002 postconviction proceedings. Robbins was entitled to retroactive application of Lamere because the state's action in procuring the jury denied Robbins of a right that goes to the very integrity of the justice system, and is implicit in the concept of ordered liberty for purposes of coming within the exception to the retroactivity analysis in Teague v. Lane, 489 US 288 (1989). Robbins v. St., 2002 MT 116, 310 M 10, 50 P3d 134 (2002).

Juror Statements of Actual Bias Against Defense That Sex Crime Victim Was Old Enough to Consent — Reversal Warranted for Failure to Grant Challenge for Cause: Freshment's defense to charges of sexual intercourse without consent with a victim under age 16 was that he believed that the victim was old enough to give consent. During voir dire, two prospective jurors gave straightforward, consistent statements of actual bias against Freshment's legal defense. Following trial counsel's attempts to rehabilitate the jurors, the District Court denied Freshment's challenges for cause, so Freshment was required to use peremptory challenges to remove the jurors from the panel, ultimately exhausting all of his peremptory challenges. Under St. v. DeVore, 1998 MT 340, 292 M 325, 972 P2d 816 (1998), abuse of discretion occurs if a court fails to excuse a prospective juror when actual bias is discovered during voir dire, so both jurors should have been dismissed for cause. Under the rule in St. v. Good, 2002 MT 59, 309 M 113, 43 P3d 948 (2002), the District Court's error was conclusively prejudicial and automatic reversal was required. St. v. Freshment, 2002 MT 61, 309 M 154, 43 P3d 968 (2002). See also St. v. Allen, 2010 MT 214, 357 Mont. 495, 241 P.3d 1045.

Improper Denial of Challenge for Cause Based on Debtor-Creditor and Attorney-Client Relationships — Erroneous Ruling on Challenge for Cause Prejudicial as Matter of Law — New Trial Warranted: During voir dire, prospective juror Derrig revealed that he was president of a bank that was represented by plaintiff's trial counsel, that he had worked with plaintiff in the past in his position as bank president, and that the bank was one of plaintiff's creditors. Defendant twice challenged Derrig for cause, based on the debtor-creditor relationship between plaintiff and the bank and because of the potential for bias arising from Derrig's attorney-client relationship with plaintiff's attorney. Both challenges were denied, so defendant ultimately used a peremptory challenge to remove Derrig from the jury panel. Defendant claimed that denial of its challenge for cause was improper. Because defendant was forced to use a peremptory challenge to remove Derrig, and in fact used all its peremptory challenges, defendant maintained that it was denied an equal number of peremptory challenges and was thus entitled to a new trial. The Supreme Court agreed. Pursuant to 25-7-223, there is no substantive difference between the chief executive officer of a creditor who is responsible for the creditor's success and the creditor itself when it comes to impartiality and jury duty. Further, an ongoing attorney-client relationship between a prospective juror and trial counsel represents the strong possibility of bias in favor of the party represented by that attorney. Under the rule in King v. Special Resource Management, Inc., 256 M 367, 846 P2d 1038 (1993), and St. v. Williams, 262 M 530, 866 P2d 1099 (1993), when a District Court erroneously denies a challenge for cause, it is the substantive equivalent of granting more peremptory challenges to one side than to the other, which is prejudicial as a matter of law, warranting reversal and a new trial. Reff-Conlin's, Inc. v. Fireman's Fund Ins. Co., 2002 MT 60, 309 M 142, 45 P3d 863 (2002).

Test for Structural Error During Voir Dire — Automatic Reversal Warranted for Structural Error in Improper Denial of Challenge for Cause to Prospective Juror: Structural error exists when there is a material failure to substantially comply with statutes governing the procurement of a jury trial. Jury selection is critically important in ensuring an accused's right to an impartial jury and a fair trial, and errors involving jury selection indelibly affect the fairness of the trial because the errors precede the trial. After reviewing St. v. Lamere, 2000 MT 45, 298 M 358, 2 P3d 204 (2000), and St. v. Van Kirk, 2001 MT 184, 306 M 215, 32 P3d 735 (2001), the Supreme Court held that structural error occurs if: (1) a District Court abuses its discretion by denying a challenge for cause to a prospective juror; (2) the defendant uses one or more peremptory challenges to remove disputed jurors; and (3) the defendant exhausts all peremptory challenges. If the test is met, the error is structural and automatic reversal is required. St. v. Good, 2002 MT 59, 309 M 113, 43 P3d 948 (2002), overruling St. v. Williams, 262 M 530, 866 P2d 1099 (1993), and St. v. DeVore, 1998 MT 340, 292 M 325, 972 P2d 816 (1998), to the extent that Williams and DeVore required a defendant to establish that the District Court error contributed to defendant's conviction by showing that the jury was charged with the determination of a factual issue important to the charges against defendant.

Failure to Summon Entire Panel by Telephonic Juror Summoning — New Trial Warranted: Of the 200-juror panel randomly drawn for Lamere's murder trial, over one-third of the prospective jurors were excluded from possible jury service by virtue of the manner in which a telephone-only notification method skewed the random nature and objectivity of the statutory jury selection procedures. By failing to summon the entire panel or array drawn for the trial, the purpose of juror notification was undermined. Jury duty cannot be lightly shirked, as a telephone summoning system allowed, without doing violence to the democratic nature of the jury system. Because the substantial failure to comply with the statutory requirements materially undermined the jury

selection process, Lamere was granted a new trial. St. v. Lamere, 2000 MT 45, 298 M 358, 2 P3d 204, 57 St. Rep. 214 (2000), following Thiel v. S. Pac. Co., 328 US 217, 90 L Ed 1181, 66 S Ct 984 (1946), and applied retroactively in Robbins v. St., 2002 MT 116, 310 M 10, 50 P3d 134 (2002). See also St. v. Groom, 49 M 354, 141 P 858 (1914), and State ex rel. School District v. Carroll, 87 M 45, 284 P 1008 (1930).

Substantial Compliance Standard Clarified With Regard to Statutory Process for Forming Jury: The objective statutory procedures established by the Legislature for the random selection of jurors are intended to protect a defendant's fundamental right to a fair and impartial jury and must be substantially complied with. Under Montana case law, the substantial compliance standard is not an absolute rule inasmuch as it permits minor deviations from statutory procedure. These technical deviations do not constitute a substantial failure to comply and therefore do not give rise to a presumption of prejudice. In clarifying the substantial compliance standard, the Supreme Court took guidance from federal case law developed under the federal Jury Selection and Service Act of 1968, 28 U.S.C. 1861, et seq. In order to establish a violation under the federal Act, a defendant must show that the government substantially failed to comply with the methods set forth by statute for jury selection. Substantial failure has been construed as a violation that contravenes one of two basic principles: (1) random selection of jurors; and (2) determination of juror disqualification, excuses, exemptions, and exclusion on the basis of objective criteria. A successful challenge to the jury panel may be founded only on a material departure from the law, a deviation amounting to more than a technical irregularity. Thus, a substantial or material statutory departure that affects the random nature or objectivity of the jury selection process establishes a violation independently of the departure's consequences in an individual case, while a technical or nonmaterial violation constitutes nonprejudicial error under the substantial compliance standard. St. v. Lamere, 2000 MT 45, 298 M 358, 2 P3d 204, 57 St. Rep. 214 (2000), overruling St. v. Robbins, 1998 MT 297, 292 M 23, 971 P2d 359, 55 St. Rep. 1213 (1998).

Telephone Jury-Summoning Procedure Violative of Statutory Selection Process — Showing of Substantial Compliance, Not Prejudice, Required — Reversible Error: Lamere, charged with killing Brownlee, filed a pretrial motion to strike the jury panel, but the motion was denied. The question on appeal was whether the District Court erred in concluding that Lamere failed to show that the telephone-dependent summoning procedure used in Cascade County prejudiced Lamere's substantial rights to a jury drawn and summoned according to law. The Supreme Court applied St. v. Robbins, 1998 MT 297, 292 M 23, 971 P2d 359, 55 St. Rep. 1213 (1998), in holding that the method of summoning jurors by telephone failed to comply with statutes governing the impaneling of a jury because jurors were neither served by mail nor served personally by the Sheriff. However, to warrant reversal, Robbins also required a showing of actual prejudice in addition to a substantial failure to comply with statutory law in drawing a jury panel. The Supreme Court chose to return to the per se rule of reversal for failure to substantially comply with statutes governing procurement of a trial jury, overruling the Robbins requirement of prejudice. The decision turned on the U.S. Supreme Court's contemporary distinction between trial error, to which harmless error review applies, and structural error, to which harmless error review is inapplicable (see Johnson v. U.S., 520 US 461, 137 L Ed 2d 718, 117 S Ct 1544 (1997), and its predecessors). In Lamere's case, the automatic rule of reversal prevailed because errors in the jury selection process are structural in nature, affecting the very framework within which a trial proceeds—errors that indelibly affect the essential fairness of the trial itself. A material failure to substantially comply with Montana statutes governing procurement of a trial jury may not be treated as harmless error because: (1) it precedes the presentation of evidence to the jury and cannot be analyzed as a mere trial error without resorting to speculation; (2) it precedes the trial process and cannot be quantitatively assessed for its prejudicial impact relative to the evidence introduced at trial; (3) it affects the very framework within which the trial proceeds; and (4) the impartiality of the jury goes to the very integrity of the justice system and because the right to an impartial jury is so essential to the concept of a fair trial that its violation cannot be considered harmless error. The substantial compliance standard vindicates not only the rights of the individual defendant but also the rights of the public in ensuring that the jury system remains inviolate, protecting a defendant's right to an impartial jury by encouraging reasonably strict compliance with statutory procedures intended to implement the fair cross-section guarantee of the sixth amendment of the U.S. Constitution. St. v. Lamere, 2000 MT 45, 298 M 358, 2 P3d 204, 57 St. Rep. 214 (2000), following Chapman v. Calif., 386 US 18, 17 L Ed 2d 705, 87 S Ct 824 (1967), Satterwhite v. Tex., 486 US 249, 100 L Ed 2d 284, 108 S Ct 1792 (1988), and Ariz. v. Fulminante, 499 US 279, 113 L Ed 302, 111 S Ct 1246 (1991), followed in St. v. Lopez, 2001 MT

97, 305 M 218, 26 P3d 745 (2001), and applied retroactively in Robbins v. St., 2002 MT 116, 310 M 10, 50 P3d 134 (2002).

Juror's Fitness to Serve at Discretion of Trial Court: The Supreme Court will not reverse a District Court's decision regarding a juror's fitness to serve absent an abuse of discretion and a showing of prejudice. The trial court has significant latitude when ruling on allegations of juror misconduct because that court is best able to observe jurors and to decide the potential for prejudice, and its determination will be given considerable weight and deference. St. v. Hatten, 1999 MT 298, 297 M 127, 991 P2d 939, 56 St. Rep. 1198 (1999), followed in St. v. Rennaker, 2007 MT 10, 335 M 274, 150 P3d 960 (2007). See also St. v. MacGregor, 2013 MT 297, 372 Mont. 142, 311 P.3d 428.

Transfer of Youth Court Case to District Court Not Violative of Minor's Constitutional Rights: Spina argued that the statute allowing transfer of her Youth Court case to the District Court resulted in violation of her rights under Art. II, sec. 15, Mont. Const., which guarantees to minors the same fundamental rights afforded to adults, and under this section, which guarantees the right to a fair trial. The Supreme Court considered alleged violations of the right against self-incrimination, the right to effective assistance of counsel, the right to a fair trial, and the right to a presumption of innocence, finding that Spina's arguments were without merit. The transfer statute did not violate Spina's constitutional rights. St. v. Spina, 1999 MT 113, 294 M 367, 982 P2d 421, 56 St. Rep. 467 (1999).

Limitation to One Jury Trial Held Unconstitutional: In 1997, the Legislature enacted the provisions codified at 46-7-102(1)(g), 46-17-201(3), and 46-17-311(1), providing that a person tried for a misdemeanor in Justice's or City Court who appeals to the District Court has the right to only one jury trial. Woirhaye was charged with misdemeanor DUI and requested a jury trial in Missoula County Justice's Court. Upon his conviction by the Justice's Court jury, Woirhaye appealed to the District Court for a trial de novo pursuant to Art. VII, sec. 4(2), Mont. Const., and 46-17-311. Woirhaye asked that the District Court declare 46-17-201(3) unconstitutional, but the District Court denied his motion. Woirhaye then petitioned the Supreme Court for a writ of supervisory control, which was granted on the grounds that Woirhaye would otherwise be denied a fundamental right. The Supreme Court held that Woirhaye's right to a jury trial in both the Justice's Court or City Court and the District Court was a fundamental right guaranteed by Art. II, sec. 26, Mont. Const., and this section. The Supreme Court pointed out that the right to a jury trial is guaranteed by Art. III, sec. 2, clause 3, of the U.S. Constitution and the sixth amendment to the U.S. Constitution and also that even if that were not the case, Montana may, under the rationale of St. v. Bullock, 272 M 361, 901 P2d 61 (1995), provide rights in excess of those guaranteed by the U.S. Constitution. The Supreme Court noted, in response to the state's argument that this section guarantees "a" jury trial, that the state's argument was not persuasive against the language of Art. II, sec. 26, Mont. Const. The Supreme Court also distinguished Ludwig v. Mass., 427 US 618 (1976), holding that Art. VII, sec. 4(2), Mont. Const., was not implicated in the case, and stated that any language in N. Cent. Serv., Inc. v. Hafdahl, 191 M 440, 625 P2d 56 (1981), indicating that a requirement for a jury trial applicable to Small Claims Court was satisfied if the right was granted at the District Court level, was dicta and could not be relied upon to support the state's case that only one jury trial was required. Consequently, the Supreme Court held 46-7-102(1)(g), 46-17-201(3), and 46-17-311(1) to be unconstitutional as violating Woirhaye's right to a jury trial. Woirhaye v. District Court, 1998 MT 320, 292 M 185, 972 P2d 800, 55 St. Rep. 1298 (1998), followed in Balyeat Law, P.C. v. Harrison, 1999 MT 144, 295 M 13, 983 P2d 902, 56 St. Rep. 566 (1999), and followed and clarified in St. v. Rensvold, 2006 MT 146, 332 M 392, 139 P3d 154 (2006).

Change of Venue Sought on Allegations of Prejudicial Pretrial Publicity — Elements Required to Be Proved: As established in St. v. Moore, 268 M 20, 885 P2d 457 (1994), a defendant who seeks a change of venue on the basis of prejudicial pretrial publicity must prove that the news reports were inflammatory and that the news reports actually inflamed the prejudice of the community to an extent that a reasonable possibility existed that the defendant may not receive a fair trial. In the present case, defendant contended that two inflammatory news articles were prejudicial due to the small number of people in the community where the crime occurred and their close-knit relationships. However, the total circulation of the newspapers that contained the inflammatory publicity was about 109 households in a county of 3,626 people, and only 6 of 78 potential jurors knew about the facts of the case from word or mouth, not the media. Affirming the denial of the venue change, the Supreme Court concluded that even if the news articles were inflammatory, they were not widespread enough in the community to generate a general belief of defendant's guilt throughout the jury pool and that the community as a whole could not have been affected

to the extent that a reasonable possibility existed that defendant would not get a fair trial. St. v. Abe, 1998 MT 206, 290 M 393, 965 P2d 882, 55 St. Rep. 876 (1998), followed in St. v. Kingman, 2011 MT 269, 362 Mont. 330, 264 P.3d 1104.

Voir Dire Question Unrelated to Defense Properly Disallowed: Sattler contended that his right to voir dire on his defense of self-defense was infringed by the District Court's refusal to allow inquiry as to whether there must be a cause or reason to commit a homicide in jail. Generally, when notice of a defense is given, the refusal to allow defendant's voir dire on the defense constitutes prejudicial error. However, in this instance, Sattler was allowed to ask two questions directly related to jurors' opinions regarding self-defense, but a third question, regarding the cause or reason to commit a homicide in jail, was properly disallowed because it went beyond the self-defense theory in suggesting to prospective jurors that the state was required to prove motive, which was not the case. St. v. Sattler, 1998 MT 57, 288 M 79, 956 P2d 54, 55 St. Rep. 230 (1998), distinguishing St. v. Olson, 156 M 339, 480 P2d 822 (1971), and St. v. McKenzie, 186 M 481, 608 P2d 428 (1980).

Potential for Emotional Involvement as Juror Bias — Omissions by Counsel During and as Result of Voir Dire as Ineffective Assistance Warranting Reversal: Two prospective jurors expressed reservations about their ability to judge a case fairly, yet counsel failed either to follow up with additional questions about whether the prospective jurors could set aside their feelings and render a fair verdict or to exclude the jurors by challenge for cause or peremptorily. When counsel, for no apparent reason, abandons a client's right to challenge a juror, error is attributed to counsel. The presence on a jury of even one juror who cannot fairly assess the credibility of witnesses is considered prejudicial. Counsel's failure to take steps to prevent the presence on the jury of two such jurors constituted ineffective assistance of counsel and reversible error. St. v. Chastain, 285 M 61, 947 P2d 57, 54 St. Rep. 1044 (1997), following U.S. v. Eubanks, 591 F2d 513 (9th Cir. 1979), overruled in St. v. Herrman, 2003 MT 149, 316 M 198, 70 P3d 738 (2003), to the extent that a claim of ineffective assistance of counsel for failure to challenge prospective jurors in voir dire can be determined from a record that is silent as to counsel's reasoning, and overruled regarding whether claim of ineffective assistance of counsel for failure to challenge prospective jurors in voir dire can be determined from a record that is silent as to the counsel's reasoning in St. v. Vukasin, 2003 MT 230, 317 M 204, 75 P3d 1284 (2003).

Failure to Have Native Americans Personally Served With Jury Summonses — No Error: After a jury had been selected, Bradley's counsel orally moved to have the panel dismissed because no Native Americans had been selected to serve. Bradley asserted that the District Court's failure to have jury summonses personally served on Native Americans, who had been served by mail but failed to appear, violated his constitutional right to a jury drawn from a representative cross-section of the community under Duren v. Mo., 439 US 357, 58 L Ed 2d 579, 99 S Ct 664 (1979), constituting purposeful discrimination based on race under Whitus v. Ga., 385 US 545, 17 L Ed 2d 599, 87 S Ct 643 (1967). To establish a prima facie case under either Duren or Whitus, a defendant must show a statistical discrepancy between the percentage of prospective jurors and persons in the community who are members of the allegedly excluded class. Bradley failed to show that the pool of prospective jurors contained an inadequate representation of Native Americans; thus, failure to serve the Native Americans with jury summonses did not entitle Bradley to a reversal of his conviction. St. v. Bradley, 262 M 194, 864 P2d 787, 50 St. Rep. 1511 (1993).

Constitutionality of Defendant's Waiver of Jury Trial in Criminal Case Over Objection of State: Hill waived his right to a jury trial on charges of felony assault (now assault with a weapon), resisting arrest, and obstructing a peace officer. The state objected and demanded a jury trial on all factual issues, contending that Art. II, sec. 26, Mont. Const., requires that before a jury trial can be waived, both parties must consent and that therefore a jury trial cannot be waived over the objection of the state. Pursuant to the 1972 change in Art. II, sec. 26, Mont. Const., a jury trial is no longer required as a matter of constitutional law in all felony criminal cases, and nothing in the intent of the framers of the constitution indicated that approval of the state was required to allow waiver of the right. In fact, the constitutional revision was implemented expressly for the benefit of the accused. The Legislature has provided a statutory procedure for waiver of the right to jury trial through the 1991 amendment to 46-16-110, which provides that a trial by jury in a criminal case may be waived, without approval of the state, upon written consent of the defendant. The procedure is consistent with the constitutional intent and is therefore not violative of Art. II, sec. 26, Mont. Const. State ex rel. Nelson v. District Court, 262 M 70, 863 P2d 1027, 50 St. Rep. 1447 (1993), distinguishing Patton v. U.S., 281 US 276, 74 L Ed 854, 50 S Ct

253 (1930), and Singer v. U.S., 380 US 24, 13 L Ed 2d 630, 85 S Ct 783 (1965), and overruled in State ex rel. Long v. Justice's Court, 2007 MT 3, 335 M 219, 156 P3d 5 (2007).

Constitutionality of "Death Qualified" Jury — Mention of Possibility of Death Sentence Not Prejudicial Per Se: Prior to voir dire, Gollehon requested the trial court to prohibit the state from asking jury panel members to declare their beliefs concerning the death penalty, arguing that: (1) questioning the members about a possible sentence was inappropriate because Montana juries do not participate in the sentencing portion of a trial; (2) social science evidence proves that when a jury is "death qualified", it is more prone to convict the defendant; and (3) if a jury knows that the death penalty could be imposed upon conviction, the error is prejudicial per se. In analyzing the death qualification of juries under 46-16-115, the Supreme Court cited Witherspoon v. Ill., 391 US 510, 20 L Ed 2d 776, 88 S Ct 1770 (1968), for the holding that excusing jurors simply because they voice general objections to the death penalty is insufficient and that only in instances when that belief prohibits the juror from applying the law that the judge has provided may a juror be excused for cause. Addressing the question of social science evidence seeming to indicate prejudice to a defendant when a jury is death qualified, the Supreme Court rejected the studies, noting that in Lockhart v. McCree, 476 US 162, 90 L Ed 2d 137, 106 S Ct 1758 (1986), the U.S. Supreme Court had seriously questioned the validity of similar studies, ruling that even if the studies were valid, it did not prove that death qualification was unconstitutional. Further, death qualification is a procedure to ensure that a jury is committed to its task and is therefore not per se an unconstitutional due process violation. St. v. Gollehon, 262 M 1, 864 P2d 249, 50 St. Rep. 1250 (1993).

Juror Outburst — Court's Removal of Child Witness From Stand — No Prejudice to Defendant: A juror's request to be dismissed when defense counsel persisted in questioning a 9-year-old witness who repeatedly broke down in tears at a certain point in questioning and the court's removal of the witness from the stand did not warrant a mistrial. There was no showing that the juror's outburst resulted in prejudice to defendant, and removal of the witness did not deprive defendant of the right to confront and cross-examine witnesses when the court gave defense counsel the option to resume questioning at a later time. St. v. McNatt, 257 M 468, 849 P2d 1050, 50 St. Rep. 365 (1993), followed in St. v. Gollehon, 262 M 293, 864 P2d 1257, 50 St. Rep. 1564 (1993), and cited in St. v. Brandon, 264 M 231, 870 P2d 734, 51 St. Rep. 244 (1994).

Fair Trial to Outweigh Free Speech: Noris contended that the presence of women spectators wearing buttons bearing the words "Women Against Rape" at his trial for kidnapping and rape denied him a fair trial. The court determined that the buttons conveyed the message that spectators believed defendant was guilty before it was proved, eroding the presumption of innocence. When balancing the competing rights of the spectators' right to free speech against defendant's right to a fair trial, the right to a fair trial controls. Norris v. Risley, 918 F2d 828 (9th Cir. 1990).

Failure of Prospective Juror to File Affidavit to Be Excused From Particular Trial Not Violative of Right to Impartial Jury: Defendant argued that under 3-15-313, the submitting of affidavits by those jurors who claim an undue hardship is mandatory and that failure to do so created a material deviation in procuring a jury and was therefore a denial of defendant's constitutional right to an impartial jury. However, once a juror is drawn from the pool, he may, without filing an affidavit, attempt to demonstrate an undue hardship so as to be excused on a particular jury panel. Failure to file an affidavit at that stage of the jury selection process does not constitute a deviation in jury selection sufficient to warrant violation of the right to an impartial jury. St. v. Henry, 241 M 524, 788 P2d 316, 47 St. Rep. 476 (1990).

Attempt by Jury Foreman to Convey Information on Defendant's Criminal Record to Jury — Remand for New Trial: The jury foreman heard in a third-party conversation that "defendant had a criminal record as long as your arm" and attempted to convey the information to the rest of the jury. Although the jury declined to hear the offered information, the injury to defendant had already occurred when the foreman heard the prejudicial comments and informed the remaining jurors that he had reliable information from the Sheriff's office. The District Court denied a motion for mistrial after examining three jurors, but the Supreme Court would not assume that the entire panel was safeguarded from contamination. In remanding for a new trial, the Supreme Court held that the presumption of prejudice that was created when uncontroverted evidence established that prejudicial statements reached one or more jurors was not rebutted when no evidence existed to rebut the presumption other than testimony of three of the jurors. St. v. DeGraw, 235 M 53, 764 P2d 1290, 45 St. Rep. 2154 (1988), distinguishing St. v. Murray, 228 M 125, 741 P2d 759, 44 St. Rep. 1394 (1987), St. v. Counts, 209 M 242, 679 P2d 1245 (1984), and St. v. Gillham, 206 M 169, 670 P2d 544 (1983).

Limiting Defense Time and Inquiry Into Preconceived Notions of Guilt: It was improper and inexcusable for judge, at voir dire, to repeatedly admonish defense counsel that a jury would be selected that day and to infer that defense counsel was an obstacle to that end. In a case such as this, which has a great amount of publicity, it is especially essential that voir dire ensures that defendant is adjudged by fair and impartial jurors. The court should strive for that objective, not expeditious selection of the jury. Defense counsel's examination of the potential jurors' preconceived notions of defendant's guilt should not have been repeatedly met with sustained objections. It was erroneous to deny defense counsel permission to ask a potential juror whether, if he were a defendant, he would want someone with that potential juror's frame of mind sitting on the jury. Defense counsel was also repeatedly admonished to limit inquiry to whether the potential juror could set aside his impressions of the case and reach a verdict based solely on the evidence; however, such a question cannot be asked and answered in a vacuum, and the defense must be allowed to fully examine the extent of the juror's pretrial convictions and determine what would be required to eradicate those convictions. One exchange during voir dire resulted in a juror who might have required defendant to prove his own innocence. However, the improperly conducted voir dire resulted in harmless error because given defendant's testimony at trial, any juror would have had to convict him of the charges. St. v. Nichols, 225 M 438, 734 P2d 170, 44 St. Rep. 382 (1987).

Nature of Inflammatory Publicity: A defendant's right to a fair trial by an impartial jury is jeopardized when the publicity surrounding the case is inflammatory. Inflammatory publicity is characterized by editorializing by the media or any calculated attempt to prejudice public opinion against the defendant or to destroy the fairness of the pool from which defendant's prospective jurors would be drawn. St. v. Nichols, 225 M 438, 734 P2d 170, 44 St. Rep. 382 (1987), followed in St. v. Abe, 1998 MT 206, 290 M 393, 965 P2d 882, 55 St. Rep. 876 (1998), and St. v. Kingman, 2011 MT 269, 362 Mont. 330, 264 P.3d 1104.

Publicity From Defendant's Televised Testimony — Not Inflammatory: Defendant could not successfully contend that the charges against him should be dropped because of inflammatory publicity because rather than being inflammatory, much of the publicity was verified, if not generated, by defendant's testimony before television cameras during the trial of his son, who was involved in the incidents for which defendant was tried, and because defendant's testimony at his son's trial mirrored defendant's testimony at his own trial. St. v. Nichols, 225 M 438, 734 P2d 170, 44 St. Rep. 382 (1987).

Voir Dire Closure for Inflammatory Publicity — Discretion Not Abused — No Protection of Defendant Who Created the Publicity: Whether or not voir dire should be closed because of inflammatory publicity is left largely to the discretion of the trial judge. The request is seldom granted. It must first be determined that the publicity is so great and so inflammatory that a presumption exists that the jury panel is prejudiced against defendant. In this case, there was no proof that closure would have protected defendant from the adverse publicity, which was at least in part generated by his testimony in the trial of his son, who was involved in the incidents for which defendant was tried. There was no abuse of discretion. St. v. Nichols, 225 M 438, 734 P2d 170, 44 St. Rep. 382 (1987).

Failure of Juror to Disclose Relationship: Defendant was charged with and convicted of sexual intercourse without consent. During voir dire, members of the jury panel were asked whether any of them knew any of the employees at the Butte-Silver Bow law enforcement agency and whether any of them were related to or knew closely anyone else employed by a law enforcement agency. Defendant contends he was prejudiced when a juror failed to disclose her brother-in-law was a civilian jailer at the jail. On appeal, the Supreme Court said other jurisdictions have held that nondisclosure of information is not grounds for reversal unless the nondisclosure amounts to "intentional concealment". There was nothing in the record to show intentional concealment or any misconduct by the juror. The omission appeared inadvertent and unintentional. There was no error in denying defendant's motion for a new trial. St. v. Bauer, 210 M 298, 683 P2d 946, 41 St. Rep. 1066 (1984), followed in St. v. Woods, 221 M 17, 716 P2d 624, 43 St. Rep. 601 (1986), St. v. Stringer, 271 M 367, 897 P2d 1063, 52 St. Rep. 473 (1995), St. v. Hatten, 1999 MT 298, 297 M 127, 991 P2d 939, 56 St. Rep. 1198 (1999), and St. v. Dunfee, 2005 MT 147, 327 M 335, 114 P3d 217 (2005). Hatten was followed in St. v. Rennaker, 2007 MT 10, 335 M 274, 150 P3d 960 (2007).

Judge's Discussion of Trial Process and Length of Service With Jurors Outside Presence of Prosecution, Defense, or Defendant: Prior to trial, the judge brought the 55 prospective jurors into court, explained the trial process, asked them if they could serve 2 weeks, and discharged two of them after the discussion. The prosecutors, defendant, and defense counsel were not present, and no record was kept of the proceeding. There was no prejudice to defendant, but the Supreme

Court stated that a record should have been kept and that it was not suggesting that such an examination should be adopted by other judges or that the method of examination was the best one. St. v. Stroud, 210 M 58, 683 P2d 459, 41 St. Rep. 919 (1984).

Defendant to Show Prejudice From Media Reports: Defendant was tried and convicted of attempted deliberate homicide. After the verdict, defense counsel polled the jury and discovered that a juror had read an entire newspaper article summarizing the case. The juror stated that this had not affected her opinions or deliberations. The District Court denied a motion for a mistrial. On appeal, the Supreme Court held that the burden is on the defendant to show that: (1) the juror was specifically exposed to media reports; and (2) the reports were prejudicial to the defendant. Mere proof that a juror was exposed to a factual account of the trial did not meet this burden of proof. St. v. Gillham, 206 M 169, 670 P2d 544, 40 St. Rep. 1576 (1983).

Prejudicial Pretrial Statements by Prosecution — Venue Changed: In a well publicized and controversial case, a defendant charged with rape had bail set at $100,000 by a Justice of the Peace and lowered to $15,000 by the District Court. The County Attorney and a Deputy County Attorney made statements to the press and various groups clearly indicating they believed defendant guilty and praising the description of defendant and his vehicle given by the 11-year-old victim. A disciplinary rule of Canons of Professional Ethics states that prosecutors shall not, in a pending case, make statements that a reasonable person would expect to be disseminated by means of public communication and that relate to the testimony or credibility of a prospective witness or to any opinion as to guilt or innocence of the accused or to the evidence or merits of the case. The failure of the County Attorney and a Deputy County Attorney to strictly adhere to the dictates of that rule jeopardized the impartial administration of justice to defendant by contributing to the establishment of prejudice against him, prejudice that the Supreme Court found to warrant a change of venue. State ex rel. Coburn v. Bennett, 202 M 20, 655 P2d 502, 39 St. Rep. 2300 (1982).

Pre-Voir Dire Determinations: Voir dire is not the solution to every venue case in which it must be determined whether prejudice still exists and whether by reason of it there is a reasonable apprehension that accused cannot receive a fair and impartial trial. Although that issue is usually determined by voir dire, each case must turn on its own merits, and a motion for a change of venue may be decided prior to voir dire if the circumstances of the case indicate inherent prejudice. Judicial economy and effective administration of justice are not served by the use of voir dire to decide the issue when it is apparent that it should be decided before voir dire, and there is the inherent problem of an atmosphere that may exert pressure on the jury selected. State ex rel. Coburn v. Bennett, 202 M 20, 655 P2d 502, 39 St. Rep. 2300 (1982).

Sandstrom Instruction: In 1972, the defendant was convicted of assault and rape. A Sandstrom-type instruction was given at his trial. After conviction, his counsel told him that a notice of appeal had been filed when no notice had been filed. The defendant wrote to a Justice of the Montana Supreme Court seeking a transcript and aid in appealing his conviction. Over the next few years, the defendant made several pro se attempts to get a transcript, which he believed was necessary in order to perfect an appeal. In 1981, a federal court ordered the Montana Supreme Court to review the defendant's conviction and to provide him with counsel. On appeal, the Montana Supreme Court found that use of the Sandstrom-type instruction rendered his trial unfair and his right to counsel was denied by the informal and summary disposition of his appeal. A new trial was ordered. St. v. Swan, 199 M 459, 649 P2d 1297, 39 St. Rep. 1522 (1982).

Prejudice — News Story During Trial: Defendant was tried and convicted of felony theft. Prior to trial several continuances were granted to avoid prejudice from articles about the defendant that were appearing in the local press. On the second day of trial, an article concerning the trial appeared in the local newspaper and defendant moved for a mistrial. The judge denied the motion and admonished the jury to refrain from reading the paper and listening to news broadcasts. Defendant appealed the denial of his motion, contending that the judge should have at least interrogated the jurors. The Supreme Court held that absent any indication on the record of prejudice to appellant so grave as to deny him a fair trial, the District Court properly exercised its discretion in denying the motion. The admonition to the jury was sufficient to correct any damaging influence from the news article. St. v. Weaver, 195 M 481, 637 P2d 23, 38 St. Rep. 2050 (1981), followed in St. v. Henrich, 268 M 258, 886 P2d 402, 51 St. Rep. 1275 (1994).

Impartial Jury — Prejudice Not Presumed: Petitioner alleged that he was denied his right to a trial by a fair and impartial jury in that much publicity surrounded his case, and his first conviction was overturned. The District Judge reviewed the transcript of voir dire and determined that the publicity had no prejudicial effect. The jurors were questioned as a whole, and many individually, as to their attitudes resulting from the trial's publicity. The apparent result of the

questioning was that nearly all jurors had heard of the case, but all agreed that they could decide the case on the evidence presented. No specific instance of a prejudiced juror was shown. The court will not presume prejudice. It is incumbent on the petitioner to present specific evidence of prejudice to the court. Judges will not "pierce the veil of jury deliberations" to try to find whether the decision was based on bias and prejudice. Fitzpatrick v. St., 194 M 310, 638 P2d 1002, 38 St. Rep. 1448 (1981).

Proof of Intent — Jury Instruction: In defendant's trial on the charge of robbery, the jury was instructed substantially as follows, that "in order to constitute the offense charged, it is necessary to prove the alleged intent. Intent need not be proved by direct and positive testimony but may be inferred from the evidence if there are any facts proved that satisfy the jury of its existence. The law also presumes that a person intends the ordinary consequences of any voluntary act committed by him. This latter presumption is a disputable presumption and may be controverted by other evidence." The court found that this instruction could not be interpreted by any juror to be mandatory in nature and did not shift the burden of going forward with the evidence or the burden of persuasion. Spurlock v. Risley, 520 F. Supp. 135, 38 St. Rep. 1339 (D.C. Mont. 1981).

Absence During Peremptory Challenges Not Violative of Constitutional Rights: In a prosecution for theft by accountability, the defendant was not denied due process of law by her absence from the courtroom during peremptory challenges of jurors. Although the defendant's presence may be crucial during the voir dire questioning of the jury, the Supreme Court has previously held that a defendant's rights are not violated when the matters handled in his absence are purely legal, and the peremptory challenge of jurors is only a pro forma execution of the decisions formulated during voir dire. Her absence was therefore not injurious to either her right of due process or her right of confrontation. St. v. Hart, 191 M 375, 625 P2d 21, 38 St. Rep. 133 (1981).

Independent Knowledge of Juror — Failure to Object: The fact that a juror had acted as a special prosecutor in a disbarment action against an attorney under a workers' compensation indictment and had used defendant's disbarment, which dealt at length with facts involved in defendant's criminal case, as a model in drafting his pleadings did not require reversal of defendant's conviction when, at the conclusion of the trial, the juror met with the judge and counsel and told them what he knew, and the defendant made no objection. The defense failed to meet its responsibility by its failure to properly object and thereby give the court an opportunity to remedy any alleged defects. St. v. Bretz, 185 M 253, 605 P2d 974 (1979).

Pretrial and Trial Publicity: In a case that was the subject of extensive pretrial and trial publicity, the defendant was not denied his right to a trial by a fair and impartial jury where the record indicated that the defendant had attempted to use the media for his own advantage and had failed to move for a change of venue on the basis of the publicity. The defendant's argument that the court should have examined the jury as to their contact with the publicity and its prejudicial effect on them was not a proper subject for examination on appeal since no such motion was made during trial. St. v. Bretz, 185 M 253, 605 P2d 974 (1979).

Alleged Juror Prejudice — Confusion in Voir Dire Record: When defendant contended that the presence of an allegedly prejudiced juror deprived him of his right to trial by a fair and impartial jury, the existence of some confusion in voir dire, as evidenced by the record, was good reason (in conjunction with authorities relating to scope of revision of juror challenge rulings) to rely on the trial court's decision to deny defendant's challenge for cause based on implied bias. St. v. Williams, 185 M 140, 604 P2d 1224 (1979).

Impartial Jury — Use of Voter Lists for Selection — United States Constitution: It is of no importance that Indians may have a tendency not to register to vote in non-Indian elections, for the purpose of determining whether there was a fair cross section of the community in a jury selection plan using voter registration lists. The legislative history of federal acts shows that no economic or social characteristics prevent a person who wants to be considered for jury service from having his name placed in the pool from which jurors are selected. Merely because no Indian was called on three successive jury panels, including the one returning indictments against Indian defendants in Montana, did not establish a substantial deviation from a fair cross section of the community. The defendants' right to an impartial jury guaranteed by the United States Constitution (similar to Art. II, sec. 24, Mont. Const.) was protected. U.S. v. Brady, 579 F2d 1121 (9th Cir. 1978).

Juror Misconduct — Presumption of Prejudice: The District Court failed to remove any prejudicial effect occasioned by statements by a juror in a public place which disqualified him as a juror. The court did not inquire into an alleged statement by the juror that "half of the jury is Hanson's friends", nor did it act properly in allowing the juror to sit until the end of the day on which the court determined his misconduct before substituting an alternate. The presumption of

prejudice remained because the members of the jury were not interrogated to determine if they had been contaminated. St. v. Eagen, 178 M 67, 582 P2d 1195 (1978).

Restricting Voir Dire: The court did not err in sustaining the State's objections to defense counsel's voir dire questioning of prospective jurors on their attitude toward defense of justification in the prosecution of felony charge of escape from prison. St. v. Stuit, 176 M 84, 576 P2d 264 (1978).

Prisoner Handcuffed in Jury Presence: In the absence of an indication of prejudicial consequences, the momentary and inadvertent observation of the defendant in handcuffs by jury members does not warrant the granting of a new trial. St. v. Baugh, 174 M 456, 571 P2d 779 (1977), followed in St. v. Schatz, 194 M 59, 634 P2d 1193, 38 St. Rep. 1687 (1981).

Replacement of Prosecutor's Friend With Alternate Juror: The court did not err when, prior to the jury retiring, it replaced with an alternate a juror who was a personal friend of the prosecutor and had personal knowledge of evidence of the case. St. v. Baugh, 174 M 456, 571 P2d 779 (1977).

Reading of Nonadmitted Police Report to Jury: When jury deliberations were tainted by reading nonadmitted police report to the material prejudice of defendant's right to an impartial jury, to confront witnesses, and to assistance of counsel at every critical stage of trial, a new trial was required. St. v. Davison, 173 M 510, 568 P2d 159 (1977).

System for Juror Qualifications — Constitutional: Argument that since Legislature enacted different system for juror qualifications based on most recent list of registered electors rather than last assessment roll, without providing for jury selection commissions to meet after effective date of statute, and therefore no list of eligible jurors was available, failed because of Supreme Court's interpretation that various county jury selection commissions will meet as soon as possible after effective date of statute, invoking court's rulemaking power, under Art. VII, sec. 2(3), Mont. Const., by supplying a meeting and selection date. State ex rel. Bennick v. District Court, 167 M 389, 538 P2d 1369 (1975).

VENUE

Testimony Regarding Defendant's Home Address Sufficient to Prove Venue: On appeal, the defendant moved to have two charges against him dismissed for failure to prove venue. The Supreme Court denied the motion, holding that the testimony from the witnesses that the defendant committed the crimes in his home and providing his home address was sufficient to reach the only rational conclusion: that the crimes occurred in the county where the defendant was charged. St. v. Patterson, 2012 MT 282, 367 Mont. 186, 291 P.3d 556.

No Presumption of Prejudice From Pretrial Publicity — Motion for Change of Venue Correctly Denied: Defendant was acquitted of attempted deliberate homicide and convicted of aggravated assault related to a bar fight that left the victim with extensive facial fractures requiring reconstructive surgeries. Media coverage following the altercation included the dissemination of portions of a voice message the defendant had left for a friend shortly after the fight, and various fundraising events occurred in Gallatin County on behalf of the victim. Prior to trial, the defendant filed a motion to change venue, alleging he would not receive an impartial trial in Gallatin County due to the "inflammatory nature" of publicity that presumed his guilt. The court held a hearing on the motion and decided to base its ruling, in part, on the results of a questionnaire sent to 150 prospective jurors, which showed that while the majority of the prospective jurors had heard about the case, they retained their ability to serve as impartial jurors. Based on these results, the District Court denied the motion for a change of venue, and the defendant was convicted of aggravated assault. The defendant appealed, contending that the facts demonstrated a presumption of prejudice that required his motion to change venue be granted. The Supreme Court outlined several relevant factors in evaluating whether pretrial publicity warrants a presumption that an impartial jury cannot be drawn, including the size and diversity of the jury pool, community sentiment, the nature of the pretrial publicity, the amount of time between the alleged crime and the trial, and, in a posttrial scenario, whether the jury's decision on guilt is contrary to a presumption of guilt (i.e., whether the defendant was convicted of the original charge or of a lesser offense). The court concluded that the District Court did not abuse its discretion in denying the defendant's motion because he did not demonstrate that the pretrial publicity had displaced the judicial process and because he was acquitted of attempted deliberate homicide. St. v. Kingman, 2011 MT 269, 362 Mont. 330, 264 P.3d 1104.

No Error in Failure to Grant Change of Venue After Trial Begun: Dean moved for a change of venue at the end of the first day of trial, claiming that a fair trial could not be had because many venire members knew of the case, knew the parties, disapproved of marijuana use, and had been influenced by pretrial publicity and taxpayer bias. The trial court denied the change

of venue motion, and on appeal the Supreme Court affirmed. The trial court allowed extensive voir dire, including private questioning of each panel member, and liberally granted motions to excuse jurors for cause. All jurors confirmed that their prior knowledge and opinions about witnesses would not interfere with their impartiality, and Dean made no assertion that the trial court abused its discretion by denying a challenge for cause to any juror. Denial of the belated motion for a venue change was affirmed. Dean v. Sanders County, 2009 MT 88, 350 M 8, 204 P3d 722 (2009).

Proper Venue for Prosecution of Common Scheme to Manufacture Methamphetamine in Several Counties — Possession Charge Dismissed for Improper Venue: Following arrest in Sanders County, Galpin was charged in Ravalli County with possession of methamphetamine in Sanders County, operating a methamphetamine lab in Ravalli County, possessing methamphetamine precursors in Ravalli and Missoula Counties, and criminal endangerment in Ravalli County. Citing venue grounds, Galpin questioned the evidence on the endangerment charge and moved to dismiss the possession charge and the Missoula County precursor charge because there was no evidence that the crimes were committed in Ravalli County where the charges were filed. The Supreme Court agreed that possession has but one requisite act, which is possession of the drug itself, and because neither the state's information nor trial testimony established that Galpin possessed methamphetamine anywhere but Sanders County, Ravalli County was not the proper venue for the possession charge, so it was dismissed. However, in pursuit of the common scheme to manufacture methamphetamine, Galpin kept precursors in storage facilities in both Ravalli and Missoula Counties and knowingly or purposely prepared, processed, or manufactured the drug as he traveled between Ravalli and Missoula Counties, so venue was proper in Ravalli County for the precursor charges. Ravalli County was also a proper venue for the criminal endangerment charges based on witness testimony that Galpin manufactured methamphetamine on at least three occasions at the witness's home in Ravalli County when children were present. St. v. Galpin, 2003 MT 324, 318 M 318, 80 P3d 1207 (2003).

Proper Venue of Custodial Interference Proceeding: Price was charged with custodial interference after failing to return his daughter to her mother. Price moved to dismiss the charge for improper venue, arguing that Lake County, where he had withheld the child, rather than Missoula County, where both parties resided and where dissolution proceedings were taking place, was the proper venue. Venue is a jurisdictional fact that must be proved at trial as any other material element. Deprivation of custodial rights is a requisite element of the offense of custodial interference, so the state must establish that the defendant: (1) knowing that there was no legal right to do so, took, enticed, or withheld a child; and (2) deprived the legal custodian of custody. When establishing the commission of an offense requires proving two or more acts, the charges may be filed in any county in which any of the acts occurred. In this case, at least one of the elements of custodial interference occurred in Missoula, so Missoula County was a proper venue for prosecution of the offense, and the District Court properly denied the motion to dismiss for improper venue. St. v. Price, 2002 MT 229, 311 M 439, 57 P3d 42 (2002), followed in St. v. Young, 2007 MT 323, 340 M 153, 174 P3d 460 (2007).

Travel in and Through County in Private Conveyance Adequate to Establish Venue — Boat as Private Conveyance: Diesen's boat collided with Hallock's boat in Fort Peck Lake, in either Valley County or Garfield County. Diesen was convicted in Valley County Justice's Court of boating under the influence, and he appealed. In District Court, Diesen moved for dismissal, alleging that the venue was improper because the state had failed to prove that any element of the offense had occurred in Valley County. The District Court applied 46-3-114 in concluding that Diesen's boat was a private conveyance and held that because the state proved beyond a reasonable doubt that the boat traveled in and through Valley County on its way to Fort Peck Marina, the Valley County Justice's Court was an appropriate venue. The Supreme Court affirmed denial of Diesen's motion to dismiss. St. v. Diesen, 2000 MT 1, 297 M 459, 992 P2d 1287, 57 St. Rep. 1 (2000).

Charges Filed in Wrong County — Venue Waived Upon Plea of Guilty: Thompson was charged in Powell County for felony escape while in detention in Yellowstone County. As part of a plea agreement, Thompson pleaded guilty and signed a waiver of rights. On appeal, Thompson contended that his constitutional and statutory rights were violated because he was prosecuted in a different county from the county where the alleged offense was committed. However, pursuant to St. v. Feeley, 170 M 227, 552 P2d 66 (1976), and McGuinn v. Risley, 210 M 349, 681 P2d 699 (1984), the statutory right to venue may be waived. Further, 46-3-111 provides that in criminal cases, venue is waived if not raised prior to the first witness being sworn. Thus, despite the fact that charges were filed in the wrong county, any assertion of improper venue was waived by Thompson's failure to object prior to pleading guilty. St. v. Thompson, 1999 MT 108, 294 M 321,

981 P2d 778, 56 St. Rep. 444 (1999), distinguishing St. v. Preite, 172 M 318, 564 P2d 598 (1977), St. v. Jackson, 180 M 195, 589 P2d 1009, 36 St. Rep. 169 (1979), and St. v. Johnson, 257 M 157, 848 P2d 496, 50 St. Rep. 209 (1993).

No Prejudicial Atmosphere in County Where State Prison Located: Defendant was charged with possession of a deadly weapon while an inmate at the state prison. He sought change of venue, contending that prejudice in the county where the prison was located was so great that a fair trial could not be had. The formation of a Citizen Protection Association and the fact that a large number of prison employees lived in the county did not constitute a prejudicial atmosphere. Also, upon review of the record of voir dire, the Supreme Court concluded an impartial jury had been empaneled, belying defendant's contention that all juries in the county were unalterably prejudiced. St. v. Palmer, 223 M 25, 723 P2d 956, 43 St. Rep. 1503 (1986).

Test for Change of Venue: A motion for a change of venue is addressed to the discretion of the trial court, and a denial is not error in the absence of an abuse of that discretion. Each case must be determined by the facts presented by it, and all indications of prejudice must be considered. The rule is that the accused is entitled to a change of venue when it appears that there are reasonable grounds to believe that the prejudice alleged actually exists and that by reason of the prejudice there is a reasonable apprehension that the accused cannot receive a fair and impartial trial. State ex rel. Coburn v. Bennett, 202 M 20, 655 P2d 502, 39 St. Rep. 2300 (1982). See also St. v. Kingman, 2011 MT 269, 362 Mont. 330, 264 P.3d 1104.

Venue Change Required in Rape Case: Defendant charged in Helena with rape of 11-year-old girl was entitled to a change of venue, as his exhibits and affidavits supplied reasonable grounds to believe that the prejudice alleged actually existed. After a Justice of the Peace set bail at $100,000, the District Court lowered it to $15,000. Angry citizens marched on the courthouse, public meetings were held, organizations were formed to address the matter, removal of the judge was sought, vandalism occurred, and threats were made against defendant. The only local paper ran numerous front-page stories with photos, went beyond an objective dissemination of information, and inflamed an already angry populace. The Sheriff, County Attorney, and a Deputy County Attorney made comments prejudicial to defendant and indicated they clearly believed him guilty. Law enforcement officials praised the victim's careful, excellent, and thorough description of her assailant and his vehicle. Numerous letters to the editor of the local paper indicating belief in defendant's guilt were printed. Defendant and his wife were forced to move to avoid reprisals and were prevented from moving into a place of their choice by complaints of nearby residents. State ex rel. Coburn v. Bennett, 202 M 20, 655 P2d 502, 39 St. Rep. 2300 (1982).

Proof of Proper Venue Beyond a Reasonable Doubt: Venue in a criminal case must be proven beyond a reasonable doubt. When defendant was charged with preparation of false evidence for submitting fraudulent petitions for workers' compensation settlements, sufficient evidence was presented from which the jury could determine that the State proved venue in Cascade County. Both petitions for settlement contained defendant's signature followed by his Great Falls address, and the settlement checks were sent to the defendant in Great Falls. St. v. Bretz, 185 M 253, 605 P2d 974 (1979).

Venue Unaffected by Publicity of Murder: Considering the nature of the crime involved, the Supreme Court found the reporting extremely objective and factual and not unreasonably voluminous. Therefore, there was no abuse of discretion in the District Court's refusal to grant defendant's motion for change of venue. St. v. Sandstrom, 176 M 492, 580 P2d 106 (1978), overruled on other grounds in Sandstrom v. St., 442 US 510, 99 S Ct 2450 (1979).

Effect of Amendment of Charge: Court erred in granting motion for change of venue when information was amended to allege witness tampering in a county in which the action was not brought. The charges cannot stand independent of the original charges, and venue remains in the county where the action was brought. St. v. Bretz, 169 M 505, 548 P2d 949 (1976).

Trial in County Where Offense Committed — Statutes: Sections 46-3-102 (renumbered 46-3-112) and 46-3-202 (now repealed), which provide venue for crimes committed in more than one county and for cases when control is exerted over stolen property in various counties, do not violate constitutional provisions guaranteeing the right to be tried in the county where the offense was committed. St. v. Bretz, 166 M 444, 534 P2d 496 (1975).

ADMISSIBILITY OF DEFENDANT'S STATEMENTS

Motion In Limine Properly Denied — No violation of Confrontation Clause: In a Youth Court proceeding, the defendant was adjudicated a serious delinquent youth and committed to the custody of the Department of Corrections until age 18 for various crimes, including the breaking of approximately 75 car windows and firing shots at moving vehicles and at least one

pedestrian. During the proceedings, the Youth Court denied the defendant's motion in limine to exclude 10 statements taken from the defendant's interview with police that the defendant alleged constituted inadmissible hearsay because the statements were attributable to witnesses who were not testifying at trial. The Supreme Court affirmed. The Youth Court's admission of the taped interview did not violate the defendant's confrontation rights because the statements constituted adoptive admissions or the witnesses were available for cross-examination. In re T.J.B., 2010 MT 116, 356 Mont. 342, 233 P.3d 341.

No Error in Failure to Suppress Incriminating Statements Made Following Knowing and Voluntary Waiver of Rights: After McCollom pleaded guilty to felony sexual assault against two 9-year-old girls, he argued on appeal that the trial court erred in failing to suppress incriminating statements made to law enforcement officers following his arrest. However, McCollom was fully advised of the right to counsel, signed a waiver of Miranda rights, admitted that he was advised of his rights and understood them, and then consented to the interrogation at which the statements were made. The trial court's conclusion that McCollom knowingly and voluntarily waived his rights was based on substantial evidence and was not clearly erroneous, and the Supreme Court affirmed denial of the suppression motion. St. v. McCollom, 2005 MT 61, 326 M 251, 109 P3d 215 (2005).

Voluntariness of Confession — Totality of Circumstances: When a defendant moves to suppress a confession or admission on grounds that it was given involuntarily, the prosecution must prove by a preponderance of the evidence that it was voluntary. On appeal, the Supreme Court will review denial of a suppression motion to determine whether findings of fact were clearly erroneous and correctly applied as a matter of law. A finding of fact is clearly erroneous if: (1) it is not supported by substantial evidence, which must be more than a scintilla of evidence but may be less than a preponderance of the evidence; (2) the trial court misapprehended the effect of the evidence; or (3) the Supreme Court has a definite or firm conviction that a mistake was made. When a determination of voluntariness depends on the credibility of witnesses, the Supreme Court will defer to the trial court. The emphasis in determining voluntariness is on whether the confession was the product of free choice or compulsion, which must take into account the totality of the circumstances, including the defendant's age and education, whether the defendant was advised of Miranda rights, the defendant's prior experience with the criminal justice system and police interrogation, the defendant's background, experience, demeanor, coherence, articulateness, and capacity to make full use of faculties, the length and method of interrogation, and whether the confession or admission was extracted through force, violence, or improper influence or by direct or implied promises. If the confession or admission was involuntary, its use violates self-incrimination and due process. Here, the Supreme Court considered the totality of the circumstances and found substantial credible evidence that Hoffman's confession was voluntary. St. v. Hoffman, 2003 MT 26, 314 M 155, 64 P3d 1013 (2003). The standard of review of denial of a motion to suppress was also applied in St. v. Munson, 2007 MT 222, 339 M 68, 169 P3d 364 (2007).

Possibility That Statements Made During Custodial Interrogation, After Lawyer Requested, Contributed to Conviction — New Trial Warranted: Spang was charged in connection with a double homicide. He made statements to police after being read his rights at arrest and again 2 days later after requesting a lawyer. Spang moved to suppress the statements, but the motion was denied on grounds that Spang waived the right to counsel after voluntarily answering interrogators' questions on both occasions. Transcripts of the interrogations were made available to the jury, and Spang was subsequently convicted on two counts of intimidation by accountability, but appealed based on insufficiency of evidence. The Supreme Court reviewed the denial of the suppression motion to determine whether the trial court's findings of fact were clearly erroneous and whether they were correctly applied as a matter of law. Here, Spang's request for counsel was neither ambiguous nor equivocal, so cessation of questioning was required until Spang either reinitiated conversation with the officers or was provided an attorney. Because neither event occurred, the trial court erred when it denied Spang's motion to suppress the statements. To determine whether the error was prejudicial, the Supreme Court applied the test in St. v. Van Kirk, 2001 MT 184, 306 M 215, 32 P3d 735 (2001), determining in this case that the error was trial error, because it occurred during presentation of the case to the jury and was amenable to qualitative assessment for prejudicial impact relative to other evidence introduced at trial. Under the cumulative evidence test, the state was required to show admissible evidence that proved the same facts as the tainted evidence. Although there was other sufficient evidence tending to prove that Spang committed intimidation by accountability, qualitatively there existed a reasonable possibility that the statements that Spang made during the second interrogation

contributed to his conviction because of the strong emphasis placed on those statements during trial. Therefore, the District Court committed reversible error when it admitted the statements during the state's case in chief. The case was remanded for a new trial, and the District Court was directed not to admit the statements made during the second interrogation. Statements from the first interrogation were admissible, however, because Spang had waived the right to counsel. Spang's argument that the first interrogation statements also be suppressed on unnecessary delay grounds failed, absent evidence that the delay between arrest and initial appearance influenced the voluntariness of those statements. St. v. Spang, 2002 MT 120, 310 M 52, 48 P3d 727 (2002), distinguishing St. v. Brubaker, 184 M 294, 602 P2d 974 (1979), and overruled, to the extent that the right to counsel for self-incrimination purposes may be invoked in custodial interrogation, in St. v. Buck, 2006 MT 81, 331 M 517, 134 P3d 53 (2006).

Admission of Murder by Schizophrenic Held Voluntarily Made — No Prejudice to Defense Case: Scarborough, a schizophrenic, was arrested for the murder of Willis and made incriminating statements in the back of a police car. He was taken to the police station where he was read his Miranda rights, waived those rights, and gave a recorded interview with a detective. The Supreme Court affirmed the District Court's decision not to suppress the statements made in the police car or the tape of the interview with the detective. After reviewing all of the evidence, the Supreme Court held that the single fact that raised doubts about the voluntariness of Scarborough's inculpatory statements is the fact that he is schizophrenic and was therefore subject to the suggestion by the arresting and interviewing officers that he had committed the crime rather than someone else. The Supreme Court reviewed the record of the circumstances of the confessions and held that they were not made because the police had suggested Scarborough's guilt to him. The Supreme Court also held that even if the confessions were involuntary, the admission of those confessions by the District Court did not prejudice Scarborough's defense because, as his defense, Scarborough admitted committing the murder but claimed that the murder was committed during an acute psychotic episode. St. v. Scarborough, 2000 MT 301, 302 M 350, 14 P3d 1202, 57 St. Rep. 1268 (2000).

Response to Friendly Police Statement That Suspect Should Not Do Anything to Himself Because Nothing Was That Bad: A police officer was driving a homicide suspect to his house to pick up a handgun that the suspect had told officers at the police station they could have. The officer told the suspect that he should not do anything to himself because nothing was that bad. The suspect answered that "if I did something to myself then we'd never find Brad". This was not an interrogation of the suspect, who had requested counsel at the police station, because it could not be said that the officer should have known that his statement was likely to elicit an incriminating response from the suspect. The officer had not participated in questioning at the police station, the questioning had not been part of a plan to convince the suspect that he might commit suicide if he did not confess, and the officer had known the suspect for years and made the statement out of concern for his well-being. Thus, the suspect's response was admissible. St. v. Moore, 268 M 20, 885 P2d 457, 51 St. Rep. 1151 (1994).

Miranda Warning Unnecessary Prior to Compelled Mental Evaluation: Defendant asserted that her Miranda rights were violated because prior to undergoing a compelled psychiatric and psychological evaluation, she was never informed that she had the right to remain silent. The Supreme Court found that the defendant was not entitled to Miranda warnings because: (1) defendant was represented by counsel; (2) counsel was fully informed of the time and place of the evaluation; (3) defendant was not in custody at the time of the evaluation; (4) defendant placed her mental state at issue; and (5) the compelled evaluation was limited to use for rebuttal purposes only. St. v. Hess, 252 M 205, 828 P2d 382, 49 St. Rep. 217 (1992).

Under Martinez Rule, No Duty to Inform Accused of Right to Testify: The defendant argued that his conviction should be overturned on the basis that he had not been advised by the trial court of his right to testify. The Supreme Court adopted the majority position of U.S. v. Martinez, 883 F2d 750 (9th Cir. 1989), that a trial court has no duty to conduct an on-the-record inquiry to determine if the defendant knowingly and intelligently waived his right to testify. St. v. Hamm, 250 M 123, 818 P2d 830, 48 St. Rep. 830 (1991).

Admissibility of Statements Made After Exercise of Right to Cut Off Questioning — Verification of Statements by Independent Source: Following his arrest, defendant was advised of his *Miranda* rights and signed a waiver. At some point in the subsequent interview, defendant indicated he did not want to give further information because he did not wish to implicate his brother; however, he continued to talk after questioning ceased. Any questions by the officers were only for clarification. Defendant moved to suppress any evidence obtained as a result of statements made after he exercised his right to cut off questioning. The motion was properly

denied in light of the voluntariness of the statements and the fact that the state's evidence was obtained independently from many other sources, including searches by search and rescue units and statements of accomplices. St. v. Kills On Top, 243 M 56, 793 P2d 1273, 47 St. Rep. 984 (1990), citing Nix v. Williams, 467 US 431, 81 L Ed 2d 377, 104 S Ct 2501 (1984).

Motion to Suppress Statements and Related Evidence — Waiver and Voluntariness — Applicability to Custodial Interrogation: The District Court granted a motion to suppress all statements made by defendant and any evidence obtained as a result of the statements, citing Smith v. Ill., 469 US 91, 83 L Ed 2d 488, 105 S Ct 490 (1984), as decisive of the suppression issue and supportive of the conclusion that defendant's request for counsel at his first interview barred further police interrogation. The Supreme Court reversed, holding that the Smith rule applied only to instances of custodial interrogation, while in this case defendant was not in custody or under formal arrest at the time he requested counsel. Further, the District Court never addressed the question of whether defendant's confession was voluntarily made; therefore, the case was remanded for hearing on the issues of waiver and voluntariness. St. v. Rorvik, 224 M 104, 728 P2d 419, 43 St. Rep. 2051 (1986).

Suppression of Confession — Drugs and Memory Lapse Allegedly Causing Involuntariness: Counsel's decision to not file a motion to suppress client's confession was not error when there was no evidence in the record to support client's claim that he was under the influence of alcohol or drugs when he made the confession, his claim that he did not remember the confession was rebutted by his reiteration of the sequence of events to the court before he entered his guilty plea, and he signed a memo restating the facts. St. v. Docken, 222 M 58, 720 P2d 679, 43 St. Rep. 1058 (1986).

When Right to Counsel Invoked — Subsequent Incriminating Testimony Inadmissible — Error Held Harmless: Recognizing that it was affording greater protection under the state constitutional right to counsel provision than the U.S. Supreme Court had granted under the identically worded federal constitutional provision, and that this was a departure it had previously declined to make in the area of criminal law, the Montana Supreme Court held that when detained defendant stated he would like to talk to "someone", he invoked his right to counsel. His willing participation in a subsequent recorded conversation, without advice of counsel, did not constitute a waiver of the right to counsel, and admission of the recording into evidence, being testimonial and self-incriminating in nature, was error. However, the error was harmless because defendant during trial testified to a different story than he told on the recording, and the recording was admissible for impeachment purposes. St. v. Johnson, 221 M 503, 719 P2d 1248, 43 St. Rep. 1010 (1986), overruled, to the extent that the right to counsel for self-incrimination purposes may be invoked in custodial interrogation, in St. v. Buck, 2006 MT 81, 331 M 517, 134 P3d 53 (2006).

Miranda Warnings Unnecessary — Lack of Custody: During an investigation for the theft of property from Valley Industrial Park (V.I.P.), the defendant, a former employee of V.I.P., invited Adams, a special investigator, into his residence and discussed the whereabouts of the missing property. The defendant requested an attorney if their conversation was taped. The tape recorder was not used. Adams neither sought a confession nor suggested defendant would be under arrest. Defendant was never in custody, and the court properly admitted Adams' testimony. Miranda warnings were unnecessary. St. v. Holmes, 207 M 176, 674 P2d 1071, 40 St. Rep. 1973 (1983).

Central Question on Motion to Suppress Confession: The central question on a motion to suppress a confession for being involuntary is whether the State has proved by a preponderance of the evidence that the person was advised of his constitutional rights and knowingly and voluntarily waived them. St. v. Blakney, 197 M 131, 641 P2d 1045, 39 St. Rep. 436 (1982).

Suppression of Confession — Voluntariness — Waiver of Right to Counsel After Making Request: To determine whether a confession should have been suppressed it had to be determined whether the confession was voluntary and whether there was an unconstitutional denial of the right to counsel. In so doing, the following questions had to be answered: What was the totality of the circumstances? Was there effective assertion of the right to counsel? And if so, was there an effective waiver at a later time? Since the evidence answered a large number of the requisite questions about the circumstances, the decision of the trial court was held not to have clearly contravened the weight of the evidence, and its holding of voluntariness was upheld. Since any indication by a defendant in any manner that he wishes to consult with an attorney suffices and evidence showed the defendant had met this requirement, the trial court erred in concluding that there was ineffective assertion of the right to counsel. After adopting the rule that a defendant can validly waive the right to counsel after making a request for counsel, the Supreme Court found the trial court had properly found that the State had met its "heavy burden" of showing waiver of counsel. St. v. Blakney, 185 M 470, 605 P2d 1093 (1979), certiorari granted, 101 S

Ct 2999 (1981), and judgment vacated and case remanded for further consideration in light of Edwards v. Ariz., 101 S Ct 1880 (1981), affirmed on remand, 197 M 131, 641 P2d 1045, 39 St. Rep. 436 (1982).

Voluntariness of Statements — Miranda Warnings — Tape Recordings: A defendant who said it probably was advisable that he have an attorney but who nonetheless went ahead and fully consented to being interrogated and tape-recorded, was held to have made a voluntary statement, having been advised of his rights. A statement made voluntarily after the speaker has been made fully aware of and understands his rights is not objectionable because the statement is made without the advice or assistance of counsel. Electronically recorded or preserved evidence is subject to the same admissibility tests as direct evidence of eyewitnesses or earwitnesses. With proper advice to a prospective defendant who then voluntarily consents to the tape-recording of his statements, the constitutional defenses of self-incrimination, unlawful search, invasion of privacy, and right to counsel disappear. Then the tape-recorded statement may be regarded as independent direct evidence or as corroborative evidence. In either case, the tests for admissibility are the same. Since the interviewing detective would have testified directly to the recorded statements, the recorded statements are themselves admissible. St. v. Brubaker, 184 M 294, 602 P2d 974 (1979).

Suppression of Defendant's Confession — When Miranda Warning Inadequate — Voluntariness: Appellant's statement was admitted into evidence erroneously for two reasons. First, the State failed to prove the voluntariness of appellant's confession at the suppression hearing by a preponderance of the evidence. When the State fails to show that appellant was advised of his Miranda rights or that appellant made the statement attributed to him or to introduce any evidence other than evidence showing that the appellant had the mental capacity to make a voluntary statement, a finding that the State has carried its burden of proving voluntariness by a preponderance of the evidence is clearly against the weight of the evidence and must be overturned. Second, the Miranda warning allegedly given appellant was inadequate. The language, "we have no way of giving you a lawyer, but one will be appointed for you, if and when you go to court", was held confusing. Because the confession "undoubtedly weighed heavily in the minds of the jurors in finding [the] appellant guilty", conviction was reversed. St. v. Dess, 184 M 116, 602 P2d 142 (1979).

Statements Made While Under Self-Induced Intoxication: When subsequent events confirmed reliability of defendant's statements made while under self-induced intoxication, trial court did not err in admitting statements in evidence because in cases of self-induced intoxication the criterion for admission is trustworthiness, which is testable by the content of the statements by evidence of subsequent events which confirm the reliability of the statements, especially since defendant freely made the statements where police did not question defendant due to his intoxicated condition. St. v. Emerson, 169 M 285, 546 P2d 509 (1976).

MISCELLANEOUS

Defendant's Convictions Upheld — Potentially Tainted Police Interview Not Contributing to Convictions: The defendant was questioned by police after he was arrested and charged with deliberate homicide for the death of his ex-wife and tampering with evidence. During the questioning, the defendant was advised of his Miranda rights, he declined to waive his rights, and at times he indicated that he did not need an attorney, while at other times he indicated that he had an attorney. The defendant also said he would not answer questions, but he continued to do so and never told the police to stop. At trial, the defendant filed a motion to suppress, arguing that the interview violated his right to counsel. The District Court denied the motion, and after deliberations the jury convicted the defendant of both charges. On appeal, the defendant argued that his convictions must be reversed based upon the denial of his motion to suppress. The Supreme Court evaluated if the ruling on the motion was prejudicial under 46-20-701. Additionally, the court evaluated whether the state could demonstrate that there was no reasonable possibility that the inadmissible evidence might have contributed to the conviction and whether under the cumulative evidence test, evidence existed that provided the same facts as the tainted evidence. Based on all the other evidence in the case, the court held that there was no reasonable possibility that the admission of the interview contributed to the convictions, and the convictions were affirmed. St. v. Larson, 2015 MT 271, 381 Mont. 94, 356 P.3d 488.

Officer's Statements Concerning Individual's Refusal to Speak Before Charges Filed — No Constitutional Violation: An officer's failure to speak with a suspect before charges had been filed because the suspect's husband told the officer that the family did not want to answer questions did not violate the suspect's constitutional rights to be informed of the nature or cause of the

accusation. Furthermore, the statements of a witness were sufficient to establish probable cause for a warrant, regardless of the officer's statements in an initial report concerning the suspect's failure to answer questions. Billings v. Nelson, 2014 MT 98, 374 Mont. 444, 322 P.3d 1039.

Prosecutor's Statements During Closing Argument — Plain Error Review Declined: During closing arguments the prosecutor made remarks regarding three defense witnesses, including statements that the witnesses were liars from a different social stratum, that they were unemployed and collecting unemployment or workers' compensation, and that they played video games all day. On appeal, the defendant claimed reversible error based on prosecutorial misconduct, despite his failure to object in District Court. The Supreme Court reviewed the trial transcripts and considered the comments in the context of the entire argument and held that a failure to review the defendant's claims for plain error review would not result in a manifest miscarriage of justice, leave unsettled the fundamental fairness of his trial, or compromise the integrity of the judicial process. St. v. Aker, 2013 MT 253, 371 Mont. 491, 310 P.3d 506. See also St. v. Lindberg, 2008 MT 389, 347 Mont. 76, 196 P.3d 1252, and St. v. Hayden, 2008 MT 274, 345 Mont. 252, 190 P.3d 1091.

Connection Between Causal Theory and Facts of Case Required — Expert Testimony on Seizures Properly Excluded: After the defendant drove on the wrong side of the interstate, forcing vehicles off of the road before colliding with a vehicle and killing its occupants, the state charged the defendant with negligent homicide and negligent endangerment on the basis that the defendant was under the influence of alcohol at the time of the incident. At trial, the District Court excluded the defendant from presenting expert testimony about the typical symptoms of partial seizures and the difficulty in diagnosing them, without giving the jury an opinion as to whether the defendant actually suffered from a partial seizure while driving. On appeal, the Supreme Court affirmed, concluding that the defendant failed to establish a connection between partial seizures and his driving and that testimony about a causal theory that was not factually connected to the case was irrelevant and would confuse the jury. The Supreme Court also concluded that excluding the testimony did not abridge the defendant's constitutional right to present a defense because Rule 702, M.R.Ev., is rationally related to the important goal of admitting only expert testimony that is logically related to the central issues of a case. St. v. Jay, 2013 MT 79, 369 Mont. 332, 298 P.3d 396.

Prosecutor's Statements and Questions Regarding Witness Credibility Violative of Right to Fair Trial — Remand: At Hayden's trial, the prosecutor questioned a detective concerning the credibility of two other witnesses who had recanted their prior statements at trial, eliciting the detective's impressions of the credibility of the witness's initial statements following an assault. The detective responded that he thought the initial statements, rather than the trial statements, were true. The prosecutor also offered his own opinion as to the witness's testimony, stated that the jury could rely on the detective's testimony, and improperly testified during closing by vouching for the efficacy of the search of Hayden's residence and stating his opinion that a scale found during the search was used for drugs. The prosecutor's conduct invaded the role of the jury, creating a clear danger that jurors adopted the prosecutor's views instead of exercising their own independent judgment, and unfairly added the probative force of the prosecutor's personal, professional, and official influence to the testimony of the witnesses. The prosecutor's conduct undermined the fundamental fairness of the proceedings and Hayden's constitutional right to a fair trial, and the case was reversed and remanded for a new trial. St. v. Hayden, 2008 MT 274, 345 M 252, 190 P3d 1091 (2008). However, see St. v. McDonald, 2013 MT 97, 369 Mont. 483, 299 P.3d 799, holding that a prosecutor's comments during closing argument regarding the witnesses' credibility were "very brief" deviations and were not egregious, and St. v. Walton, 2014 MT 41, 374 Mont. 38, 318 P.3d 1024, holding that a prosecutor's closing remarks did not rise to the level of plain error because the prosecutor did not directly comment on the truthfulness of a witness, offer his own testimony, or elicit credibility testimony from other witnesses.

Jury Trial Not Required in Civil Contempt Case: O'Neil was enjoined from and held in civil contempt for the unauthorized practice of law. O'Neil appealed on grounds that due process required that he be granted a jury trial on the charges. The Supreme Court disagreed, noting that under federal law, there might be a right to a jury trial in criminal contempt cases that impose serious contempt penalties, but that there is no general federal constitutional right to a jury trial for criminal contempt in federal or state courts. However, O'Neil was charged with civil contempt, not criminal contempt, and the penalty under 3-1-511 does not provide sanctions that rise to the level of a serious penalty. O'Neil was afforded adequate due process under 3-1-518, including a reasonable opportunity to obtain counsel, to prepare a defense or explanation prior to hearing, to testify in his own behalf, and to call witnesses at the hearing. O'Neil was not entitled

to a higher standard of due process that might require a jury trial, and the District Court did not err in holding that a jury trial was not required. Mont. Supreme Court Comm'n on Unauthorized Practice of Law v. O'Neil, 2006 MT 284, 334 M 311, 147 P3d 200 (2006), following Kauffman v. District Court, 1998 MT 239, 291 M 122, 966 P2d 715 (1998).

No Implied Presumption of Parole Eligibility — Federal Constitutional Protections Not Violated by Sentence of Life Imprisonment Without Parole — Montana Constitutional Protections Not Addressed: Garrymore was sentenced to life in prison without parole for the deliberate homicide of his adopted infant child. Garrymore appealed the parole restriction and sought to have the sentence vacated on grounds that 45-5-102(2) contains an implicit presumption of parole eligibility. Garrymore contended that under the statute, standing alone and without the operation of 46-18-202, he was entitled to a parole-eligible sentence, subject to 46-23-201, that was taken away by the sentencing judge in violation of due process and a trial by jury. The Supreme Court found nothing in sentencing statutes that creates a presumption in favor of parole eligibility that must be overcome in order for a sentencing judge to impose a parole restriction. Rather, sentencing courts have broad discretion under 46-18-202 to impose parole eligibility restrictions on felony sentences, and the Legislature has placed no limitation on the exercise of that authority. A parole-eligible sentence was not taken away from Garrymore because he was not entitled to such a sentence to begin with. Additionally, although the judge must state the reasons for a parole eligibility restriction when one is imposed, no particular finding of fact need be included among those reasons. Therefore, because the statutory maximum for violating 45-5-102(1)(a) is life in prison without parole, restricting Garrymore's parole eligibility did not violate any federal constitutional rights. The Supreme Court also declined to address Garrymore's undeveloped argument that the parole eligibility restriction violated the Montana Constitution's greater jury trial right absent a compelling reason why Montana's greater jury trial right dictated a different result. St. v. Garrymore, 2006 MT 245, 334 M 1, 145 P3d 946 (2006), followed in St. v. Rosling, 2008 MT 62, 342 M 1, 180 P3d 1102 (2008).

No Prejudice Warranting New Trial on Grounds of Cumulative Error: Larson contended that he was denied a fair trial and was entitled to a new trial because of the cumulative errors argued in his appeal. The doctrine of cumulative error requires reversal of a conviction when a number of errors taken together prejudice a defendant's right to a fair trial. However, in this case, the Supreme Court declined to apply the doctrine after reviewing all the issues on appeal. There was no prejudice shown, there was no abuse of judicial discretion, none of the evidentiary rulings were erroneous, and there was sufficient evidence to support the conviction. Larson's mere allegations of error without proof of prejudice were insufficient to satisfy the doctrine, and Larson's conviction was affirmed. St. v. Larson, 2004 MT 345, 324 M 310, 103 P3d 524 (2004).

No Violation of Defendant's Substantial Rights by Filing Amended Information on Day of Trial to Include Reference to Statutorily Mandated Sentencing Range for Repeat Offender: Gardipee was charged by information with misdemeanor partner abuse. On the morning of trial, the District Court granted the state's request to amend the information to include a reference to the statutorily mandated sentencing range for repeat offenders in 45-5-206(3) because of Gardipee's prior domestic abuse convictions. Following conviction, Gardipee appealed on grounds that allowing the amended information on the day of trial violated his substantial rights. The Supreme Court disagreed. The elements of the charged crime were not changed, and the only difference between the informations was the recognition that pursuant to the statute, a persistent offender was subject to an enhanced sentence for a third or subsequent conviction, so the amendment did not violate Gardipee's substantial rights. St. v. Gardipee, 2004 MT 250, 323 M 59, 98 P3d 305 (2004).

Differences Between Suspects in Photographs — Lineup Not Impermissibly Suggestive: A witness identified Baldwin in a photographic lineup, but Baldwin contended that the lineup was impermissibly suggestive because of numerous differences among the subjects in the photographs. The Supreme Court was not persuaded. Mere variations in appearance among photographs presented to a witness do not automatically invalidate an identification. St. v. Baldwin, 2003 MT 346, 318 M 489, 81 P3d 488 (2003), following U.S. v. Robertson, 606 F2d 853 (9th Cir. 1979).

One-on-One Showup Identification Impermissibly Suggestive — Witness Testimony Permissible Under Totality of Circumstances: Bingman sought to exclude the testimony of witnesses in a felony DUI trial on grounds that the witnesses' observation of Bingman through a two-way window at the police department was impermissibly suggestive, resulting in an unreliable identification. The suggestive nature of one-on-one showup identifications has been previously recognized. In St. v. Clark, 2000 MT 40, 298 M 300, 997 P2d 107 (2000), the Supreme Court set out a two-part test for determining whether evidence gained from such an identification is permissible. The

state conceded that the identification procedure was impermissibly suggestive, satisfying the first part of the Clark test. The second part of the test requires a determination of whether, under the totality of the circumstances, the identification gave rise to a substantial likelihood of irreparable misidentification. In this case, despite the impermissibly suggestive nature of the showup identification procedure, the certainty with which the witnesses identified Bingman outweighed the likelihood of misidentification, so the District Court did not err in allowing the witnesses' testimony. St. v. Bingman, 2002 MT 350, 313 M 376, 61 P3d 153 (2002).

Clarification of Harmless Error Analysis in Determining Whether Trial Court Error Resulted in Prejudice — Structural Error Versus Trial Error — Cumulative Evidence Test Versus Overwhelming Weight of Evidence Test: When determining whether trial court error has prejudiced a defendant, the Supreme Court has applied slightly different standards in various cases, resulting in some inconsistency and confusion over the proper test to be applied in a harmless error analysis. Over time, the "overwhelming weight of the evidence" test expressed in St. v. McKenzie, 186 M 481, 608 P2d 428 (1980) (affirmed in In re Petition of Brodniak v. St., 239 M 110, 779 P2d 71 (1989), and St. v. Fuhrmann, 278 M 396, 925 P2d 1162 (1996)), eclipsed the more substantive inquiry of whether erroneously admitted evidence might have contributed to a conviction, resulting in an inclination to simply tally the quantity of the admissible evidence of guilt instead of evaluating the qualitative impact that the inadmissible evidence might have had on the finder of fact—an approach that the court found unacceptable. In order to preserve the substantial rights of the accused and the fundamental fairness of the criminal trial and to provide consistent guidance to practitioners, the Supreme Court found it appropriate to formally adopt an approach to harmless error issues that first defined the type of error in question and that second, depending on the type of error, set a uniform standard against which the error must be analyzed to determine if the error was sufficiently prejudicial to warrant reversal, completing the analysis begun in St. v. Lamere, 2000 MT 45, 298 M 358, 2 P3d 204 (2000). The first step is to analyze whether the claimed error is structural error or trial error. Structural error is the type that affects the framework within which the trial proceeds, such as errors in jury selection, total deprivation of the right to counsel, and lack of an impartial judge, and is automatically reversible without additional analysis or review. Trial error is the type that typically occurs during presentation of the case to a jury. It is not presumptively prejudicial and is thus subject to harmless error review pursuant to 46-20-701. Once a convicted person raises and establishes that evidence was erroneously admitted and has alleged that there is a reasonable possibility that the evidence might have contributed to a conviction, the state must demonstrate that the error was not prejudicial. To determine whether that reasonable possibility exists, the Supreme Court abandoned the "overwhelming weight of the evidence" test in McKenzie, Brodniak, and Fuhrmann in favor of the "cumulative evidence" test set out in Harrington v. Calif., 395 US 250 (1969). In making its proof under the cumulative evidence standard, the state must show admissible evidence that proved the same facts as the tainted evidence and demonstrate that the quality of the tainted evidence was such that there was no possibility that it might have contributed to the conviction. If the only evidence tending to prove an element of the crime is tainted, then reversal will be compelled. If the tainted evidence does not go to the proof of an element of the crime and there is no other evidence that proves the same facts as the tainted evidence, then the tainted evidence will be considered harmless only if there is no possibility that it might have contributed to the conviction. In the present case, the trial court erred in admitting evidence related to Van Kirk's performance on a horizontal gaze nystagmus test; however, there was other admissible cumulative evidence that proved that same fact of Van Kirk's DUI as the tainted evidence, so Van Kirk's right to a fair trial was not prejudiced and the DUI conviction was affirmed. St. v. Van Kirk, 2001 MT 184, 306 M 215, 32 P3d 735 (2001), followed in St. v. Peplow, 2001 MT 253, 307 M 172, 36 P3d 922 (2001), St. v. Spang, 2002 MT 120, 310 M 52, 48 P3d 727 (2002), St. v. Weldele, 2003 MT 117, 315 M 452, 69 P3d 1162 (2003), St. v. Crawford, 2003 MT 118, 315 M 480, 68 P3d 848 (2003), St. v. Slavin, 2004 MT 76, 320 M 425, 87 P3d 495 (2004), St. v. Paoni, 2006 MT 26, 331 M 86, 128 P3d 1040 (2006), and St. v. Russette, 2008 MT 413, 347 M 285, 198 P3d 791 (2008). See also Swan v. St., 2006 MT 39, 331 M 188, 130 P3d 606 (2006), and St. v. Chavez-Villa, 2012 MT 250, 366 Mont. 519, 289 P.3d 113.

Failure to Object at Trial to Refusal to Allow Testimony of Additional Witnesses After Trial Commenced — No Interference With Constitutional Right to Present Defense: LaDue contended that failure to allow the testimony of two additional witnesses after the start of his trial on charges of attempted deliberate homicide interfered with his constitutional right to present a defense. However, LaDue did not raise the constitutional question at trial, thus failing to preserve the

issue for appeal. Failure to raise the issue at trial constituted waiver of the right to appeal it. St. v. LaDue, 2001 MT 47, 304 M 288, 20 P3d 775 (2001).

Postconviction Relief — Cumulative Error Doctrine Does Not Apply When There is No Error: Although cumulative error may serve as a basis for reversal, the court will not apply the doctrine when no errors have been shown. Kills On Top v. St., 2000 MT 340, 303 M 164, 15 P3d 422, 57 St. Rep. 1444 (2000).

Standard of Review — Not Error to Adopt Party's Proposed Findings and Conclusions: The Supreme Court reviews a District Court's denial of a petition for postconviction relief to determine whether the court's findings of fact are clearly erroneous and whether the court's conclusions of law are correct. There was no reversible error when the District Court essentially adopted the state's proposed findings of fact and conclusions of law. Kills On Top v. St., 2000 MT 340, 303 M 164, 15 P3d 422, 57 St. Rep. 1444 (2000).

No Prosecutorial Misconduct in Eliciting Facts to Aid Witness Recollection, Disclosing Prior Witness Conversations, or Offering Statements in Rebuttal Based on Testimony: Defendant alleged several instances of prosecutorial misconduct in his trial for sexual intercourse without consent and incest with his daughter. The prosecutor had instructed the daughter that the assault occurred in Montana rather than Idaho, thereby avoiding Duffy's challenge to Montana's jurisdiction. However, the prosecutor was not prohibited from discovering facts to aid the daughter's recollection of where the incident occurred and doing so was not misconduct. Duffy also contended that the prosecutor's questioning of a detective about a telephone call to Duffy was misconduct because the prosecutor did not disclose the conversation, but the trial court cured any potential for violating Duffy's substantial rights by instructing the jury to disregard the testimony and by refusing to give the prosecution's flight instruction that was the basis for that line of inquiry. Lastly, Duffy claimed misconduct when the prosecutor elicited testimony from the daughter regarding her desire to see Duffy convicted and then later reiterated that testimony during rebuttal. However, Duffy's own counsel opened the door for the testimony, and the prosecutor was then free to reexamine the daughter for the purpose of discovering the daughter's motive; therefore, the prosecutor's subsequent comments were not construed as misconduct warranting a mistrial. St. v. Duffy, 2000 MT 186, 300 M 381, 6 P3d 453, 57 St. Rep. 734 (2000), followed in St. v. Hayden, 2008 MT 274, 345 M 252, 190 P3d 1091 (2008). See also St. v. Berger, 1998 MT 170, 290 M 78, 964 P2d 725 (1998), and St. v. Soraich, 1999 MT 87, 294 M 175, 979 P2d 206 (1999).

Identification Procedure Impermissibly Suggestive — Motion In Limine to Suppress Witness's In-Court Identification Properly Denied — No Substantial Likelihood of Irreparable Misidentification: The witness stood by defendant's car for several minutes after an accident observing him for injuries and then left to get help when she saw that he appeared drunk and that there was a pistol on the car seat. When the witness and police returned, the defendant and pistol were gone. After many procedural delays and the suppression of evidence of defendant's driver's license taken from the car, the County Attorney's office sent a letter to the witness along with two photographs of defendant in jailhouse attire. The state affirmatively identified the person in the photos as defendant and asked the witness to notify the County Attorney's office if the photos didn't depict the person whom she saw in the car. Defendant's motion in limine to prohibit the witness's identification testimony was denied by the District Court. On appeal, the Supreme Court held that although the identification procedure was impermissibly suggestive, considering the totality of the circumstances, it did not create a substantial likelihood of misidentification and the motion was properly denied. St. v. Clark, 2000 MT 40, 298 M 300, 997 P2d 107, 57 St. Rep. 185 (2000).

No Error in Refusing to Dismiss Charges for Failure to Hold Timely Probable Cause Hearing: Brown was arrested on February 13, but no probable cause hearing was held until February 18. Brown moved for dismissal on due process grounds of failure to hold a probable cause hearing within 48 hours of arrest, citing County of Riverside v. McLaughlin, 500 US 44, 114 L Ed 2d 49, 111 S Ct 1161 (1991), but the dismissal motion was denied. Brown appealed. The Supreme Court pointed out that the question to be decided was not whether Brown was accorded a timely probable cause determination, but rather whether the District Court erred in refusing to dismiss the charges as a remedy for failure to hold a probable cause hearing. Dismissal of charges is not the correct remedy for failure to timely charge a person who was arrested without a warrant. Under St. v. Beach, 217 M 132, 705 P2d 94, 42 St. Rep. 1080 (1985), the proper remedy is the exclusion of evidence acquired as a result of the delay. The trial court did not err in refusing the motion to dismiss. St. v. Brown, 1999 MT 339, 297 M 427, 993 P2d 672, 56 St. Rep. 1346 (1999). See also St. v. Dieziger, 200 M 267, 650 P2d 800, 39 St. Rep. 1734 (1982).

Constitutional Right to Present Witnesses to Be Considered in Applying Sanction for Untimely Disclosure of Witnesses: Dezeeuw was charged by information with aggravated assault. His counsel failed to timely disclose witnesses and, as a result, was sanctioned by the District Court when the court refused to allow the testimony of one of Dezeeuw's witnesses who was an eye witness to the assault. The Supreme Court held that in determining whether the District Court abused its discretion in applying the severest of sanctions, Dezeeuw's right under this section to present witnesses in his behalf must be taken into consideration. The Supreme Court held that the District Court abused its discretion in applying the severest sanction, that Dezeeuw was prejudiced by the exclusion of his witness's testimony, and that Dezeeuw should therefore be given a new trial. St. v. Dezeeuw, 1999 MT 331, 297 M 379, 992 P2d 1276, 56 St. Rep. 1323 (1999).

Limitation to One Jury Trial Held Unconstitutional: In 1997, the Legislature enacted the provisions codified at 46-7-102(1)(g), 46-17-201(3), and 46-17-311(1), providing that a person tried for a misdemeanor in Justice's or City Court who appeals to the District Court has the right to only one jury trial. Woirhaye was charged with misdemeanor DUI and requested a jury trial in Missoula County Justice's Court. Upon his conviction by the Justice's Court jury, Woirhaye appealed to the District Court for a trial de novo pursuant to Art. VII, sec. 4(2), Mont. Const., and 46-17-311. Woirhaye asked that the District Court declare 46-17-201(3) unconstitutional, but the District Court denied his motion. Woirhaye then petitioned the Supreme Court for a writ of supervisory control, which was granted on the grounds that Woirhaye would otherwise be denied a fundamental right. The Supreme Court held that Woirhaye's right to a jury trial in both the Justice's Court or City Court and the District Court was a fundamental right guaranteed by Art. II, sec. 26, Mont. Const., and this section. The Supreme Court pointed out that the right to a jury trial is guaranteed by Art. III, sec. 2, clause 3, of the U.S. Constitution and the sixth amendment to the U.S. Constitution and also that even if that were not the case, Montana may, under the rationale of St. v. Bullock, 272 M 361, 901 P2d 61 (1995), provide rights in excess of those guaranteed by the U.S. Constitution. The Supreme Court noted, in response to the state's argument that this section guarantees "a" jury trial, that the state's argument was not persuasive against the language of Art. II, sec. 26, Mont. Const. The Supreme Court also distinguished Ludwig v. Mass., 427 US 618 (1976), holding that Art. VII, sec. 4(2), Mont. Const., was not implicated in the case, and stated that any language in N. Cent. Serv., Inc. v. Hafdahl, 191 M 440, 625 P2d 56 (1981), indicating that a requirement for a jury trial applicable to Small Claims Court was satisfied if the right was granted at the District Court level, was dicta and could not be relied upon to support the state's case that only one jury trial was required. Consequently, the Supreme Court held 46-7-102(1)(g), 46-17-201(3), and 46-17-311(1) to be unconstitutional as violating Woirhaye's right to a jury trial. Woirhaye v. District Court, 1998 MT 320, 292 M 185, 972 P2d 800, 55 St. Rep. 1298 (1998), followed in Balyeat Law, P.C. v. Harrison, 1999 MT 144, 295 M 13, 983 P2d 902, 56 St. Rep. 566 (1999), and followed and clarified in St. v. Rensvold, 2006 MT 146, 332 M 392, 139 P3d 154 (2006).

Prosecutor's Comments in Response to Defense Counsel's Opening Statement Not Prejudicial: Defense counsel told the jury in opening statements that a witness had made inconsistent statements, referring to a statement given to the investigator for the public defender's office. The investigator was never called, and the theory was not substantiated. The prosecutor referred to the theory in closing, noting that the defense had failed to present the evidence that defense counsel had referred to in opening. Although it is improper to comment on a criminal defendant's failure to testify, it is proper for a prosecutor to direct the jury's attention to facts in issue that could be controverted by persons other than the defendant. The prosecutor was entitled to comment on the theory suggested by defense counsel because the theory lacked evidentiary support. The District Court did not err in refusing to grant a mistrial on grounds of prosecutorial comments because the comments were plainly in response to defense counsel's opening statements. St. v. Soraich, 1999 MT 87, 294 M 175, 979 P2d 206, 56 St. Rep. 370 (1999).

Evidence of Habit Disallowed — No Denial of Due Process and Right to Defense — Unspecific Objection — No Impairment of Substantial Rights by Comment of District Court on Merits of Defense: Huerta was tried on charges of felony assault (now assault with a weapon) of a juvenile and attempted to present evidence that it was the habit of the juvenile's mother to punish him severely. The District Court prevented the evidence from going to the jury. Huerta claimed that the District Court had prevented Huerta from presenting his only defense and thereby prevented him from obtaining a fair trial, in violation of his right to due process under the fifth amendment to the U.S. Constitution and his right to a defense under the sixth amendment. The Supreme Court noted that the claim of denial of a constitutional right was made for the first time on

appeal and, citing St. v. Weeks, 270 M 63, 891 P2d 477 (1995), and St. v. Loh, 275 M 460, 914 P2d 592 (1996), held that Huerta had not made a specific enough objection when he objected at trial to a "miscarriage of justice". The Supreme Court also held that the District Court erred when it commented before the jury that "Brenda . . . is not on trial here". However, the Supreme Court held, as it noted that it had in St. v. Cassill, 71 M 274, 229 P 716 (1924), that under the circumstances, Huerta had received a fair trial and that his substantial rights were not prejudiced by the remark of the District Court. St. v. Huerta, 285 M 245, 947 P2d 283, 54 St. Rep. 1133 (1997).

Alleged Error Part of Defense Strategy — Trial Not Constitutionally Defective — Plain Error and Cumulative Error Doctrines Held Inapplicable: Hanson was charged with sexual assault of and deviate sexual conduct with his former girlfriend's son, Aaron. Hanson alleged that the testimony of his victim and certain witnesses was unreliable, that certain testimony was incorrectly presented on rebuttal, that the state introduced evidence of other acts in violation of both Rule 404(b), M.R.Ev. (Title 26, ch. 10), and his constitutional right to due process, that the state's cross-examination of him went too far, that he was improperly impeached by certain state evidence, and that the prosecutor incorrectly commented on the veracity of a witness. For these reasons, Hanson argued that he was deprived of a fair trial in violation of the constitutional guaranty of a fair trial and that the doctrines of plain error and cumulative error applied so as to require a new trial even though he had not objected to the evidence before the District Court. The Supreme Court reviewed the trial record and pointed out that Hanson either failed to object to testimony by Aaron, Aaron's therapist, and a Deputy Sheriff or he actually solicited their testimony himself in an effort to show their lack of credibility. The Supreme Court held, citing St. v. Campbell, 241 M 323, 787 P2d 329 (1990), and St. v. Finley, 276 M 126, 915 P2d 208 (1996), that the alleged errors did not rise to the level of a manifest miscarriage of justice, did not leave unsettled the question of the fundamental fairness of the trial, and did not compromise the integrity of the judicial system. Therefore, the court refused to invoke the plain or cumulative error doctrine to review issues raised for the first time on appeal. St. v. Hanson, 283 M 316, 940 P2d 1166, 54 St. Rep. 678 (1997). See also St. v. Hart, 2000 MT 332, 303 M 71, 15 P3d 917, 57 St. Rep. 1398 (2000), in which the Supreme Court refused to apply the plain error doctrine regarding the prosecutor's comments that defendant's presence in court while prosecution witnesses testified gave defendant an opportunity to fabricate answering testimony prior to taking the stand.

Amendment of Charge by Arguing Different, Similar Violation in Closing Argument: When the state, which charged defendant with violation of an August 4 restraining order, was allowed to argue in its closing argument that a September 18 restraining order was violated, a substantive amendment to the charge occurred. The court committed error because defendant has the due process right to know what to defend against. The charge of violating the August 4 restraining order should have been dismissed. St. v. Asmundson, 283 M 141, 940 P2d 104, 54 St. Rep. 535 (1997).

Lack of Evidentiary Hearing to Determine Whether Dissemination of Trial Information Would Jeopardize Trial Fairness — Media Involvement — "Pretrial Proceeding" Construed: The District Court did not conduct an evidentiary hearing or consider reasonable alternatives before issuing an order barring anyone involved in a criminal case from disseminating evidentiary information to the press or public and sealing evidentiary documents. The Missoulian newspaper sought to reverse the gag order. The Supreme Court, exercising supervisory control, applied the phrase "pretrial proceeding" in 46-11-701 to include all documents filed in conjunction with the pretrial process, regardless of whether the documents constitute records of a specific court hearing. Even though the gag order was entered with the consent of both counsel, that consent did not override the clear intent of 46-11-701 to balance the public's right to know with the defendant's right to a fair trial, a balancing that can only be accomplished by including the media in the decisionmaking process. Evidentiary materials filed with the court also fall within the public's constitutional right to know. Based on the District Court's failure to comply with 46-11-701, the Supreme Court reversed the order sealing court documents and remanded. State ex rel. The Missoulian v. District Court, 281 M 285, 933 P2d 829, 54 St. Rep. 175 (1997).

Participant Gag Order — Indirect Restraint of Media — Conditions for Issuance of Gag Order: A participant gag order is not as intrusive as a prior restraint upon publication or as intrusive as an order restricting news sources through closure of court proceedings or sealing of court documents, but instead constitutes an indirect restraint. A participant gag order does nevertheless impinge on the media's right to access news and the public's right to know. Prior restraints on publication consist of court-imposed restrictions that are directed at the media and interfere with the media's right to publish material already in its possession. Indirect restraints

of the media include, without limitation, restraints that are aimed at the media's ability to gather information or to access official proceedings but that do not intrude on the media's prerogative to publish or edit information already in its possession and include restraints that are not directed at the media but at the sources of information. When the rights of the accused to a fair trial are asserted, a gag order may issue only when the following conditions have been met: (1) the press and general public are given an opportunity to be heard on the question before issuance of the order; (2) the court describes what alternatives have been considered and explains why those alternatives cannot adequately protect the defendant's fair trial rights; (3) the order is narrowly tailored to protect the defendant's fair trial rights; and (4) the court has made specific findings that there is a substantial probability that fair trial rights will be prejudiced by publicity that the gag order would otherwise prevent. A participant gag order is subject to a heightened scrutiny analysis. State ex rel. The Missoulian v. District Court, 281 M 285, 933 P2d 829, 54 St. Rep. 175 (1997), following N.Y. Times Co. v. Sullivan, 376 US 254, 11 L Ed 2d 686, 84 S Ct 710 (1964), and distinguishing Great Falls Tribune v. District Court, 186 M 433, 608 P2d 116 (1980), and State ex rel. Smith v. District Court, 201 M 376, 654 P2d 982 (1982).

Identification of Defendant as Perpetrator — Necessity of In-Court Identification: It was not reversible error to refuse to dismiss on the ground that there was no in-court identification of defendant as the perpetrator. The method of identifying a defendant as the perpetrator is largely within the discretion of the trial judge. It was sufficient in this case that several police officers referred in their testimony to defendant as being the perpetrator. St. v. Stringer, 263 M 295, 868 P2d 588, 51 St. Rep. 63 (1994).

Dismissal for Failure to Charge Offense of Which Convicted — Reckless Driving Not Lesser Included Offense of DUI: Barker was charged with DUI but was convicted of reckless driving by the Ravalli County Justice of the Peace. Barker appealed to the District Court and filed a motion to dismiss, which the District Court granted. The Supreme Court affirmed, holding that the reckless driving charge and the DUI charge were inapposite charges and that reckless driving was not a lesser included offense of DUI. The Supreme Court also held that the conviction should be set aside because Barker did not have notice that he was charged with reckless driving, which violated Barker's constitutional right to due process. St. v. Barker, 260 M 85, 858 P2d 360, 50 St. Rep. 970 (1993).

No Prejudice in Prosecutor's Voir Dire Questioning — Failure to Request Cautionary Instruction or Mistrial: Defendant claimed that the prosecutor's questions to prospective jurors during voir dire in regard to the juror's potential discomfort in telling a group of people the details of a first sexual experience denied him a fair trial because he was not allowed to present any possible explanation for an incest victim's motives, biases, and prejudices other than defendant's guilt to the offense charged. The Supreme Court found no prejudice in the questions because the thrust of the comment was not to suggest that the alleged acts were the victim's first sexual experience but rather to elicit a response from the jury panel as to the potential difficulty of the victim to testify about the alleged acts of incest. Although defendant objected to the prosecutor's comment, he did not request the trial court to admonish the panel or give a cautionary instruction, nor did he request a mistrial. Under these circumstances, defendant was not denied a fair trial as a result of prosecutorial misconduct. St. v. Rhyne, 253 M 513, 833 P2d 1112, 49 St. Rep. 577 (1992). See also St. v. Hildreth, 267 M 423, 884 P2d 771, 51 St. Rep. 1086 (1994).

No Absolute Right to Counsel at Placement Hearing — Due Process: A delinquent youth was not denied due process when, pursuant to 41-5-523 (renumbered 41-5-1512), he was placed in a youth incarceration facility without an adversarial hearing to decide his placement. Beyond commitment of the youth by the Youth Court, the delinquent youth has no absolute right to counsel at the placement hearing. However, the youth is not without due process rights at the hearing stage. A youth placement committee created by 41-5-525 (renumbered 41-5-121) makes a recommendation to the Department of Family Services (now Department of Public Health and Human Services), which can accept or reject the recommendation under 41-5-527 (renumbered 41-5-123 and now repealed). In addition, the Youth Court can modify that decision if placement is not in the best interests of the child. In re Peterson, 235 M 313, 767 P2d 319, 46 St. Rep. 13 (1989).

Waiver of Jury Trial in Justice Court — Right to Jury Trial on Appeal: Defendant waived the right to jury trial in Justice Court and was convicted in a bench trial. It was his right, after making a timely request, to a trial by jury on appeal to the District Court. St. v. Bender, 232 M 424, 756 P2d 1157, 45 St. Rep. 1165 (1988).

Time of Attachment of Right: Under the sixth amendment to the U.S. Constitution, an arrestee incarcerated for traffic violations had no right to counsel or to be informed of the nature

of accusations against him during the 30 minutes he was incarcerated while police were in the process of booking him. Strandberg v. City of Helena, 791 F2d 744 (9th Cir. 1986).

Right of Access to Court Not Denied — Access to Legal Library: Appellant, accused of intimidation, proceeded pro se with his defense. Court-appointed counsel assisted him with legal research and allowed appellant use of his own Montana codes. The Sheriff at the county jail accommodated appellant's request to do research at the jail and prepare a brief. After conviction, appellant appealed on several grounds, one of them being that he was denied access to a substantial legal library. On appeal, the Supreme Court held that appellant was provided with more than adequate legal assistance during the short time he was incarcerated and that his right of access to the courts was not denied. The Supreme Court expressed no opinion on whether the constitutionally mandated requirement that prisons provide inmates with adequate legal libraries or some other reasonable alternative extends to persons awaiting trial while in county jails or whether it extends to nonindigents. St. v. Lance, 222 M 92, 721 P2d 1258, 43 St. Rep. 1086 (1986), followed in St. v. Mason, 253 M 419, 833 P2d 1058, 49 St. Rep. 506 (1992).

No Right of Defendant to Attend Pretrial Meeting of Prosecutor and Witnesses at Crime Scene: It was not a violation of due process of law or any other federal or state constitutional provision for the prosecutor to meet with witnesses to a shooting at the place of the shooting for the purpose of going over what the witnesses saw on the night of the shooting. St. v. Sage, 221 M 192, 717 P2d 1096, 43 St. Rep. 738 (1986).

Jury Instruction — Did Not Improperly Lessen State's Burden of Proof: When the jury was instructed separately on the burden of proof in a criminal case, it was not error for the court to give the following instruction: "The jury will always bear in mind that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence and no adverse inferences may be drawn from his failure to do so." St. v. Elliott, 221 M 174, 717 P2d 572, 43 St. Rep. 723 (1986).

Mere Allegations of Prejudice Insufficient to Satisfy Cumulative Error Doctrine: Defendant contended that the overall demeanor of the prosecution and the District Court, together with other alleged errors, required a reversal of his conviction; however, he articulated no particular comments or remarks and alleged no prejudice to his substantial rights. The Supreme Court has acknowledged the cumulative error doctrine, which is the accumulation of errors which prejudice a defendant's right to a fair trial, but noted that mere allegations of error without proof of prejudice are insufficient to satisfy the doctrine. The resolution of the alleged errors indicated no error meriting reversal of this case, and the court held that defendant failed to carry his burden of showing prejudice and declined to reverse his conviction on grounds of cumulative error. St. v. Grant, 221 M 122, 717 P2d 562, 43 St. Rep. 685 (1986). See also St. v. Hildreth, 267 M 423, 884 P2d 771, 51 St. Rep. 1086 (1994), St. v. Flowers, 2004 MT 37, 320 M 49, 86 P3d 3 (2004), and St. v. Kearney, 2005 MT 171, 327 M 485, 115 P3d 214 (2005).

No Right to Second Psychiatric Examination: Defendant was convicted of aggravated kidnapping and deliberate homicide, pursuant to pleas of guilty, and was sentenced to death. Judgment was affirmed by the Supreme Court. Subsequently, defendant filed a motion for an additional psychiatric evaluation based on the case of Ake v. Okla., 470 US 68, 84 L Ed 2d 53, 105 S Ct 1087 (1985), which was decided after arguments in defendant's case. The Supreme Court distinguished the facts of defendant's case from the facts in Ake and denied defendant's motion. The Supreme Court found that defendant had already been afforded his right to access to a competent psychiatrist for the preparation of a defense based on his mental condition and was not entitled to an additional psychiatric examination. The Ake decision lacks direct application to Montana's capital sentencing proceedings and defendant's case. St. v. Smith, 217 M 453, 705 P2d 1110, 42 St. Rep. 1348 (1985).

Delay in Initial Appearance — Exclusion of Confession: The defendant was arrested on a misdemeanor charge in Louisiana and incarcerated for several days before he was taken before a magistrate there for arraignment. Before he was arraigned he was questioned by Louisiana police concerning a murder which had occurred in Montana several years earlier. After being advised of his Miranda rights several times, the defendant confessed to the murder. At trial he moved to suppress evidence of his confession on the basis it was obtained after he was denied his right to be taken before a magistrate or judge to be arraigned on the misdemeanor charge and advised of his rights. The rule in this regard is the "McNabb-Mallory" rule, which has been adopted by the Montana Supreme Court and which requires the exclusion of any confession obtained as a result of unnecessary delay in the initial appearance. The test for determining whether the delay was unnecessary is set forth in St. v. Benbo, 174 M 252, 570 P2d 894, 34 St. Rep. 1140 (1977). Under Benbo, the defendant has the initial burden of showing the delay was unnecessary. If established,

the burden shifts to the prosecution to show that evidence obtained during the delay was not unreasonably related to the delay. In the present case the defendant has not established an unnecessary delay in arraignment, and even if it were assumed that there was such a delay, the prosecution has established the voluntariness of the defendant's statements by a preponderance of the evidence. The defendant's burden with regard to establishing an unnecessary delay is not met merely by establishing that the authorities could have presented him earlier. St. v. Beach, 217 M 132, 705 P2d 94, 42 St. Rep. 1080 (1985), followed in St. v. Brown, 1999 MT 339, 297 M 427, 993 P2d 672, 56 St. Rep. 1346 (1999).

Guilty Plea Withdrawal Requested on Petition to Revoke Suspension of Sentence — Denied: Order denying motion to withdraw guilty plea was affirmed when: (1) there was no evidence the plea was coerced; (2) the plea was apparently the result of a plea bargain; (3) at the time of the plea the judge interrogated defendant about nearly all the issues involved, such as voluntariness and competency; (4) his attorney at the time stated he was satisfied defendant was acting voluntarily; and (5) defendant did not promptly attempt to withdraw the plea, the attempt coming only when, 3 years after the plea was entered, he was in danger of having his suspended sentence revoked. St. v. Flamm, 215 M 466, 697 P2d 1371, 42 St. Rep. 547 (1985).

Evaluation of Likelihood of Misidentification: D.K. was forcibly raped at knife point in her home in Butte. After the rape, D.K. was shown photographic lineups, one of which contained a 1977 photo of defendant and the other a current picture of defendant. D.K. could not identify her attacker but showed interest in the photos of defendant. Defendant's photos were the only ones bearing the words "Police Dep't. Butte, Montana". At a physical lineup, D.K. immediately identified defendant as her attacker. The trial court granted defendant's motion to exclude the photo identification but denied motions to suppress evidence of the physical lineup or to prevent any in-court identification. On appeal, defendant contends that the photo lineups were impermissibly suggestive and tainted any later identification. The Supreme Court followed the two-pronged test of determining if the identification procedure was impermissibly suggestive and, if so, whether under the totality of the circumstances the procedure had a tendency to give rise to a likelihood of misidentification (St. v. Lara, 179 M 201, 587 P2d 930 (1978)). The court used the five factors set out in Neil v. Biggers, 409 US 188, 34 L Ed 2d 401, 93 S Ct 375 (1970), to evaluate the likelihood of misidentification. Considering the totality of the circumstances, the court did not find that the photo lineups gave rise to an "irreparable misidentification". St. v. Bauer, 210 M 298, 683 P2d 946, 41 St. Rep. 1066 (1984). The five-part Neil test was applied in St. v. Schoffner, 248 M 260, 811 P2d 548, 48 St. Rep. 424 (1991), St. v. Clark, 2000 MT 40, 298 M 300, 997 P2d 107, 57 St. Rep. 185 (2000), and St. v. Baldwin, 2003 MT 346, 318 M 489, 81 P3d 488 (2003).

Fundamental Fairness Required: Defendant was charged with sale of dangerous drugs (now criminal distribution of dangerous drugs). Defendant contended he had been entrapped because a paid informer had used persistent and harassing techniques over a period of a month and a half to induce defendant to obtain drugs for him. Defendant wished to present the testimony of Worley to show the informant's techniques. Worley claimed his fifth amendment right against self-incrimination and refused to answer questions regarding his connection with the informant. The trial court refused to grant Worley immunity and ruled his testimony irrelevant and immaterial. Defendant also attempted to use the testimony of Surman to show that the informant had used similar techniques before. The trial court ruled the testimony immaterial and irrelevant to the defense of entrapment. On appeal, the Supreme Court held that the testimony was relevant and admissible. The case was remanded for a new trial because defendant was denied his right to present a full and meaningful defense. The court analogized to Rule 404, Montana Rules of Evidence, which allows the introduction of evidence of other crimes in certain circumstances. The court held that fundamental fairness requires that the principle behind the rule must be equally available to show a plan or method of operation by a state informant. St. v. Chapman, 209 M 57, 679 P2d 1210, 41 St. Rep. 550 (1984).

Allegedly Exculpatory Evidence Not Produced by State — No Error: Defendant was convicted of felony theft and felony criminal mischief for the unauthorized cutting of Christmas trees on a section of land, section 35, owned by a paper company. Defendant did have permission to cut trees on an adjacent section, section 36, owned by the state of Montana. Defendant moved to dismiss the case on the grounds that the State had suppressed material or exculpatory evidence by selling most of the trees shortly after the incident. Defendant claimed that as a result of this sale, he had no evidence with which to prove that he had cut trees not on section 35, but rather on section 36. The District Court denied the dismissal motion, and the Supreme Court affirmed. The Supreme Court reasoned that defendant had not filed a motion to produce the trees until

5 months after the incident, long after the trees had been disposed of, that defendant had not shown that the evidence was exculpatory, and that, in any event, the paper company had had possession and control of the trees, not the State. St. v. Palmer, 207 M 152, 673 P2d 1234, 40 St. Rep. 1957 (1983).

Forfeiture Proceedings — No Violation of Defendant's Due Process Rights: In a proceeding under Title 44, ch. 12, defendant, in his answer to the State's notice of intent to institute forfeiture proceedings, admitted ownership of the vehicle but refused to respond to the allegations that it had been used in criminal activity. Hearing on the forfeiture was held after defendant had been sentenced and forfeiture was ordered. On appeal, defendant asserted that the requirement of Title 44, ch. 12, part 2, that the owner or claimant of seized property file an answer within 20 days of the State's notice was a violation of his right to due process. Defendant reasoned that the statute requires an unconstitutional choice to be made in the forfeiture proceeding, i.e., a defendant must choose either to give evidence that may be used against him in a criminal proceeding or to forfeit his property. The Supreme Court found that Title 44, ch. 12, part 2, does not require that a defendant incriminate himself in the answer and further found that this defendant had not done so. Therefore, the court ruled that the statutes are not facially unconstitutional. Neither was the statutes' application to defendant unconstitutional, since his forfeiture hearing was not held until after his sentencing. St. v. Baker, 205 M 244, 667 P2d 416, 40 St. Rep. 1244 (1983).

Theft — Burden on Defendant to Disprove Unlawful Possession or Prove Lawful Possession — Unconstitutional: Defendant was convicted of felony theft of an air compressor, which he contended he had rented from an unidentified party. On appeal, defendant contended that an instruction couched in the exact language of 45-6-304 (now repealed) was unconstitutional in that it created a rebuttable presumption placing a burden of persuasion on the defendant as to the effect of possession and that it undermined the "beyond a reasonable doubt" standard of proof in that it contained no time constraints nor was it limited to "exclusive possessions". The Supreme Court held 45-6-304 (now repealed) unconstitutional and held any instruction using the language of the statute to be prejudicial to a defendant. The court stated that the burden of proving every essential element of theft must always be on the State. Section 45-6-304 (now repealed) takes away the presumption of innocence and forces a defendant to testify by placing a burden on him to either disprove unlawful possession or prove lawful possession. The court set forth what it considered a proper instruction on the effect a jury may give to the unauthorized possession of stolen property. St. v. Kramp, 200 M 383, 651 P2d 614, 39 St. Rep. 1819 (1982), followed in St. v. Morigeau, 202 M 36, 656 P2d 185, 39 St. Rep. 2311 (1982).

Continuing Series of Offenses — Charge, Trial, and Conviction for Each Violation: Petitioner was charged in Justice's Court with violating 15-57-102 (now repealed) during a "calendar year" and on conviction was sentenced under 15-57-110 (now repealed), which provides that each day of a violation constitutes a separate offense punishable by a fine not to exceed $200. Petitioner was convicted, sentenced to pay a fine of $1,200, and upon refusal to pay the fine was incarcerated for contempt. Petitioner was granted a Writ of Habeas Corpus because the due process guarantee of this section prohibits sentencing a person for each separate offense unless he was charged, tried, and convicted for each such offense. Crane v. St., 200 M 280, 650 P2d 794, 39 St. Rep. 1743 (1982).

Out-of-Court Identification — One-Man Showup — Federal Habeas Corpus: A one-man showup out-of-court identification may be unnecessarily suggestive, thus violating federal due process rights, and through the doctrine of "fruit of the poisonous tree", corrupt subsequent in-court identification. Under the facts presented here, viewed under the standards enumerated in Neil v. Biggers, 409 US 188 (1972), the identification was reliable and as such did not violate defendant's federal due process rights. Jenkins v. Warrington, 530 F. Supp. 121, 39 St. Rep. 174 (D.C. Mont. 1982).

Habeas Corpus — Federal Fourth Amendment Collateral Attack: A prisoner's petition for federal habeas corpus predicated on a claim of unconstitutional search and seizure must be barred where a prisoner fails to assert that the state courts had denied him a full and fair opportunity to litigate his fourth amendment claim, and furthermore the petition must be denied where the record of state proceedings clearly indicates that the petitioner was given a full and fair opportunity to litigate the claim in state court. Jenkins v. Warrington, 530 F. Supp. 121, 39 St. Rep. 174 (D.C. Mont. 1982).

Jury Not Involved in Sentencing — Different Factors Required: Petitioner claimed he was denied constitutional rights because the jury was not involved in the sentencing determination; he was sentenced to hang. The factor of overriding importance in sentencing schemes is that the trial and sentencing must be bifurcated, with different factors considered at each. The factors

considered by a judge in imposing the death penalty are not elements of the crime. There is no constitutional requirement that a jury make the determination to impose the death penalty. Petitioner's claim was properly dismissed. Fitzpatrick v. St., 194 M 310, 638 P2d 1002, 38 St. Rep. 1448 (1981).

Death Sentence — Convicted to Show Mitigation — Requirement Constitutional: Petitioner, under a sentence of death, alleged error in that the burden in sentencing rests on him to show mitigation. The mitigating factors regarding the death penalty sentence have no bearing on guilt or innocence. It is permissible to allow facts pertinent only to the question of punishment to be determined by a judge rather than by a jury, and the state need not prove such facts beyond a reasonable doubt. Fitzpatrick v. St., 194 M 310, 638 P2d 1002, 38 St. Rep. 1448 (1981).

Preliminary Hearing — Defendant Not to Appear Handcuffed in Prison Clothes: Defendant claimed he was entitled to a new trial because the trial court refused his motion that he be permitted to attend his preliminary hearing without handcuffs and prison clothes. Although the Supreme Court found no prejudice in the case, they reminded trial courts of their duty to avoid potential prejudice caused by the appearance of a defendant. They urged trial courts to stop this practice and order custodial officials to bring defendants into court dressed in their own clothes without handcuffs. This is especially necessary since courts have been opened up to the news media. St. v. Rodriguez, 192 M 411, 628 P2d 280, 38 St. Rep. 578F (1981).

Voluntariness of Waiver of Rights of Accused — Findings and Conclusions Absent: Appeal was made from a conviction for sexual intercourse without consent and sexual assault. The defendant contended on appeal that he did not voluntarily and knowingly waive his Miranda rights and it was error for his statement to be used as evidence against him. In determining whether or not a confession should be suppressed, the trial judge must decide if it was voluntary. The Supreme Court said the determination of voluntariness turned solely on the credibility of the witnesses and deferred to the trial judge's finding of voluntariness supported by substantial credible evidence. It declined to substitute its judgment when there was substantial evidence to support the judge's determination. Although the judge did not enter specific facts and findings as is preferable, it was not reversible error in a suppression hearing. It was noted, too, that the defendant never asked that findings and conclusions be entered. St. v. Camitsch, 192 M 124, 626 P2d 1250, 38 St. Rep. 563 (1981).

Discovery Limited by Court — Witness' Bias a Jury Question: The defendant, convicted of theft in a holdup of a truckstop, appealed that the trial court had erred in refusing to allow discovery of the "rap sheet" of a suspected accomplice. Defendant argued on appeal that he was denied due process. The reviewing court disagreed, saying that unlike the defendant in the case this defendant relied upon, who was unable to make a record from which to argue the witness' bias or lack of impartiality because the witness' criminal record could not be presented to the jury, this defendant was permitted to fully present evidence of the criminal character and bias of the suspected accomplice. The jury was aware of the immunity bargain between the witness and the prosecution and of the witness' complicity in the truckstop theft. The trial court's denial of the defendant's motion was well within its discretion to control cross-examination. St. v. Dolan, 190 M 195, 620 P2d 355, 37 St. Rep. 1860 (1980).

Sentencing — Ineligibility for Parole or Furlough — Vagueness: Petitioners contend that 46-18-202(2) is invalid because it is too vague in defining the supposed offense. This section does not define an offense. It does not create a new offense, nor does it forbid or require the doing of an act. Its sole purpose is to permit a District Judge, in the course of ordinary sentencing, to determine that a defendant should serve his full sentence for the protection of society. Cavanaugh v. Crist, 189 M 274, 615 P2d 890, 37 St. Rep. 1461 (1980).

Sentence Enhanced — Defendant Not Sentenced for Crime Not Charged: Defendant was convicted of the crime of aggravated burglary with a weapon, and the charging document, while omitting any mention of additional sentencing under 46-18-221, did mention that he was armed with a knife while committing the crime and was sentenced under 46-18-221 for an additional 5 years for the use of the knife. The defendant was not sentenced for a crime with which he was not charged because 46-18-221 does not create a separate substantive offense but enhances the penalty for an underlying offense. The defendant was not denied due process due to the additional sentencing because the jury was instructed on the crime of aggravated burglary with a weapon and found him guilty of that crime. St. v. Davison, 188 M 432, 614 P2d 489 (1980).

Right to Fair Trial — Claim of Overzealous Prosecution: The record did not support defendant's claim that the cumulative effect of the actions of the prosecution, which according to the defendant included filing multiple counts, participating in pretrial publicity, resisting payment of appointed counsel, dismissing and refiling charges without notice to the defendant,

demanding documents from the defense, and withholding the names of witnesses, denied him his right to a fair trial. The issues present, if considered error, are not in any sense prejudicial. St. v. Bretz, 185 M 253, 605 P2d 974 (1979).

Circumstances Favoring Withdrawal of Guilty Plea: The defendant was not made aware of the differing elements of assault as set forth in 45-5-201 and 45-5-202, and the District Court had before it evidence indicating that defendant was under the influence of a combination of drugs and alcohol and was possibly suffering from mental distress or instability at the time of the alleged assault. Under those circumstances the judge should not have accepted defendant's guilty plea, and defendant should be allowed to withdraw the plea. St. v. Nelson, 184 M 491, 603 P2d 1050 (1979).

Denial of Motion for Continuance: In a prosecution for attempted deliberate homicide, the court did not err in denying defendant's motion for a continuance, in which defendant argued he was deprived of his right to effective counsel, due process, and time to prepare his case. Motions for continuance are directed to the sound discretion of the trial court, and the trial court will not be reversed absent a showing of prejudice to the movant, citing St. v. Paulson, 167 M 310, 538 P2d 339 (1975). As more than 2 months elapsed between the entry of defendant's plea and his motion for continuance and because he failed to show any prejudice, the motion was properly denied. St. v. Kirkland, 184 M 229, 602 P2d 586 (1979).

Recording Closing Arguments Does Not Deny Fair Trial: Defendant's right to a fair trial was not invaded or denied by the court's failure to prohibit the tape-recording by the audience of the State's closing arguments. St. v. McKenzie, 177 M 280, 581 P2d 1205 (1978).

Unfair Trial — Prosecutorial Misconduct: It is not the duty of the prosecuting attorney to make independent determinations concerning the admissibility of evidence once the court rules such evidence is inadmissible. Willful attempts by the prosecutor in this case to place excluded evidence before the jury resulted in a reversal of conviction because of its prejudicial effect. St. v. Bain, 176 M 23, 575 P2d 919 (1978).

Dismissal of Counts — Effect on Trial of Remaining Count: The State's failure to dismiss two of three counts of aggravated assault prior to beginning of trial when it knew the victim would not be present to testify did not constitute denial of a fair trial on the remaining count because evidence admitted was permissible circumstantial evidence easily separated from direct evidence introduced on the first count and the jury was duly admonished to ignore all evidence stricken upon dismissal of two counts. St. v. Bradford, 175 M 545, 575 P2d 83 (1978).

Failure to Call Witnesses Who Would Determine Truth: In an alleged felony theft the search for truth was less than vigorous by counsel, and the judge had a duty to sua sponte demand that a search for the truth be exhausted before the matter be decided. Failure to call witnesses enumerated by defendant who could help determine the truth denied defendant a fair trial and due process. St. v. Mickelson, 172 M 489, 565 P2d 308 (1977).

Hearing Constitutional Claims on Appeal: Although constitutional questions should be interposed as promptly as possible, unless there is substantial evidence of waiver, appeal of constitutional claims will be heard on their merits. Fitzpatrick v. Crist, 164 M 382, 528 P2d 1322 (1974).

DECISIONS UNDER 1889 CONSTITUTION

RIGHT TO APPEAR AND DEFEND IN PERSON

Motion for New Trial: Article III, sec. 16, 1889 Mont. Const., and former section requiring the presence of a defendant at trial do not require that the defendant be present at a hearing on a motion for a new trial because such a hearing is held after the verdict has been rendered and is not part of the trial. St. v. Peters, 146 M 188, 405 P2d 642 (1965).

Not Applicable to Matters of Law: A defendant's constitutional and statutory right to be present at trial does not encompass proceedings before the court involving matters of law but only where the jury is hearing his cause or where his presence is essential to a fair and just determination of a substantial issue. St. v. Peters, 146 M 188, 405 P2d 642 (1965).

Right to Be Present Throughout Trial: Under the constitutional and statutory provisions applicable, a defendant charged with crime must be present throughout the entire trial, including the rendition of the verdict, and the fact of his presence must be made to appear from the record. St. v. Reed, 65 M 51, 210 P 756 (1922).

RIGHT TO COUNSEL

Effective Counsel — Representation Adequate: Counsels' efforts were effective and client was adequately represented. Digiallonardo v. Betzer, 163 M 104, 515 P2d 705 (1973); St. v. Perry, 161 M 155, 505 P2d 113 (1973).

Denial of Continuance — Refusal to Cooperate With Appointed Attorney: Denial of continuance based on substitution of counsel was not an abuse of discretion or a denial of defendants' constitutional right to counsel when defendants had refused for 3 months to communicate with court-appointed counsel and first attempted to obtain alternate counsel on the day before trial. St. v. Spurlock, 161 M 388, 506 P2d 842 (1973).

Attempted Discharge of Court-Appointed Attorney Immediately Before Trial: When counsel appointed by court with defendant's approval effectively represented defendant for several weeks before trial, including securing postponements and filing of several motions, then defendant sought to discharge counsel the day before trial and have new counsel appointed, there was no denial of right to counsel in court's refusal to permit counsel to withdraw, thus forcing defendant to proceed to trial with appointed counsel. St. v. Forsness, 159 M 105, 495 P2d 176 (1972).

Effective Counsel — Defendant's Confidence: Effective counsel does not mean one in which the defendant has confidence. Success is not the test of efficient counsel; frequently neither vigor, zeal, nor skill can overcome the truth. St. v. Forsness, 159 M 105, 495 P2d 176 (1972), followed in St. v. Martz, 233 M 136, 760 P2d 65, 45 St. Rep. 1370 (1988).

No Right to Choice of Counsel: Indigent defendant's right to counsel does not encompass right to counsel of his choice. Unless there is good cause shown why the court's appointment should not have been made, indigent defendant must accept attorney selected by court or waive right to be represented by counsel. St. v. Forsness, 159 M 105, 495 P2d 176 (1972).

Conflict of Appointed Counsel: Defendant was charged with first-degree burglary and requested appointed counsel. The District Court appointed as counsel the former County Attorney who had prosecuted defendant for an earlier burglary that was part of the information being defended. Defendant was convicted. On appeal, the Supreme Court held that any error in appointing as counsel the attorney who had prosecuted defendant in the prior conviction charged in the information was corrected by the subsequent granting of a motion to vacate and set aside the conviction. St. v. Butler, 148 M 46, 417 P2d 100 (1966).

Questioning of Counsel's Tactics: The Supreme Court is reluctant to second-guess defense counsel or to speculate on alternative trial tactics, particularly when counsel is vastly experienced and of unquestioned reputation. St. v. Callaghan, 144 M 401, 396 P2d 821 (1964); Tomich v. St., 141 M 487, 379 P2d 114 (1963).

Appointed Counsel — Withdrawal of Plea: Defendant pleaded guilty to burglary and was sentenced by the judge. Defendant then argued that his plea was involuntary and that counsel be appointed for him to pursue his motion to withdraw the plea. The trial court denied the motion. The Supreme Court, relying on Douglas v. Calif., 372 US 353, 9 L Ed 2d 811, 83 S Ct 814 (1963), held that it was not error to refuse to assign an attorney to defendant to urge his written motion subsequent to his sentence. The court held that Douglas did not require appointment of counsel for any postconviction procedure other than the first appeal. St. v. Pelke, 143 M 262, 389 P2d 164 (1964).

Effective Counsel — Court Will Not Second-Guess Attorney: The strategy of counsel will not be second-guessed to determine what could have been done to achieve a possible but highly speculative result. For assistance to be ineffective, it must be so deficient as to render the trial a farce and a mockery. St. v. Noller, 142 M 35, 381 P2d 293 (1963).

Effective Counsel — Failure to Object to Prosecutor's Remarks: Failure of court-appointed counsel to object to certain remarks by the prosecutor was not alone sufficient to deprive defendant of due process under Art. III, sec. 16, 1889 Mont. Const., in the absence of a showing that counsel displayed such a lack of diligence and competence as to reduce the trial to a "farce or a sham". St. v. Noller, 142 M 35, 381 P2d 293 (1963).

Discharge of Appointed Counsel: When defendant charged with burglary was granted the services of court-appointed counsel, he did not have the right to discharge such counsel unless he was able to provide counsel at his own expense or desired to undertake his own defense. However, upon a proper showing, such counsel could be discharged by the court. Peters v. St., 139 M 634, 366 P2d 158 (1961).

Effective Counsel — Failure to Provide Record on Appeal: When court-appointed counsel failed to advise clerk's office as to what would be required for record on appeal from conviction of burglary and there was no record before the Supreme Court, defendant had been denied his

right to effective representation by counsel on his appeal. St. v. Bubnash, 139 M 517, 366 P2d 155 (1961).

Failure to File Timely Appeal: Although Supreme Court dismissed appeal because court-appointed counsel was late in filing notice of appeal, the court considered the questions presented on appeal because defendant had no voice in the appointment of counsel. St. v. Frodsham, 139 M 222, 362 P2d 413 (1961).

Appointed Counsel — Time for Preparation: A defendant is guaranteed counsel by appointment of the court if he cannot himself employ an attorney. It is equally the duty of the court to make the appointment of counsel effective, i.e., to give court-appointed counsel a reasonable time for the preparation of his case after he has been appointed. St. v. Blakeslee, 131 M 147, 306 P2d 1103 (1957).

Scope of Right to Counsel: The constitutional provision that one accused of crime shall have the right to appear by counsel, when applied to one imprisoned with reference to his right to consult with his attorney, does not guarantee to him the right of private consultation on matters not connected with a case pending against him; but when the accusation against him has ripened into a judgment of conviction and he becomes a ward of the state, he no longer possesses such constitutional right and is subject to all reasonable rules and regulations of the state prison. St. v. District Court, 85 M 215, 278 P 122 (1929).

RIGHT TO DEMAND NATURE AND CAUSE OF ACCUSATION

Sufficiency of Information: Information which charged defendant with an infamous crime against nature and also described the manner in which the crime was committed, which was an assault, did not leave the defendant in the dark as to the nature and cause of the accusation. In plain and concise language he was accused of the infamous crime against nature, which of necessity, like the crime of rape, involved an assault as a part of the act. St. v. McSloy, 127 M 265, 261 P2d 663 (1953).

Defendant Entitled to Bill of Particulars: Although there is no statute requiring the giving of a bill of particulars in a criminal case, the right to demand such exists, giving accused the right to demand the nature and cause of the accusation when the information fails to furnish the necessary particulars. State ex rel. Wong Sun v. District Court, 112 M 153, 113 P2d 996 (1941).

Declaration of Common Law: The guaranty contained in Art. III, sec. 16, 1889 Mont. Const., is declaratory of the common-law rule that no one shall be held to answer an information or indictment unless the crime be charged with precision and fullness, to the end that the defendant may have ample opportunity to make his defense and avail himself of his conviction or acquittal in a subsequent proceeding for the same offense. St. v. Wolf, 56 M 493, 185 P 556 (1919).

Information Need Not Allege or Describe Manner Offense Was Accomplished: In a prosecution under the statute for the infamous crime against nature, the right of the defendant to "demand the nature and cause of the accusation" has been accorded to him, even though the information fails to allege a description of the manner or means by which the offense was accomplished. St. v. Guerin, 51 M 250, 152 P 747 (1915).

Accusation Against Agent as Principal: The constitutional rights to demand the nature and cause of the accusation are not violated by the statute permitting an accusation against one as principal who is in fact an agent, for the reason that the old distinction between principal and accessory before the fact was merely arbitrary and "without existence in natural reason or the ordinary doctrines of the law". St. v. Geddes, 22 M 68, 55 P 919 (1899).

RIGHT TO CONFRONT WITNESSES

Testimony by Deposition Improper: Allowing testimony of purchasers in drug case to be presented by deposition was error where no subpoena had been issued for purchasers and they had appeared in state to testify at another trial 6 days after conclusion of accused's trial. St. v. LaCario, 163 M 511, 518 P2d 982 (1974).

Introduction of Deposition: Provision allowing for the taking of depositions did not violate Art. III, sec. 16, 1889 Mont. Const., which provided for the right to confrontation, and depositions taken under authority of that provision were admissible at trial upon a showing that the witness was either dead or not within the jurisdiction. Tooker v. St., 147 M 207, 410 P2d 923 (1966).

Right Not Absolute: The right to confrontation is not an absolute one. Tooker v. St., 147 M 207, 410 P2d 923 (1966).

Examination of Witnesses — Presentencing Procedure: When defendant pleaded guilty to grand larceny, the extent of his punishment should have been determined by the exercise of sound discretion on the part of the judge after the circumstances had been "presented by the

testimony of witnesses examined in open court". Kuhl v. District Court, 139 M 536, 366 P2d 347 (1961).

Reading Testimony Given at Prior Trial Improper:

On the second trial of a defendant the testimony of a state witness given at the first trial could not be read into evidence at the second trial since to do so would be to deprive the defendant of his right to meet a witness face to face. St. v. Piveral, 127 M 427, 265 P2d 969 (1954), overruled in St. v. Bouldin, 153 M 276, 456 P2d 830 (1969).

It was error for the court to allow the testimony of a witness at the first trial to be read into evidence at the second trial. It was the right of the defendant to have the jury see and observe the witness upon the witness stand. It was his right that the jury see how the witness acted while under direct and cross-examination. It was his right to have the jury judge the credibility of the witness from his appearance and manner while on the witness stand. St. v. Storm, 127 M 414, 265 P2d 971 (1954), overruled in St. v. Bouldin, 153 M 276, 456 P2d 830 (1969).

Concealing Names of Witnesses: Constitutional right to meet witnesses face to face and to demand nature and cause of accusation would be made ineffective if State can conceal names of its witnesses until day of trial. State ex rel. Porter v. District Court, 124 M 249, 220 P2d 1035 (1950).

Previous Knowledge of Witnesses: If, during the presentation of the case, the court accorded the defendant all the rights enumerated in Art. III, sec. 16, 1889 Mont. Const., and further guarded him against surprise by the introduction of evidence against him by the State which he could not meet or the effect of which he could not minimize, so far as this would have been possible by previous knowledge of the witnesses, he could not complain that the County Attorney failed to pursue the statute regarding the endorsing of the names of witnesses upon the information. St. v. McDonald, 51 M 1, 149 P 279 (1915).

Right to Face Witnesses — Not Absolute: That the right secured by Art. III, sec. 16, 1889 Mont. Const., to a person accused of crime to meet the witnesses against him face to face is not an absolute one is determined by Art. III, sec. 17, 1889 Mont. Const., wherein provision is made for taking and using the deposition of a witness in a criminal case. St. v. Vanella, 40 M 326, 106 P 364 (1910).

Admission of General Recollection of Testimony When Witness Unavailable Improper: The accused is entitled to meet the witnesses against him face to face, and it was error, when the prosecuting witness was not within the state, to admit in evidence the committing magistrate's general recollection of the testimony which such witness gave at the preliminary examination. St. v. Lee, 13 M 248, 33 P 690 (1893). See also St. v. Byers, 16 M 565, 41 P 708 (1895).

SPEEDY TRIAL

Only Delay Not Caused by Defendant to Be Counted: In determining whether right to speedy trial had been violated for purposes of Art. III, sec. 16, 1889 Mont. Const., and statute requiring dismissal of action if not brought to trial within 6 months after filing of information, court would count only days of delay which had not been caused by defendants, sum total of which was less than 6 months, notwithstanding that more than 6 months had passed since filing of informations. State ex rel. Thomas v. District Court, 151 M 1, 438 P2d 554 (1968).

Delay While Defendant in Prison: Under Art. III, sec. 16, 1889 Mont. Const., a convicted forger's right to a speedy trial was not violated by delaying the trial until the defendant had been paroled from the state prison. St. v. Miekle, 148 M 320, 420 P2d 155 (1966).

Legislative Implementation: Section providing for the discharge of one accused of crime unless trial is had within a stated time after filing of information or indictment was enacted to enforce the right to a speedy trial provided for by Art. III, sec. 16, 1889 Mont. Const., and constitutes a legislative construction or definition thereof and must be construed fairly to accomplish that end. St. v. McGowan, 113 M 591, 131 P2d 262 (1942).

Effect of Appeal on Right to Speedy Trial: When defendant was tried within a week after the offense was committed, Art. III, sec. 16, 1889 Mont. Const., was complied with, but when he appealed to the District Court for trial de novo, he did not have the benefit of section providing for dismissal of prosecution when not postponed on defendant's application if not brought to trial within 6 months. The section had no application under such facts. St. v. Schnell, 107 M 579, 88 P2d 19 (1939).

When Defendant's Duty to Ask for Speedy Trial: When one convicted in a Justice's Court of a misdemeanor appealed to the District Court and desired a more speedy trial than was accorded him, it was incumbent upon him to apply for it before he could avail himself of Art. III, sec. 16, 1889 Mont. Const. St. v. Schnell, 107 M 579, 88 P2d 19 (1939).

Right May Be Waived: The right to a speedy trial guaranteed by the Constitution to one accused of crime may be waived by him. St. v. Test, 65 M 134, 211 P 217 (1922).

Appeal of Order Granting New Trial: When, under a statute requiring that a defendant be brought to trial before the end of the second term of the court after the indictment was found, a defendant has been twice tried before the expiration of the second term after the filing of the information and the State prosecutes an appeal from an order granting him a new trial after a conviction on the second trial, which appeal was finally held to be unauthorized, and during the pendency of such appeal two terms elapsed without another trial, this is not a denial to the accused of the speedy trial guaranteed him by Art. III, sec. 16, 1889 Mont. Const. State ex rel. Northrup v. Conrow, 13 M 552, 35 P 240 (1893).

IMPARTIAL JURY

Increased Sentence for Prior Convictions: Section authorizing judges to consider and to determine validity of prior conviction before imposing sentence under increased sentence law does not unconstitutionally deprive accused of right to jury trial. Newman v. Estelle, 156 M 502, 484 P2d 276 (1971), certiorari denied, 404 US 966, 30 L Ed 2d 285, 92 S Ct 341 (1971).

Interference With Voir Dire and Opening Statement: Refusal of court to permit voir dire examination of prospective jurors on subjects related to defense of insanity, for which defendant had given notice, and denial to defendant of opportunity to make opening statement until after presentation of prosecution's case were improper interference with defendant's right to have jury consider his defense. St. v. Olson, 156 M 339, 480 P2d 822 (1971).

Denial of Motion for Change of Venue — Failure to Show Bias: District Court did not abuse its discretion in denying defendant's motion for change of venue with leave to renew after jury was selected, when affidavits and testimony were inconclusive as to existence of countywide bias and prejudice against defendant and motion was not renewed at time jury was selected. St. v. Logan, 156 M 48, 473 P2d 833 (1970).

Effect of Jury Instruction on Presumption of Innocence: Instruction that, while mere unexplained possession of stolen property was not sufficient to justify conviction, one found in possession of property that may have been stolen must explain such possession in order to remove effect of that fact as circumstance to be considered with other evidence pointing to guilt did not deprive defendant of presumption of innocence. St. v. Gray, 152 M 145, 447 P2d 475 (1968).

Pretrial Publicity on Codefendant — Change of Venue Not Required: Defendant was charged with first degree murder and kidnapping. The crime received widespread newspaper coverage. The codefendant entered a guilty plea, and his story was printed in the press. Defendant contended the pretrial publicity of the case prevented him from selecting an impartial jury. The Supreme Court stated that mere publication of a news story concerning a crime is not a deprivation of a constitutional right or ground for a change of venue. Defendant selected a jury without using all his peremptory challenges. Under these circumstances a change of venue was not required. St. v. Corliss, 150 M 40, 430 P2d 632 (1967).

Method of Impaneling Jury — Error: Method used by judge to impanel jury caused a systematic and calculated exclusion of noncity dwellers. St. v. Porter, 125 M 503, 242 P2d 984 (1952).

Injunction Against Criminal Acts: Section (since repealed) requiring the District Court upon conviction of a person for an offense against the prohibition act to enjoin such person perpetually from thereafter violating any of its provisions was void insofar as it authorized the issuance of injunction against the commission of offenses not denominated nuisances in the act. State ex rel. Stewart v. District Court, 77 M 361, 251 P 137 (1926).

Juror — Removed for Cause Absent Statutory Grounds: Although a statute professes to give all the grounds of challenging a juror for cause, the constitutional guaranty of an impartial jury cannot be destroyed by the Legislature's omission of grounds that clearly render the juror incompetent. St. v. Russell, 73 M 240, 235 P 712 (1925).

Effect of Legislative Provisions: The right to trial by an impartial jury is an unqualified one that it is beyond the power of the Legislature to curtail. Any provisions of the statutes that relate to the selection of a jury are to be understood as merely providing the means by which the constitutional guaranty may be exercised to the fullest extent. St. v. Brooks, 57 M 480, 188 P 942 (1920).

No Right to Object to Removal of Juror for Cause: In a criminal action the defendant cannot object that a particular juror was not allowed to sit in his case on a challenge for cause. St. v. Byrd, 41 M 585, 111 P 407 (1910).

Jury to Determine Guilt: When defendant in a prosecution for murder pleads "not guilty", an instruction to the jury to the effect that it could find him guilty of murder in either of its degrees or of voluntary or involuntary manslaughter, but "you cannot find him not guilty," is in contravention of defendant's constitutional right to have the question of his guilt or innocence determined by a jury, of which right he cannot be deprived. St. v. Koch, 33 M 490, 85 P 272 (1905). See also St. v. Sloan, 35 M 367, 89 P 829 (1907); State ex rel. Rowe v. District Court, 44 M 318, 119 P 1103 (1911).

Right to Jury in Misdemeanor Cases: The constitutional guaranty that in all criminal prosecutions the accused shall have the right to trial by jury includes misdemeanors as well as felonies. St. v. Koch, 33 M 490, 85 P 272 (1905).

All Jurors to Be Impartial: One accused of crime is guaranteed the right to "a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed". An impartial jury must be composed of 12 impartial men. A number less than that will not suffice. If one of the jurors is incompetent because of actual bias entertained by him against the accused and conceals such incompetency on his voir dire, this vitiates the jury as a whole. St. v. Mott, 29 M 292, 74 P 728 (1903).

VENUE

Error in Denial of Defendant's Change of Venue Motion: Court erred in refusing to grant defendant a change of venue where evidence disclosed that local newspapers had fanned the feeling of the community against the defendant and that county officials themselves felt that the feeling against the defendant was so high that they moved him for safety to the state prison. St. v. Dryman, 127 M 579, 269 P2d 796 (1954), followed in St. v. Kingman, 2011 MT 269, 362 Mont. 330, 264 P.3d 1104.

Indirect Evidence: While indirect methods of establishing venue in criminal cases is not approved, when there was evidence that the offense occurred in Whitefish, it sufficiently established that the offense was committed in Flathead County. St. v. Williams, 122 M 279, 202 P2d 245 (1949).

Publication of Seditious Article: Proof of the charge in the information that defendant published the seditious article mentioned herein, in a certain county, was indispensable to give the court of such county jurisdiction to try the cause. St. v. Smith, 57 M 563, 190 P 107 (1920).

"District" Defined: The word "district", as used in the provision declaring that in criminal prosecutions the accused shall be tried by a jury from the "county or district in which the offense is alleged to have been committed", is not synonymous with the term "township" but means the precise portion of the territory or political division of the state over which a court may exercise power in criminal matters. St. v. O'Brien, 35 M 482, 90 P 514 (1907).

Trial by Peers: The design of Art. III, sec. 16, 1889 Mont. Const., is to guarantee to every person charged with a crime a trial by jury from the vicinage or neighborhood where the crime is supposed to have been committed so that he may have the benefit, on his trial, of his own good character and standing with his neighbors, if these he has preserved, and also of such knowledge as the jury may possess of the witnesses who may give evidence against him. St. v. O'Brien, 35 M 482, 90 P 514 (1907).

Charge to Show Venue: The local jurisdiction of the crime is the county where it is committed, and the charge must show that fact. The defendant is entitled to know the cause of the accusation so that he may prepare his defense. St. v. Beesskove, 34 M 41, 85 P 376 (1906).

County Where Offense Committed: Criminal actions must be tried in the county where the offense was committed. St. v. Tully, 31 M 365, 78 P 760 (1904).

MISCELLANEOUS

Right to Introduce Evidence: In a murder prosecution the court properly refused to permit the defendant to introduce the results of a lie-detector test given 5 1/2 months after the crime to which it referred. St. v. Hollywood, 138 M 561, 358 P2d 437 (1960).

"Criminal Prosecutions" Defined: The term "criminal prosecutions", as employed in Art. III, sec. 16, 1889 Mont. Const., refers to prosecutions for offenses which were crimes at common law and doubtless to statutory offenses. State ex rel. Payne v. District Court, 53 M 350, 165 P 294 (1917).

Right to Public Trial: When, in a prosecution for rape, the court made an order that on account of the nature of the case no one should be allowed in the courtroom in addition to those then present, and those present, after once leaving, could not return, court officers, doctors, attorneys, and newspapermen being excluded from the order, the enforcement of such order was a denial of the right to a public trial. St. v. Keeler, 52 M 205, 156 P 1080 (1916).

"Trial" Defined: The word "trial", as used in Art. III, sec. 16, 1889 Mont. Const., embraces all proceedings in the progress of a criminal prosecution after the issues are made up, down to and including the rendition of the verdict. St. v. Koch, 33 M 490, 85 P 272 (1905).

Applicable Only to Criminal Cases: Since a disbarment proceeding is not a criminal prosecution, Art. III, sec. 16, 1889 Mont. Const., is inapplicable, and depositions can be taken on the application of the Attorney General. In re Wellcome, 23 M 259, 58 P 711 (1899).

Attorney General's Opinions

Duty of Mental Health Professional to Inform Involuntarily Committed Patient of Rights: A certified professional person has knowledge of a detainee's rights and the law requiring notice of those rights. Therefore, a mental health professional examining a person under a petition for involuntary commitment must determine whether the person has been informed of his rights and, if not, inform him of those rights. 43 A.G. Op. 64 (1990).

Right to Assistance of Counsel in Misdemeanor Cases: Indigent defendants must be furnished counsel in all misdemeanor cases except those in which the judge has weighed the seriousness and gravity of the offense and precludes any imprisonment upon conviction and informs the defendant of this before the trial. Should counsel be appointed, costs and attorney fees are borne by the appropriate governmental unit or agency pursuant to 46-8-201 (now repealed). 37 A.G. Op. 36 (1977), followed in St. v. Skurdal, 235 M 291, 767 P2d 304, 45 St. Rep. 2394 (1988).

Coroner's Inquest Not a Trial or Criminal Proceeding: A witness at a Coroner's inquest may be accompanied and advised by counsel; however, this counsel does not have the right to participate in the inquest or cross-examine other witnesses or to comment on the Coroner's instructions to the jury, as a Coroner's inquest is not a trial involving the merits but rather a preliminary investigation as no criminal consequences necessarily follow a Coroner's inquest. Any subsequent criminal proceeding is brought independently by the County Attorney. 36 A.G. Op. 49 (1976).

Law Review Articles

"The Mother of All Balancing Tests": State v. Ariegwe and Montana's Revised Speedy Trial Analysis, Braccio & Lundberg, 69 Mont. L. Rev. 463 (2008).

State v. Whitlow and Ineffective Counsel: No Record, Foreshadowing the Record, and Making a Record, Harkin, 63 Mont. L. Rev. 373 (2002).

Face to Face: The Crime Lab Exception of Rule 803(8) of the Montana Rules of Evidence and the Montana Confrontation Clause, Weilhammer, 60 Mont. L. Rev. 167 (1999).

Fair Trial and Free Press: The Courtroom Door Swings Open, Carey, 45 Mont. L. Rev. 323 (1984).

Criminal Procedure: The Legal Mechanics After Arrest and Investigation, Kirscher, 40 Mont. L. Rev. 151 (1979).

Criminal Procedure—Montana Law and the Federal Impact, Elison, 38 Mont. L. Rev. 27 (1977).

The Right to Effective Trial Counsel: State v. McElveen, Ostby, 37 Mont. L. Rev. 387 (1976).

Discovery in the Federal Criminal System, Kampfe & Dostal, 36 Mont. L. Rev. 189 (1975).

Argersinger v. Hamlin: A Demand for Change in Administration of Criminal Justice, Fetscher, 35 Mont. L. Rev. 151 (1974).

Waiver of Fourth Amendment Rights by the Accused, Dye, 31 Mont. L. Rev. 57 (1969).

Industrial Security Clearance and Individual Freedom, Beighle, Dalthorp, & Shanahan, 19 Mont. L. Rev. 121 (1958).

"Coram Nobis"—Is it Either an Available or the Most Satisfactory Post-Conviction Remedy to Test Constitutionality in Criminal Proceedings?, Briggs, 17 Mont. L. Rev. 160 (1956).

Section 25. Self-incrimination and double jeopardy.

Convention Notes

Revises 1889 constitution by protecting a person from being tried for the same crime by both this state and the United States or another state.

Compiler's Comments

Former Constitutional Provision: This section is similar to Art. III, sec. 18, 1889 Mont. Const.

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DECISIONS UNDER 1972 CONSTITUTION

SELF-INCRIMINATION

Criminal Defendant's Submission of Affidavit at Evidentiary Hearing — Waiver of Right to Remain Silent: After the defendant was found guilty of DUI per se, fourth offense, which is a felony, the defendant moved to dismiss the felony or, alternatively, to amend the charge to a misdemeanor DUI, arguing that a previous DUI conviction was constitutionally infirm because she was not informed of her right to counsel if she could not afford one. The District Court held an evidentiary hearing on the motion at which the only evidence the defendant presented was her affidavit. The state then called the defendant to testify, which the defendant objected to on the basis that she had a right to remain silent. The District Court overruled the objection, concluding the state had a right to cross-examine the defendant because she had submitted the affidavit in support of her motion, which was effectively testimony. On appeal, the Supreme Court affirmed, concluding that the defendant's submission of the affidavit waived her right to remain silent. The defendant could not submit an affidavit without being subject to cross-examination as to the contents of the affidavit. St. v. Johnson, 2015 MT 221, 380 Mont. 198, 356 P.3d 438.

Use of Confidential Treatment Court Information to Charge Felony Drug Offenses — Violation of Right Against Self-Incrimination: While the defendant was a participant in Treatment Court, he had a positive drug test. Subsequently, the defendant provided incriminating information in three interviews with the Treatment Court probation officer, believing that he had to be honest to comply with Treatment Court requirements and fearing that he would receive sanctions if he refused to answer questions. Based on incriminating information obtained in the interviews, the defendant was charged with distribution of dangerous drugs and possession of dangerous drugs. The District Court denied the defendant's motions to suppress and dismiss. On appeal, the Supreme Court reversed, concluding that the state violated Treatment Court confidentiality by disclosing the incriminating information to law enforcement in order to investigate new drug offenses and that the defendant's right against self-incrimination was violated when he was compelled to provide the incriminating information or face sanctions or discharge from Treatment Court. St. v. Plouffe, 2014 MT 183, 375 Mont. 429, 329 P.3d 1255.

Confession Involuntary — False Direct or Implied Promises of Immunity: While in custody for another crime, the defendant agreed to discuss a murder he witnessed in exchange for the promise of immunity. The county attorney, in a letter to the defendant, declined to agree to immunity for the murder. On several occasions, however, the investigating officer indicated to the defendant that he had immunity and defendant was convicted of felony murder based on statements made while under this belief. Eventually, the Supreme Court held that the confession was involuntary, based on the misleading representations from the investigating officer. St. v. Old-Horn, 2014 MT 161, 375 Mont. 310, 328 P.3d 638.

Miranda Warning Not Required Before Gathering of Nontestimonial Evidence: The District Court concluded that the officer's failure to give the defendant a Miranda warning immediately after her arrest required the suppression of all evidence subsequently obtained, including results of the HGN test, field sobriety tests, and the Intoxilyzer test and other nontestimonial evidence gathered at the jail. The Supreme Court reversed, concluding that a Miranda warning is required only prior to a custodial interrogation and that the nontestimonial evidence should not have been suppressed because that evidence is real and objective and is not protected by the right against self-incrimination. St. v. Kelm, 2013 MT 115, 370 Mont. 61, 300 P.3d 687.

Invocation of Right to Remain Silent — Standard: The same standards apply for determining when an accused has invoked the Miranda right to remain silent and the Miranda right to counsel. In invoking the right to remain silent, a suspect must articulate the suspect's desire to remain silent sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request to not speak with the police. St. v. Nixon, 2013 MT 81, 369 Mont. 359, 298 P.3d 408.

Fundamental Right to Testify: J.S.W. asked to testify at her involuntary commitment hearing. The District Court stated that it would allow her to testify for 3 minutes but subsequently did not cut her off and encouraged additional questioning. The Supreme Court acknowledged a fundamental right to testify in one's own behalf but declined to apply plain error review in this case, since J.S.W. could show no error to review. In re J.S.W., 2013 MT 34, 369 Mont. 12, 303 P.3d 741, following Rock v. Ark., 483 US 44 (1987).

Defendant's Pre-Miranda Statements Not Suppressed — Defendant Chose to Engage Police Spontaneously — District Court Affirmed: The defendant was convicted of partner or family

member assault on his sister. He filed a motion to suppress statements he made to police officers when they arrived at his home shortly after the incident. Although he conceded that his initial statements to the police were spontaneous, he argued that everything he stated after the police officers began asking questions should be suppressed because he had not received a Miranda warning. The District Court denied the motion to suppress, ruling that at the time he made the statements, the defendant was not considered to be "in custody" according to the six factors identified in State v. Lacey, 2009 MT 62, 349 Mont. 371, 204 P.3d 1192. Because the defendant was not "in custody", a Miranda warning was not required. On appeal, the Supreme Court affirmed, holding that the recorded conversation with the police demonstrated that the defendant chose to engage the officers and that the police had not used any threatening language. St. v. Labbe, 2012 MT 76, 364 Mont. 415, 276 P.3d 848.

Joinder Affirmed — No Prejudice in Denial of Motion to Sever: Following the defendant's convictions of burglary and criminal possession of dangerous drugs, the defendant appealed, challenging the District Court's denial of his motion to sever three counts of burglary and one count of criminal possession of dangerous drugs for which he was charged on the basis that the denial prejudiced his right to a fair trial; allowed for the introduction of inadmissible evidence; and eliminated his right to testify as to one count while remaining silent to the other. The Supreme Court affirmed, concluding the counts were properly joined because the burglary and drug charges were linked by a common motive; the limited evidence admitted did not demonstrate that the defendant was guilty of other crimes and the defendant failed to demonstrate that the evidence would have been inadmissible at separate trials; and the defendant's right against self-incrimination was not exploited because he did not attempt to testify, nor did he specifically inform the District Court that he intended to testify as to one count but not to another. St. v. Kirk, 2011 MT 314, 363 Mont. 102, 266 P.3d 1262.

Sentence Affirmed — No Improper Consideration of Defendant's Refusal to Admit Guilt: The defendant argued that the District Court's imposition of sentence violated the defendant's right against self-incrimination because two witnesses for the state testified during sentencing that the defendant continued to deny molesting the victim. The Supreme Court concluded that the record did not support the defendant's argument that the sentence was improperly based upon the defendant's exercise of the right against self-incrimination and refusal to take responsibility for the crime, noting the state's witnesses did not suggest that the defendant be punished for not admitting to the crime but, instead, testified that the defendant's denial posed risks to the victim and barriers to treatment. St. v. Howard, 2011 MT 246, 362 Mont. 196, 265 P.3d 606.

Miranda Waiver Upheld — Absence of Unequivocal Request for Attorney and Involuntariness: The defendant moved to suppress statements he made in a police interview on the basis that an officer had conducted a custodial interrogation without providing Miranda warnings, during which the defendant had unequivocally requested an attorney, and that the defendant was too intoxicated to voluntarily waive his right to an attorney. The Supreme Court upheld the District Court's denial of the motion. The defendant's request to call his mother to call his attorney was insufficient to constitute an unequivocal request. In addition, while intoxication is one factor to consider in the totality of the circumstances as to whether a waiver was voluntary, it was clear in this case that the defendant's waiver was voluntary. St. v. Main, 2011 MT 123, 360 Mont. 470, 255 P.3d 1240, followed in St. v. Nixon, 2013 MT 81, 369 Mont. 359, 298 P.3d 408.

No Custody or Interrogation — Miranda Warning Not Required for Public Roadside DUI Investigation: A Miranda warning is not required during a roadside DUI investigation if brief public investigative encounters, even if somewhat coercive, do not constitute a custody and if the request for a field sobriety test is done without interrogation. St. v. Larson, 2010 MT 236, 358 Mont. 156, 243 P.3d 1130.

Appeal Raising Unconstitutional Self-Incrimination — Motion to Amend Judgment Subject to Normal Time Limits: Parrish was required to complete Phase II of the sex offender treatment program at Montana State Prison but argued that fulfilling the program requirement for disclosing his past criminal history was a violation of his constitutional right against self-incrimination. He petitioned the District Court for modification of his sentence, but the petition was denied as untimely. The Supreme Court held that the same time limitations for review of a judgment by a District Court applied to Parrish's petition to the District Court notwithstanding that Parrish had raised a constitutional issue concerning his sentence, those time limitations being the ones set forth in 46-18-116, 46-21-102, and Rule 4(5)(b)(i), M.R. App. P. Parrish filed his motion to amend judgment more than a year after the time for appeal to the Supreme Court had expired. St. v. Parrish, 2010 MT 196, 357 Mont. 375, 239 P.3d 957.

Proper Jury Instruction Regarding Defendant's Lack of Right to Attorney During Field Sobriety Tests: During a traffic stop, Stanczak was asked to perform field sobriety tests. The District Court instructed the jury in Stanczak's DUI trial that because there was no custodial interrogation, Stanczak had no right to counsel before completing the tests. On appeal, the Supreme Court affirmed the instruction as a full and fair instruction on the applicable law. St. v. Stanczak, 2010 MT 106, 356 Mont. 263, 232 P.3d 896.

Right to Counsel During Custodial Interrogation Distinguished From Right After Criminal Proceedings Initiated — No Violation of Right to Counsel Absent Unambiguous Request: Scheffer waived his Miranda rights and, after being interviewed, was arrested for sexual intercourse without consent. Scheffer contended that evidence from the interrogation should be suppressed because he requested but did not receive counsel during the interrogation. However, the requests were ambiguous when read in context, and a reasonable officer in light of the circumstances would not have understood Scheffer to be requesting an attorney. The right to counsel under Art. II, sec. 24, Mont. Const., attaches when adversarial criminal proceedings have begun. However, the right to counsel during a custodial interrogation under Art. II, sec. 25, Mont. Const., attaches when the defendant makes an unambiguous request for counsel. Here, Scheffer's motion to suppress was properly denied because formal proceedings had not begun and because the request for counsel was ambiguous. St. v. Scheffer, 2010 MT 73, 355 Mont. 523, 230 P.3d 462.

Prosecutor's Repeated and Deliberate Use of Defendant's Invocation of Right to Silence — New Trial Warranted: During Wagner's trial for attempted deliberate homicide, the prosecutor repeatedly and deliberately used Wagner's invocation of the right to silence as evidence of Wagner's guilt. The prosecutor also referenced Wagner's failure to tell his version of events until trial and raised as further evidence of Wagner's guilt the fact that Wagner had requested to speak with an attorney and, after invoking his Miranda rights, had commented that he didn't want to dig himself a deeper hole. The Supreme Court found that Wagner's request to speak with an attorney and the comment that Wagner didn't want to dig himself a deeper hole were in fact an invocation of Wagner's right to remain silent. The prosecutor's conduct raised questions regarding the fundamental fairness of the trial by violating Wagner's right to due process and privilege against self-incrimination, constituting plain error, and the Supreme Court concluded that the constitutional violations entitled Wagner to a new trial. The case was reversed. St. v. Wagner, 2009 MT 256, 352 M 1, 215 P3d 20 (2009), following Doyle v. Ohio, 426 US 610 (1976). See also St. v. Sullivan, 280 M 25, 927 P2d 1033 (1996).

Evidence That Statements Freely Given, Not Compelled — Defendant's Right to Remain Silent Not Infringed — Mosley Standard: Morrisey was detained when officers served search warrants. The officers read Morrisey his Miranda rights prior to interrogation. When informed that he had the right to remain silent, Morrisey stated, "Yeah, I will." When told that anything he said could and would be used against him, Morrisey replied, "I ain't saying nothing." When informed that he had the right to an attorney and whether he understood that if he chose to answer questions he had the right to stop answering questions at any time, Morrisey answered, "Yes, got it." The officers then conversed with and questioned Morrisey for the next 3 to 4 hours, during which time Morrisey made incriminating statements. At trial for deliberate homicide, Morrisey moved to suppress the statements and evidence recovered as a result of the statements, but the motion was denied. On appeal, Morrisey maintained that his right to remain silent was violated during the interrogation and that the motion to suppress should have been granted. The Supreme Court recognized Morrisey's right against self-incrimination protected by due process and the totality of the circumstances test, as well as the Miranda doctrine. The court noted that under Oregon v. Elstad, 470 US 298 (1985), failure to give the prescribed warnings prior to questioning does not constitute actual coercion, but rather creates a bright-line legal presumption of coercion that is irrebuttable for purposes of the prosecution's case-in-chief. In this case, Morrisey did not contend that he did not receive Miranda warnings prior to questioning, but rather that officers failed to honor his assertion of the right to remain silent. The court, however, cited the standard in Michigan v. Mosley, 423 US 96 (1975), that the admissibility of statements obtained after a person in custody has decided to remain silent depends under Miranda on whether the person's right to cut off questioning was scrupulously honored. Morrisey was clearly in custody and also clearly invoked the right to silence but then willingly engaged in a running conversation with the officers, giving statements freely, voluntarily, and without compulsion, yet without invoking the right to cut off questioning. Therefore, under the Miranda-Mosley theory, Morrisey's right to remain silent was not infringed, and he was not entitled to suppression of the incriminating statements. The District Court was affirmed. St. v. Morrisey, 2009 MT 201, 351 M 144, 214 P3d 708 (2009), followed in St. v. Nixon, 2013 MT 81, 369 Mont. 359, 298 P.3d 408.

Sentencing Court's Consideration of Defendant's Background Information, Including Self-Reported Incidents of Sexual Contact With Children — No Error: While in sexual offender treatment, Hill admitted sexual contact with 12 or 13 other children. The District Court subsequently considered the self-reported acts in a psychosexual evaluation, which Hill maintained was a violation of the right against self-incrimination. The Supreme Court disagreed. In a classic penalty situation where an accused cannot elect to exercise the right to remain silent because of the possibility of substantial penalties if the person chooses not to speak, the state is prevented from using the compelled statements in later criminal proceedings. However, Hill was not in a classic penalty situation, but rather in a classic plea bargain situation. By consent decree, the state offered Hill treatment in exchange for an admission of misdemeanor assault and an agreement to undergo treatment. Hill was not faced with penalties by refusing to reveal prior sexual contacts, and the consent decree was never revoked even though Hill violated it. Absent a classic penalty situation, Hill's right against self-incrimination was not violated by the District Court's consideration of Hill's character, history, mental and physical condition, and background, including the self-reported acts in the psychosexual evaluation. St. v. Hill, 2009 MT 134, 350 M 296, 207 P3d 307 (2009). See also St. v. Fuller, 276 M 155, 915 P2d 809 (1996), and In re R.L.H., 2005 MT 177, 327 M 520, 116 P3d 791 (2005).

Waiver of Rights and Confession Voluntary Despite Defendant's Emotional State — Motion to Suppress Testimonial Evidence Properly Denied When Defendant Advised of Miranda Rights: Lacey was advised of his Miranda rights prior to interrogation and subsequently confessed to felony sexual intercourse without consent and sexual assault. Lacey moved to suppress the testimonial evidence on grounds that he was under intense emotional distress when waiving his rights, so the confession was not voluntary, but the trial court denied the motion. On appeal, the Supreme Court examined the totality of the circumstances and affirmed. In this case, the interrogation was clearly custodial in nature, but when a custodial interrogation has occurred and a subject has been properly informed of the Miranda rights, those rights against self-incrimination may be waived by a waiver that is made voluntarily, knowingly, and intelligently. A defendant may move to suppress a confession on grounds that it was involuntary, which focuses on the factual inquiry of whether the confession was the product of free choice or compulsion. Lacey contended that the confession could not be voluntary because of the extreme emotional distress, but there was no indication that officers took advantage of that emotional state to manipulate Lacey and coerce the confession, so the confession was voluntary. Lacey was properly advised of his Miranda rights and knowingly and intelligently waived those rights, so the denial of the motion to suppress the confession was not error. St. v. Lacey, 2009 MT 62, 349 M 371, 204 P3d 1192 (2009).

Failure of Defendant to Admit Incest — Sentence Not Considered More Harsh Given Relevant Sentencing Factors: Bullman consistently maintained that he was not guilty of incest with his stepdaughter because he was never married to her mother. Because Bullman refused to admit guilt and was thus ineligible for community-based treatment, he asserted that he was sentenced more harshly by being sentenced to prison. The Supreme Court examined the record and disagreed. The sentencing court was aware of the prohibition against sentencing a defendant to prison because the defendant does not admit guilt, but the court also considered numerous other relevant factors in sentencing Bullman to prison in addition to the expert opinion that Bullman was not a candidate for community-based treatment, including: (1) the significant impact of the crime on the victim; (2) the need to protect society; (3) Bullman's need for appropriate treatment; (4) Bullman's criminal history; and (5) Bullman's long history of substance abuse. Given these sentencing factors, the Supreme Court could not conclude that Bullman was sentenced to prison for failure to admit guilt, and the conviction was affirmed. St. v. Bullman, 2009 MT 37, 349 M 228, 203 P3d 768 (2009).

Arrested Driver's Refusal of Breath Test Nontestimonial Conduct: Because the refusal of a driver to take a breath test is nontestimonial conduct, the constitutional prohibition against self-incrimination is not implicated. St. v. Slade, 2008 MT 341, 346 M 271, 194 P3d 677, (2008).

Requirement for Annual Polygraph Test as Condition of Suspended Sentence Not Unlawful — Use of Test Results in Punishment Prohibited: As a condition of Hameline's suspended sentence the District Court required Hameline to undergo an annual polygraph test. Hameline objected on grounds that the condition was illegal because polygraph results are not admissible in Montana court proceedings and on grounds that requiring the test violated the constitutional right against self-incrimination. The Supreme Court reiterated the complete prohibition against the direct or indirect use of polygraph results in court proceedings, while noting that requiring a person to undergo a polygraph test is not in itself illegal, so requiring a polygraph test for other purposes is not prohibited. The court also held that the right against self-incrimination did not prevent the

District Court from compelling Hameline to undergo a polygraph test, but the right did prevent the state from using information gleaned from the test to punish Hameline. St. v. Hameline, 2008 MT 241, 344 M 461, 188 P3d 1052 (2008), followed in St. v. Smart, 2009 MT 1, 348 M 274, 201 P3d 123 (2009). See also St. v. Heddings, 2008 MT 402, 347 M 169, 198 P3d 242 (2008).

Sufficient Proof of Miranda Warning Despite Failure of Recording Equipment — Denial of Motion to Suppress Statements Proper: Following Gittens' arrest, officers attempted to memorialize the reading of Gittens' Miranda rights, but the camera equipment failed to record any audio. At trial, Gittens moved to suppress all statements that he made after the arrest on grounds that, absent recorded proof, he had not been properly informed of his Miranda rights. The trial court denied the motion, and Gittens appealed, but the Supreme Court affirmed. Pursuant to St. v. Grey, 274 M 206, 907 P2d 951 (1995), officers should preserve a tangible record of the giving and waiver of Miranda rights when the means to do so are readily available, but the lack of a tangible record does not mandate suppression of a detainee's statements. Rather, this is simply one factor that weighs against the state in proving its burden. The proper inquiry is whether, based on all available evidence, the state met its burden of proving that the officer read the detainee the Miranda rights and whether those rights were waived. In this case, two officers testified that they had made a good faith effort to preserve a record of the reading and waiver, that one officer read the Miranda rights off of a card while the other officer observed, that Gittens verbally waived the rights and never indicated that he wished to avail himself of those rights, and that if the officers had known that the audio equipment was nonfunctional, they would have had Gittens sign a written acknowledgment and waiver. The trial court weighed the testimony of Gittens and the officers and found the officers more credible. The Supreme Court declined to disturb the trial court's decision that the state met its burden of proving that Gittens was properly advised of his rights despite the lack of a tangible record. St. v. Gittens, 2008 MT 55, 341 M 450, 178 P3d 91 (2008).

Suspect Interrogated in Home Without Miranda Warning — Motion to Suppress Improperly Denied: Following a lead of methamphetamine use at Munson's home, detectives went to the home and, without giving Munson a Miranda warning, questioned Munson for 1 3/4 hours before Munson confessed to possessing methamphetamine paraphernalia. Munson was arrested for criminal possession of dangerous drugs and paraphernalia, and at trial, Munson moved to suppress the evidence and statements made to the officers, but the motion was denied. On appeal, the Supreme Court reversed. The officers created a custodial atmosphere, and Munson's freedom of action was significantly restricted. Under the totality of the circumstances, a reasonable person in Munson's position would not have felt free to terminate the interview and leave or to ask the officers to leave, so for purposes of Miranda, Munson was in custody and subjected to an interrogation. Therefore, failure of the officers to give Munson a Miranda warning rendered Munson's statements inadmissible. Because Munson's consent to a search was not given freely and without duress or coercion, all evidence seized under the guise of consent was also inadmissible. St. v. Munson, 2007 MT 222, 339 M 68, 169 P3d 364 (2007), following St. v. Osteen, 216 M 258, 700 P2d 188 (1985), and St. v. Rushton, 264 M 248, 870 P2d 1355 (1994).

Right Against Self-Incrimination Not Violated When Admitting Guilt Not Requirement of Sexual Offender Course: Osborne's suspended sentence was revoked for failure to complete a sexual offender course following imprisonment for sexual intercourse without consent. Citing St. v. Imlay, 249 M 82, 813 P2d 979 (1991), Osborne asserted that the course violated his right against self-incrimination because the course required him to admit guilt of sexual intercourse without consent. The Supreme Court distinguished Imlay and disagreed. Imlay's sexual offender course required Imlay to admit guilt, while Osborne's course was specifically tailored for offenders who did not admit guilt. In addition, Imlay followed all the other conditions of parole, but Osborne did not. Thus, Osborne's right against self-incrimination was not violated, and revocation of Osborne's suspended sentence for failure to complete the sexual offender course was affirmed. St. v. Osborne, 2007 MT 217, 339 M 45, 167 P3d 405 (2007).

Custodial Interrogation of Youth Without Consent — Miranda Warning Required — Suppression of Confession and Withdrawal of Guilty Plea Required: A 14-year-old boy's mother called his school, reported that he had not returned home the previous night, and requested that he be picked up. The school resource officer notified police and asked that the boy be brought to school if found. An officer later found the boy on the street smelling of alcohol and took the boy to the police station where it was discovered that several town businesses had been burglarized during the night, including a bowling alley where money and liquor had been stolen. Although there was no record that the youth was advised of his Miranda rights, during interrogation both prior to and after arrival of his parents, the youth confessed to robbing the bowling alley and

subsequently pleaded guilty to felony burglary. The Youth Court summarily determined that the confessions were voluntary, denied a motion to suppress, found the youth was delinquent, and ordered 2 years' probation. On appeal, the Supreme Court addressed the voluntariness of the confessions and reversed. Given the absence of a tangible record that the officer read Miranda rights to the youth or that the youth or the parents consented in writing to a waiver of Miranda rights or agreed to the interview, the requirement in 41-5-331 that a youth be advised of the right against self-incrimination and the right to counsel was violated. Thus, the confessions could not be considered voluntary and should have been suppressed by the Youth Court. The Supreme Court also ordered that on remand, the youth be allowed to withdraw the guilty plea In re Z.M., 2007 MT 122, 337 M 278, 160 P3d 490 (2007).

Sentence Based Upon Lack of Remorse Inferred From Silence Not Legal Sentence: Rennaker was found guilty of incest after defending against the charge by asserting consent and that the victim was 20 years old at the time of the offense. When Rennaker was found guilty and asked at his sentencing hearing if he had anything to say and he replied that he did not, the District Court found that silence indicated Rennaker's lack of remorse and sentenced Rennaker to a term in the state prison. The Supreme Court, citing St. v. Shreves, 2002 MT 333, 313 M 252, 60 P3d 991 (2002), and St. v. Cesnik, 2005 MT 257, 329 M 63, 122 P3d 456 (2005), held that because the District Court did not tie Rennaker's apparent lack of remorse to any evidence or statement by him, but rather inferred it from Rennaker's silence, the District Court violated Rennaker's right against self-incrimination. The Supreme Court remanded the case for resentencing. St. v. Rennaker, 2007 MT 10, 335 M 274, 150 P3d 960 (2007). See also St. v. Garcia, 2011 MT 130, 360 Mont. 537, 254 P.3d 589.

No Clear Comment on or Infringement of Defendant's Right to Remain Silent — Plain Error Doctrine Not Invoked: Upshaw claimed that the testimony of a detective at trial regarding Upshaw's decision to exercise the right to remain silent violated the right to due process and the privilege against self-incrimination and that pursuant to Doyle v. Ohio, 426 US 610 (1976), the Supreme Court should invoke the plain error doctrine and reverse the conviction. The state asserted that the prosecutor did not commit a Doyle error by eliciting testimony of Upshaw's post-Miranda silence, but rather that the evidence came from a nonresponsive answer by the detective and that the prosecution did not deliberately seek to put the evidence before the jury or use the evidence to impeach Upshaw. The Supreme Court examined the record and determined that the brief comment on Upshaw's silence was confined to a minor portion of the detective's testimony and that the prosecutor did not pursue the issue, use the testimony to impeach Upshaw, or refer to the testimony in cross-examination or closing. To be plain, an error should firmly convince a person that the prosecutor's comments created an inference for the jury that, by remaining silent, Upshaw must be guilty. However, in this case, there was no such firm conviction. Thus, the court declined to invoke the plain error doctrine because there was no clear comment on or infringement of Upshaw's right to remain silent. St. v. Upshaw, 2006 MT 341, 335 M 162, 153 P3d 579 (2006), following St. v. Godfrey, 2004 MT 197, 322 M 254, 95 P3d 166 (2004).

Alleged Error Must Be Plain to Trigger Plain Error Review: English argued that the Supreme Court should apply plain error review to consider whether certain trial testimony violated English's constitutional right to remain silent. However, English could not point to how the allegedly offensive testimony affected the fairness of the trial or resulted in a miscarriage of justice, especially because part of the testimony was elicited by English's own counsel, who had the opportunity to object to any erroneous testimony but declined to so do. A fundamental aspect of the plain error doctrine is that the alleged error must be plain. In this case, if there was any error, it was not plain, and the Supreme Court declined to invoke the doctrine to address English's constitutional issues. St. v. English, 2006 MT 177, 333 M 23, 140 P3d 454 (2006).

Broad Right to Counsel During Custodial Interrogation — Limited Right to Counsel for Police Procedure Not Involving Verbal Inquiry: When first interviewed, Buck was asked to provide a fingernail scraping, but Buck requested a lawyer, and the interview was concluded. During a subsequent interrogation, Buck confessed to an assault without requesting a lawyer. Buck asserted that the confession should be suppressed because the request for a lawyer made during the first interview was not honored during the subsequent interrogation, but the suppression motion was denied. On appeal, Buck also contended that he was not educated in constitutional law sufficiently to distinguish between the right to counsel as it applied to the two different procedures. The Supreme Court noted that the right to counsel in custodial interrogation is broad enough that it may be invoked in certain circumstances by a vague statement that does not include a reference to a lawyer, but it is not so broad that it may be invoked by a request that is unambiguously linked to another police procedure. A suspect may seek legal assistance for only

limited purposes in dealing with law enforcement, and a suspect's request for counsel that is unambiguously limited to a police procedure that does not involve verbal inquiry does not invoke the right to counsel in custodial interrogation. Buck's request for counsel was unambiguously limited to the search incident to the fingernail scraping and did not extend to the subsequent custodial interrogation, nor did Buck establish error related to an inability to understand the request for counsel in two different contexts. Denial of the suppression motion was affirmed. St. v. Buck, 2006 MT 81, 331 M 517, 134 P3d 53 (2006), following Conn. v. Barrett, 479 US 523 (1987), and overruling St. v. Johnson, 221 M 503, 719 P2d 1248 (1986), and St. v. Spang, 2002 MT 120, 310 M 52, 48 P3d 727 (2002), to the extent that those cases held that the right to counsel for self-incrimination purposes may be invoked in custodial interrogation.

Boot Camp Confessions — No Classic Penalty Situation Compelling Self-Incriminating Statements: Woods volunteered for boot camp. A qualification for successful completion of the camp was full disclosure of past crimes in order to receive a sentence reduction. Unsuccessful completion of boot camp required a return to prison. In an anger management class at boot camp and later to several other persons, Woods made self-incriminating statements regarding a prior double homicide, and Woods was subsequently arrested based on the statements. Woods asserted that he received ineffective assistance of counsel because his attorney failed to raise the classic penalty situation to explain that use of his statements were violative of his right against self-incrimination. The Supreme Court noted that the classic penalty situation did not apply because Woods volunteered for boot camp and volunteered the statements. However, the statements were uncoerced, so the information upon which the state relied for its homicide investigation was not compelled by any threat of penalty from the state, and because no classic penalty situation existed, Woods could not argue ineffective assistance of counsel for failing to argue that it did. Woods did not invoke self-incrimination protection at boot camp, and the privilege against self-incrimination could not be considered self-executing. Thus, Woods's petition for postconviction relief was properly denied. St. v. Woods, 2005 MT 186, 328 M 54, 117 P3d 152 (2005), following St. v. Fuller, 276 M 155, 915 P2d 809 (1996), and distinguishing Robbins v. St., 2002 MT 116, 310 M 10, 50 P3d 134 (2002).

Use of Youth's Voluntary Confession of Drug Use in Subsequent Probation Violation Proceedings Not Error: A youth admitted that she had used methamphetamine, as part of an agreement with the County Attorney and in exchange for a recommendation that the youth be placed in a drug treatment program. When the youth violated the terms of her probation, the confession of prior drug use was admitted into evidence. The youth contended that the self-incriminating statement was inadmissible because the youth was not informed that the statement could later be used against her if she violated probation. The Supreme Court declined to reverse the Youth Court's disposition simply because the youth was not advised that the admission could be used later and instead noted that if the confession was voluntary and not coerced, it could properly be used at a later trial for drug possession. Further, under In re C.L., 2004 MT 71, 320 M 369, 87 P3d 462 (2004), the fact that an admission is voluntary is all that is required for a confession to be admissible in a Youth Court proceeding. In this case, the youth was not placed in a position in which she was coerced into waiving the right against self-incrimination by a threat of penalty, but rather voluntarily admitted drug use as a condition of sentencing to a drug treatment program in a manner similar to a plea bargain agreement. Thus, the Youth Court did not err in allowing the youth's admission into evidence and in taking judicial notice of the youth's waiver of the right against self-incrimination. In re R.L.H., 2005 MT 177, 327 M 520, 116 P3d 791 (2005).

Refusal to Admit Guilt During Treatment for Sexual Offense to Which Defendant Pleaded Guilty — No Deprivation of Right Against Self-Incrimination: Van Haele was incarcerated for sex crimes to which he pleaded guilty, and part of the sentence required Van Haele to follow a treatment plan. However, Van Haele refused to participate in sex offender treatment on grounds that to do so would require him to admit guilt in violation of the constitutional right against self-incrimination. However, there was no question either of compelling Van Haele to disclose the commission of sexual offenses for which he was not charged or of using any compelled disclosures against him. Rather, Van Haele persisted in refusing to admit guilt during treatment for offenses to which he previously pleaded guilty, so he was not deprived of the right against self-incrimination. St. v. Van Haele, 2005 MT 153, 327 M 400, 114 P3d 225 (2005), distinguishing St. v. Imlay, 249 M 82, 813 P2d 979 (1991), and St. v. Fuller, 276 M 155, 915 P2d 809 (1996).

Error for Prosecutor to Comment on Defendant's Post-Miranda Silence Regardless When Warning Given: Following arrest on sexual assault and attempted sexual intercourse without consent charges, Godfrey received an acknowledgment of rights form from his attorney. Godfrey initialed the form and subsequently went over the form with the District Court during his initial

appearance. Godfrey later complained that the state prosecutor violated Godfrey's due process rights by commenting at trial on Godfrey's silence, in violation of Doyle v. Ohio, 426 US 610 (1976). The state contended that because Godfrey did not have his Miranda rights read to him by a police officer at the time of arrest, Doyle did not apply. The Supreme Court found the state's argument to be without merit and declined to distinguish between a situation when a defendant is advised of the right to remain silent by an arresting officer and a situation when a defendant is advised of the right by a court, or to distinguish between an oral warning and a written form. However, in this case, Godfrey's counsel did not object to the prosecutor's comments at trial, so the court had to decide whether the trial error was sufficiently prejudicial to trigger plain error review. After reviewing the record, the court concluded that it was not plain that the prosecutor's comments had created an inference for the jury that by remaining silent, Godfrey must have been guilty. Absent a clear comment on or infringement of Godfrey's fundamental right to remain silent and absent a contemporaneous objection by Godfrey's counsel to the prosecutor's comments, the conviction was affirmed. St. v. Godfrey, 2004 MT 197, 322 M 254, 95 P3d 166 (2004). See also St. v. Finley, 276 M 126, 915 P2d 208 (1996), and St. v. Sullivan, 280 M 25, 927 P2d 1033 (1996).

Lack of Remorse Not Sole Sentence Enhancement Factor — Incest Sentence Affirmed: Defendant contended that the sentencing court erred in augmenting a sentence for incest simply because defendant did not show remorse or admit guilt. The Supreme Court noted that St. v. Shreves, 2002 MT 333, 313 M 252, 60 P3d 991 (2002), prohibits enhancement of a sentence solely because a defendant is not remorseful or refuses to be accountable for the defendant's conduct. However, in this case, the sentencing court did not rely solely on defendant's attitude in enhancing the incest sentence but also considered defendant's risk of reoffending, risk to society, prospects for rehabilitation, character, background, history, and mental and physical functioning. Thus, Shreves was distinguishable, and the sentence was affirmed. St. v. J.C., 2004 MT 75, 320 M 411, 87 P3d 501 (2004).

Lack of Advisement of Right to Counsel and Right Against Self-Incrimination for Youth Taken Into Custody for Questioning Reversible Error — When Waiver of Rights Attaches: A youth was questioned at the Sheriff's office regarding a burglary and criminal mischief and was then taken home, where he agreed to relinquish articles of clothing that were not inconsistent with evidence found at the crime scene. The youth's parents were not notified of any of the Sheriff's actions, and no omnibus hearing was held. The youth's clothing was later introduced at trial over the youth's objection. Following conviction, the youth appealed, contending that the clothing was not legally obtained pursuant to a search warrant, that he was not advised of his rights, and that he did not give an informed waiver of his right to have his parents contacted prior to relinquishment of the clothing. The state maintained that the youth voluntarily consented to relinquish the clothing and thus waived his rights. The Supreme Court reversed. Under the Montana Youth Court Act, a youth taken into custody for questioning on a matter that could result in allegations that the youth is delinquent must be advised of the right to counsel and the right against self-incrimination, and the youth's parents must be immediately notified by the investigating officer. A youth who is 16 years of age or older may make an effective waiver of those rights. In determining whether waiver and consent by juveniles are voluntary, the Supreme Court applies the totality of circumstances test set out in Evans v. District Court, 2000 MT 38, 298 M 279, 995 P2d 455 (2000), which provides that a determination of voluntariness takes into account: (1) the defendant's age and level of education; (2) whether the defendant was advised of the defendant's rights; (3) the defendant's prior experience with the criminal justice system; (4) the defendant's background and experience; and (5) the defendant's demeanor, coherence, articulateness, and capacity to make full use of the defendant's faculties. Here, the District Court failed to take the Evans factors into account, and the requirements of 41-5-331 regarding parental notification were not fulfilled. Failure to follow statutory requirements and to consider the totality of the circumstances was reversible error. In re C.T.P., 2004 MT 63, 320 M 279, 87 P3d 399 (2004).

Plain Error in Allowing Youth's Extrajudicial Statements When Youth Not Advised of Right to Counsel and Right Against Self-Incrimination: A youth asserted for the first time on appeal that the Youth Court improperly admitted extrajudicial statements that the youth made regarding the youth's whereabouts when a burglary and criminal mischief were committed. Despite the state's contention that the arguments should not be considered because they were not raised at trial, the Supreme Court nevertheless considered the argument under the plain error doctrine because the youth was not notified while in custody of the fundamental right to counsel and the right to avoid self-incrimination, nor were the youth's parents notified as required. The youth's rights under the Montana Youth Court Act and the constitution were simply ignored in this case, so in order to avoid a question of the fundamental fairness of the trial by admission of

constitutionally infirm extrajudicial statements, the Supreme Court reversed the trial court's decision to admit the statements. In re C.T.P., 2004 MT 63, 320 M 279, 87 P3d 399 (2004).

Noncustodial Statements to Law Enforcement — Motion to Suppress Improperly Granted: The District Court granted Reavley's motion to suppress a statement made to law enforcement at the police station on grounds that the police: (1) gave mere lip service to Miranda warnings; (2) did not respond to Reavley's inquiry about a need for counsel; (3) used psychological coercion by implying that Reavley would receive leniency if he confessed to the crime; (4) made repeated religious references; (5) falsely told Reavley that a hypnotist was on the way; and (6) lied about DNA evidence that did not exist. The Supreme Court's review of the record did not support the findings. In examining whether the statement was voluntary, the Supreme Court applied the factors in St. v. Olson, 2003 MT 61, 314 M 402, 66 P3d 297 (2003), to determine whether Reavley was subjected to a custodial interrogation, and all the factors weighed in favor of the state. Reavley was not in custody when he was questioned by the police, so a Miranda warning was not required when questioning began. Officers did not use threats or violence or otherwise act improperly during the interview. At no time did Reavley make a clear, unambiguous, and unequivocal request for counsel, and he was free to leave the station at any time. Based on these facts, the motion to suppress the statement was improperly granted, and the District Court was reversed. St. v. Reavley, 2003 MT 298, 318 M 150, 79 P3d 270 (2003), distinguishing St. v. Grey, 274 M 206, 907 P2d 951 (1995).

Voluntariness of Statements Made to Officers Responding to Emergency Call — Admissibility of Statements Not Made During Custodial Interrogation: Officers responded to an emergency 9-1-1 domestic violence call at Saxton's home and discovered a marijuana growing operation in the home. Saxton contended that statements made to the officers should be suppressed because the statements were not voluntary and because no Miranda warning was given. The trial court disagreed, and the Supreme Court affirmed. Although the state may not use confessions or admissions obtained through custodial interrogations without proper Miranda warnings, in this case, the officer's conversation with Saxton was not considered a custodial interrogation within the context of Miranda because Saxton was not restrained in any way and was told repeatedly that she was free to leave and because Saxton's statements regarding ownership of the marijuana were offered voluntarily. St. v. Saxton, 2003 MT 105, 315 M 315, 68 P3d 721 (2003).

Confession a Result of Exploitation of Unlawful Arrest — Miranda Warning Insufficient to Negate Cumulative Effect of Circumstances Leading to Confession: Officers had insufficient probable cause to arrest Van Dort, resulting in an unlawful arrest, and the Supreme Court then considered whether Van Dort's subsequent confession was legitimate. The state maintained that because Van Dort was given Miranda warnings, the confession should be admissible. Van Dort averred that the Miranda warnings alone were insufficient to sever the causal connection between the confession and the arrest. The court noted that as set out in St. v. Beach, 217 M 132, 705 P2d 94 (1985), which adopted the federal rule set out in Brown v. Ill., 422 US 590 (1975), the general principle is that a confession obtained as a result of an unlawful arrest is inadmissible; however, there must be a causal connection between the arrest and the confession. In determining whether a causal connection exists, the court considers: (1) the presence or absence of timely Miranda warnings; (2) whether there was an intervening independent act by the defendant or some third party; (3) the temporal proximity of the arrest and confession; and (4) the degree of the alleged constitutional violation. Miranda warnings will not, in all cases, attenuate the corruptive effect of a prior constitutional violation or remove the taint of a prior constitutional violation. In this case, the Miranda warnings did not sever the chain of causality between Van Dort's unlawful arrest and the confession and were insufficient to negate the cumulative effect of all the relevant circumstances leading to Van Dort's confession. The court distinguished Beach, holding that despite the issuance of Miranda warnings, Van Dort's confession was the result of the exploitation of the unlawful arrest and inadmissible as fruit of the poisonous tree, and the Supreme Court reversed the District Court's denial of Van Dort's motion to suppress. St. v. Van Dort, 2003 MT 104, 315 M 303, 68 P3d 728 (2003).

Traffic Stop Based on Drug Tip Considered Custodial Interrogation — Miranda Warning Required: Officers received a tip from Olson's estranged husband that a methamphetamine lab was being operated in Olson's garage. The officers placed the garage under surveillance and saw equipment being loaded into Olson's car that same day. The officers stopped the car for an investigative stop, and an officer informed Olson that he knew that lab equipment was in the trunk. Olson initially denied it, but when the officer expressed concern for Olson and her son, she made incriminating statements and confessed that the lab was in the car. Olson later sought to suppress the statements because she was not read her Miranda rights before she made the

statements. The question was whether Olson was subject to a custodial interrogation that entitled her to receive the Miranda warnings. The District Court held that an interrogation did not occur because Olson was not asked any direct questions. The Supreme Court concluded that although Olson was not under arrest at the time that the statements were made, she was nevertheless subjected to a custodial interrogation. Olson was not free to leave during the conversation, the officer's questions were directed specifically at Olson, no other party was privy to the conversation, and the officer should have known that under the circumstances, his statements were reasonably likely to elicit an incriminating response. Because Olson did not receive Miranda warnings before she was interrogated, the statements that she made were in violation of her constitutional right against self-incrimination and should have been suppressed. St. v. Olson, 2003 MT 61, 314 M 402, 66 P3d 297 (2003), followed in St. v. McKee, 2006 MT 5, 330 M 249, 127 P3d 445 (2006). See also St. v. Staat, 251 M 1, 822 P2d 643 (1991), and St. v. Flack, 260 M 181, 860 P2d 89 (1993).

Voluntariness of Confession — Totality of Circumstances: When a defendant moves to suppress a confession or admission on grounds that it was given involuntarily, the prosecution must prove by a preponderance of the evidence that it was voluntary. On appeal, the Supreme Court will review denial of a suppression motion to determine whether findings of fact were clearly erroneous and correctly applied as a matter of law. A finding of fact is clearly erroneous if: (1) it is not supported by substantial evidence, which must be more than a scintilla of evidence but may be less than a preponderance of the evidence; (2) the trial court misapprehended the effect of the evidence; or (3) the Supreme Court has a definite or firm conviction that a mistake was made. When a determination of voluntariness depends on the credibility of witnesses, the Supreme Court will defer to the trial court. The emphasis in determining voluntariness is on whether the confession was the product of free choice or compulsion, which must take into account the totality of the circumstances, including the defendant's age and education, whether the defendant was advised of Miranda rights, the defendant's prior experience with the criminal justice system and police interrogation, the defendant's background, experience, demeanor, coherence, articulateness, and capacity to make full use of faculties, the length and method of interrogation, and whether the confession or admission was extracted through force, violence, or improper influence or by direct or implied promises. If the confession or admission was involuntary, its use violates self-incrimination and due process. Here, the Supreme Court considered the totality of the circumstances and found substantial credible evidence that Hoffman's confession was voluntary. St. v. Hoffman, 2003 MT 26, 314 M 155, 64 P3d 1013 (2003). The standard of review of denial of a motion to suppress was also applied in St. v. Munson, 2007 MT 222, 339 M 68, 169 P3d 364 (2007).

Sentence Based on Refusal to Admit Guilt Violative of Right Against Self-Incrimination: Shreves was convicted of deliberate homicide and sentenced to 100 years in prison, with no parole for 60 years. At trial, Shreves chose to testify on his own behalf and assert his innocence, and at sentencing, Shreves chose not to testify, but his counsel indicated that Shreves maintained his innocence. The District Court imposed the sentence based in significant part on Shreves' failure to show remorse or responsibility. Shreves appealed on grounds that it was improper to hold his refusal to admit to the crime against him in determining the sentence. The state contended that the sentencing court properly considered the lack of remorse as a factor relevant to Shreves' rehabilitation and the danger presented to the community, and argued that the lack of remorse was based on trial testimony and evidence. The Supreme Court considered whether Shreves adequately invoked the right to maintain silence, the scope of the oral sentence that controlled over the subsequent written sentence as it related to the entire sentence, and the District Court's decision to base its sentence in large part on Shreves' refusal to admit to the crime. Although lack of remorse can be considered as a sentencing factor, a sentence that is based on a refusal to admit guilt cannot be upheld. Here, the Supreme Court was unable to find a sentencing distinction between punishing Shreves for remaining silent and the proper consideration of Shreves' failure to show remorse. A sentencing court may not draw a negative inference of lack of remorse from a defendant's silence at sentencing when the defendant has maintained innocence throughout the proceedings. Shreves was improperly penalized for maintaining his innocence pursuant to the constitutional right to remain silent. The sentence was therefore illegal. Shreves' conviction was reversed, and the case was remanded for resentencing. St. v. Shreves, 2002 MT 333, 313 M 252, 60 P3d 991 (2002), distinguished in St. v. J.C., 2004 MT 75, 320 M 411, 87 P3d 501 (2004), and St. v. Burkhart, 2004 MT 372, 325 M 27, 103 P3d 1037 (2004). See also St. v. Imlay, 249 M 82, 813 P2d 979 (1991), St. v. Kelly, 265 M 298, 876 P2d 641 (1994), St. v. Fuller, 276 M 155, 915 P2d 809 (1996), St. v. Rennaker, 2007 MT 10, 335 M 274, 150 P3d 960 (2007), and St. v. Garcia, 2011 MT 130, 360 Mont. 537, 254 P.3d 589.

Prosecutor's Comment Alleging Uncontradicted Evidence Erroneous When Defendant Who Asserted Right to Remain Silent Was Only Person Who Could Offer Contradictory Evidence — Error Harmless: Harrington was arrested for DUI, was read his Miranda rights, and chose to remain silent. Harrington contended that his due process rights and privilege against self-incrimination were violated by testimony elicited and statements made by the prosecution during trial. Although Harrington failed to preserve the issues in the District Court, the Supreme Court applied the plain error doctrine pursuant to its discretionary power enunciated in St. v. Finley, 276 M 126, 915 P2d 208 (1996), considering the totality of the circumstances and evaluating the nature of the constitutional rights implicated, rather than the sufficiency of the evidence. The court decided that because no comment was made that Harrington at any time refused to give a statement or refused to testify and because the prosecutor did not insinuate that an innocent person would have given a statement or testified, no Doyle error occurred (see Doyle v. Ohio, 426 US 610 (1976)). However, the prosecutor did comment during rebuttal that there was no evidence to contradict the state's case, which was error as an improper reference to Harrington's decision not to testify because Harrington was the only person who could have offered contradictory testimony (see St. v. Hart, 154 M 310, 462 P2d 885 (1969)). To determine whether the error was prejudicial, the court applied the test in St. v. Van Kirk, 2001 MT 184, 306 M 215, 32 P3d 735 (2001). The error was considered a trial error rather than a structural error, and because the error concerned comment rather than evidence, the court went on to determine whether it was harmless and contributed to the conviction. In this case, the single comment that the evidence was uncontradicted was an isolated one, and there was no reasonable possibility that it contributed to Harrington's conviction given the fact that during closing, the prosecutor focused on the driving errors Harrington made before being stopped, the videotape of Harrington's field sobriety tests, the arresting officer's expertise, and the results of the preliminary breath test. Harrington's constitutional rights were not prejudiced by the improper reference to his decision not to testify. Columbus v. Harrington, 2001 MT 258, 307 M 215, 36 P3d 937 (2001).

Appropriateness of Treatment Plan Requirement That Parents Provide Explanation of Child's Injuries: Four treatment plans were developed with the parents, the purpose of all of which was to: (1) return the child to parental custody; (2) enable the parents to provide a safe and nurturing environment for the child; (3) enable the parents to develop an awareness of the child's needs and an ability to meet those needs; (4) help the parents develop minimal parenting skills; and (5) resolve the issues that led to the child's abuse, which included a requirement that the parents provide a reasonable and consistent explanation for the child's injuries. The parents were subsequently convicted of endangering the welfare of the child, and the state petitioned for custody. Prior to the permanent custody hearing, the mother moved to strike the task that required an explanation of the child's injuries, but the state never filed a brief in response to the motion. Nevertheless, the motion was denied. Following the termination of the mother's parental rights, she challenged the appropriateness of that task on grounds that the task placed her in the untenable position of having to choose between incriminating herself and failing to complete the treatment plan, in violation of her right against self-incrimination, relying on In re A.N., 2000 MT 35, 298 M 237, 995 P2d 427 (2000). The Supreme Court found her reliance on In re A.N. misplaced. The mother waived her self-incrimination privileges by voluntarily testifying regarding her knowledge of the child's injuries at both the permanent custody hearing and during the criminal proceeding and could not argue later that the disputed task impinged on her constitutional privilege against self-incrimination. Further, the state's duty to protect children, as set out in 41-3-101, necessitated that the parents come to terms with the reasons why the child was abused, and without demonstrable willingness from the parents to resolve the abuse issues, the District Court had no assurance that the child would not be abused again. Thus, the task was a fair requirement in the treatment plan, and the District Court did not err in concluding that the plan was appropriate or in denying the motion to strike the task from the plan. Denying the motion was within the court's discretion regardless of whether the state filed a brief in response to the motion. In re A.C., 2001 MT 126, 305 M 404, 27 P3d 960 (2001).

Assertion of Error in Alleged Comment on Post-Miranda Silence — No Doyle Violation: Clausell contended that the state violated his right to due process and privilege against self-incrimination by commenting on his silence after he received a Miranda warning, relying on Doyle v. Ohio, 426 US 610 (1976). The Supreme Court found that the issue was reviewable under the common-law plain error doctrine set out in St. v. Finley, 276 M 126, 915 P2d 208 (1996); however, the court found no Doyle violation in this case. Not only did the record fail to support Clausell's assertion that the prosecution commented on his post-Miranda silence, it also did not support his assertion that he was silent after he received Miranda warnings. In fact, between the time that

they arrived at the hospital and the time of being arrested and given the warnings, Clausell gave five different accounts of how his girlfriend was injured. He had not received a Miranda warning prior to making any of the statements that the state referred to in arguments at trial. The Doyle rule is limited to instances in which the prosecution seeks to impeach a defendant's testimony based on silence after Miranda warnings are given, and no construction of Doyle could be read to preclude the state from comparing Clausell's voluntary, inconsistent statements. Clausell failed to establish any improper comment on his post-Miranda silence, and thus his constitutional rights were not violated by the state's comments at trial. St. v. Clausell, 2001 MT 62, 305 M 1, 22 P3d 111 (2001), followed in St. v. Tadewaldt, 2010 MT 177, 357 Mont. 208, 237 P.3d 1273.

Use of Testimony From Prior Trial in Retrial Not Precluded: Ingraham was convicted of negligent homicide, criminal endangerment, and criminal trespass to property in relation to an automobile accident. Admission of certain evidence was found to constitute reversible prejudicial error, and the case was remanded for a new trial. On remand, Ingraham moved to preclude the state from using his testimony from the first trial during its case in chief at the second trial, based on 46-16-701 and his constitutional right not to be compelled to testify against himself. The District Court granted Ingraham's motion, based in part on Harrison v. U.S., 392 US 219 (1968), as interpreted in People v. Armentero, 384 NW 2d 98 (Mich. App. 1986), and the state appealed. The Supreme Court examined the legislative history of 46-16-701, noting that prior to amendment in 1967, the statute expressly required that testimony must be produced anew in a new trial—i.e., testimony from an earlier trial could not be used in a new trial of the same case. However, the 1967 amendment deleted that requirement. When the Legislature amends a statute, it is presumed that some change to existing law is intended; thus, the presumption is that since 1967, the use of testimony from a prior trial in a new trial is not precluded by statute. With regard to the alleged constitutional issue of self-incrimination, the Supreme Court noted that under Harrison and subsequent federal cases, in order to preclude the use of prior testimony in a subsequent trial, the testimony must have been compelled by the admission of evidence both illegally obtained and improperly admitted at trial, but when testimony is compelled as a result of evidence that was improperly admitted rather than unconstitutionally obtained, Harrison does not preclude use of the testimony in a later trial. The District Court abused its discretion in granting Ingraham's motion excluding his prior testimony. State ex rel. Mazurek v. District Court, 2000 MT 266, 302 M 39, 22 P3d 166, 57 St. Rep. 1111 (2000).

Order for Psychiatric Evaluation in Child Abuse Case Not Violative of Privilege Against Self-Incrimination: The District Court hearing a child abuse and neglect case ordered the mother to submit to a psychiatric evaluation, participate in counseling, and follow through with the therapist's recommendations. The mother claimed that the order violated her privilege against self-incrimination under the fifth amendment to the U.S. Constitution. The Supreme Court found no suggestion of criminal liability attending the mother's participation in counseling and noted that a child abuse and neglect proceeding is not a criminal case. Further, 41-3-403 specifically authorizes medical and psychological evaluations of and counseling services for the parents in such cases. Thus, a constitutional violation was not established. In re B.P. & A.P., 2000 MT 39, 298 M 287, 995 P2d 982, 57 St. Rep. 179 (2000).

Inclusion of Self-Incriminating Requirement as One Element of Parenting Plan — Harmless Error: As part of his third parenting treatment plan, the father was required to affirmatively explain the cause of his child's injuries, assume responsibility for any injuries inflicted on the child, and cooperate with law enforcement to resolve the related criminal charges against him. In essence, the state used the treatment plan to make an official inquiry into the child's injuries, leaving the father with the Hobson's choice of either disclosing his involvement in the child's injuries and incriminating himself in the criminal proceeding or facing certain termination of his parental rights. The Supreme Court found the requirement to be inappropriate. However, the requirement impacted only one goal of five that the District Court found were not successfully met and only one task of four that were not completed. Thus, inclusion of the inappropriate requirement did not significantly impact the District Court's decision to terminate the father's parental rights or result in substantial injustice. The error was harmless, and the Supreme Court affirmed. In re A.N. & C.N., 2000 MT 35, 298 M 237, 995 P2d 427, 57 St. Rep. 155 (2000).

Transfer of Youth Court Case to District Court Not Violative of Minor's Constitutional Rights: Spina argued that the statute allowing transfer of her Youth Court case to the District Court resulted in violation of her rights under Art. II, sec. 15, Mont. Const., which guarantees to minors the same fundamental rights afforded to adults, and under Art. II, sec. 24, Mont. Const., which guarantees the right to a fair trial. The Supreme Court considered alleged violations of the right against self-incrimination, the right to effective assistance of counsel, the right to a fair trial, and

the right to a presumption of innocence, finding that Spina's arguments were without merit. The transfer statute did not violate Spina's constitutional rights. St. v. Spina, 1999 MT 113, 294 M 367, 982 P2d 421, 56 St. Rep. 467 (1999).

Nontestimonial Nature of Reciting Alphabet and Counting in DUI Field Test — Constitutional Self-Incrimination Protection Inapplicable: Devlin was arrested for DUI and taken to the Sheriff's office for additional field sobriety tests, which were videotaped. Prior to being advised of his Miranda rights, an officer asked Devlin to recite the alphabet starting at "K" and to count aloud from 46 to 72. Upon prosecution in Justice's Court, Devlin moved for suppression of all statements made prior to the Miranda warning and of testimonial answers in the field sobriety tests, but the motion was denied. Devlin renewed the motion in District Court, which suppressed the results of the alphabet and counting tests. The state appealed. The Supreme Court noted that the constitutional right against self-incrimination was designed to protect against the cruel trilemma of having to choose among answering truthfully, answering falsely, or remaining silent. However, the court declined to expand the holding in Pa. v. Muniz, 496 US 582, 110 L Ed 2d 528, 110 S Ct 2638 (1990), to cover relatively content-free oral declarations, holding that neither reciting the alphabet nor counting involves an express or implied assertion of fact or belief. Therefore, a defendant who is asked to do so conveys no facts specific to the person being questioned, assuming that the defendant is familiar with the alphabet and counting. Neither reciting the alphabet nor counting is testimonial in nature, so the constitutional protection against self-incrimination does not attach when a driver is asked to perform either as part of a DUI field sobriety test. St. v. Devlin, 1999 MT 90, 294 M 215, 980 P2d 1037, 56 St. Rep. 383 (1999), affirming St. v. Thompson, 237 M 384, 773 P2d 722, 46 St. Rep. 887 (1989).

Defense of Mental State for Mitigated Deliberate Homicide — Right of Defendant to Refuse to Answer Questions by State Psychological Expert — Remedy for Unrebuttable Testimony: Park, who was charged with forgery and deliberate homicide, filed notice of his intent to use the affirmative defense that extreme mental and emotional stress caused him to commit the offenses and gave notice of his intent to use expert psychological testimony in the course of his defense. The state requested an examination of Park by its own psychological expert, but Park objected to the oral part of the requested examination on the grounds that his defense was not reliance upon a mental disease or defect and the state therefore had no right to a psychological examination. In its decision granting supervisory control over the proceedings, the Supreme Court held that: (1) Park did not by the use of the defense of mitigated deliberate homicide waive his right to remain silent guaranteed by the U.S. and Montana Constitutions when questioned by the state's psychological expert; (2) by invoking his right against self-incrimination in the interview with the state's psychological expert, Park should not be able to put his version of the facts in the case before the jury through the testimony of his own psychological expert because giving the defendant that right would be similar to allowing Park to testify but not be subject to cross-examination, which the Supreme Court held in St. v. Wilson, 193 M 318, 631 P2d 1273 (1981), a defendant would not be allowed to do; and (3) if Park refuses to talk to the state's psychological expert but takes the witness stand in his own defense, the state's expert may listen to Park's testimony and respond accordingly to that testimony. Park v. District Court, 1998 MT 164, 289 M 367, 961 P2d 1267, 55 St. Rep. 657 (1998).

Examination of Defendant by State Psychiatrist — Supervisory Control Granted to Prevent Denial of Defendant's Fifth Amendment Right Against Self-Incrimination: Park, who was charged with forgery and deliberate homicide, filed notice of his intent to use the affirmative defense that extreme mental and emotional stress caused him to commit the offenses and gave notice of his intent to use expert psychological testimony in the course of his defense. The state requested an examination of Park by its own psychological expert, but Park objected to the oral part of the requested examination on the grounds that, first, his defense was not reliance upon a mental disease or defect and the state therefore had no right to a psychological examination, and, second, he did not want to discuss his offenses with the psychological expert for fear of waiving his constitutional right against self-incrimination. The Supreme Court, citing Mapes v. District Court, 250 M 524, 822 P2d 91 (1991), held that the case was appropriate for supervisory control because Park was faced with the loss of a constitutional right as part of the psychological interview and appeal could not prevent the loss of that right. Park v. District Court, 1998 MT 164, 289 M 367, 961 P2d 1267, 55 St. Rep. 657 (1998).

Coercion of Testimony by Lengthy Interrogation, Threats, Bribes, Good Cop/Bad Cop Technique, and Misrepresentations Refuted by Record: Law enforcement officers did not coerce defendant's statements. A 5 1/2-hour interview with a 2-hour break for dinner, a 2-hour interview on the next day, and a 1-hour interview on the third day did not amount to overly long or arduous

interrogation. Defendant's move to a jail nearer his family was at his request, refuting his assertion that the officers threatened him with consequences to his family. The record contained similar evidence refuting allegations of use of good cop/bad cop technique, misrepresentations that defendant was not a suspect, offers of cigarettes, and feigned concern about defendant's family. St. v. Lawrence, 285 M 140, 948 P2d 186, 54 St. Rep. 1082 (1997).

Officer Testimony, Tapes, and Notes Showing Advice and Waiver of Rights: The state met its burden of showing by a preponderance of the evidence that defendant was advised of his rights, voluntarily waived them, and talked to the police. The officers who interviewed him testified that he was advised of his rights at the beginning of each of three interviews. The tape that was recorded at the end of each interview started with defendant's stating that he had been advised of his rights and had waived them. The notes of one of the officers referred to advices and waivers of rights. Defendant signed a waiver form. The statements would not be found inadmissible for failure to make a tape recording or other record of the advice and waiver at the time that they were given. Grey, in which the court stated a preference for such a record, does not require such a record. How the officers preserve a record of the advice and waiver is up to them. However, a tangible record should be preserved when the means to do so are readily available, and failure to do so will result in extreme disfavor with the court in later determining the voluntariness of a waiver. St. v. Lawrence, 285 M 140, 948 P2d 186, 54 St. Rep. 1082 (1997).

Prosecutor's Comments on Defendant's Post-Miranda Silence — Violation of Right to Due Process and Privilege Against Self-Incrimination Reviewable Under Plain Error Doctrine: At trial for deliberate homicide, the prosecutor commented on the defendant's post-Miranda silence in the opening statement, introduced testimony regarding the defendant's refusal to make a statement, and commented twice during the closing statement about the defendant's silence. The defense counsel did not comment or object at trial. The defendant did not testify at trial. The Supreme Court held that the defendant's due process rights and the privilege against self-incrimination were violated by the prosecutor's comments and that the issue was reviewable under the common-law plain error doctrine. The Supreme Court reversed and remanded. St. v. Sullivan, 280 M 25, 927 P2d 1033, 53 St. Rep. 1282 (1996), distinguished in St. v. Baker, 2000 MT 307, 302 M 408, 15 P3d 379, 57 St. Rep. 1297 (2000). Baker was followed in St. v. Tadewaldt, 2010 MT 177, 357 Mont. 208, 237 P.3d 1273.

Taxpayer Properly Held in Contempt for Refusal to File Income Tax Returns — Privilege Against Self-Incrimination No Defense: Gillispie failed to file an income tax return for 4 years. The District Court ordered her to file the returns or to show cause why she should not be required to file them. At the hearing, the Department of Revenue introduced Gillispie's W-2 forms, which showed that she had made the minimum income necessary to require her to file returns. The District Court ordered her to file the returns or be found in contempt. When Gillispie failed to file the returns, the District Court held her in contempt, and Gillispie filed a petition for a writ of habeas corpus with the Supreme Court. The Supreme Court held that the District Court had jurisdiction to order Gillispie to file the returns and jurisdiction to hold Gillispie in contempt and that the District Court also had sufficient evidence to do so. The Supreme Court also held that Gillispie's privilege against self-incrimination does not justify the outright refusal to file a return and cannot be used as a method of evading payment of lawful taxes. The Supreme Court held that she must demonstrate the specific parts of the returns that would result in self-incrimination. Gillispie v. Sherlock, 279 M 21, 929 P2d 199, 53 St. Rep. 507 (1996).

Privilege Against Self-Incrimination as Self-Executing Under Threat of Penalty: Citing numerous federal cases, the Supreme Court held that a person claiming protection against self-incrimination generally must affirmatively invoke it, even when the government is unquestionably attempting to compel an answer. If a witness under compulsion to answer makes disclosures instead of claiming the privilege, the witness cannot be said to have been compelled to self-incriminate. A defendant's ignorance of the right against self-incrimination generally does not excuse the failure to claim the privilege, and if the defendant fails to assert the privilege, it is considered waived. However, failure to invoke the privilege does not preclude the benefit if the defendant is placed in a situation in which the defendant is not free to admit, deny, or refuse to answer. In that case, the privilege is said to be self-executing. One such case is when the government prevents a voluntary invocation of the privilege by threatening to penalize the individual if the privilege is invoked. A command to speak, under threat of loss of liberty, implicitly forecloses the option of remaining silent. In the present case, Fuller was convicted of rape and sexual assault and was required to enter sexual offender treatment. As part of the treatment, he was required to disclose his offense history and was told that failure to do so would result in revocation of probation and subsequent imprisonment. Fuller complied, admitting

prior offenses, which were reported and for which he was then charged and arrested. Fuller was essentially ordered to incriminate himself to avoid punishment, and despite the holding in St. v. Imlay, 249 M 82, 813 P2d 979 (1991), that a sentencing court lacks authority to revoke probation solely on grounds that a defendant refuses to admit guilt, the threat of punishment was credible and Fuller's reliance on the belief that the court could carry out the threat was reasonable. Because the state improperly compelled Fuller to disclose past criminal acts in violation of his right against compelled self-incrimination and his right to remain silent, the state was prohibited from using any of the elicited information as the basis for a later, separate criminal prosecution. St. v. Fuller, 276 M 155, 915 P2d 809, 53 St. Rep. 325 (1996), followed in St. v. Woods, 2005 MT 186, 328 M 54, 117 P3d 152 (2005), and St. v. Plouffe, 2014 MT 183, 375 Mont. 429, 329 P.3d 1255. See also Minn. v. Murphy, 465 US 420, 79 L Ed 2d 409, 104 S Ct 1136 (1984), and In re A.N. & C.N., 2000 MT 35, 298 M 237, 995 P2d 427, 57 St. Rep. 155 (2000).

Prosecutor's Comments on Defendant's Postarrest Silence — No Constitutional Violation: Finley argued that the prosecutor's cross-examination and closing argument impermissibly commented on Finley's postarrest silence, violating the right to due process of law as set forth in Doyle v. Ohio, 426 US 610, 49 L Ed 2d 91, 96 S Ct 2240 (1976), and the privilege against self-incrimination. However, citing St. v. Furlong, 213 M 251, 690 P2d 986 (1984), the Supreme Court held that Doyle does not apply to postarrest silence when the defendant has not been assured of the right to remain silent and of no subsequent penalty for asserting that right, as in this case when Finley was not given any Miranda warning. Further, Finley's privilege against self-incrimination was not violated because Finley voluntarily chose to take the stand during trial. Thus, his credibility was subject to impeachment just like any other witness. Although the prosecutor's comments were not condoned, Finley's constitutional rights were not violated by the comments, absent the giving of a Miranda warning. St. v. Finley, 276 M 126, 915 P2d 208, 53 St. Rep. 310 (1996), following Jenkins v. Anderson, 447 US 231, 62 L Ed 2d 30, 100 S Ct 45 (1980), and followed in St. v. Sullivan, 280 M 25, 927 P2d 1033, 53 St. Rep. 1282 (1996). See also St. v. Baker, 2000 MT 307, 302 M 408, 15 P3d 379, 57 St. Rep. 1297 (2000) (no demonstration of self-incrimination violation when defendant was impeached regarding conflicting stories provided as part of direct testimony).

Totality of Circumstances — Police Deception and Failure to Give Adequate Miranda Warning — Confession Not Voluntary: The defendant moved to suppress a videotaped statement on the grounds that the statement was obtained involuntarily. The Supreme Court stated that in a custodial interrogation at the station house, the failure of the police to preserve some tangible record of the giving of Miranda warnings and of the knowing, intelligent waiver by the detainee will be viewed with distrust in the judicial assessment of voluntariness under the totality of circumstances surrounding the confession or admission. Based on the totality of the circumstances of police deception and on the failure to give the defendant adequate warning, the confession was not voluntary and the District Court erred in denying the motion to suppress. St. v. Grey, 274 M 206, 907 P2d 951, 52 St. Rep. 1193 (1995), followed in St. v. Loh, 275 M 460, 914 P2d 592, 53 St. Rep. 226 (1996), and distinguished in St. v. Gittens, 2008 MT 55, 341 M 450, 178 P3d 91 (2008). Loh was followed, as to totality of circumstances, in St. v. Hayworth, 1998 MT 158, 289 M 433, 964 P2d 1, 55 St. Rep. 631 (1998). The rules regarding preservation of a tangible record, set out in Grey, St. v. Siegal, 281 M 250, 934 P2d 176, 54 St. Rep. 158 (1997), and St. v. Weaver, 1998 MT 167, 290 M 58, 964 P2d 713, 55 St. Rep. 668 (1998), were extended to statements of a witness or informant made at the station house or in a similarly controlled environment in St. v. Worrall, 1999 MT 55, 293 M 439, 976 P2d 968, 56 St. Rep. 225 (1999).

Impeachment Questioning on Defendant's Silence — Not Error: In a trial for sexual intercourse without consent, the District Court allowed the defendant to be cross-examined on statements that the defendant had voluntarily made to a police officer prior to arrest and on how the defendant's testimony at trial conflicted with those statements. The District Court did not err in allowing the state to use the defendant's silence regarding consensual sexual intercourse during the initial interrogation by police as evidence against the defendant at trial. St. v. Graves, 272 M 451, 901 P2d 549, 52 St. Rep. 755 (1995).

Alford Plea in Sexual Assault Case — Revocation of Suspended Sentence: In a sexual assault case, the defendant sufficiently raised the issue of the fifth amendment right against self-incrimination to warrant review on appeal. The defendant entered an Alford plea, and sexual offender evaluation and treatment were conditions of the suspended sentence. The District Court did not abuse its discretion when it revoked the defendant's suspended sentence for violations of the conditions of the suspended sentence, including sexual offender evaluation and treatment. St. v. Butler, 272 M 286, 900 P2d 908, 52 St. Rep. 745 (1995).

Prison Sentence in Conformity With Presentence Investigation — No Violation of Imlay and Fifth Amendment Rights: Henrich was sentenced to a term in the state prison after being convicted of sexually assaulting his two daughters. Henrich objected to the presentence investigation report, claiming that he was being sentenced to prison because the counselor completing the report noted that Henrich continued to deny his guilt. Henrich alleged that he was being punished for exercising his fifth amendment rights, in violation of the Supreme Court's opinion in St. v. Imlay, 249 M 82, 813 P2d 979 (1991). The Supreme Court reviewed the record of the sentencing hearing and found that Henrich was being sentenced to prison not because he refused to admit his guilt but because of the severity of his crimes and the slim chance for rehabilitation. St. v. Henrich, 268 M 258, 886 P2d 402, 51 St. Rep. 1275 (1994).

Constitutionality of Disclosure Statutes — Failure to Provide Psychiatric Reports — Defense of Mental Disease or Defect Precluded: Defendant was examined by a psychiatrist, and the trial court ordered submission of the medical report to the court. Following additional examination by three more psychiatrists or psychologists, defendant gave notice of the intention to rely on mental disease or defect as a defense, but the notice did not specify the names and addresses of persons defendant intended to call as witnesses to support his defense. The state moved for discovery of the names, addresses, and any statements or reports required to be disclosed under 46-15-323. Defense counsel refused to provide the information because disclosure could not be done without disclosing privileged or incriminating information. The trial court advised counsel that 46-15-328 provides for protective orders and for excising privileged or incriminating information and ordered disclosure. The trial court ruled that nondisclosure precluded defendant's use of the mental disease or defect defense. Defense counsel appealed to the Supreme Court, arguing that the disclosure requirements were an unconstitutional violation of the right against self-incrimination under the federal and state constitutions. The Supreme Court previously affirmed Montana's reciprocal discovery provisions against attack on the same constitutional grounds in State ex rel. Carkulis v. District Court, 229 M 265, 746 P2d 604 (1987). In this case, the court noted that the discovery provisions allow a defendant to be examined by as many psychiatrists as desired and that only statements of those that are to be called as witnesses at trial need be disclosed. Further, as set out in Smith v. McCormick, 914 F2d 1153 (9th Cir. 1990), the attorney-client privilege extends only to the point of testimonial use of that communication. Defendant was advised but refused to avail himself of the protective order provisions of 46-15-328, and in doing so, the refusal to comply with constitutional statutory discovery provisions precluded the use of the mental disease or defect defense. St. v. Davidson, 266 M 404, 880 P2d 1331, 51 St. Rep. 867 (1994).

Sentence Thrown Out Because of Judge's Failure to Observe Defendant's Fifth Amendment Rights: The trial judge stated that he based the sentence he gave Kelly on the evidence presented and on the fact that Kelly had not testified. The Supreme Court upheld the conviction but remanded the case for resentencing, with instructions that the defendant could not be punished for asserting his right against self-incrimination. St. v. Kelly, 265 M 298, 876 P2d 641, 51 St. Rep. 522 (1994).

Defendant's Request for Psychiatric Examination — Waiver of Fifth Amendment Privilege: Smith relied on Estelle v. Smith, 451 US 454, 68 L Ed 2d 359, 101 S Ct 1866 (1981), in claiming that his constitutional right against self-incrimination was violated by the state's use of a psychiatrist's report and testimony to establish aggravating factors and rebut mitigating evidence. However, Estelle is distinguishable because Smith personally initiated the examination, thus waiving the constitutional privilege. Smith had access to advice of counsel prior to the examination and could not claim that statements made during the examination were compelled against his will. St. v. Smith, 261 M 419, 863 P2d 1000, 50 St. Rep. 1388 (1993) (Smith II). Following automatic appeal and review, the death sentence was affirmed in St. v. Smith, 280 M 158, 931 P2d 1272, 53 St. Rep. 1345 (1996) (Smith III).

Dangerous Drug Tax Reporting Procedures as Protection Against Self-Incrimination: The procedures outlined in 15-25-113 (now repealed) regarding the reporting by law enforcement personnel to the Department of Revenue of persons subject to the dangerous drug tax do not relate the tax to a criminal conviction but rather protect the taxpayer's constitutional right against self-incrimination. Sorensen v. Dept. of Revenue, 254 M 61, 836 P2d 29, 49 St. Rep. 624 (1992).

Expert Testimony Beyond Scope Originally Allowed — Waiver of Objection When Witness Called by Defendant: Consistent with the holding in Buchanan v. Ky., 483 US 402, 97 L Ed 2d 336, 107 S Ct 2906 (1987), the District Court stated that it would allow testimony of a counselor for the limited purpose of the state's rebuttal if defendant placed his state of mind in issue through

direct testimony or by calling his own psychologist as a witness. However, defendant called the counselor as a witness during presentation of his case, asking about communications between defendant and the counselor. To the extent that the counselor's testimony exceeded the purposes for which it was originally allowed, it was the fault of the defendant, who thereby waived any objection he might have otherwise asserted based on privilege or the constitutional right against self-incrimination. St. v. Goodwin, 249 M 1, 813 P2d 953, 48 St. Rep. 539 (1991), followed, with regard to constitutionality of ordering a compelled evaluation for rebuttal purposes, in St. v. Hess, 252 M 205, 828 P2d 382, 49 St. Rep. 217 (1992). See also Smith v. McCormick, 914 F2d 1153 (9th Cir. 1990).

Refusal to Admit Guilt Following Conviction — Augmentation of Sentence Prohibited: Defendant's sentence for sexual assault was suspended on the condition that he complete a sex offender treatment course. Despite attempts to seek enrollment in two separate courses, he was not accepted for treatment because he consistently denied committing a sexual offense. Upon evidence of his failure to complete a course, his suspended sentence was revoked and he was sentenced to 5 years in the state prison. The Supreme Court, following the decision in Thomas v. U.S., 368 F2d 941 (5th Cir. 1966), found that even though defendant had already been convicted of the crime he now denies, the criminal justice system still provides opportunities to challenge that conviction. These legally guaranteed rights would be rendered meaningless if defendant could be compelled to admit guilt as a condition to his continued freedom. While defendant would be foreclosed from invoking the protection of such procedures to establish his innocence, the reliability of an admission of guilt would be highly suspect. Additionally, because defendant testified in his own defense at trial and denied committing a sexual crime, by admitting his guilt, he would have abandoned his right against self-incrimination, not only as to the crime for which he was charged but also as to the crime of perjury. Therefore, absent any grant of immunity, when a defendant has consistently denied guilt, his right against self-incrimination should be protected and augmenting a defendant's sentence because he refuses to confess to a crime or invokes his privilege against self-incrimination is prohibited. St. v. Imlay, 249 M 82, 813 P2d 979, 48 St. Rep. 588 (1991), overruling any holding to the contrary in St. v. Donnelly, 244 M 371, 798 P2d 89, 47 St. Rep. 1600 (1990), and distinguished in St. v. Henrich, 268 M 258, 886 P2d 402, 51 St. Rep. 1275 (1994), St. v. Butler, 272 M 286, 900 P2d 908, 52 St. Rep. 745 (1995), and St. v. Osborne, 2007 MT 217, 339 M 45, 167 P3d 405 (2007).

Prosecutorial Comment on Defendant's Silence — Failure to Object — No Plain Error or Doyle Violation: There is no plain error or Doyle violation (Doyle v. Ohio 426 US 610, 49 L Ed 2d 91, 96 S Ct 2240 (1976)) when the defendant first focuses on the issue of his earlier silence in cross-examination of the state's witnesses, fails to object to the state's reference to the same silence for alleged improper purposes, and then for the first time on appeal, alleges that admission of such evidence constitutes plain reversible error. St. v. Sadowski, 247 M 63, 805 P2d 537, 48 St. Rep. 93 (1991).

Defendant's Choice Between Silence and Presenting a Defense Not Invasion of Right Against Self-Incrimination: The defendant argued that the lower court had refused to admit certain evidence offered by the defense and by so doing had forced the defendant to take the stand in violation of his right against self-incrimination. The Supreme Court stated that the mere fact that the defendant's version of the facts would not otherwise have been brought before the jury does not render his decision compelled. The court held that the question to be determined is whether the defendant had been compelled to testify or merely had been required to make tactical decisions regarding the defense of his position. St. v. Van Dyken, 242 M 415, 791 P2d 1350, 47 St. Rep. 835 (1990).

Voluntary Statement of Inmate at Reclassification Hearing: A prison inmate claimed defendant inmate assaulted him. Defendant was placed in temporary lockup in the maximum security unit. A reclassification hearing, which is held to notify the inmate of the reason why he is being moved, was held. When he was told that charges might be filed, he stated, "For what? I only used my fist." The statement was admissible at trial even though there had been no Miranda warning. Officials seldom ask the inmate questions at a reclassification hearing and asked none of defendant. Defendant volunteered the statement, and a freely given voluntary statement is admissible when there was no Miranda warning. St. v. DePue, 237 M 428, 774 P2d 386, 46 St. Rep. 923 (1989). See also St. v. Belgarde, 1998 MT 152, 289 M 287, 962 P2d 571, 55 St. Rep. 590 (1998), for the admissibility of a voluntary statement made after arrest but before a reading of the defendant's rights.

Audio-Video Taping:

Driver was arrested for DUI, and an audio-video tape was made at the Sheriff's office of his actions and speech during field sobriety tests, the reading of his Miranda rights, and his waiver of those rights. The tape was objective evidence, not constitutionally prohibited testimonial compulsion. The court distinguished between the compelling of communications or testimony and real, physical, or objective evidence. The tape was introduced into evidence not for the incriminating content of the words of the defendant, but rather as evidence that helped the jury understand the testimony of the police who observed the defendant's unsteady walk and slurred speech. St. v. Thompson, 237 M 384, 773 P2d 722, 46 St. Rep. 887 (1989), reaffirmed in St. v. Belgarde, 244 M 500, 798 P2d 539, 47 St. Rep. 1762 (1990), St. v. Devlin, 1999 MT 90, 294 M 215, 980 P2d 1037, 56 St. Rep. 383 (1999), and St. v. Van Kirk, 2001 MT 184, 306 M 215, 32 P3d 735 (2001).

An audio-video tape of a DUI defendant at the Sheriff's office was objective evidence and not protected by the fifth amendment; therefore, whether he was, or should have been, given a Miranda warning prior to the taping is not an issue. St. v. Thompson, 237 M 384, 773 P2d 722, 46 St. Rep. 887 (1989).

Audio-video taping of defendant arrested for driving while intoxicated was held to be objective evidence, outside the privilege against self-incrimination, since there was no evidence indicating the recording contained speech or gestures testimonial in nature. St. v. Finley, 173 M 162, 566 P2d 1119 (1977), reaffirmed in St. v. Belgarde, 244 M 500, 798 P2d 539, 47 St. Rep. 1762 (1990).

Prosecutor's Language — Referral to Defendant's Prior Inconsistent Statements: One of the arguments put forth by the defendant's attorney was that the alleged sexual abuse victim had been coached. By reminding the jury that the defendant had not said that the victim had been coached when the defendant had been originally interrogated, the prosecutor was not commenting on the defendant's refusal to take the stand. St. v. Wiman, 236 M 180, 769 P2d 1200, 46 St. Rep. 279 (1989).

Breathalyzer Test — Defendant's Refusal Made Prior to Miranda Warning Admissible: Under the holding of St. v. Jackson, 206 M 338, 672 P2d 255, 40 St. Rep. 1698 (1983), neither the results of the Breathalyzer test nor a defendant's refusal to submit to the test are communications protected by the fifth amendment of the U.S. Constitution or by Montana's constitutional prohibition against self-incrimination. Thus, a refusal to submit to a Breathalyzer test made prior to Miranda warnings is not subject to suppression because the Miranda warning does not apply to such nontestimonial conduct. Missoula v. Forest, 236 M 129, 769 P2d 699, 46 St. Rep. 237 (1989), followed in Helena v. Barrett, 245 M 35, 798 P2d 544, 47 St. Rep. 1865 (1990). See also St. v. Michaud, 2008 MT 88, 342 M 244, 180 P3d 636 (2008), in which a defendant's claim of a constitutional prohibition against self-incrimination by the admission of defendant's refusal to submit to a blood alcohol test was again foreclosed by the decision in S. Dak. v. Neville, 459 US 533 (1983), which defined the refusal as nontestimonial conduct.

Comments on Silence of Accused Objectionable — Harmless Error: The Supreme Court found a prosecutor's comments on a defendant's silence, although apparently unintentional, to be clearly objectionable. The court cautioned the prosecution in criminal cases not to comment, even indirectly, on the silence of the accused. However, in light of overwhelming evidence of guilt, the comments in this case were found to be harmless beyond a reasonable doubt under the rule set out in Chapman v. Calif., 386 US 18, 17 L Ed 2d 705, 87 S Ct 824 (1967). St. v. Johnson, 233 M 473, 760 P2d 760, 45 St. Rep. 1653 (1988), followed in St. v. Mix, 239 M 351, 781 P2d 751, 46 St. Rep. 1740 (1989), and St. v. Whitlow, 285 M 430, 949 P2d 239, 54 St. Rep. 1227 (1997).

Reference to Defendant's Silence Admissible — Response to Defense: A defendant's privilege against self-incrimination was not violated by prosecutor's comments on the failure to testify when the state's reference to defendant's silence was a fair response to a claim made by defendant or defense counsel. St. v. Dawson, 233 M 345, 761 P2d 352, 45 St. Rep. 1542 (1988), following U.S. v. Robinson, 485 US 25, 99 L Ed 2d 23, 108 S Ct 864 (1988).

Comment on Refusal to Testify — Right to Remain Silent Infringed: The District Court, by repeatedly pointing out to defendant his right to testify, emphasized his failure to take the stand and focused the jury's attention on defendant's silence at a late stage of the trial. Citing Griffin v. Calif., 380 US 609, 14 L Ed 2d 106, 85 S Ct 1229 (1965), the Supreme Court noted that "comment on the refusal to testify is a remnant of the 'inquisitorial system of criminal justice' which the [right against self-incrimination] outlaws" and that such comment "cuts down on the privilege by making its assertion costly". What the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another. Although there was no evidence that the District Court manifestly intended to comment on the defendant's failure to testify, the Supreme Court was unable to find, beyond

reasonable doubt, that the remarks were harmless error. Despite curative instructions intended to cure the error, judgment of the District Court was reversed and remanded. St. v. Wilkins, 229 M 78, 746 P2d 588, 44 St. Rep. 1794 (1987).

Attorney's Voluntary Disclosure of Confidential Statements — No Waiver of Attorney-Client Privilege: Defendant's court-appointed attorney called himself to the stand to testify about defendant's inconsistent statements. Based on the District Court's acceptance of the testimony, the Supreme Court found the following factors prejudiced defendant's right to a fair trial: (1) the attorney's testimony of defendant's statements was extremely prejudicial and had limited probative value; (2) the state presented no evidence that defendant intended to waive his right not to divulge this privileged information; and (3) given defendant's unfamiliarity with courtroom procedure, defendant's right against self-incrimination need not be surrendered in order to assert a statutory right. Conviction was reversed. St. v. Statczar, 228 M 446, 743 P2d 606, 44 St. Rep. 1668 (1987).

Prosecutor's Language — No Comment on Defendant's Failure to Testify: The language used by the prosecutor was not manifestly intended or was not of such character that the jury would naturally and necessarily take it as a comment on the defendant's failure to testify on his own behalf at his trial for burglary. A comment stating the defendant has the right to remain silent is not the same as a comment on the accused's failure to exercise that right. St. v. Gonyea, 225 M 56, 730 P2d 424, 44 St. Rep. 39 (1987). See also St. v. Mix, 239 M 351, 781 P2d 751, 46 St. Rep. 1740 (1989).

Motion to Suppress Statements and Related Evidence — Waiver and Voluntariness — Applicability to Custodial Interrogation: The District Court granted a motion to suppress all statements made by defendant and any evidence obtained as a result of the statements, citing Smith v. Ill., 469 US 91, 83 L Ed 2d 488, 105 S Ct 490 (1984), as decisive of the suppression issue and supportive of the conclusion that defendant's request for counsel at his first interview barred further police interrogation. The Supreme Court reversed, holding that the Smith rule applied only to instances of custodial interrogation, while in this case defendant was not in custody or under formal arrest at the time he requested counsel. Further, the District Court never addressed the question of whether defendant's confession was voluntarily made; therefore, the case was remanded for hearing on the issues of waiver and voluntariness. St. v. Rorvik, 224 M 104, 728 P2d 419, 43 St. Rep. 2051 (1986).

"Miranda" Warning Unnecessary for Traffic Violation: It was not necessary for a police officer to give the Miranda warning to a person stopped for a speeding violation because a traffic stop does not constitute the "custodial interrogation" element that must be present before the warning need be given. Billings v. Skurdal, 224 M 84, 730 P2d 371, 43 St. Rep. 2036 (1986), citing Berkemer v. McCarty, 468 US 420, 82 L Ed 2d 317, 104 S Ct 3138 (1984), and followed in St. v. Allen, 1998 MT 293, 292 M 1, 970 P2d 81, 55 St. Rep. 1202 (1998). See also St. v. Elison, 2000 MT 288, 302 M 228, 14 P3d 456, 57 St. Rep. 1206 (2000), St. v. Wrzesinski, 2006 MT 263, 334 M 157, 145 P3d 985 (2006), and St. v. Hurlbert, 2009 MT 221, 351 M 316, 211 P3d 869 (2009).

Confession of Juvenile — Voluntariness and Mental Deficiency: A 14-year-old boy with an I.Q. of 86 confessed to the sexual assault of a 6-year-old child. The Supreme Court noted that mental deficiency does not preclude admissibility of a confession if the defendant was capable of understanding the meaning and consequences of his statements, quoting St. v. Phelps, 215 M 217, 696 P2d 447, 42 St. Rep. 305 (1985). Looking to the totality of the circumstances, including the defendant's background, experience, and conduct, the court found substantial credible evidence to support the voluntariness of the confession. In re J.W.K., 223 M 1, 724 P2d 164, 43 St. Rep. 1483 (1986).

When Right to Counsel Invoked — Subsequent Incriminating Testimony Inadmissible — Error Held Harmless: Recognizing that it was affording greater protection under the state constitutional right to counsel provision than the U.S. Supreme Court had granted under the identically worded federal constitutional provision, and that this was a departure it had previously declined to make in the area of criminal law, the Montana Supreme Court held that when detained defendant stated he would like to talk to "someone", he invoked his right to counsel. His willing participation in a subsequent recorded conversation, without advice of counsel, did not constitute a waiver of the right to counsel, and admission of the recording into evidence, being testimonial and self-incriminating in nature, was error. However, the error was harmless because defendant during trial testified to a different story than he told on the recording, and the recording was admissible for impeachment purposes. St. v. Johnson, 221 M 503, 719 P2d 1248, 43 St. Rep. 1010 (1986), overruled, to the extent that the right to counsel for self-incrimination purposes may be invoked in custodial interrogation, in St. v. Buck, 2006 MT 81, 331 M 517, 134 P3d 53 (2006).

Voluntariness of Waiver of Miranda Rights — Totality of Circumstances Test: Defendant Gleed argued on appeal that he did not knowingly and voluntarily waive his Miranda rights before making statements during questioning and therefore his statements should not have been allowed into evidence at trial. In applying the totality of circumstances test of St. v. Grimestad, 183 M 29, 598 P2d 198 (1979), and considering the factors outlined in St. v. Blakney, 197 M 131, 641 P2d 1045 (1982), the Supreme Court held that Gleed's intelligence, age, and education, as well as his statements and conduct, provided sufficient evidence to support the trial court's determination that he knowingly and voluntarily waived his privilege against self-incrimination. The trial court properly denied Gleed's motion to suppress his statements. St. v. Gleed, 220 M 56, 713 P2d 543, 43 St. Rep. 169 (1986).

Incarceration Unlawful — Subsequent Confession Voluntary: The defendant, while incarcerated illegally in Louisiana on a misdemeanor charge, confessed to a murder committed in Montana several years earlier. At his subsequent trial in Montana on a charge of deliberate homicide, the defendant moved to suppress evidence of his confession on several grounds, including that the State failed to establish the confession was voluntary. When, as in this case, a defendant shows his incarceration was initially illegal, the burden shifts to the State to show that his right against self-incrimination was not violated. The determination of voluntariness depends on the totality of the circumstances, with the burden of proof on the State to prove voluntariness by a preponderance of the evidence. In this case the defendant was issued numerous timely and complete Miranda advisements prior to making the incriminating statement. Also, he confessed in the presence of his attorney after opportunity to confer with him. The totality of the facts indicate the trial court did not err in finding the confession voluntary. St. v. Beach, 217 M 132, 705 P2d 94, 42 St. Rep. 1080 (1985), followed in St. v. Loh, 275 M 460, 914 P2d 592, 53 St. Rep. 226 (1996). Loh was followed in St. v. Hayworth, 1998 MT 158, 289 M 433, 964 P2d 1, 55 St. Rep. 631 (1998).

No Right to Counsel Before Deciding Whether to Submit to Chemical Testing — Blood Alcohol Test Not "Critical Stage" Event, Self-Incriminating Communication, or Denial of Due Process: Defendant was arrested on a charge of driving while under the influence of alcohol. He agreed to a chemical test after being told that he had a right to refuse the test and that he did not have a right to consult an attorney before deciding whether to submit to testing. The District Court granted the defendant's motion to suppress the results of the test on the basis of the 6th and 14th amendments to the U.S. Constitution. The Supreme Court reversed and found that neither the U.S. Constitution nor the Montana Constitution guarantees a defendant the opportunity to seek an attorney's advice before deciding whether to submit to a blood alcohol test, when consent is considered given as a matter of law. A Breathalyzer test is not susceptible to the suggestive manipulation characteristic of the "critical stage" event, the results of the test are not self-incriminating communications, and the statutory procedures for the test meet due process requirements. St. v. Armfield, 214 M 229, 693 P2d 1226, 41 St. Rep. 2430 (1984), followed in St. v. Van Kirk, 2001 MT 184, 306 M 215, 32 P3d 735 (2001), and St. v. Michaud, 2008 MT 88, 342 M 244, 180 P3d 636 (2008).

No Impeachment by Fact That Defendant's Exculpatory Story Told for First Time at Trial: The State may not seek to impeach a defendant's exculpatory story, told for the first time at trial, by cross-examining the defendant about his failure to have told the story after receiving Miranda warnings at the time of his arrest. St. v. Furlong, 213 M 251, 690 P2d 986, 41 St. Rep. 2096 (1984).

Tactical Decision on Testifying — No Fifth Amendment Violation: After a hearing on the state's petition for temporary custody of C.L.R., the District Court amended the petition pursuant to 41-3-401 (renumbered 41-3-422) to terminate the father's parental rights. At the time of the hearing, the father was appealing his conviction for deliberate homicide of C.L.R.'s half-brother. The father requested a stay in the termination proceedings pending his criminal appeal, which request the District Court denied. The father contended that in order to testify at the termination hearing, he had to jeopardize his fifth amendment right to remain silent (similar to Art. II, sec. 25, Mont. Const.). The fifth amendment protection against persons testifying against themselves covers not only criminal proceedings but other proceedings where compelled testimony could lead to future prosecution. The test is whether the person is compelled to testify or merely required to make tactical decisions regarding the defense of his position. The Supreme Court held that the father's decision to testify was not compelled. His decision to testify hinged on a tactical decision and not on penalty of certain loss of his parental rights if he failed to testify. In re C.L.R., 211 M 381, 685 P2d 926, 41 St. Rep. 1436 (1984), followed in St. v. Donnelly, 244 M 371, 798 P2d 89, 47 St. Rep. 1600 (1990), and distinguished in In re A.N. & C.N., 2000 MT 35, 298 M 237, 995 P2d

427, 57 St. Rep. 155 (2000). See also St. v. Imlay, 249 M 82, 813 P2d 979, 48 St. Rep. 588 (1991), which overruled Donnelly with regard to augmentation of sentence for failure to admit guilt.

Defendant's Brief — Copy Given Prosecutor by Court Before Trial: It was not error for the District Court to give a copy of the defendant's trial brief to the prosecution prior to the trial. Assuming the brief's contents raised the prospect of self-incrimination, the defendant was under no compulsion to produce the information or argument summarized in the brief, and the self-incrimination guarantee pertains only to compelled self-incrimination. In addition, the defendant waived any privileges with respect to the brief's contents because the brief's subject matter was to be freely offered and elaborated on at trial. There was no substantial prejudice from giving the brief to the prosecution. St. v. Anderson, 211 M 272, 686 P2d 193, 41 St. Rep. 1357 (1984).

Later Voluntary Amplification of Confession — No Second Miranda Warning — Not Error: Approximately a month after his arrest for homicide, followed by a Miranda warning and confession, the defendant asked to see the Sheriff. When the Sheriff arrived at the cell, no Miranda warning was given, but the defendant began clarifying his confession and reenacting transactions that occurred the day of the homicide. The Supreme Court held it was not error for the District Court to admit the Sheriff's testimony regarding the incident because the defendant had been given a Miranda warning at the time of his first confession and he had asked to talk to the Sheriff and voluntarily offered information in an atmosphere free from coercion. The court also held that because there was no direct infringement of the defendant's fourth or fifth amendment rights under the federal constitution, the Sheriff's testimony could not be excluded as the fruit of a suppressed statement. In a further holding, the court provided that the Sheriff's statements were not inadmissible under Rule 701, Montana Rules of Evidence, on the grounds that the Sheriff's testimony was nonexpert opinion testimony and that even if error had occurred, there was no reversible error because no prejudice was demonstrated. St. v. Kutnyak, 211 M 155, 685 P2d 901, 41 St. Rep. 1277 (1984).

Self-Defense — Judge's Refusal to Give Instruction Without Testimony of Defendant — Not Contrary to Right Against Self-Incrimination: Defendant raised the affirmative defense of self-defense in his trial for homicide. There were no witnesses to the killing other than the defendant. The defendant argued that he could introduce evidence tending to show the decedent was the aggressor by showing his reputation and specific acts of turbulence or violence. It was not error for the District Court to require the defendant to testify as to his own fear or apprehension, based upon the deceased's reputation, to lay a foundation for other witnesses to testify as to the deceased's violence or risk being denied an instruction on self-defense. Neither at that point nor during the trial did defense counsel object to the ruling or assert his client could not be compelled to testify against himself, and it was never asserted, even at appellate argument, that defendant would not have testified except for that ruling. St. v. Kutnyak, 211 M 155, 685 P2d 901, 41 St. Rep. 1277 (1984).

Prosecutorial Comment on Failure to Testify After Defense Said Defendant Would: Defendant was convicted of attempt to commit burglary. The state's case was based on circumstantial evidence and was not ironclad. An eyewitness saw a flashlight being used and shadows in the night and reported to the police. When the police arrived, defendant was apprehended in the eyewitness' yard across the alley from the scene of the crime. Defendant did not testify, and neither did either of his codefendants, though in his opening statement the defense attorney stated that defendant would testify. In his closing argument and again in his rebuttal closing argument, the prosecutor emphasized the fact that defendant did not testify even though his attorney had said he would and that the reason for his failure to testify was not known. In effect, the prosecutor solemnized the silence of defendant into evidence against him and error occurred. Against the background of the evidence, the prosecutor's comments loomed larger and pointed to defendant's guilt. The conviction was reversed because the court could not say beyond a reasonable doubt that the comments did not contribute to the verdict and because the error may have played a substantial part in the jury's deliberation and contributed to the verdict. St. v. Gladue, 208 M 174, 677 P2d 1028, 41 St. Rep. 249 (1984). See also St. v. Mix, 239 M 351, 781 P2d 751, 46 St. Rep. 1740 (1989).

Plea Based on Promised Lenience — Inadmissible: Plaintiff pleaded guilty to sexual intercourse without consent. He later withdrew the plea, which was based on plea bargaining, and went to trial. At the trial, plaintiff's confession upon entering the plea was used to impeach him. The Montana Supreme Court upheld plaintiff's conviction in St. v. Hansen, 194 M 197, 633 P2d 1202, 38 St. Rep. 1541 (1981). Plaintiff brought this action, contending that the admission of his confession violated his rights under the fifth amendment to the United States Constitution (similar to Art. II, sec. 25, Mont. Const.). The court held that where a plea is brought about by

thoughts of promised lenience, it cannot be admitted into evidence when it has been withdrawn. The court ordered a new trial. Hansen v. Risley, 40 St. Rep. 2100 (D.C. Mont. 1983) (apparently not reported in Federal Supplement).

Miranda Warnings Unnecessary — Lack of Custody: During an investigation for the theft of property from Valley Industrial Park (V.I.P.), the defendant, a former employee of V.I.P., invited Adams, a special investigator, into his residence and discussed the whereabouts of the missing property. The defendant requested an attorney if their conversation was taped. The tape recorder was not used. Adams neither sought a confession nor suggested defendant would be under arrest. Defendant was never in custody, and the court properly admitted Adams' testimony. Miranda warnings were unnecessary. St. v. Holmes, 207 M 176, 674 P2d 1071, 40 St. Rep. 1973 (1983).

Refusal to Submit to Blood Alcohol Test Not Self-Incrimination: Use of evidence of a defendant's refusal to submit to a blood alcohol test in a DUI prosecution does not violate the defendant's fifth amendment right against self-incrimination. The language used in Art. II, sec. 25, Mont. Const., is substantially identical to and affords no basis for interpreting it more broadly than its federal counterpart. Montana's constitutional prohibition against self-incrimination is not offended by the admission of defendant's refusal to submit to a Breathalyzer sobriety test. St. v. Jackson, 206 M 338, 672 P2d 255, 40 St. Rep. 1698 (1983).

Forfeiture Proceedings — No Requirement That Defendant Incriminate Himself: In a proceeding under Title 44, ch. 12, defendant, in his answer to the State's notice of intent to institute forfeiture proceedings, admitted ownership of the vehicle but refused to respond to the allegations that it had been used in criminal activity. Hearing on the forfeiture was held after defendant had been sentenced and forfeiture was ordered. On appeal, defendant asserted that the requirement of Title 44, ch. 12, part 2, that the owner or claimant of seized property file an answer within 20 days of the State's notice was a violation of his right to due process. Defendant reasoned that the statute requires an unconstitutional choice to be made in the forfeiture proceeding, i.e., a defendant must choose either to give evidence that may be used against him in a criminal proceeding or to forfeit his property. The Supreme Court found that Title 44, ch. 12, part 2, does not require that a defendant incriminate himself in the answer and further found that this defendant had not done so. Therefore, the court ruled that the statutes are not facially unconstitutional. Neither was the statutes' application to defendant unconstitutional, since his forfeiture hearing was not held until after his sentencing. St. v. Baker, 205 M 244, 667 P2d 416, 40 St. Rep. 1244 (1983).

Inhospital Interview Not Custodial Interrogation: Defendant and Cunningham were in a car traveling east in the westbound lane of traffic when it collided with another car, killing the driver. Defendant was at the hospital when a patrolman arrived. The patrolman asked the defendant his name, date of birth, and if he had been driving the car at the time of the accident. Defendant stated he was driving and the accident was his fault. Defendant was not placed under arrest or given a Miranda warning. His blood-alcohol content was .225%. Defendant was convicted of negligent homicide. Defendant contended he was "in custody" when questioned at the hospital and should have been given a Miranda warning. The Supreme Court, relying on Oregon v. Mathiason, 429 US 492 (1977), applied the rule that Miranda warnings are required only when there has been such a restriction on a person's freedom as to render him "in custody". Relying on State ex rel. Berger v. District Court, 150 M 128, 432 P2d 93 (1967), the court held that an inhospital nonaccusatory interview, where the defendant was not placed under arrest during or immediately following the interview, was not custodial interrogation. The motion to suppress the questioning was properly denied. St. v. Lapp, 202 M 327, 658 P2d 400, 40 St. Rep. 120 (1983).

Improper Instruction on Effect of Possession of Stolen Property: Instruction taken from 45-6-304 (now repealed) that "you are instructed that possession of stolen property shall not constitute proof of the commission of the offense of theft. Such fact shall place a burden on the possessor to remove the effect of such fact as a circumstance to be considered with all the other evidence pointing to his guilt" was reversible error as it took away defendant's presumption of innocence and forced him to testify, by placing a burden on him to either disprove unlawful possession or prove lawful possession. That section was declared unconstitutional in St. v. Kramp, 200 M 383, 651 P2d 614, 39 St. Rep. 1819 (1982). St. v. Morigeau, 202 M 36, 656 P2d 185, 39 St. Rep. 2311 (1982).

Impeachment by Reference to Remaining Silent: Defendant charged with burglary told his second attorney on the date set for trial that he had an alibi and intended to rely on it. In his direct testimony, defendant testified concerning his alibi and that he said nothing to the police during and after his arrest and never confessed to the crime. The state, on cross-examination, repeatedly asked why he had not raised his alibi defense earlier. Defendant's direct testimony

opened the door to the impeachment inquiry, and the prosecutor's questions were proper and did not violate his right against self-incrimination. Defendant could not cloak himself on direct examination with seeming innocence because of his silence following arrest and at the same time be immune from impeachment when, to attack his credibility, the same kind of silence could be shown to speak to his guilt. St. v. White, 200 M 123, 650 P2d 765, 39 St. Rep. 1619 (1982), distinguished in St. v. Furlong, 213 M 251, 690 P2d 986, 41 St. Rep. 2096 (1984).

Defendant Not Required to Incriminate Himself to Preserve Fourth Amendment Rights: Although it has been held that the owner of a car or a container will lose his standing to object to the search of it if he abandons it prior to the time of search, a mere disclaimer of ownership in an effort to avoid making an incriminating statement in response to police questioning should not alone be considered to constitute abandonment. St. v. Isom, 196 M 330, 641 P2d 417, 39 St. Rep. 137 (1982).

Youth Court — Holding Youth Without Arraignment Until Transfer to District Court: Defendant, age 17, was arrested and charged with homicide. Defendant refused to be interviewed by a Youth Court probation officer or a psychologist. The State moved to transfer prosecution to the District Court. Because of lack of an interview, the probation officer could not recommend for or against transfer and so advised the court. The motion was granted and defendant was ordered to be tried as an adult. Defendant contends that the cause of the transfer was his refusal to be interviewed and that the court placed on him the burden to justify continuation in Youth Court. Placing the burden on him, defendant claims, would force him to waive his right against self-incrimination. That is not the case here; the record indicates that the Youth Court considered each factor in 41-5-206. Once the Youth Court was refused the interviews, the only source of information it could rely on was that coming other than from the defendant. In doing so, the Youth Court considered each of the factors set out in 41-5-206. St. v. Rodriguez, 192 M 411, 628 P2d 280, 38 St. Rep. 578F (1981).

Waiver of Right to Counsel by Defendant Claiming Mental Defect — When Confession Suppressed: Defendant, convicted of aggravated assault, appealed based on issues related to his confession. The Supreme Court on review said the real issue is whether the defendant knowingly and voluntarily waived the right to counsel. The question of waiver was inextricably interwoven with the question of the voluntariness of the accused's confession. That was especially true because the defendant alleged incapacity because of mental illness. Whether a confession should have been suppressed depends on its voluntariness, and that depends on the "totality of the circumstances". The Supreme Court found that the evidence showed that Miranda warnings were given before confession, that the defendant was capable of understanding the warnings, that the defendant waived his rights to counsel and against self-incrimination knowingly and voluntarily, and that the defendant was not improperly induced into confession. St. v. Mercer, 191 M 418, 625 P2d 44, 38 St. Rep. 312 (1981).

Seizure of Pubic Hair Not Self-Incrimination: The State obtained a search warrant authorizing the seizure of pubic hairs from Armstrong. Armstrong contends that the seizure violated his right against self-incrimination. The fifth amendment, however, protects an accused only from being compelled to provide evidence of a testimonial or communicative nature. The seizure of pubic hairs is not protected by the right against self-incrimination. St. v. Armstrong, 189 M 407, 616 P2d 341, 37 St. Rep. 1563 (1980).

"Good Cop/Bad Cop" Questioning Technique — Examination of Totality of Circumstances: In determining whether the impermissible "good cop/bad cop" questioning technique was used by police, the totality of the circumstances must be examined. The intent of the officers, whether or not they planned to use the technique, is irrelevant to that inquiry. Where the defendant confessed to a seemingly "nice" police officer after he had been questioned by officers who seemed to him to be angry was not, in this instance, triggered by the use of the technique but rather hinged on the defendant's listening to a codefendant's recorded confession at the end of the questioning session. The trial court's determination that the confession was freely given is supported by the comparatively short questioning period, the number of Miranda warnings given and defendant's understanding of them, and the defendant's age and education. St. v. Davison, 188 M 432, 614 P2d 489 (1980).

Voluntariness of Confession — Totality of Circumstances: Involuntariness in a confession, rendering it unusable against a defendant, may be caused either by physical or mental coercion. To be used against him, the confession must be a product of an essentially free and unconstrained choice by its maker. In determining whether a confession was voluntary once the defendant contends that it is a product of coercion, the burden is placed upon the State to show that the defendant knowingly and intelligently waived his privilege against self-incrimination and right to

counsel by a preponderance of the evidence. This issue is addressed to the trial court's discretion and depends upon the totality of the circumstances; if there is substantial evidence to support the trial court's finding, it must be affirmed. St. v. Davison, 188 M 432, 614 P2d 489 (1980).

Neutron Activation Test for Gunpowder Residues: The defendant was arrested at the police station without a warrant, and the police administered a neutron activation test to determine if there were gunpowder residues on the defendant's hands. The defendant sought to suppress the results of the test on the grounds that his fifth amendment right against self-incrimination was violated. The Supreme Court held that the administration of a neutron activation test upon defendant did not violate his rights under the fifth amendment because the fifth amendment only protects against compelling "evidence of a testimonial or communicative nature". The gunpowder residues taken from the defendant's hands do not meet this criterion. St. v. Ulrich, 187 M 347, 609 P2d 1218 (1980).

Fruits of Involuntary Confession: The defendant's confession was obtained involuntarily. Under the "fruit of the poisonous tree doctrine", evidence obtained as a result of an involuntary confession must be suppressed unless: (1) the evidence is sufficiently purged from the constitutional violation so as to remove its primary taint; (2) the evidence is obtained from a source independent of the defendant's confession; or (3) it is inevitable that the evidence would have been discovered apart from the defendant's confession. The Supreme Court found that none of the exceptions applied and that the evidence should have been suppressed. St. v. Allies, 186 M 99, 606 P2d 1043 (1979).

Voluntariness of Confession: The police read the defendant his Miranda rights before they originally interrogated him and again just before he confessed to the homicide. Between the original interrogation and the confession, the police kept the defendant incommunicado in a small room in a hostile police environment. They used the nice cop/mean cop method of interrogation and lied to the defendant while using the guilt assumption technique of interrogation. The defendant eventually confessed to the homicide after a truth serum was administered and he was told that his story was inconsistent and contradictory to his "serum" story. The Supreme Court, after considering the totality of the circumstances, found the confession to be inadmissible on the basis that it was not made voluntarily. St. v. Allies, 186 M 99, 606 P2d 1043 (1979), followed in St. v. Hermes, 273 M 446, 904 P2d 587, 52 St. Rep. 1055 (1995), and St. v. Johnson, 274 M 124, 907 P2d 150, 52 St. Rep. 1186 (1995). Allies was distinguished in St. v. Scarborough, 2000 MT 301, 302 M 350, 14 P3d 1202, 57 St. Rep. 1268 (2000). Hermes was followed, as to totality of circumstances, in St. v. Hayworth, 1998 MT 158, 289 M 433, 964 P2d 1, 55 St. Rep. 631 (1998), and St. v. Hill, 2000 MT 308, 302 M 415, 14 P3d 1237, 57 St. Rep. 1301 (2000).

Voluntariness of Confession — Burdens of Proof — Harmless Error: A trial judge can properly require party moving for suppression of evidence (involuntary confession) to initiate suppression hearing proceedings. The rationale for such a procedure is the requirement that the movant establish a prima facie case that a constitutional infringement has occurred. Once this has been accomplished, the ultimate burden of proving the propriety of the state's action (obtaining a confession) shifts to the State, notwithstanding 46-13-301(4), which is unconstitutional. Thus, the District Court did not err in requiring appellant to present his evidence first at the suppression hearing but did err in putting the ultimate burden on the defendant at the hearing. The Supreme Court, however, upheld the District Court's denial of the motion to suppress because its error was harmless beyond a reasonable doubt. St. v. Blakney, 185 M 470, 605 P2d 1093 (1979), certiorari granted, 101 S Ct 2999 (1981), and judgment vacated and case remanded for further consideration in light of Edwards v. Ariz., 101 S Ct 1880 (1981), affirmed on remand, 197 M 131, 641 P2d 1045, 39 St. Rep. 436 (1982).

Voluntariness of Confession — Effective Request for Counsel and Subsequent Waiver: To determine whether a confession should have been suppressed, it had to be determined whether the confession was voluntary and whether there was an unconstitutional denial of the right to counsel. In so doing, the following questions had to be answered: What was the totality of the circumstances? Was there effective assertion of the right to counsel? And if so, was there a subsequent waiver? Since the evidence answered a large number of the requisite questions about the circumstances, the decision of the trial court was held not to have clearly contravened the weight of the evidence, and its holding of voluntariness was upheld. Since any indication by a defendant in any manner that he wishes to consult with an attorney suffices and evidence showed the defendant had met this requirement, the trial court erred in concluding that there was ineffective assertion of the right to counsel. After adopting the rule that a defendant can validly waive the right to counsel after making a request for counsel, the Supreme Court found the trial court properly found that the State had met its "heavy burden" of showing waiver of

counsel. St. v. Blakney, 185 M 470, 605 P2d 1093 (1979), certiorari granted, 101 S Ct 2999 (1981), and judgment vacated and case remanded for further consideration in light of Edwards v. Ariz., 101 S Ct 1880 (1981), affirmed on remand, 197 M 131, 641 P2d 1045, 39 St. Rep. 436 (1982).

Request Addressed to Defense Counsel During Trial: Defendant was not denied his constitutional right to remain silent when the prosecutor, in the course of interviewing a witness, asked defense counsel to check his files for a letter about which he was questioning the witness. Defense counsel made no objection at the time of the incident, and the request was made of counsel and not of the defendant. After reviewing the transcript, it appears the exchange did not prejudice the defendant. St. v. Bretz, 185 M 253, 605 P2d 974 (1979).

Voluntariness of Statement — Recording Statement: A defendant who said it probably was advisable that he have an attorney but who nonetheless went ahead and fully consented to being interrogated and tape-recorded was held to have made a voluntary statement, having been advised of his rights. A statement made voluntarily after the speaker has been made fully aware of and understands his rights is not objectionable because the statement is made without the advice or assistance of counsel. Electronically recorded or preserved evidence is subject to the same admissibility tests as direct evidence of eyewitnesses or earwitnesses. With proper advice to a prospective defendant who then voluntarily consents to the tape-recording of his statements, the constitutional defenses of self-incrimination, unlawful search, invasion of privacy, and right to counsel disappear. Then the tape-recorded statement may be regarded as independent direct evidence or as corroborative evidence. In either case, the tests for admissibility are the same. Since the interviewing detective would have testified directly to the recorded statements, the recorded statements are themselves admissible. St. v. Brubaker, 184 M 294, 602 P2d 974 (1979).

Admission of Confession — Harmless or Prejudicial Error: When error is federal constitutional error, as with the improper admission of a confession, the error cannot be considered harmless unless the court finds it harmless beyond a reasonable doubt. Admission of a confession taken without adequate Miranda warnings constituted prejudicial error, resulting in overturn of convictions on two charges. Nonetheless, because admission of that portion of the same confession that related to another charge (criminal trespass) against the defendant was held harmless error, conviction on that other charge was sustained. St. v. Dess, 184 M 116, 602 P2d 142 (1979).

Statements Made to Civilians Prior to Police Custody: On two occasions while the defendant and his stepchild were alone, the stepchild received serious injuries. On both occasions the defendant gave explanations of how the injuries occurred to his wife and to several doctors. The defendant was charged with aggravated assault and filed a motion to suppress his statements concerning the cause of the child's injuries. The court properly denied the motion. The statements were voluntarily given. The Miranda warnings do not apply to statements given by a person before he is a criminal suspect in police custody. The statements made here were not made to law enforcement agents or their alter egos. St. v. Hall, 183 M 511, 600 P2d 1180 (1979).

Voluntariness of Signed Statement: Flathead County Sheriff's deputy downplayed the defendant's Miranda rights by telling him that reading him his rights was merely procedural and that he was not being accused of anything. During the questioning, the deputies suggested answers to their questions and impliedly threatened to send him to Warm Springs State Hospital if he did not cooperate. In the signed statement of the defendant they specifically requested that he add a sentence. All of these facts are sufficient to affirm the District Court's findings that the statements made by the defendant were not voluntary and should be suppressed. St. v. Grimestad, 183 M 29, 598 P2d 198 (1979).

Probation Revocation — Lesser Standard Applies — United States Constitution: The necessity of waiving the United States Constitution's privilege against self-incrimination (similar to Art. II, sec. 25, Mont. Const.) in order to testify to matters going to guilt or innocence does not constitute an impermissible imposition on the policy allowing a criminal defendant to be heard in his own defense. The policies behind the United States Constitution's due process right to be heard (similar to Art. II, sec. 17, Mont. Const.) are not significantly impaired by a similar disability at a probation revocation and sentencing hearing, where less procedural protection is generally warranted. Ryan v. St., 580 F2d 988 (9th Cir. 1978).

Incriminating Statements at Prison Disciplinary Hearing: When defendant uttered incriminating statements at a disciplinary hearing involving allegations of possession of a weapon by a prisoner, without benefit of Miranda cautionary statements, subsequent admission of the statements into evidence at defendant's trial was a violation of the privilege against self-incrimination. St. v. Harris, 176 M 70, 576 P2d 257 (1978).

Conversations With Defendant After Charge: Conversations with a defendant following his being charged with gambling offenses that were used to prove bribery charges were admissible

because they were used to prove a distinct and separate offense from that for which the defendant was originally charged. St. v. Hensley, 171 M 38, 554 P2d 745 (1976).

Comments on Defense Case by Prosecution: When there was no comment on defendant's failure to testify, a rhetorical question by a prosecutor that there was "no evidence" or "no testimony" to rebut the State's evidence was not violative of the right to remain silent. St. v. Armstrong, 170 M 256, 552 P2d 616 (1976).

Admissibility of Statements Made While Under Self-Induced Intoxication: When subsequent events confirmed reliability of defendant's statements made while under self-induced intoxication, trial court did not err in admitting statements in evidence because in cases of self-induced intoxication the criterion for admission is trustworthiness, which is testable by the content of the statements by evidence of subsequent events that confirm the reliability of the statements, especially since defendant freely made the statements and police did not question defendant due to his intoxicated condition. St. v. Emerson, 169 M 285, 546 P2d 509 (1976).

Probation Revocation Hearing: Hearing on revocation of probation that was held prior to trial for criminal charge on same facts alleged as grounds for revocation was not a violation of defendant's protection against self-incrimination. St. v. Ryan, 166 M 419, 533 P2d 1076 (1975).

Testimony That Defendant Claimed Privilege — Harmless Error: The testimony of police officer that the defendant when accused and warned of his rights claimed his fifth amendment privilege, although irrelevant and improper, was harmless error where the State presented overwhelming evidence of guilt and the defendant himself testified at trial. St. v. Flamm, 165 M 128, 526 P2d 119 (1974).

Voluntariness of Confession — Absence of Coercion: In the absence of evidence of physical or psychological coercion, the defendant's handwritten confession, made about 2 hours after the crime was reported and after the defendant had been informed of his rights, was voluntarily given and admissible at trial. St. v. Smith, 164 M 334, 523 P2d 1395 (1974).

DOUBLE JEOPARDY

Double Jeopardy Claim Premature — Attachment Upon Conviction: After being charged with aggravated assault and elder abuse, the defendant filed a pretrial motion arguing that the prosecution was required to choose between prosecuting him for either offense rather than prosecuting him for both. The District Court denied the motion. On appeal, the Supreme Court affirmed, holding that the defendant's claim of double jeopardy was premature because he had not yet been tried for or convicted of either offense. St. v. Violette, 2015 MT 67, 378 Mont. 320, 343 P.3d 574.

Double Jeopardy Protection Against Multiple Convictions or Punishments — Charging in the Alternative Specifically Allowed Under Montana Law: The defendant was convicted of criminal endangerment and of assault as a lesser included offense of aggravated assault but was not convicted of the aggravated assault charge. On appeal, the defendant argued the charges were multiplicitous because they addressed one crime with multiple charges, in violation of the federal prohibition against multiplicitous charges under the double jeopardy clause. The Supreme Court held that the defendant's claim was meritless because federal jurisprudence protects a defendant only from conviction on multiplicitous charges and the defendant was never subjected to multiple convictions or punishments. Further, even if the defendant had been convicted on multiplicitous charges, the District Court could have cured the double jeopardy violation by vacating one of the convictions. St. v. Zink, 2014 MT 48, 374 Mont. 102, 319 P.3d 596.

Statutory Prohibition Against Multiple Convictions Not Applicable to Multiple Offenses Charged Against Defendant: The defendant was charged with aggravated assault and criminal endangerment. The District Court instructed the jury on the offenses of criminal endangerment, aggravated assault, and assault as a lesser included offense of aggravated assault. The defendant was convicted of criminal endangerment and the lesser offense of assault. On appeal, the defendant argued that criminal endangerment is a lesser included offense of aggravated assault, and thus he could not be charged with both under 46-11-410. The Supreme Court disagreed, holding that even if criminal endangerment is a lesser included offense of aggravated assault, the defendant was not convicted of both charges, so the prohibition under 46-11-410 does not apply. St. v. Zink, 2014 MT 48, 374 Mont. 102, 319 P.3d 596.

Double Jeopardy Not Applicable if Crimes Committed Against Different Victims: Charging both criminal endangerment and aggravated assault did not constitute plain error because different victims were involved. St. v. Torres, 2013 MT 101, 369 Mont. 516, 299 P.3d 804.

Conviction of Incest and Attempted Incest Upheld — Crimes Arising From Separate and Distinct Transactions: After a jury found him guilty of both incest and attempted incest, the

defendant moved for a new trial on multiple grounds, including an allegation that he was subjected to double jeopardy. The defendant argued that both offenses occurred on the same day during a hunting trip, but the Supreme Court determined the convictions were based on two separate and distinct transactions. St. v. Geren, 2012 MT 307, 367 Mont. 437, 291 P.3d 1144, citing St. v. Williams, 2010 MT 58, 355 Mont. 354, 228 P.3d 1127.

Conviction Overturned at Postconviction Hearing — Retrial Not Violative of Double Jeopardy: A defendant's right to be free from double jeopardy did not prevent the state from reprosecuting him after his conviction was overturned by the postconviction court for prosecutorial misconduct and ineffective assistance of counsel. St. v. Duncan, 2012 MT 241, 366 Mont. 443, 291 P.3d 106.

Conviction in City Court — Appeal for Trial De Novo in District Court — Dismissal of Case for Insufficient Evidence by District Court — No Appeal for State: The defendant was convicted in city court for obstructing a peace officer, disorderly conduct, and assault with a bodily fluid. She appealed to the District Court for a jury trial de novo. Following the presentation of the prosecutor's case, the District Court granted the defendant's motion to dismiss based on insufficient evidence. The state appealed to the Supreme Court, which concluded that a dismissal based on insufficient evidence is an acquittal and that the state could not appeal the dismissal from District Court because a successful appeal would subject the defendant to retrial in violation of double jeopardy principles. Cut Bank v. Hall, 2012 MT 16, 363 Mont. 380, 270 P.3d 20.

Failure to Object to Prosecution for Conduct Previously Used to Enhance Federal Sentence — No Ineffective Assistance: The defendant argued that the District Court erred in concluding that the defendant's trial counsel provided effective assistance when counsel failed to raise a double jeopardy objection to the state prosecution of the defendant for conduct that was used to enhance his federal sentence. Distinguishing St. v. Neufeld, 2009 MT 235, 351 Mont. 389, 212 P.3d 1063, the Supreme Court concluded that the state and federal charges were distinct and did not arise from the same transaction as defined in 46-1-202, and, in addition, controlling caselaw at the time the District Court considered the motion held that double jeopardy did not bar prosecution of an offense that was used to enhance a sentence in a prior prosecution. Because any objection on double jeopardy grounds to the state charge lacked merit, the District Court did not err in concluding counsel was effective. Heddings v. St., 2011 MT 228, 362 Mont. 90, 265 P.3d 600.

Spatial Proximity Not Sufficient to Establish Same Transaction: After law enforcement discovered a blue bag containing a baggie, spoon, and loaded syringe in the defendant's possession, the defendant was charged with possession of drug paraphernalia and pleaded guilty to the charge the next day. Later, when test results for the substance in the syringe tested positive for methadone, the state charged the defendant with possession of dangerous drugs. The defendant moved to dismiss the charge, which the District Court denied. The Supreme Court affirmed, concluding the spatial proximity of the items in the blue bag was insufficient, by itself, to constitute a same transaction under 46-1-202 and 46-11-504. In addition, because the prosecutor did not have knowledge of the substance in the syringe, prosecution was not barred by the former prosecution of the possession of drug paraphernalia charge. St. v. Kopp, 2011 MT 125, 360 Mont. 501, 255 P.3d 160.

Sexual Intercourse Without Consent and Sexual Assault Not Part of Same Transaction — Conviction and Sentence Upheld: Goodenough challenged his conviction for sexual intercourse without consent and sexual assault that stemmed from repeated sexual encounters with one of his granddaughters that occurred between 2002 and 2005. Goodenough alleged that his conviction for sexual intercourse without consent precluded his sentence for the lesser included offense of sexual assault because the crimes constituted a single transaction. The Supreme Court disagreed. Even though the conduct underlying the offenses was similar, continued over the course of several years, and was described by prosecutors as a "continuous course of conduct", the facts and evidence established separate offenses from which a jury could find multiple incidents that occurred on different days between 2002 and 2005. St. v. Goodenough, 2010 MT 247, 358 Mont. 219, 245 P.3d 14, distinguishing St. v. Williams, 2010 MT 58, 355 Mont. 354, 228 P.3d 1127.

Sentencing Defendant as Persistent Felony Offender — No Double Jeopardy: Sentence enhancements based on recidivism, and not based on the same prior conviction, do not violate double jeopardy. St. v. Brooks, 2010 MT 226, 358 Mont. 51, 243 P.3d 405.

No Double Jeopardy for Initiation of Revocation Proceeding After a 72-Hour Hold and Release — Ineffective Assistance of Counsel Claim Denied: Revocation of probation following a 72-hour hold and release for a suspected probation violation did not violate the prohibition on double jeopardy. Revocation of probation does not constitute a punishment for purposes of

double jeopardy, and defense counsel did not render ineffective assistance by failing to raise the argument. St. v. Maynard, 2010 MT 115, 356 Mont. 333, 233 P.3d 331.

Revocation of Parole or Probation Not Considered Punishment for Double Jeopardy Purposes: Revocation is a supervisory act involving the enforcement of conditions imposed on a term of parole or probation. Therefore, the same act or acts may form the basis for revoking both an offender's parole and an ensuing suspended sentence without contravening double jeopardy protections. Here, Haagenson was granted conditional release and a suspended sentence subject to certain conditions, including a requirement that he remain law abiding and not consume alcohol. Haagenson subsequently violated these conditions and thus forfeited both the conditional release and the future suspended sentence. St. v. Haagenson, 2010 MT 95, 356 Mont. 177, 232 P.3d 367, distinguishing St. v. Martinez, 2008 MT 233, 344 Mont. 394, 188 P.3d 1034, and St. v. Johnston, 2008 MT 318, 346 Mont. 93, 193 P.3d 925.

Alford Plea to Partner or Family Member Assault Not Precluding Subsequent Prosecution for Assault on Minor: After beating his girlfriend's 2-year-old son, Weatherell was charged with assault on a minor, criminal endangerment, and partner or family member assault. Weatherell entered an Alford plea to the partner or family member assault and endangerment charges and moved to dismiss the remaining charges on double jeopardy grounds, but the motion was denied. On appeal, the Supreme Court held that under 46-11-410(2)(a) and (2)(d), Weatherell's Alford plea to partner or family member assault did not foreclose a subsequent prosecution for assault on a minor. Denial of the dismissal motion was affirmed. St. v. Weatherell, 2010 MT 37, 355 Mont. 230, 225 P.3d 1256.

Double Jeopardy Not Applicable to Revocation of Parole or Suspended Sentence: LeDeau was released on parole a few months before the unsuspended portion of a sentence for sexual assault was served. Shortly thereafter LeDeau admitted violating the terms of parole, so parole and the suspended sentence were revoked. LeDeau appealed on grounds of double jeopardy, but the Supreme Court affirmed. Parole is a privilege, not a right, and revocation of parole does not constitute punishment for purposes of double jeopardy. When a suspended sentence is imposed, the sentencing court may revoke the suspended sentence upon a showing that any sentencing condition has been violated. A revocation proceeding is not a criminal adjudication, does not require proof of a criminal offense, does not impose punishment for any new offense, and is an act in the performance of the duty of supervision of the offender. Thus, double jeopardy is not applicable to revocation of a suspended sentence. St. v. LeDeau, 2009 MT 276, 352 M 140, 215 P3d 672 (2009).

Defendant's Acquiescence in Termination of Trial — Waiver of Right to Object to Trial Termination — Retrial Not Barred: A mistrial was declared during Cates' trial for sexual intercourse without consent, and the state amended the information, refiled the charges, and sought a second trial. Cates moved to dismiss on double jeopardy grounds, but the motion was denied pursuant to St. v. Carney, 219 M 412, 714 P2d 532 (1986), which holds that a second criminal trial is barred unless there is a manifest necessity to terminate the trial or the defendant acquiesces in the termination. Cates appealed, but the Supreme Court affirmed. If the totality of the circumstances and the affirmative conduct of the defendant show that the right to object to trial termination has been waived, then a retrial is not barred on double jeopardy grounds. Here, Cates twice expressed willingness to terminate the proceedings by offering two mistrial motions, and Cates never wavered or expressed any misgivings, even when given the opportunity to do so. Thus, Cates waived the right to object to termination of the proceedings, and under 46-11-503(2)(a), retrial under the amended information was not barred and Cates' motion to dismiss was properly denied. St. v. Cates, 2009 MT 94, 350 M 38, 204 P3d 1224 (2009). See also U.S. v. Dinitz, 424 US 600 (1976), Peretz v. U.S., 501 US 923 (1991), and Keating v. Sherlock, 278 M 218, 924 P2d 1297 (1996).

Aggravated Assault as Lesser Included Offense of Felony Homicide — Merger of Offenses — Conviction for Both Offenses Error: Russell was convicted of felony homicide and aggravated assault. Aggravated assault was charged as the predicate offense for charging felony homicide. Russell asserted that because the felony homicide conviction was predicated on the same assault, the conviction for aggravated assault should be dismissed. The District Court declined to dismiss the assault conviction, but on appeal the Supreme Court reversed. A defendant cannot be found guilty of felony homicide without having committed a predicate felony offense. When the offenses are charged in that fashion, the offenses merge and the predicate offense becomes a lesser included offense of felony homicide. Therefore, the District Court erred by not granting Russell's motion to dismiss the lesser included offense of aggravated assault after being convicted of felony murder. St. v. Russell, 2008 MT 417, 347 M 301, 198 P3d 271 (2008), followed in St. v. Williams,

2010 MT 58, 355 Mont. 354, 228 P.3d 1127, regarding vacation of lesser included offense and denial of new trial despite double jeopardy violation.

Bond Forfeiture Not Generally Synonymous With Conviction — No Double Jeopardy for Assault Proceedings: Toth forfeited bond for disorderly conduct that occurred on the same day that he was charged with assault with a weapon. Toth claimed that if the bond forfeiture arose from the same events that led to the assault charge, double jeopardy would bar further conviction for assault. The Supreme Court disagreed. Absent specific legislation to that effect, bond forfeiture is not generally synonymous with a conviction for double jeopardy purposes. Bond forfeiture is essentially a civil action and is not admissible as evidence in any other civil action, but bond forfeiture is included within the definition of conviction for particular statutorily delineated purposes only, not including assault. Thus, even if Toth's felony assault charge bond forfeiture arose out of the same transaction as the disorderly conduct, jeopardy did not attach by the bond forfeiture, so Toth's claim failed. St. v. Toth, 2008 MT 404, 347 M 184, 197 P3d 1013 (2008). See also Scott v. S. Carolina, 513 SE 2d 100 (S.C. 1999).

Revocation of Federal Probation Not Considered Prosecution Under State Law — No Double Jeopardy Violation: In 1991, Maki was convicted in federal court of five offenses. While on supervised probation for the federal offenses in 2006, Maki violated the terms of supervised release by manufacturing and distributing drugs in Montana and his federal probation was revoked. Maki was subsequently charged with felony drug violations in Montana. Maki moved to dismiss the state charges on double jeopardy grounds, asserting that he would face double punishment for the same conduct that formed the basis for the federal revocation if the state prosecution was continued. The District Court reasoned that Maki had not faced new charges in federal court, so double jeopardy did not apply with respect to the federal court's use of the state violation as a basis for revocation. Therefore, the District Court denied the motion, and on appeal the Supreme Court affirmed. Under 46-11-504, when conduct constitutes an offense within the jurisdiction of a state or federal court, a prosecution in any jurisdiction is a bar to subsequent prosecution in Montana if the prosecution resulted in an acquittal or conviction and a subsequent prosecution is based on an offense arising out of the same transaction. However, the federal revocation proceeding was not a prosecution as contemplated in 46-11-504, so the state was not barred from prosecuting Maki for felony drug charges. Additionally, the basis of a revocation proceeding is a violation of a sentencing condition and is not a second punishment for the underlying offense, so Maki's double jeopardy argument failed. St. v. Maki, 2008 MT 379, 347 M 24, 196 P3d 1281 (2008).

Defendant's Double Jeopardy Argument Fails: The City Court's granting of the state's motion to dismiss charges to which the defendant wished to plead guilty had no effect on his pending District Court charges as the defendant had no constitutional right to use a double jeopardy argument to defend against District Court charges. St. v. Milligan, 2008 MT 375, 346 M 491, 197 P3d 956 (2008).

District Court Authority to Revoke Suspended Sentence for Parole Violation for Which Defendant Not Sanctioned or Punished: Martinez was given a 7-year suspended sentence for felony criminal endangerment, subject to 25 conditions, including a requirement that Martinez notify the probation officer upon a change of residence. Following numerous probation violations, three separate intervention hearings were held to address the violations. One of the probation officers subsequently recommended that Martinez be brought before the District Court for revocation of the suspended sentence. The District Court heard testimony from two probation officers regarding the repeated violations and revoked Martinez's suspended sentence. Martinez appealed on grounds that the probation officer lacked the statutory authority to seek sentence revocation for conduct addressed by the revocation hearings and contended that the revocation violated double jeopardy because it amounted to double punishment for violations addressed by the revocation hearings. The Supreme Court agreed that once a probation officer elects to pursue an intervention hearing under 46-23-1012(3), the officer cannot then also pursue a revocation hearing before the District Court for the same violation. However, Martinez's violation of the requirement to notify the probation officer upon a change of residence occurred after the third intervention hearing, and Martinez was not sanctioned or punished for that violation. That violation in itself was sufficient to support revocation of Martinez's suspended sentence, and even if the District Court considered the history of Martinez's violations in reaching its decision, the court did not abuse its discretion or exceed its statutory authority in revoking the sentence based on that violation alone. Additionally, no double jeopardy violation occurred when the sentence was revoked based on a violation for which Martinez was not previously sanctioned or punished.

Thus, revocation of Martinez's suspended sentence was affirmed. St. v. Martinez, 2008 MT 233, 344 M 394, 188 P3d 1034 (2008).

Convictions for Possession of Dangerous Drugs Vacated Given Convictions for Possession of Dangerous Drugs With Intent to Distribute Same Drugs — Remand for Resentencing: Wing was convicted of criminal distribution of dangerous drugs, two counts of criminal possession of dangerous drugs, and two counts of criminal possession of dangerous drugs with intent to distribute. On appeal, Wing asserted that because the two counts of possession and two counts of possession of dangerous drugs with intent to distribute involved the same drugs, a conviction under all four counts would unconstitutionally permit multiple punishments for the same offense. The Supreme Court agreed and remanded with instructions to vacate Wing's convictions for criminal possession of dangerous drugs and to resentence Wing in accordance with the remaining convictions. St. v. Wing, 2008 MT 218, 344 M 243, 188 P3d 999 (2008).

Continuation of Trial Not Double Jeopardy Violation: Based on pretrial conversations with both counsel, a Justice's Court Judge anticipated an abbreviated bench trial designed to get Barron's DUI case through Justice's Court as quickly as possible so that Barron could then receive a trial de novo in District Court. However, defense counsel immediately began lodging objections, and the judge realized that the proceedings would not be quickly resolved. After concluding that neither party was ready for a more full-blown proceeding, the judge decided in the interests of justice to continue the trial to another date when the parties could be more fully prepared and more time could be allotted for trial. Defense counsel subsequently objected to the continuance on double jeopardy grounds, and following conviction and appeal to District Court, defense counsel again raised the issue, asserting that the trial following the continuation in Justice's Court constituted double jeopardy and warranted dismissal of the charges. The District Court declined to dismiss the charges, and Barron appealed. The Supreme Court considered whether Barron had been subjected to double jeopardy when the Justice's Court continued the initial bench trial and decided that no double jeopardy violation occurred. The trial following the lawful continuance did not constitute a new trial because the Justice's Court did not issue any findings or reach a verdict following the initial hearing, the state did not use the continuance to encourage the judge to reexamine evidence presented in the initial hearing, and Barron was not subjected to multiple punishments for the same offense. Double jeopardy did not apply because Barron was not subject to a second or successive trial on the underlying charges. St. v. Barron, 2008 MT 69, 342 M 100, 179 P3d 519 (2008).

Interim Appeal, Rather Than Trial De Novo, Appropriate for Consideration of Double Jeopardy Challenge: Barron appealed a Justice's Court decision to the District Court for trial de novo, then moved to dismiss the case on double jeopardy grounds. The motion was denied, and Barron appealed to the Supreme Court. Normally, the Supreme Court will not consider appeals from District Court unless a final judgment of conviction has been rendered. However, as set out in Three Forks v. Schillinger, 2007 MT 331, 340 M 211, 173 P3d 681 (2007), there is no trial de novo if a second trial in District Court would violate the provision against double jeopardy. Thus, notwithstanding the fact that the District Court had not rendered final judgment, the Supreme Court accepted Barron's interim appeal to consider the merits of the double jeopardy claim. St. v. Barron, 2008 MT 69, 342 M 100, 179 P3d 519 (2008).

No Triple Jeopardy in Prosecution of Misdemeanor Absent Prosecutorial Intent to Provoke Mistrial: At Mouat's misdemeanor DUI trial, the city prosecutor presented a videotape of Mouat's arrest, which showed the arresting officer asking Mouat about previous DUI arrests. Mouat moved for and was granted a mistrial. The trial court found that admission of the offending statement was an inadvertent oversight by both parties and ordered the city to redact the statement from the tape. Nevertheless, despite the city's efforts, at the next trial, the statement was still slightly audible, and Mouat again moved for and was granted a mistrial. Mouat then asserted that, based on double jeopardy and fundamental fairness grounds, the prosecution should not be granted a third trial in a misdemeanor case when the cause was negligence on the part of the government. The Supreme Court disagreed, citing St. v. Mallak, 2005 MT 49, 326 M 165, 109 P3d 209 (2005), for the proposition that when a mistrial is declared on a defendant's motion, double jeopardy does not bar a subsequent trial unless the governmental conduct in question was intended to goad defendant into moving for a mistrial. Billings v. Mouat, 2008 MT 66, 342 M 79, 180 P3d 1121 (2008).

Conviction of Possessing Stolen Vehicle in Washington Barring Prosecution for Theft of Same Vehicle in Montana: Cech stole a car in Montana and drove it to Washington where he was arrested and convicted of possession of stolen property. Cech was subsequently charged in Montana for theft of the same vehicle. At the Montana trial, Cech asserted double jeopardy. The

trial court determined prosecution was not prohibited because the offenses were not the same and because Cech did not meet the first part of the three-part test in St. v. Tadewaldt, 277 M 261, 922 P2d 463 (1996), which provides that subsequent prosecution is barred if a defendant's conduct constitutes an offense within the jurisdiction of the court in which the first prosecution occurred and within the jurisdiction of the court in which the subsequent prosecution is pursued. On appeal, the Supreme Court disagreed and reversed. The underlying conduct that served as a basis for both prosecutions sought to accomplish the same criminal objective of controlling the stolen vehicle that led to the filing of analogous charges directed at that conduct in both states. Cech could not have been charged with possession of the stolen car in Washington if he had not first stolen the car in Montana and taken it to Washington. Thus, the charges arose out of the same transaction, and the double jeopardy provisions of 46-11-504 barred the subsequent prosecution for theft in Montana. St. v. Cech, 2007 MT 184, 338 M 330, 167 P3d 389 (2007). See also St. v. Sword, 229 M 370, 747 P2d 206 (1987).

Suspension of Sentence Following Probation Violation Not Violative of Double Jeopardy — Credit for Time Served Properly Allowed: DeWitt was convicted of two counts of aggravated burglary, found to be a persistent felony offender, and sentenced to three consecutive 10-year sentences. DeWitt appealed, and the Supreme Court remanded with instructions to dismiss one count. While awaiting resentencing, DeWitt was incarcerated for 1,275 days. The District Court then resentenced DeWitt to one 10-year sentence for aggravated burglary and a consecutive 10-year sentence as a persistent felony offender, suspended all but 1,275 days of the 20-year sentence, and gave DeWitt credit for 1,275 days served. Without prison time to serve, DeWitt was immediately released on probation. DeWitt subsequently violated probation, the suspended sentence was revoked, and DeWitt was sentenced to 10 years with 5 years suspended, with credit for 160 days served while awaiting revocation proceedings. DeWitt appealed on grounds that the sentencing court failed to allow credit for the 1,275 days served when the suspended sentence was revoked and the new 10-year sentence was imposed and asserted that his double jeopardy rights were violated by reinstatement of the original sentence. The Supreme Court disagreed with both arguments. When the sentencing court sentenced DeWitt following the probation violation, the court had a 16.5-year suspended sentence to work with, which was more than sufficient to account for the 10-year sentence with 5 years suspended that was imposed. Although a sentencing court must give credit for time served, revocation of a suspended sentence based on a probation violation and reinstatement of the original sentence does not constitute double jeopardy as long as the sentence is within the parameters of the sentence imposed in the initial suspended sentence and credit is allowed for time served. Further, a persistent felony offender designation is not a separate crime carrying a separate sentence, but rather is a statutorily required sentence enhancement that is part of the initial sentence, so the sentencing court could not have "dropped" the persistent felony offender count and sentenced DeWitt only under the aggravated burglary count, thereby limiting the available time on resentencing to 6.5 years. The sentence was not violative of double jeopardy, was within statutory parameters, and was affirmed. St. v. DeWitt, 2006 MT 302, 334 M 474, 149 P3d 549 (2006).

Facially Invalid Sentence — Statutory Bar Against Appeal Unconstitutional — Habeas Corpus Relief Granted: Lott was sentenced in 1992 for aggravated kidnapping, sexual intercourse without consent, aggravated burglary, and felony assault, and each sentence was enhanced by 10 years for use of a dangerous weapon. The 5-year limit on appealing the sentences that was in effect at sentencing (now a 1-year limit) expired, so Lott was procedurally barred from challenging the sentences. The Supreme Court subsequently decided in St. v. Guillaume, 1999 MT 29, 293 M 224, 975 P2d 312 (1999), that application of the weapons enhancement to a felony offense that itself required proving use of a weapon constituted a double jeopardy violation. Guillaume was held to apply retroactively in St. v. Whitehorn, 2002 MT 54, 309 M 63, 43 P3d 922 (2002), so Lott's sentence was unconstitutionally enhanced with regard to the aggravated burglary and felony assault convictions. The state asserted that Lott was procedurally barred from raising the issue in a habeas corpus petition because Lott did not raise the issue on direct appeal or in a petition for postconviction relief. After analyzing habeas corpus and postconviction relief in Montana, the Supreme Court noted the constitutional guarantee that the writ of habeas corpus may never be suspended and concluded that as applied to a facially invalid sentence, the procedural bar in 46-22-101 unconstitutionally suspends the writ. Even if Lott had filed a direct appeal or petition for postconviction relief, the double jeopardy argument would have been unavailing because Guillaume and Whitehorn were not decided until well after both filing dates had expired. In order to avoid a grievous wrong and a miscarriage of justice, the Supreme Court granted Lott's petition for habeas corpus and remanded for resentencing pursuant to Guillaume

and Whitehorn. Lott v. St., 2006 MT 279, 334 M 270, 150 P3d 337 (2006), followed in St. v. Jackson, 2007 MT 186, 338 M 344, 165 P3d 321 (2007), and in St. v. Andersen-Conway, 2007 MT 281, 339 M 439, 171 P3d 678 (2007).

No Implied Presumption of Parole Eligibility — Federal Constitutional Protections Not Violated by Sentence of Life Imprisonment Without Parole — Montana Constitutional Protections Not Addressed: Garrymore was sentenced to life in prison without parole for the deliberate homicide of his adopted infant child. Garrymore appealed the parole restriction and sought to have the sentence vacated on grounds that 45-5-102(2) contains an implicit presumption of parole eligibility. Garrymore contended that under the statute, standing alone and without the operation of 46-18-202, he was entitled to a parole-eligible sentence, subject to 46-23-201, that was taken away by the sentencing judge in violation of due process and a trial by jury. The Supreme Court found nothing in sentencing statutes that creates a presumption in favor of parole eligibility that must be overcome in order for a sentencing judge to impose a parole restriction. Rather, sentencing courts have broad discretion under 46-18-202 to impose parole eligibility restrictions on felony sentences, and the Legislature has placed no limitation on the exercise of that authority. A parole-eligible sentence was not taken away from Garrymore because he was not entitled to such a sentence to begin with. Additionally, although the judge must state the reasons for a parole eligibility restriction when one is imposed, no particular finding of fact need be included among those reasons. Therefore, because the statutory maximum for violating 45-5-102(1)(a) is life in prison without parole, restricting Garrymore's parole eligibility did not violate any federal constitutional rights. The Supreme Court also declined to address Garrymore's undeveloped argument that the parole eligibility restriction violated the Montana Constitution's greater jury trial right absent a compelling reason why Montana's greater jury trial right dictated a different result. St. v. Garrymore, 2006 MT 245, 334 M 1, 145 P3d 946 (2006), followed in St. v. Rosling, 2008 MT 62, 342 M 1, 180 P3d 1102 (2008).

Constitutionality of Persistent Felony Offender Statutes: Shults contended that the persistent felony offender (PFO) statutes were unconstitutional on their face in violation of double jeopardy, equal protection, and cruel and unusual punishment or as they applied to Shults's case. The Supreme Court disagreed. First, the PFO statutes do not constitute double jeopardy because a sentence as a habitual criminal is not viewed as a new jeopardy (see Gryger v. Burke, 334 US 728 (1948)). Second, Shults was not able to show that the PFO statutes classify two or more similarly situated groups in an unequal manner and thus failed to meet the first threshold of a meritorious equal protection claim. Last, a sentence that is within maximum statutory guidelines and that is not so disproportionate as to shock the conscience or outrage the moral sense of the community is not considered cruel and unusual punishment. Shults's sentence was within statutory parameters, and in light of Shults's 18-year criminal history and repeated failure to conform his behavior to societal norms despite having numerous opportunities to do so, the sentence could not be seen as so disproportionate as to shock the conscience or outrage the moral sense of the community and thus was not considered cruel and unusual punishment. St. v. Shults, 2006 MT 100, 332 M 130, 136 P3d 507 (2006).

Persistent Felony Offender Statute Not Violative of Double Jeopardy Protections: Wardell was convicted of felony sexual contact with a child in South Dakota and later was charged with numerous sexual crimes in Montana, including failure to register as a sex offender. The District Court sentenced Wardell to 5 years on the failure to register count and designated Wardell as a persistent felony offender, ultimately adding an additional 20-year consecutive sentence. Wardell appealed on grounds that the conviction for failure to register and the sentence for persistent felony offender constituted double jeopardy because each relied on the same underlying conviction. The Supreme Court disagreed. A sentence as a habitual criminal is not to be viewed as a new jeopardy. The sentence enhancement was related to the second crime—failure to register—and thus did not constituted double jeopardy. Under 46-18-501, the dual use of the prior South Dakota conviction for designating Wardell as a persistent felon was authorized. Further, it is not a crime to be a persistent felony offender, and being designated a persistent felony offender cannot constitute double jeopardy. St. v. Wardell, 2005 MT 252, 329 M 9, 122 P3d 443 (2005).

Failure of Counsel to Argue Included Offenses Under State Law Considered Ineffective Assistance of Counsel: Becker was convicted of criminal possession of dangerous drugs, accountability for criminal production or manufacture of dangerous drugs, and criminal possession of precursors to dangerous drugs. On appeal, Becker argued that he should have been convicted only of criminal production or manufacture by accountability because the other two charges were part of the manufacturing process and that failure to include the other charges violated his due process rights. The Supreme Court declined to address the double jeopardy issue

under the plain error doctrine because Becker raised it for the first time on appeal. However, the court found it appropriate to address the issue under Becker's ineffective assistance of counsel claim. Becker's counsel's failure to include all the relevant charges in a dismissal motion and to rely on the proper statutory grounds for dismissal constituted deficient performance under the first prong of the Strickland test. The second Strickland prong was also met because Becker was prejudiced by counsel's deficient performance, inasmuch as there was a reasonable probability that the result of the proceeding would have been different but for counsel's errors. The Supreme Court thus vacated the convictions and remanded for resentencing. St. v. Becker, 2005 MT 75, 326 M 364, 110 P3d 1 (2005), distinguished in St. v. Williams, 2010 MT 58, 355 Mont. 354, 228 P.3d 1127. See also St. v. White, 2001 MT 149, 306 M 58, 30 P3d 340 (2001).

Violation of Motion In Limine in First Trial Not Grounds for Double Jeopardy Dismissal in Second Trial: Mallak contended that the state goaded him into moving for a mistrial by purposely violating a motion in limine prohibiting testimony of Mallak's prior violent conduct and that under Oreg. v. Kennedy, 456 US 667 (1982), and St. v. Laster, 223 M 152, 724 P2d 721 (1986), a second trial was a violation of double jeopardy. The Supreme Court disagreed. The part of the testimony that Mallak objected to was a product of the prosecutor's inadvertence, not intention, and did not inevitably lead to a violation of the motion in limine, unlike the inherently violative questioning in Laster. Thus, double jeopardy did not apply, and the trial court did not err in denying Mallak's motion to dismiss the charges. St. v. Mallak, 2005 MT 49, 326 M 165, 109 P3d 209 (2005), followed in Billings v. Mouat, 2008 MT 66, 342 M 79, 180 P3d 1121 (2008), regarding the principle that when a mistrial is declared on a defendant's motion, double jeopardy does not bar a subsequent trial unless the governmental conduct in question was intended to goad defendant into moving for a mistrial, and followed in Helena v. Whittinghill, 2009 MT 343, 353 M 131, 219 P3d 1244 (2009), to the extent that it is insufficient to bar a retrial absent intent on the part of the prosecutor to subvert the protections afforded by the double jeopardy clause, even when the prosecutor's conduct prompting the mistrial motion constitutes harassment or overreaching.

Assault With Weapon Not Lesser Included Offense of Assault of Peace Officer — No Double Jeopardy in Convicting of Both Offenses: Matt was charged with assault with a weapon and with assault on a peace officer. Matt pleaded guilty to assault on a peace officer and moved to dismiss the assault with a weapon charge, contending that it was a lesser included offense of assault on a peace officer and that prosecution for assault with a weapon therefore violated Matt's double jeopardy rights. The Supreme Court noted that each offense requires proof of an element not included in the other offense, so assault with a weapon is not a lesser included offense of assault on a peace officer. Thus, prosecution of both offenses did not violate Matt's constitutional or statutory double jeopardy protections, and both convictions were affirmed. St. v. Matt, 2005 MT 9, 325 M 340, 106 P3d 530 (2005), following St. v. Beavers, 1999 MT 260, 296 M 340, 987 P2d 371 (1999).

Increased Sentence Imposed on Resentencing After Original Sentence Vacated Not Due Process Violation: After Redfern's petition for postconviction relief was granted, Redfern's original sentence was vacated and the District Court resentenced him to a greater period of potential imprisonment and supervision than the original sentence. Redfern appealed the new sentence, contending that the greater sentence on resentencing violated the right to due process. The Supreme Court affirmed. Under N.C. v. Pearce 395 US 711 (1969), neither double jeopardy nor equal protection bars imposition of a more severe sentence upon resentencing after an original conviction is set aside unless a heavier sentence is imposed to punish a defendant for successfully having the original conviction set aside. However, in order to meet due process requirements and allow full appellate review of the constitutional legitimacy of the sentence, a longer sentence on resentencing after a new trial must be based on objective information concerning identifiable conduct of the defendant after the original sentencing and reasons for the longer sentence must affirmatively appear on the record. Both conditions were met here, there was no showing that the more severe sentence was imposed as retaliatory motivation by the sentencing judge, and the new sentence was within statutory sentencing parameters. St. v. Redfern, 2004 MT 277, 323 M 225, 99 P3d 223 (2004), following St. v. Forsyth, 233 M 389, 761 P2d 363 (1988), and St. v. Hubbel, 2001 MT 31, 304 M 184, 20 P3d 111 (2001), and distinguishing St. v. Ringewold, 2001 MT 185, 306 M 229, 32 P3d 729 (2001). Redfern was followed in St. v. Bullplume, 2011 MT 40, 359 Mont. 289 251 P.3d 114.

Failure to Raise Double Jeopardy Objection at Settling of Jury Instructions or to Object to Verdict Form in Which Offenses Listed as Separate Counts — Appeal Precluded: Minez was convicted of both criminal possession and criminal production of dangerous drugs. On appeal,

Minez argued that conviction of both offenses, which arose out of the same transaction, constituted double jeopardy. However, at trial, Minez abandoned a request for jury instructions on double jeopardy and never returned to the issue, failed to raise a double jeopardy objection at the settling of jury instructions, and did not object to the verdict form in which both offenses were listed as independent counts. Having abandoned the constitutional double jeopardy objections at trial, Minez was precluded from raising the issue on appeal, and the convictions were affirmed. St. v. Minez, 2004 MT 115, 321 M 148, 89 P3d 966 (2004).

State Deliberate Homicide Prosecution Not Barred by Federal Conviction for Firearm Possession: Gazda, a felon, was charged in federal court with unlawful possession of a firearm and ammunition. Prior to the federal trial, Gazda was charged in Montana with deliberate homicide. Following the federal conviction, Gazda moved to dismiss the state charge, arguing that he was placed twice in jeopardy because the prosecution had presented evidence in the federal case that he had committed the homicide. To determine if the subsequent prosecution was barred under 46-11-504, the Supreme Court applied the three-part test in St. v. Tadewaldt, 277 M 261, 922 P2d 463 (1996), which sets out that subsequent prosecution is barred if: (1) a defendant's conduct constitutes an offense within the jurisdiction of the court in which the first prosecution occurred and within the jurisdiction of the court in which the subsequent prosecution is pursued; (2) the first prosecution results in acquittal or conviction; and (3) the subsequent prosecution is based on an offense arising out of the same transaction. The District Court found that the first and third factors were not met, and the Supreme Court agreed. The concurrent jurisdiction factor failed because the state and federal courts lacked authority to prosecute equivalent offenses based on the same underlying conduct. The same transaction factor failed because the conduct to support the criminal objective of the state deliberate homicide charge was distinct from the federal weapons charge. Thus, double jeopardy did not bar the subsequent state prosecution. St. v. Gazda, 2003 MT 350, 318 M 516, 82 P3d 20 (2003).

Conviction for Production of Methamphetamine and Possession of Property Used to Produce Methamphetamine Not Double Jeopardy — Separate Elements of Each Offense: Minez contended that the possession of glassware and chemicals used to produce methamphetamine was only a form of preparation to commit the offense of producing methamphetamine and that conviction of two offenses for the same act violated double jeopardy protections. The Supreme Court disagreed. The elements of each offense were different, and each required proof of an additional fact not required by the other. Double jeopardy does not apply to conviction for two separate crimes. St. v. Minez, 2003 MT 344, 318 M 478, 82 P3d 1 (2003).

Reprosecution of Homicide Charges Precluded by Double Jeopardy After Initial Finding of Innocence: Demontiney was charged with deliberate homicide, mitigated deliberate homicide, and negligent homicide. The jury returned a verdict of not guilty on deliberate homicide and guilty on mitigated deliberate homicide. The Supreme Court vacated the conviction because a mitigated deliberate homicide conviction without a deliberate homicide conviction is logically impossible. The state sought a retrial, but the Supreme Court disallowed a retrial on any of the three charges on double jeopardy grounds. Demontiney was found not guilty of deliberate homicide and could not be retried on that charge. The mitigated deliberate homicide conviction was vacated, so that charge could not be retried. Further, under 46-11-503, the state may not prosecute a defendant on the same transaction when two or more offenses are known to the prosecutor, supported by probable cause, and consummated prior to the original charge when the former prosecution resulted in an acquittal. The negligent homicide charge was known, supported, and consummated, and the original prosecution ultimately resulted in an acquittal, so retrial on negligent homicide was also prohibited. Demontiney v. District Court, 2002 MT 161, 310 M 406, 51 P3d 476 (2002).

Retroactivity of Substantive and Procedural Rules Distinguished — Nichols Rule Prohibiting Retroactive Applicability of Guillaume Sentencing Enhancement Restriction Overruled: Whitehorn was convicted in 1995 of felony assault, criminal endangerment, and possession of dangerous drugs, and the sentencing court added an additional 10-year sentence for use of a weapon. In 1999, the Supreme Court decided St. v. Guillaume, 1999 MT 29, 293 M 224, 975 P2d 312 (1999), which held that enhancing a defendant's sentence for use of a weapon when the underlying offense (felony assault in Guillaume's case) required proof of the use of a weapon violated the constitutional double jeopardy provision. Whitehorn moved for resentencing in light of Guillaume, arguing that the enhanced sentence should be stricken because his underlying offense of felony assault also required proof that he used a weapon. The state initially agreed that Guillaume applied and that resentencing was appropriate, but prior to resentencing, the state changed its position in light of St. v. Aguilar, 1999 MT 159, 295 M 133, 983 P2d 345 (1999), and

St. v. Nichols, 1999 MT 212, 295 M 489, 986 P2d 1093 (1999), which provided that Guillaume would not be retroactively applied to cases not pending on direct appeal or to cases that were final when that opinion was issued. Whitehorn then filed a petition for postconviction relief under 46-21-102, arguing that his case was not final because he had not exhausted the 5-year time period for filing for postconviction relief (revised to 1 year in 1997). The District Court agreed that the petition was timely filed under 46-21-102, but, relying on Nichols, denied the petition and held that Whitehorn's case was final and not pending on direct review, and thus concluded that Guillaume could not be retroactively applied. Whitehorn appealed the denial of his petition for postconviction relief. The Supreme Court found that the District Court erred in not retroactively applying Guillaume and reversed, holding that under the common-law doctrine of plain error, Whitehorn was not procedurally barred from raising the retroactivity argument on appeal. The court distinguished between substantive and procedural rules when considering whether to apply a rule change retroactively. In Nichols, the court adopted the retroactivity analysis in Teague v. Lane, 489 US 288 (1989), which stands for the proposition that on collateral review, a new procedural rule of constitutional law will not be applied retroactively if it puts primary, private individual conduct beyond the power of the criminal law to proscribe or if the procedures used to convict the defendant are so implicit in the concept of ordered liberty as to constitute a watershed rule of criminal procedure. In Nichols, the court concluded that Guillaume announced a new rule, but that neither Teague exception applied. However, here the court decided that Guillaume was by its own terms a substantive rule to which the Teague exceptions should not even have been applied (accord, Chambers v. U.S., 22 F3d 939 (9th Cir. 1994)). Partially overruling Nichols and a similar holding in St. v. Wells, 2001 MT 55, 304 M 329, 21 P3d 610 (2001), the court concluded that it was illogical to refuse to extend constitutional protections to citizens simply because their claims are raised by collateral review rather than direct appeal. However, the court retained the Guillaume analysis, clarifying that sentences on convictions for felony assault with a weapon and aggravated burglary are the only offenses that may not be enhanced under 46-18-221. St. v. Whitehorn, 2002 MT 54, 309 M 63, 43 P3d 922 (2002). See also Desist v. U.S., 394 US 244 (1969), and Mackey v. U.S., 401 US 667 (1971).

Imprisonment for Probation Violation Not Considered Double Jeopardy: Walker was convicted of felony DUI, sentenced to 6 months in prison followed by 2 years of supervised probation, and fined $1,000. Following 6 months' confinement, Walker was released and began serving the probationary sentence but violated the terms of probation about 1 year later. During revocation hearings, Walker contended that additional incarceration pursuant to 61-8-731 for probation violations would constitute double jeopardy because the entirety of the 6 months' prison term had already been served. The District Court disagreed, revoked probation, and committed Walker to the Department of Corrections for the time remaining on the original 2-year probation. Walker appealed, but the Supreme Court affirmed. The court found no distinction between the revocation of a suspended sentence and the revocation of a probationary sentence. In either case, the subsequent conduct, not the original offense, forms the basis for revocation, and the sentencing court retains jurisdiction over the defendant during the period of probation. Walker conceded that 61-8-731 provides by its terms for revocation of probation and for incarceration upon violation of probation. The revocation is not new punishment for the criminal offense of felony DUI, but rather constitutes the consequence of violating probationary conditions. Walker failed to bear the burden of proving 61-8-731 unconstitutional beyond a reasonable doubt on double jeopardy grounds. St. v. Walker, 2001 MT 170, 306 M 159, 30 P3d 1099 (2001), distinguishing St. v. Guillaume, 1999 MT 29, 293 M 224, 975 P2d 312 (1999).

Application of Weapon Enhancement Statute to Conviction for Mitigated Deliberate Homicide Not Violative of Double Jeopardy Protection: Park was sentenced to 40 years for mitigated deliberate homicide, plus 10 years for use of a weapon. Citing St. v. Guillaume, 1999 MT 29, 293 M 224, 975 P2d 312 (1999), Park contended on appeal that the imposition of the additional weapon enhancement sentence violated the constitutional prohibition against double jeopardy. The Supreme Court distinguished Guillaume because the offense charged in that case was felony assault, which requires the use of a weapon, while mitigated deliberate homicide does not. The double jeopardy question under Guillaume and its progeny is not whether a weapon was used in the offense, but rather whether the statutory definition of the offense includes the use of a weapon, with the result that defendant is punished twice for the same offense. The court also discounted Park's argument that use of a weapon is implied every time that a deliberate or mitigated homicide occurs. The court has limited the definition of weapon in several cases, and case law also provides numerous instances of homicide when no conceivable weapon caused the death. Park's enhanced sentence for use of a weapon was affirmed. St. v. Park, 2001 MT 157, 306

M 98, 30 P3d 1062 (2001), following St. v. Keith, 2000 MT 23, 298 M 165, 995 P2d 966 (2000), and St. v. Dunnette, 2000 MT 33, 298 M 208, 996 P2d 379 (2000).

Suspending Less of Sentence After Retrial Than After First Trial — Court's Belief Time Needed to Complete Ordered Programs: If a judge imposes a more severe sentence upon a defendant after a new trial than that imposed in the former trial, the reasons for doing so must appear in the record and be based on objective information concerning identifiable conduct of defendant occurring after the time of the original sentencing. Otherwise, there is a presumption that the greater sentence was for a vindictive purpose, and the presumption must be rebutted. It was constitutionally legitimate for the court to reduce, after a second trial resulting in the same incarceration term, the amount of time that the sentence was suspended after the first trial. The court believed that defendant needed the time to complete rehabilitative programs that the court ordered him to complete in each sentence and suspended less time to ensure that there was sufficient time to complete the programs. St. v. Hubbel, 2001 MT 31, 304 M 184, 20 P3d 111 (2001).

Petition for Postconviction Relief Filed Twelve Years After Conviction Time Barred — Guillaume Inapplicable: Charlo was convicted of aggravated assault in 1986 and sentenced to 20 years plus 10 years for use of a weapon, and the sentence was affirmed in 1987 (see St. v. Charlo, 226 M 213, 735 P2d 278 (1987)). Following the decision in St. v. Guillaume, 1999 MT 29, 293 M 224, 975 P2d 312 (1999), Charlo petitioned for postconviction relief in 1999 on grounds that the imposition of the additional 10-year weapon enhancement sentence violated his double jeopardy rights. The District Court concluded that Guillaume did not apply and that no miscarriage of justice would occur if the court applied the 5-year statute of limitations on postconviction relief provided in 46-21-102 (now 1 year). The Supreme Court concurred. A petition filed 12 years after final conviction clearly violated the statute of limitations in 46-21-102. The court relied on St. v. Keith, 2000 MT 23, 298 M 165, 995 P2d 966, 57 St. Rep. 120 (2000), for the holding that application of the weapon enhancement provision in 46-18-221 to a conviction in which the underlying offense does not require use of a weapon as an element of the crime does not constitute a double jeopardy violation. The offense of aggravated assault does not require use of a weapon, so Guillaume did not apply. The court also declined to apply the fundamental miscarriage of justice exception in St. v. Redcrow, 1999 MT 95, 294 M 252, 980 P2d 622 (1999). Guillaume was the sole basis of Charlo's petition, so Charlo could not show that the Redcrow exception would apply. St. v. Charlo, 2000 MT 192, 300 M 435, 4 P3d 1201, 57 St. Rep. 761 (2000).

Motion to Dismiss on Grounds of Insufficient Evidence Properly Denied: When it was clear from the record that a reasonable juror could have concluded from the evidence taken in a light most favorable to the prosecution that guilt on several counts was proved beyond a reasonable doubt, the District Court did not abuse its discretion in denying defendant's motion for a directed verdict of acquittal, and further prosecution was not barred on double jeopardy grounds. St. v. Hocevar, 2000 MT 157, 300 M 167, 7 P3d 329, 57 St. Rep. 625 (2000). See also St. v. Bromgard, 261 M 291, 862 P2d 1140 (1993), and St. v. Campbell, 278 M 236, 924 P2d 1304 (1996).

Amended Information Not Violative of Double Jeopardy Guarantee: Dixon built a pipe bomb and used it to blow up a traffic sign. Dixon pleaded guilty to criminal endangerment, possession of a destructive device, and criminal mischief. An amended information was filed, dropping the criminal endangerment charge to negligent endangerment and changing the possession of a destructive device to possession of explosives. Dixon pleaded not guilty and moved to dismiss, contending that he was placed in double jeopardy by the amended information. The District Court concluded that under Blockburger v. U.S., 284 US 299, 76 L Ed 306, 52 S Ct 180 (1932), the amended information did not violate Dixon's double jeopardy rights because each offense charged required proof of a fact that the other offenses did not. The Supreme Court affirmed, finding that Dixon was not subjected to multiple prosecutions for the same offense and did not receive multiple punishments for the same offense, nor was his sentence enhanced on the basis of a factor for which he had already received punishment. Dixon's right against double jeopardy was not abridged. St. v. Dixon, 2000 MT 82, 299 M 165, 998 P2d 544, 57 St. Rep. 354 (2000).

No Sentence Enhancement for Use of Weapon in Assault on Police Officer: Because a conviction for assault on a police officer requires proof of use of a weapon, an additional sentence for use of a weapon under 46-18-221 violates the double jeopardy provision of the Montana Constitution. St. v. Smith, 2000 MT 57, 299 M 6, 997 P2d 768, 57 St. Rep. 272 (2000), following St. v. Guillaume, 1999 MT 29, 293 M 224, 975 P2d 312 (1999).

Application of Weapon Enhancement Statute to Conviction for Criminal Endangerment Not Violative of Double Jeopardy Protection: Keith was sentenced to 10 years in prison plus 10 years for use of a weapon, with 15 years suspended, for criminal endangerment. Keith argued that

application of the weapon enhancement statute to the felony conviction for criminal endangerment violated the right to be free from multiple punishments for the same offense, pursuant to St. v. Guillaume, 1999 MT 29, 293 M 224, 975 P2d 312 (1999). The Supreme Court distinguished Guillaume, noting that unlike the felony assault statute in that case, the definition of criminal endangerment does not require proof of the use of a weapon nor did Keith's use of a weapon raise the crime from a misdemeanor to a felony as in Guillaume. Because the offense of criminal endangerment, by its own terms, does not specifically increase a defendant's punishment for use of a weapon, application of the weapon enhancement statute to a criminal endangerment violation is not a double jeopardy violation. St. v. Keith, 2000 MT 23, 298 M 165, 995 P2d 966, 57 St. Rep. 120 (2000), followed in St. v. Dunnette, 2000 MT 33, 298 M 208, 996 P2d 379, 57 St. Rep. 141 (2000), and St. v. Charlo, 2000 MT 192, 300 M 435, 4 P3d 1201, 57 St. Rep. 761 (2000).

Arraignment After Jury Empaneled and Sworn — No Double Jeopardy: The trial court arraigned Beavers on an amended charge after the jury was empaneled and sworn, which Beavers claimed was a violation of his constitutional protection against double jeopardy. However, this situation does not constitute a successive prosecution. Beavers was prosecuted only once for the offense, so double jeopardy protections did not apply. St. v. Beavers, 1999 MT 260, 296 M 340, 987 P2d 371, 56 St. Rep. 1035 (1999), distinguishing Crist v. Bretz, 437 US 28, 57 L Ed 2d 24, 98 S Ct 2156 (1978).

Application of Weapon Enhancement Statute to Felony Conviction When Underlying Offense Requires Proof of Weapon Use Unconstitutional Under Montana Double Jeopardy Provision: When presented with the question of whether the weapon enhancement statute, 46-18-221, violates the double jeopardy provisions of this section, the Supreme Court held that the Montana Constitution affords greater protection against multiple punishment than the federal constitution and that application of the weapon enhancement statute to felony convictions when the underlying offense requires proof of the use of a weapon violates Montana's constitutional double jeopardy provision. In the instant case, the only factor raising Guillaume's charge from misdemeanor assault to felony assault (now assault with a weapon) was the use of a weapon. The distinction between the two offenses and the different penalties imposed by each offense is the Legislature's way of punishing a criminal defendant for the use of a weapon in committing an assault. Thus, when the weapon enhancement statute was applied to the felony assault (now assault with a weapon) conviction, Guillaume was subjected to double punishment—once when the charge was elevated from misdemeanor assault to felony assault (now assault with a weapon) and again when the weapon enhancement statute was applied. This is exactly what double jeopardy was intended to prevent. The state's argument, that double jeopardy did not protect against multiple punishments for the same offense because that protection is not explicit in the constitutional language, failed because the fifth amendment to the U.S. Constitution has been held in N.C. v. Pearce, 393 US 711, 23 L Ed 2d 656, 89 S Ct 2072 (1969), to protect against multiple punishments for the same offense, and the Montana Constitution provides at least the same protection or greater. Further, the fact that legislative modification of the felony assault (now assault with a weapon) statute could achieve the same result as the present sentencing scheme did not mean that double jeopardy did not apply in this case. St. v. Guillaume, 1999 MT 29, 293 M 224, 975 P2d 312, 56 St. Rep. 117 (1999), distinguishing St. v. Davison, 188 M 432, 614 P2d 489 (1980), and St. v. Zabawa, 279 M 307, 928 P2d 151, 53 St. Rep. 1162 (1996), followed in St. v. Brown, 1999 MT 31, 293 M 268, 975 P2d 321, 56 St. Rep. 139 (1999), St. v. Roullier, 1999 MT 37, 293 M 304, 977 P2d 970, 56 St. Rep. 157 (1999), St. v. Aguilar, 1999 MT 159, 295 M 133, 983 P2d 345, 56 St. Rep. 629 (1999), St. v. Smith, 2000 MT 57, 299 M 6, 997 P2d 768, 57 St. Rep. 272 (2000), St. v. Weitzel, 2000 MT 86, 299 M 192, 998 P2d 1154, 57 St. Rep. 368 (2000), St. v. Hart, 2000 MT 332, 303 M 71, 15 P3d 917, 57 St. Rep. 1398 (2000), and St. v. Gustafson, 2000 MT 364, 303 M 386, 15 P3d 944, 57 St. Rep. 1554 (2000), and distinguished in St. v. Park, 2001 MT 157, 306 M 98, 30 P3d 1062 (2001), and St. v. Anderson, 2001 MT 188, 306 M 243, 32 P3d 750 (2001). Guillaume will not be retroactively applied to cases not pending on direct appeal or to cases that were final when that opinion was issued. St. v. Nichols, 1999 MT 212, 295 M 489, 986 P2d 1093, 56 St. Rep. 827 (1999). Nichols was overruled in St. v. Whitehorn, 2002 MT 54, 309 M 63, 43 P3d 922 (2002), to the extent that the Supreme Court refused to retroactively apply Guillaume. Aguilar was followed in St. v. Gustafson, 2000 MT 364, 303 M 386, 15 P3d 944, 57 St. Rep. 1554 (2000).

Supreme Court Power to Review Legislative Act for Constitutional Conformity Not Violative of Separation of Powers Doctrine: Although the Montana Constitution confers upon the Legislature the exclusive power to set appropriate punishments for criminal acts, the Supreme Court is constitutionally vested with the exclusive power to review whether a particular legislative act

conforms to the constitution. Thus, the court's holding that the Montana weapon enhancement statute was violative of state constitutional double jeopardy protections was not a violation of the separation of powers doctrine. St. v. Guillaume, 1999 MT 29, 293 M 224, 975 P2d 312, 56 St. Rep. 117 (1999). See also In re License Revocation of Gildersleeve, 283 M 479, 942 P2d 705, 54 St. Rep. 735 (1997).

DUI and Negligent Homicide Arising From Same Accident Not Part of Same Transaction — No Double Jeopardy: Booth pleaded guilty in Justice's Court to a DUI charge and claimed double jeopardy when he was subsequently charged in District Court with two counts of negligent homicide arising out of the accident that led to the DUI charge and conviction. Neither 46-11-503 nor 46-11-504 barred the District Court charges. Under each section, double jeopardy requires that the offenses arise out of the same transaction. Because Booth's conduct in allegedly causing the two deaths was not motivated by a purpose to accomplish the criminal objective of DUI, the DUI and negligent homicide offenses did not arise out of the same transaction within the meaning of the statutory definition of "same transaction" as conduct consisting of a series of acts that are motivated by a purpose to accomplish a criminal objective and that are necessary or incidental to the accomplishment of that objective. State ex rel. Booth v. District Court, 1998 MT 344, 292 M 371, 972 P2d 325, 55 St. Rep. 1395 (1998), followed in St. v. Condo, 2008 MT 114, 342 M 468, 182 P3d 57 (2008).

Negligent Homicide Charges After DUI Guilty Plea — Supervisory Control to Avoid Double Jeopardy Trial: If the District Court's conclusion that the Justice's Court plea of guilty to DUI did not bar subsequent prosecution of two negligent homicide charges arising out of the same auto accident as the DUI charge is proved, on appeal, to be incorrect, the defendant will have been subjected to prosecution even though double jeopardy entitled him to avoid prosecution altogether. Thus, it is clear that an appeal would not be an adequate remedy, and the defendant's application to the Supreme Court for a writ of supervisory control presented legal issues appropriate for the Supreme Court's consideration and would be accepted and decided. State ex rel. Booth v. District Court, 1998 MT 344, 292 M 371, 972 P2d 325, 55 St. Rep. 1395 (1998).

"Offenses Lie in a Single Court" — Does Not Mean They Occur in Same Court: The reference in 46-11-503 to two or more offenses in regard to which "jurisdiction and venue of the offenses lie in a single court" requires that jurisdiction and venue lie in a single court; the phrase does not require that, when double jeopardy is claimed, the former and subsequent prosecutions occur in the same court. State ex rel. Booth v. District Court, 1998 MT 344, 292 M 371, 972 P2d 325, 55 St. Rep. 1395 (1998), followed in St. v. Condo, 2008 MT 114, 342 M 468, 182 P3d 57 (2008).

Consideration of Pending DUI Charge in Prior Offense — No Double Jeopardy Violation: Defendant, convicted of operating a motor vehicle after having been declared a habitual traffic offender appealed, claiming that a pending third DUI charge, which had already been considered for purposes of assessing rehabilitation prospects during sentencing on a prior and separate criminal charge, constituted double jeopardy. In reversing the District Court's decision dismissing the DUI charge, the Supreme Court, based on the United States Supreme Court's decision in Witte v. U.S., 515 US 389 (1995), held that the District Court erred in dismissing the DUI charge, stating that the court may properly sentence a person for criminal conduct after considering such conduct as an aggravating factor in a prior sentencing hearing on unrelated charges without violating the double jeopardy provision. St. v. Anderson, 1998 MT 258, 291 M 242, 967 P2d 413, 55 St. Rep. 1061 (1998), followed in St. v. Anderson, 2001 MT 188, 306 M 243, 32 P3d 750 (2001).

Misdemeanor Traffic Offenses in Tribal Court and Felony DUI in State District Court Not Arising From Same Transaction — No Double Jeopardy: Couture was cited for two misdemeanor traffic offenses in tribal court. A few days later he was moved to state District Court and charged with felony DUI, sixth offense. He pleaded guilty to the tribal court misdemeanors and then sought dismissal of the District Court felony on grounds of double jeopardy. He contended that because the offenses all arose from the same transaction and he had been convicted in tribal court, prosecution in District Court was barred under 46-11-504. The District Court properly held that the misdemeanors—driving without a license and without proof of insurance—were unrelated to the criminal objective of DUI. Because by definition the offenses did not arise out of the same transaction, the District Court felony prosecution did not constitute double jeopardy. St. v. Couture, 1998 MT 137, 289 M 215, 959 P2d 948, 55 St. Rep. 548 (1998), following St. v. Sword, 229 M 370, 747 P2d 206 (1987).

Oral Pronouncement as Legally Effective Sentence — Correction of Error in Written Judgment by Nunc Pro Tunc Order — Due Process and Double Jeopardy Rights Not Violated: The oral pronouncement of sentence is the legally effective sentence. The written judgment and commitment serves as evidence of the sentence orally pronounced. In the event of a conflict

between the oral and written sentence, the oral controls. The sentencing court may correct an error in a written judgment and commitment by a nunc pro tunc order, pursuant to 46-18-117 (now repealed), to accurately reflect what was orally pronounced at the sentencing hearing. Absent evidence of a tangible detriment or concrete injury to defendant, a clarifying nunc pro tunc order does not jeopardize a defendant's due process rights or constitute double jeopardy. St. v. Lane, 1998 MT 76, 288 M 286, 957 P2d 9, 55 St. Rep. 311 (1998), overruling St. v. Enfinger, 222 M 438, 722 P2d 1170 (1986), St. v. Wirtala, 231 M 264, 752 P2d 177 (1988), St. v. Mason, 253 M 419, 833 P2d 1058 (1992), and St. v. Graveley, 275 M 519, 915 P2d 184 (1996), to the extent that those cases held that the written judgment and commitment, rather than the oral pronouncement of sentence, was to be considered the final, valid order. The Supreme Court amended former Rule 5, M.R.App.P. (now superseded), to reflect the Lane decision in In re Amending Rule 5 of the Mont. Rules of Appellate Procedure, 55 St. Rep. 1267 (1998). Lane was followed in St. v. Horton, 2001 MT 100, 305 M 242, 25 P3d 886 (2001), and St. v. Ringewold, 2001 MT 185, 306 M 229, 32 P3d 729 (2001).

Consecutive Sentences Upon Conviction for Multiple Thefts, Common Scheme — Prosecutorial Discretion Correctly Exercised — No Double Jeopardy Found: During a 5-day period in April 1994, Savaria issued bad checks upon the same nonexistent checking account to numerous retail merchants in the Missoula area. He was charged with six counts of theft, common scheme, to which he pleaded guilty. The District Court sentenced Savaria to consecutive 10-year sentences on each of the counts, which Savaria argued constituted multiple punishments for commission of the same offense, in violation of the constitutional prohibition against double jeopardy. The Supreme Court recognized that the U.S. Constitution prohibits both multiple punishments for the same offense and multiple prosecutions for offenses arising out of the same transaction, but, after application of the test announced in Blockburger v. U.S., 284 US 299 (1932), and in reliance upon St. v. Crowder, 248 M 169, 810 P2d 299 (1991), and Stilson v. St., 278 M 20, 924 P2d 238 (1996), held that the prosecutor had the discretion to charge each of the bad check writing incidents as an individual felony theft, common scheme, pointing out that each of the multiple common schemes was supported by separate and distinct evidence. The Supreme Court held that the District Court therefore did not err in imposing consecutive sentences on the separate charges because they were not prohibited by the constitutional prohibition against double jeopardy. St. v. Savaria, 284 M 216, 945 P2d 24, 54 St. Rep. 852 (1997).

Revocation of Game License — Not Violation of Double Jeopardy: Section 87-4-427 serves a remedial purpose and is not a punitive or penal statute. The Department of Fish, Wildlife and Parks' revocation of a game farm (now alternative livestock ranch) license was not punishment and did not violate double jeopardy rights. In re Game Farm License No. 319 of Brogan, 283 M 413, 942 P2d 100, 54 St. Rep. 670 (1997).

Weapons Enhancement Statute Not Double Jeopardy When Legislative Intent Clear Statute Intended to Impose Cumulative Punishments: Zabawa argued that applying the weapons enhancement statute to him constituted double jeopardy because the use of a weapon was an element of felony assault (now assault with a weapon) to which he had pleaded guilty. The Supreme Court held that applying the weapons enhancement statute did not constitute double jeopardy because the language of the statute clearly showed the Legislature's intent to impose cumulative punishments and that the United States Supreme Court in Mo. v. Hunter, 459 US 359 (1983), had ruled that cumulative punishments imposed in a single trial do not violate the double jeopardy clause of the fifth amendment of the U.S. Constitution. St. v. Zabawa, 279 M 307, 928 P2d 151, 53 St. Rep. 1162 (1996), distinguished in St. v. Guillaume, 1999 MT 29, 293 M 224, 975 P2d 312, 56 St. Rep. 117 (1999). See also St. v. Keith, 2000 MT 23, 298 M 165, 995 P2d 966, 57 St. Rep. 120 (2000).

Punishment for Refusal to Take Breathalyzer Test and for Driving Under the Influence Not Double Jeopardy: Danichek argued that he could not be convicted of driving under the influence because he had already been punished when his driver's license was suspended for refusing to take the Breathalyzer test and that to punish him for driving under the influence would constitute multiple punishments for the same offense. The Supreme Court held that Danichek's license was suspended for refusing the test and that it was the refusal that was a violation. That conviction had nothing to do with whether or not the person actually was driving under the influence, and therefore, he was being punished for two separate infractions and was not being placed in double jeopardy. Helena v. Danichek, 277 M 461, 922 P2d 1170, 53 St. Rep. 767 (1996).

No Double Jeopardy — Initial Single Count Misdemeanor Charge Converted to Felony Bad Check Common Scheme: Vargas was charged with a single count of misdemeanor issuing a bad check despite the fact that the complaint alleged that he had written 10 bad checks over a 3-week

period. He pleaded guilty and was given a 6-month suspended jail sentence. Several months later, the County Attorney was notified that Vargas had written an additional 18 bad checks during the same 3-week period. In light of the new information, Vargas was charged with a felony for issuing all 28 bad checks, common scheme. Vargas moved to dismiss this information, claiming that under double jeopardy protections, his prior misdemeanor conviction prevented additional punishment for the same conduct for which he had been convicted. The District Court denied the motion to dismiss. Vargas changed his plea to guilty but reserved the right to appeal on double jeopardy grounds and, in doing so, maintained that the state violated his right to be free from a second prosecution for the same offense when it charged him with felony common scheme based in part on a check that had formed the basis for a prior misdemeanor conviction. Pursuant to Brown v. Ohio, 432 US 161, 53 L Ed 2d 187, 97 S Ct 2221 (1977), the general rule is that the double jeopardy clause prohibits the state or federal government from trying a defendant for a greater offense after it has convicted that defendant of a lesser included offense. Although Vargas's argument was consistent with Brown, it did not take into account the significant exceptions to the general rule that were set out in Jeffers v. U.S., 432 US 137, 53 L Ed 2d 168, 97 S Ct 2207 (1977). Under Jeffers, a subsequent prosecution for a greater crime is allowed if: (1) all the elements necessary to the greater crime had not taken place at the time prosecution for the lesser crime had begun; or (2) the facts necessary to show the greater crime had not been discovered by the state before the first trial, despite the exercise of due diligence. Pursuant to U.S. v. Stricklin, 591 F2d 1112 (5th Cir. 1979), once the defendant makes a prima facie case of double jeopardy, it is the state's responsibility to demonstrate by a preponderance of the evidence that it exercised due diligence in discovering all relevant facts before the first trial or, as in this case, before the guilty plea. The case was remanded for further proceedings on the question of whether the state exercised due diligence. St. v. Vargas, 279 M 357, 928 P2d 165, 53 St. Rep. 1184 (1996).

Stay of Second Trial Required Until Double Jeopardy Claim Addressed: Defendant, charged with assault and drug possession, proceeded to trial before a jury, which was empaneled without alternate members by stipulation. After opening statements, a juror informed the court that she would not be able to continue as a juror because of illness. A mistrial was declared without objection from the defendant, and a second trial date was scheduled. The defendant filed a motion to dismiss all charges on the basis of the prohibition against double jeopardy and argued that the double jeopardy motion must be addressed prior to the beginning of the second trial. The state argued that the second trial should proceed, citing the Supreme Court's rulings in Forsyth and LaFlesch, which held that a defendant's double jeopardy claim could be reviewed adequately on appeal following a retrial. The Supreme Court disagreed and overruled its previous decisions in Forsyth and LaFlesch, ruling that to have any significance, the guarantee against double jeopardy must be given effect prior to, not after, the second trial. Once a defendant endures a second trial, the defendant has incurred the risk of being put in jeopardy, which cannot be remedied or expunged after the fact. Keating v. Sherlock, 278 M 218, 924 P2d 1297, 53 St. Rep. 855 (1996).

Incest Not Included Offense of Sexual Intercourse Without Consent: McQuiston contended that his conviction for both incest and sexual intercourse without consent violated double jeopardy protections because under 46-11-410, a defendant may not be convicted of more than one offense if one offense is an included offense in another, as defined in 46-1-202. The Supreme Court held that incest is not an included offense of sexual intercourse without consent but rather is a distinct and wholly separate offense, each crime requiring proof of distinct elements that the other does not. McQuiston's conviction for both crimes was not a double jeopardy violation. St. v. McQuiston, 277 M 397, 922 P2d 519, 53 St. Rep. 729 (1996), following St. v. Sor-Lokken, 247 M 343, 805 P2d 1367 (1991).

Double Jeopardy Protection Against Three Distinct Abuses — Civil Sanction Following Criminal Prosecution: The U.S. Supreme Court has held that the double jeopardy clause protects against three distinct abuses: (1) a second prosecution for the same offense; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. A defendant who has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be categorized as remedial, but only as a deterrent or retribution. In identifying a double jeopardy violation, a court should assess the character of the sanctions imposed by the state. Whether a sanction constitutes punishment is not determined from the defendant's perspective, but rather by the purposes actually served by the sanction. A civil sanction that serves only retributive or deterrent purposes constitutes punishment. St. v. Schnittgen, 277 M 291, 922 P2d 500, 53 St. Rep. 710

(1996), citing U.S. v. Halper, 490 US 435, 104 L Ed 2d 487, 109 S Ct 1892 (1989), and followed in In re Game Farm License No. 319 of Brogan, 283 M 413, 942 P2d 100, 54 St. Rep. 670 (1997). See also N.C. v. Pearce, 395 US 711, 23 L Ed 2d 656, 89 S Ct 2072 (1969), and Witte v. U.S., 515 US 389, 132 L Ed 2d 351, 115 S Ct 2199 (1995). However, see St. v. Anderson, 1998 MT 258, 291 M 242, 967 P2d 413, 55 St. Rep. 1061 (1998), distinguishing Pearce and Witte with regard to use of criminal conduct in a prior sentencing hearing on unrelated charges without violating the double jeopardy provision.

Termination of Employment of Public Employee and Criminal Prosecution on Same Facts — No Double Jeopardy Violation: Relying on U.S. v. Reed, 937 F2d 575 (11th Cir. 1991), U.S. v. Payne, 2 F3d 706 (6th Cir. 1993), Loui v. Bd. of Medical Examiners, 889 P2d 705 (Hawaii 1995), and U.S. v. Ursery, 518 US 267, 135 L Ed 2d 549, 116 S Ct 2135, (1996), and distinguishing U.S. v. Halper, 490 US 435, 104 L Ed 2d 487, 109 S Ct 1892 (1989), the Supreme Court held that a public employee may be both terminated from employment and prosecuted criminally on the same facts without creating a double jeopardy violation. In the present case, Deputy Sheriff Schnittgen was charged with criminal mischief as the result of an incident at a bar when he was off duty and was subsequently terminated from his position based on his behavior the same evening. The employment termination in this case did not serve the purpose of punishment, but instead served the remedial purpose of protecting public safety and property and of promoting public confidence and trust in law enforcement and thus was not violative of double jeopardy protections. St. v. Schnittgen, 277 M 291, 922 P2d 500, 53 St. Rep. 710 (1996).

Multiple Common Schemes — Conviction in Multiple Counties Not Violative of Double Jeopardy: Stilson was convicted of issuing a bad check, common scheme, in Lewis and Clark County. In April of 1991, he was convicted of the same type of felony in Missoula County. Two months later, he was convicted of the same type of felony in Cascade County. He also wrote bad checks in Yellowstone and Butte-Silver Bow Counties and although he was not prosecuted for those offenses, the Missoula County judgment required him to make restitution for those bad checks as well. Stilson appealed for postconviction relief, alleging that his convictions were for the same common scheme and that the multiple convictions violated his right preventing double jeopardy. He contended that state law does not provide a basis to divide a single common scheme of issuing bad checks into multiple common schemes. Although the Legislature did not provide for multiple common schemes, neither was that possibility foreclosed. Under the circumstances of this case, Stilson was charged in each county for only the checks written in that particular county and the bad checks written in each county were separate and distinct common scheme offenses. The evidence required for proof of the offense in each county was different and specific to each county, and the series of acts or transactions in each county were different from those in other jurisdictions, both individually and as a group. Thus, under appropriate facts and circumstances, double jeopardy protections do not necessarily prevent a defendant who has been convicted of a common scheme in one county from being convicted of a common scheme in a different county. Stilson v. St., 278 M 20, 924 P2d 238, 53 St. Rep. 572 (1996).

Prison Disciplinary Proceedings as Remedial — No Impediment to Criminal Proceedings Involving Same Conduct: The prohibition against double jeopardy does not bar criminal prosecution for conduct that has been the subject of prior remedial administrative prison disciplinary proceedings, such as the forfeiture of good time for escape. Even if administrative sanctions are considered punishment, they are integral parts of and distinct from an inmate's single punishment of incarceration for the prior conviction. The withholding of the contingent reward of good time is not considered punishment for double jeopardy purposes because the withholding is a consequence of the underlying prior conviction that resulted in the incarceration and not a result of the rule violation or escape attempt that led to the disciplinary action itself. St. v. Nelson, 275 M 86, 910 P2d 247, 53 St. Rep. 50 (1996). See also U.S. v. Halper, 490 US 435, 104 L Ed 2d 487, 109 S Ct 1892 (1989), and U.S. v. Soto-Olivas, 44 F3d 788 (9th Cir. 1995).

Judgment as Including Sentence — Sentence Not Strictly Premised on Punishment: A defendant has 60 days under former Rule 5(b), M.R.App.P. (now superseded), to appeal a final judgment. Although prior to the 1991 enactment of 46-1-202, "sentence" was interpreted as being the same as "punishment", 46-1-202 now defines a sentence as any judicial disposition of a criminal proceeding upon a plea, verdict, or finding of guilt. The judicial disposition is itself a sentence regardless of whether actual punishment is deferred or imposed immediately. This broader definition applies to deferment cases, but in double jeopardy cases, the narrower meaning premised on the punishment factor still applies. Therefore, a judgment that includes a deferred sentence is final for purposes of appeal, and an appeal filed more that 60 days after sentencing

was dismissed as untimely. St. v. Rice, 275 M 81, 910 P2d 245, 53 St. Rep. 48 (1996), followed in Davis v. St., 2004 MT 112, 321 M 118, 88 P3d 1285 (2004).

Double Jeopardy — Vacating Trial When Defendant Requested Attorney After First Witness Was Sworn: After the first witness was sworn and testified in a prosecution for two misdemeanors, the judge asked defendant about a letter in the court file indicating that defendant had a public defender. Defendant said that he had not been in touch with the public defender and that he wanted a lawyer. The court vacated the trial to allow defendant a chance to obtain counsel. At a trial held 11 months later, a motion to dismiss because jeopardy attached after the first witness was sworn in the first trial was properly denied. Defendant's request for counsel prompted the vacation of the first trial, and the vacation worked to his advantage because he secured the public defender's representation. Found to be without merit was defendant's claim that the legal defect at the first trial, which the court feared might arise from lack of counsel, would not have occurred because the consequence of failure to appoint counsel would only prohibit the judge, under 46-8-101, from including jail time in the sentence. St. v. Stringer, 263 M 295, 868 P2d 588, 51 St. Rep. 63 (1994).

Reinstatement of Charge Following Withdrawal of Plea — Not Double Jeopardy: The parties agreed that the state would recommend a 30-year sentence with 25 years suspended if Losson would plead guilty to mitigated deliberate homicide and that they would argue any additional sentence for weapon enhancement at the sentencing hearing, with the state arguing for the maximum 10-year sentence. After Losson pleaded guilty, the state informed her that it would introduce recently discovered evidence to prove that her motive was to gain $106,000 in life insurance and that it would use the evidence in support of its argument for weapon enhancement. Losson then withdrew her plea, and the state recharged her with deliberate homicide. Losson was ultimately convicted of mitigated deliberate homicide, but on appeal, she contended that the state breached the plea agreement and violated her double jeopardy protection by reinstating the deliberate homicide charge. The Supreme Court affirmed, noting that the state did not breach the plea agreement, but rather Losson chose to withdraw her plea. Double jeopardy protection does not relieve a defendant from the consequences of the voluntary choice of plea withdrawal. Further, Losson's double jeopardy argument was moot because she was only convicted on mitigated deliberate homicide and thus could not challenge the deliberate homicide charge. St. v. Losson, 262 M 342, 865 P2d 255, 50 St. Rep. 1588 (1993).

Double Jeopardy — Civil Penalty: The Montana marijuana tax was unconstitutional as a violation of double jeopardy even though it was a civil rather than a criminal sanction. A civil sanction that serves as punishment is protected under double jeopardy. There must be an approximation between the amount of taxes and the damages and costs sustained by the state in order for the provision not to be considered punishment. In re Kurth Ranch, 986 F2d 1308 (9th Cir. 1993), affirmed in Dept. of Revenue v. Kurth Ranch, 511 US 767, 128 L Ed 2d 767, 114 S Ct 1937 (1994), and distinguished in In re Game Farm License No. 319 of Brogan, 283 M 413, 942 P2d 100, 54 St. Rep. 670 (1997).

Retrial of Unconvicted Offense Prohibited — Dismissal of Conviction for Uncharged Offense Affirmed: Barker was charged with DUI but was convicted of reckless driving by the Ravalli County Justice of the Peace. Barker appealed to the District Court and filed a motion to dismiss, which the District Court granted. On appeal by the state, the Supreme Court affirmed, holding that the reckless driving charge and the DUI charge were inapposite charges and that reckless driving was not a lesser included offense of DUI. The Supreme Court also held that while a defendant's statutory remedy for appealing a Justice's Court decision is a trial de novo in the District Court, it would be a violation of the prohibition against double jeopardy to try Barker again on the DUI charge because Barker was originally charged with that offense and jeopardy had attached when the first witness was sworn. When Barker appealed from the erroneous conviction of an uncharged offense, he did not waive his constitutional protection against double jeopardy for charges of which he was acquitted. St. v. Barker, 260 M 85, 858 P2d 360, 50 St. Rep. 970 (1993).

Denial of Accrued Benefits Not Unconstitutional: State employees, dismissed because of criminal and sexual misconduct investigations, appealed a summary judgment, alleging that the refusal by the Department of Social and Rehabilitation Services (now Department of Public Health and Human Services) to pay accrued vacation benefits violated the double jeopardy and equal protection clauses of the federal constitution. The Supreme Court held that the employees' failure to meet the statutory prerequisite to receive the accrued vacation benefits does not equate to violating a law and facing double jeopardy. Similarly, the terminated employees failed to

establish any grounds to support an equal protection discrimination violation. Stuart v. Dept. of Social and Rehabilitation Services, 256 M 231, 846 P2d 965, 50 St. Rep. 48 (1993).

Dangerous Drug Tax Not Double Jeopardy — Civil Remedy Versus Criminal Penalty — Constitutionality of Dangerous Drug Tax: The Department of Revenue assessed a dangerous drug tax on two men who were convicted of possession of dangerous drugs, sentenced, and fined under the criminal code. Two District Courts found that the tax was excessive and punitive rather than remedial and that it constituted a second criminal penalty imposed for the same crime in violation of the constitutional prohibition against double jeopardy. The Supreme Court disagreed, noting that the dangerous drug tax is an excise tax based on the quantity of drugs in the taxpayer's possession and does not impose any affirmative disability or restraint of liberty or privileges upon the taxpayer. Under Helvering v. Mitchell, 303 US 391, 82 L Ed 917, 58 S Ct 630 (1938), both a civil and criminal penalty are allowed for the same act or omission. Although the conduct of possessing dangerous drugs subjects a taxpayer to both a criminal penalty and a tax, the tax is not so punitive in purpose or effect that it negates the legislative intent to create a civil sanction. Rather, the tax is remedial and is collected through a separate administrative procedure. In distinction to U.S. v. Halper, 490 US 735, 104 L Ed 2d 487, 109 S Ct 1892 (1989), the tax does not serve the goal of punishment rather than its remedial purpose of compensating the government for its loss and needs no proof of remedial costs on the part of the state. The method of reporting the tax due and the method of collecting the tax do not transform it into a criminal penalty. After applying the factors in Kennedy v. Mendosa, 372 US 144, 9 L Ed 2d 644, 83 S Ct 554 (1963), the court held that the dangerous drug tax is not a criminal penalty and does not rest on a criminal conviction but constitutes a separate civil remedy and as such is not a multiple punishment that violates double jeopardy. The Dangerous Drug Tax Act is constitutional on its face. Sorensen v. Dept. of Revenue, 254 M 61, 836 P2d 29, 49 St. Rep. 624 (1992).

Possession of Explosives and Criminal Mischief — Neither an Inchoate Crime: Wolfe argued that he had been subjected to double jeopardy in being convicted of both possession of explosives and criminal mischief. The Supreme Court held that the statute prohibiting double jeopardy applied only to inchoate crimes and that neither of the two crimes Wolfe was convicted of was inchoate. The Supreme Court also held that under the test used in Blockburger v. U.S., 284 US 299, 76 L Ed 306, 52 S Ct 180 (1932), Wolfe had not been subjected to double jeopardy. St. v. Wolfe, 250 M 400, 821 P2d 339, 48 St. Rep. 1001 (1991).

Possession of Drugs on Person and on Property as Separate Acts of Possession: Defendant was charged and convicted of one count of criminal possession of methamphetamine on his person and one count of criminal possession of methamphetamine on his premises—charges he contended should have been merged into one charge of possession arising from the same transaction. The Supreme Court, while recognizing that the prohibition against double jeopardy protects a defendant both from multiple punishments imposed at a single prosecution for the same offense and from multiple prosecutions for offenses arising from the same transaction, nevertheless found that the Legislature intended to punish both "actual" possession of drugs on the person and "constructive" possession on the premises. Each count required proof of a fact that the other did not. Under the rationale of Blockburger v. U.S., 284 US 299, 76 L Ed 2d 306, 52 S Ct 180 (1932), conviction on both counts was affirmed. St. v. Crowder, 248 M 169, 810 P2d 299, 48 St. Rep. 376 (1991), followed, with regard to multiple offenses of issuing a bad check, common scheme, in Stilson v. St., 278 M 20, 924 P2d 238, 53 St. Rep. 572 (1996), and followed, with regard to issuing bad checks in several thefts, common scheme, in St. v. Savaria, 284 M 216, 945 P2d 24, 54 St. Rep. 852 (1997). However, see U.S. v. Johnson, 909 F2d 1517 (D.C. Cir. 1990), in which it was held that when a defendant possesses the same controlled substance in the same place at the same time, he commits only one act of possession.

Conviction of Sexual Assault and Incest — No Violation of Double Jeopardy Protections: Because the victim was 15 years old, the state had to prove lack of consent for a sexual assault charge. The incest statute does not require proof of lack of consent if the victim is under 18 years of age. The jury could have found defendant guilty of incest and not guilty of sexual assault. Based on the facts of this case, the convictions and sentencing of defendant for sexual assault and incest did not violate double jeopardy protections. St. v. Sor-Lokken, 247 M 343, 805 P2d 1367, 48 St. Rep. 142 (1991), followed in St. v. McQuiston, 277 M 397, 922 P2d 519, 53 St. Rep. 729 (1996).

Trial for Witness Tampering and Underlying Crime Not Constituting Double Jeopardy: The defendant argued that the information charging him was ambiguous and therefore he was unsure as to whether he was being tried twice for the same crime. The Supreme Court found that he was tried for successive crimes arising from separate incidents at separate trials so that double jeopardy did not exist. St. v. Matt, 245 M 208, 799 P2d 1085, 47 St. Rep. 1988 (1990).

Failure to Poll Jury in First Trial: The Supreme Court held that it was not improper for the lower court to order a mistrial without polling the deadlocked jury in the first trial. The Supreme Court also held that there was no presumption that the jury's inability to reach a decision indicated a reasonable doubt as to the defendant's guilt. Therefore, a second trial did not constitute double jeopardy. St. v. Van Dyken, 242 M 415, 791 P2d 1350, 47 St. Rep. 835 (1990) , followed in Keating v. Sherlock, 278 M 218, 924 P2d 1297, 53 St. Rep. 855 (1996).

Prosecution Presenting New Evidence at Second Trial: The defendant argued that the prosecution's introduction of new evidence at the second trial constituted double jeopardy. The Supreme Court ruled that a mistrial placed the parties in the same position as if there had been no trial in the first instance and that therefore the introduction of new evidence was proper. St. v. Van Dyken, 242 M 415, 791 P2d 1350, 47 St. Rep. 835 (1990).

Trying Defendant Twice in Five-Year Period for Second Offense DUI Not Double Jeopardy: The defendant was convicted of DUI at 17 years of age. Several months later when he was 18, the defendant was arrested for a second incident and tried and convicted for DUI, second offense. Two years later, the defendant was arrested for a third time, initially with a third offense DUI. The prosecution amended the charge to a second offense DUI upon learning that the defendant had been a juvenile when convicted the first time. The defendant argued that charging him twice within a 5-year period under Montana's DUI scheme for second offense DUI constituted double jeopardy. The Supreme Court held that it was not double jeopardy because the defendant was not being tried twice for the same occurrence. Each charge arose from a separate set of facts. The court further stated that although the first conviction for second offense DUI might not have been correct since the first DUI conviction had occurred when the defendant was a minor, the second charge for a second offense DUI was proper. St. v. Chasse, 240 M 341, 783 P2d 1370, 46 St. Rep. 2178 (1989).

Persistent Felony Offender Statute Not Violative of Double Jeopardy Protection: As set out in St. v. Maldonado, 176 M 322, 578 P2d 296 (1978), the persistent felony offender statute authorizing enhanced sentences for recidivists does not constitute double jeopardy. St. v. Farnsworth, 240 M 328, 783 P2d 1365, 46 St. Rep. 2165 (1989).

Revocation of Suspended Sentence:

Because the revocation proceeding is not a criminal adjudication, does not require proof of a criminal offense, does not impose punishment for any new offense, and is an act in the performance of the duty of judicial supervision of probationary liberty, the double jeopardy clause is inapplicable. St. v. Lange, 237 M 486, 775 P2d 213, 46 St. Rep. 991 (1989), citing St. v. Eckley, 579 P2d 291, 34 Oreg. App. 563 (1978), and followed in St. v. Brister, 2002 MT 13, 308 M 154, 41 P3d 314 (2002).

The court rejected defendant's contention that revocation of a suspended sentence enhanced his punishment and thus subjected him to double jeopardy. Even though a defendant must live with the conditions of probation throughout the period of suspension and even though he must serve the entire sentence if the suspension is revoked, there is no double jeopardy. The prohibitions against double jeopardy do not preclude the State from filing a second petition for revocation of suspended sentence that alleges the same facts. St. v. Oppelt, 184 M 48, 601 P2d 394 (1979), followed in St. v. Johnston, 2008 MT 318, 346 M 93, 193 P3d 925 (2008). Johnston was overruled in part in St. v. Maynard, 2010 MT 115, 356 Mont. 333, 233 P.3d 331.

Offenses Revealed in Treatment as Part of Plea Bargain — Further Prosecution Barred: As a prerequisite to a plea bargain, defendant was required to participate in a treatment program. In order to be accepted for treatment, he had to undergo an evaluation of his amenability to treatment. An indication of his amenability was his willingness to admit his past behavior. Unless the evaluator believed defendant had admitted all offenses, defendant would not be accepted into the program. If not accepted, plea negotiations would cease and defendant would face a prison sentence or fine. Hence, in order to ensure the continuance of negotiations, defendant waived his right to silence and underwent evaluation. When defendant admitted further crimes during evaluation, the state sought a sentence in excess of that agreed upon in the plea bargain. The Supreme Court held that fundamental fairness forbade the state from prosecuting the defendant for offenses for which he had essentially already been punished. St. v. Thiel, 236 M 63, 768 P2d 343, 46 St. Rep. 182 (1989).

Original Sentence Not Reduced to Writing — Second Sentencing Not Double Jeopardy: At a sentencing hearing, defendant was sentenced to 80 years plus 5 years as a persistent felony offender. The sentence was not reduced to writing. Nine days later at a second sentencing hearing, the sentence was amended to provide ineligibility for parole during the first 40 years of imprisonment. The second sentence was reduced to writing. Defendant claimed the subsequent

amendment constituted double jeopardy. However, the imposition of a more severe sentence is not equivalent to being twice placed in jeopardy. The appeal of a sentence imposed upon conviction does not expose a defendant to successive prosecutions or multiple punishments for the same crime. A defendant remains subject to a single determination of guilt or innocence and a single, albeit potentially more severe, punishment. St. v. Wirtala, 231 M 264, 752 P2d 177, 45 St. Rep. 596 (1988), overruled, to the extent that the written judgment and commitment, rather than the oral pronouncement of sentence, is considered the final, valid order, in St. v. Lane, 1998 MT 76, 288 M 286, 957 P2d 9, 55 St. Rep. 311 (1998).

Manifest Necessity for Mistrial and Retrial — Ineffective Assistance of Counsel — No Basis for Reversal by Subsequent Trial Judge: After 1 day of trial, a trial court on its own motion exercised sound discretion in finding manifest necessity for a mistrial based on the conclusion that counsel was too inexperienced to defend a major felony charge involving conspiracy and accountability theories. The court also properly found that manifest necessity dictated the matter be retried and that the bar of double jeopardy did not prevent a retrial. On appeal, the Supreme Court distinguished Strickland v. Washington, 466 US 668, 80 L Ed 2d 674, 104 S Ct 2052 (1984), in noting that the second prong of the Strickland test was established for the consideration of action taken in the course of a complete trial. Because there was no way of showing whether counsel's conduct deprived defendant of a fair trial unless the trial had been allowed to go to a conclusion, Strickland was inapplicable. There was no basis for reversal of the mistrial decision by a subsequent trial judge. St. v. Moran, 231 M 387, 753 P2d 333, 45 St. Rep. 79 (1988). Opinion withdrawn, but issue affirmed in St. v. Moran, 231 M 387, 753 P2d 333, 45 St. Rep. 703 (1988).

Bear Killed Unlawfully — State Prosecution Barred: Defendant was charged in state District Court for subscribing to a materially false statement on an application for a grizzly bear trophy license and was charged and convicted in federal District Court for violating the Endangered Species Act for taking the same trophy. The federal court and the state court have concurrent jurisdiction, and the state prosecution is barred as it is based on an offense arising out of the same transaction as the federal charge. St. v. Sword, 229 M 370, 747 P2d 206, 44 St. Rep. 2053 (1987).

Dual Sovereignty Exception: Section 46-11-504 eliminates the "dual-sovereignty" exception to the prohibition against double jeopardy. It bars state prosecution following federal prosecution for the same conduct. It cannot bar a subsequent federal prosecution. U.S. v. Engesser, 788 F2d 1401 (9th Cir. 1986). See also St. v. Zimmerman, 175 M 179, 573 P2d 174 (1977).

Incest Conviction Reversed — Retrial for Sexual Assault Not Barred by Double Jeopardy: The prosecution's proof of sexual contact is the same in both the incest statute and the sexual assault statute. The prosecution in the original trial on a charge of incest, reversed on appeal, barred retrial on a charge of sexual assault. A defendant whose conviction was reversed because the evidence was insufficient as a matter of law could not be retried. The U.S. Supreme Court reversed, holding the constitution permits a retrial after a conviction is reversed because of a defect in the charging instrument. St. v. Hall, 224 M 187, 728 P2d 1339, 43 St. Rep. 2120 (1986), reversed, 481 US 400, 95 L Ed 2d 354, 107 S Ct 1825 (1987).

Attempt by Prosecutor to Provoke Defense Motion for Mistrial — Double Jeopardy: When a defendant moves for a mistrial and the motion is granted, the "manifest necessity" standard allowing a court to lift the double jeopardy bar to a second trial does not apply (U.S. v. Tateo, 377 US 463, 12 L Ed 2d 448, 84 S Ct 1587 (1964)). The Montana Supreme Court recognized a narrow exception to this rule, as outlined in Oreg. v. Kennedy, 456 US 667, 72 L Ed 2d 416, 102 S Ct 2083 (1982), holding that the circumstances under which a defendant may invoke the bar of double jeopardy are limited to cases "in which the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial". In the case at bar, the District Court held and the Supreme Court affirmed that the prosecutor attempted, through a series of overreaching questions, to shift the focus of the trial from a charge of criminal sale of drugs for which there was only weak evidence to sexual crimes initially reported but later denied on cross-examination. The court found that the questions were so prejudicial that the defendant had little choice but to move for a mistrial to avoid a conviction for crimes with which he had not been charged. St. v. Laster, 223 M 152, 724 P2d 721, 43 St. Rep. 1614 (1986), followed in Keating v. Sherlock, 278 M 218, 924 P2d 1297, 53 St. Rep. 855 (1996).

Dangerous Offender Designation Added After Initial Oral Sentencing — No Double Jeopardy: Appellant contended District Court unconstitutionally subjected him to double jeopardy by designating him a dangerous offender after the court had already sentenced him for mitigated deliberate homicide, committing the offense with a weapon, and as a persistent felony offender in a previous hearing that same day. The Supreme Court disagreed, noting that the first sentence,

which omitted the dangerous offender designation, was not reduced to writing, signed by the judge, or filed with the court; therefore, there was no former jeopardy under the first oral sentence because it was not a final valid judgment. St. v. Enfinger, 222 M 438, 722 P2d 1170, 43 St. Rep. 1403 (1986), followed in St. v. Mason, 253 M 419, 833 P2d 1058, 49 St. Rep. 506 (1992), and overruled, to the extent that the written judgment and commitment, rather than the oral pronouncement of sentence, is considered the final, valid order, in St. v. Lane, 1998 MT 76, 288 M 286, 957 P2d 9, 55 St. Rep. 311 (1998).

No New Trial When Prosecutor Failed to Prove Essential Element of Crime Charged: Defendant was convicted under 45-5-503 of sexual intercourse without consent. On appeal, he claimed that penetration had not been proved at trial. The Supreme Court agreed and reversed the conviction. The victim had testified indirectly on the issue, but her testimony was ambiguous, and she was not asked to explain her statements. The Supreme Court stated that the fact that this is a delicate subject does not eliminate the requirement that the state prove each element of its case beyond a reasonable doubt. The court further ruled that it would be a violation of the constitutional protection against double jeopardy to remand for a new trial. The state had its opportunity to prove its case and failed to do so. Under its authority set forth in 46-20-703 to reduce the offense of which a defendant has been convicted to a lesser included offense because the record contains evidence establishing all of the elements of sexual assault, the Supreme Court remanded the case to the District Court for entry of judgment finding the defendant guilty of the crime of sexual assault. St. v. Lundblade, 221 M 185, 717 P2d 575, 43 St. Rep. 732 (1986).

Midtrial Dismissal of Jury Upon Appeal by State of Adverse Evidentiary Ruling — Second Trial as Double Jeopardy: After a DUI negligent homicide trial began, the state decided to appeal the trial court's order sustaining objection to the admissibility of blood analyses based on improper chain of custody of the blood samples. The trial court dismissed the jury upon the state's decision to initiate the interlocutory appeal. The Supreme Court held that these circumstances do not show a manifest necessity to terminate the trial, in accordance with Wade v. Hunter, 336 US 684 (1949), and therefore a second trial would constitute double jeopardy. The court further stated that, as a general rule, a ruling on the admission of evidence which is adverse to the state does not constitute an urgent circumstance or a plain and obvious case constituting manifest necessity to discontinue the trial and allow an interlocutory appeal. St. v. Carney, 219 M 412, 714 P2d 532, 43 St. Rep. 54 (1986), distinguished in St. v. Yarns, 252 M 45, 826 P2d 543, 49 St. Rep. 132 (1992).

Conviction for Aggravated Assault, Escape, and Obstructing a Peace Officer — No Double Jeopardy: There was no double jeopardy when defendant was convicted of aggravated assault, escape, and obstructing a peace officer, all of which arose out of the same event, as each offense contains an element not common to the other offenses. St. v. Thornton, 218 M 317, 708 P2d 273, 42 St. Rep. 1614 (1985), followed in St. v. Hawkins, 239 M 404, 781 P2d 259, 46 St. Rep. 1786 (1989).

Mistrial Following Hung Jury — Bailiff Misconduct — Original Jeopardy Not Terminated: Following mistrial because of a jury deadlock, defendant petitioned for a Writ of Supervisory Control, claiming double jeopardy. He contended that misconduct on the part of the bailiff was chargeable to the State in the same manner as misconduct committed by a prosecutor or judge. The Supreme Court refused the petition, but proceeded to declare that in Montana a mistrial following a hung jury does not terminate the original jeopardy. If governmental conduct giving rise to a motion for mistrial was intended to provoke defendant into moving for mistrial, then retrial might properly be prohibited. However, the court held that comments by the bailiff were not intended to provoke defendant into moving for mistrial. State ex rel. Forsyth v. District Court, 216 M 480, 701 P2d 1346, 42 St. Rep. 965 (1985), overruled in Keating v. Sherlock, 278 M 218, 924 P2d 1297, 53 St. Rep. 855 (1996).

Right to Speedy Trial Separable From Claim of Double Jeopardy — Speedy Trial Issue to Await Retrial: Following mistrial because of a jury deadlock, defendant petitioned for a Writ of Supervisory Control, claiming double jeopardy and lack of speedy trial. The court refused to take jurisdiction, but proceeded to reject defendant's claim of double jeopardy. The court held, however, that defendant's claim of denial of right to speedy trial was generically different from his claim of double jeopardy. The speedy trial issue could not be considered until the retrial was held and all of the facts presented to the Supreme Court on appeal. At that time, the issue would be ready for decision. State ex rel. Forsyth v. District Court, 216 M 480, 701 P2d 1346, 42 St. Rep. 965 (1985).

Reasonably Specific Date in Information — Double Jeopardy Protected: Information charging incest indicated a 10-month period during which the crime was committed. The court found the information sufficiently specific since victim resided with defendant father during entire period

and defendant could not establish deprivation of alibi defense. The court applied the test set forth in St. v. Clark, 209 M 473, 682 P2d 1339, 41 St. Rep. 833 (1984), and held that the two-part test was satisfied. Defendant contended that the broad time frame alleged in the information subjected him to double jeopardy. The court rejected the argument, noting that the State is barred by Art. II, sec. 25, Mont. Const., from retrying defendant for the offense to this particular victim during the time in question. St. v. D.B.S., 216 M 234, 700 P2d 630, 42 St. Rep. 770 (1985).

Retrial on Same Charge — Double Jeopardy: The state's failure to present sufficient evidence to support a charge of felony theft precludes a retrial on the same charge. St. v. Furlong, 213 M 251, 690 P2d 986, 41 St. Rep. 2096 (1984).

Theft and Receiving Stolen Property — Conviction From Same Act — Double Jeopardy: Defendant pleaded guilty to burglary and theft of coins from a residence. Based on a plea agreement, other charges against him were dismissed and he was placed on probation. Restitution was not ordered. While on probation, defendant sold some of the coins for which he had previously been convicted of theft. Criminal charges were filed against defendant under 45-6-301, receiving stolen property. The Supreme Court reversed defendant's second conviction because since both convictions arose from the same transaction, the second conviction was a violation of the prohibition against double jeopardy. St. v. Hernandez, 213 M 221, 689 P2d 1261, 41 St. Rep. 2063 (1984).

Theft and Criminal Mischief — Conviction From Same Act — No Error: Conviction of a defendant of both the crime of felony theft and the crime of felony criminal mischief as a result of the defendant's involvement in one criminal incident is permissible under 46-11-502 (renumbered 46-11-410) and is not a violation of the constitutional prohibition against double jeopardy. St. v. Palmer, 207 M 152, 673 P2d 1274, 40 St. Rep. 1957 (1983).

Multiple Counts Arising From Same Incident — No Double Jeopardy: Defendant was charged in Justice's Court with four counts of misdemeanor assault arising from a fight outside a bar. The jury acquitted him of two counts and found him guilty of two counts. After sentence was imposed, defendant appealed to District Court. Defendant moved to dismiss the charges prior to the trial. The District Court dismissed the charges based on double jeopardy. On appeal, the Supreme Court vacated and remanded, saying the right to a trial de novo in District Court is merely a continuing jeopardy arising from the Justice's Court proceedings. In dicta, the court said the double jeopardy clause protects against: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. St. v. Lindseth, 203 M 115, 659 P2d 844, 40 St. Rep. 333 (1983).

Pretrial Dismissal of Case Following Conviction in Similar Case — Use of Evidence Seized Upon Arrest on Dismissed Charge: After tribal court ordered defendant to stay away from a certain residence, he broke into it and was convicted in tribal court of criminal contempt of the court. He was then charged in the Justice's Court with criminal mischief and criminal trespass, arrested, searched, and charged in the District Court with illegal possession of dangerous drugs found during the search. The Justice's Court action was then dismissed. Defendant argued the arrest and search were illegal as the arrest was for a crime growing out of an action that was the subject of a prior conviction and that double jeopardy attached and the evidence obtained during the search was illegal. A second jeopardy did not attach because the Justice's Court action was dismissed before either a jury was empaneled and sworn or the court began to hear evidence. Thus there was no double jeopardy requiring suppression of the evidence. St. v. Caye, 203 M 6, 659 P2d 841, 40 St. Rep. 258 (1983).

Double Jeopardy — Legislative Intent of Multiple Punishment: Defendant contended that his guarantees against double jeopardy were violated when he was convicted of both aggravated burglary and aggravated assault. In determining whether multiple punishments should be allowed for offenses arising out of the same transaction, the dispositive question is whether the Legislature intended to provide for multiple punishments. The court found several bases for concluding that the Legislature intended to permit punishment for both offenses, including the fact that one could commit either offense without committing the other. St. v. Wells, 202 M 337, 658 P2d 381, 40 St. Rep. 127 (1983), followed in St. v. Evans, 247 M 218, 806 P2d 512, 48 St. Rep. 170 (1991).

Double Jeopardy — Assault Conviction in District Court — Driving Under the Influence Conviction in Justice's Court: The defendant's involvement in a vehicular accident resulted in his conviction in Justice's Court of driving under the influence of alcohol and his conviction in District Court of aggravated assault. The defendant's constitutional right against being placed in double jeopardy was not violated as each offense requires proof of a fact the other does not. Driving

under the influence requires proof of intoxication, while assault does not. Assault requires proof of bodily injury, while driving under the influence does not. St. v. Pierce, 199 M 57, 647 P2d 847, 39 St. Rep. 1205 (1982).

Conviction of Nonexistent Crime: Hembd was convicted of a nonexistent crime, attempted negligent arson. The jury was given instruction on several crimes, some of which existed. In this case, the jury's verdict is an implicit acquittal of the other charges. It would be a violation of the guarantee against being twice put in jeopardy for the same offense if Hembd were tried. The conviction was therefore reversed with instructions to dismiss the action. St. v. Hembd, 197 M 438, 643 P2d 567, 39 St. Rep. 653 (1982).

Double Jeopardy — Remand Order Not Required to Specify New Trial: A defendant was convicted of aiding and abetting another in witness tampering and aggravated assault. The conviction was reversed and the defendant was rearraigned on the original charges. The defendant was convicted of lesser included offenses. On appeal, the defendant alleged double jeopardy. He argued that the failure to order specifically and expressly a new trial precluded further action. A remand order need not order a new trial for one to occur. The remand order in this case was supported by the opinion of the Supreme Court. On review, the Supreme Court said it was clear its intention was to leave the door open to retrial and accordingly a new trial was granted. Therefore, the defendant's double jeopardy rights were not violated by his second trial. St. v. Cardwell, 191 M 539, 625 P2d 553, 38 St. Rep. 451 (1981).

Additional Penalty for Use of Weapon in Committing Crime — Not Double Jeopardy: A defendant convicted of an offense committed with a weapon and given an additional sentence under 46-18-221 is not subjected to multiple punishments for the same offense in violation of the Double Jeopardy Clauses of the federal and state Constitutions because 46-18-221 does not constitute a separate offense or penalize the defendant for a separate offense; his sentence for an underlying offense is enhanced based upon the existence of an additional factor, the use of a weapon. St. v. Davison, 188 M 432, 614 P2d 489 (1980), distinguished in St. v. Guillaume, 1999 MT 29, 293 M 224, 975 P2d 312, 56 St. Rep. 117 (1999).

Collateral Estoppel: Collateral estoppel applies only when an issue of ultimate fact has been previously determined by a valid and final judgment and only if the applicability inquiry is set in a practical frame and viewed with an eye to all the circumstances of the proceedings. The court examined the record of the prior proceedings, took into account the pleadings, evidence, charge, and other relevant matters, and concluded that the first jury could have grounded its verdict of guilty of robbery on issues other than those required for deliberate homicide. The retrial was ordered because the jury had been erroneously instructed that the defendant could be acquitted of deliberate homicide even though he was guilty of the underlying felony robbery. Collateral estoppel did not apply. St. v. Bad Horse 185 M 507, 605 P2d 1113 (1980).

Retrial After Reversal of Conviction: A defendant is not subjected to double jeopardy by virtue of his retrial after reversal of his judgment of conviction. The original conviction of robbery could have been sustained except for errors. The court did not believe that because the defendant was not guilty of deliberate homicide that he was likewise guiltless of the underlying charge of robbery. The remand was founded on the right of receiving a trial with a properly instructed jury. Double jeopardy did not apply. St. v. Bad Horse 185 M 507, 605 P2d 1113 (1980).

Conviction for Deliberate Homicide and Aggravated Kidnapping: The offenses of deliberate homicide and aggravated kidnapping are separate and distinct offenses in our Codes, and each requires proof of elements the other does not. Therefore, a defendant may be convicted and sentenced for both deliberate homicide and aggravated kidnapping without violating the double jeopardy prohibition even though the counts arose from the same conduct or episode. Because each offense requires proof of elements which the other does not, aggravated kidnapping is not a lesser included offense and defendant's double jeopardy claim must fail on this point as well. St. v. Coleman, 185 M 299, 605 P2d 1000 (1979), affirmed in St. v. Coleman, 249 M 128, 814 P2d 48, 48 St. Rep. 610 (1991).

Double Jeopardy — Collateral Estoppel: Prosecution of the defendant was not barred by the double jeopardy provision of the United States Constitution and the accompanying doctrine of collateral estoppel even though the defendant had been tried on a similar charge in another county. The instant case involved no issue of ultimate fact that was twice litigated. St. v. Bretz, 185 M 253, 605 P2d 974 (1979).

Proper Time for Objection: Prosecution of defendant was not barred by the double jeopardy provision of the United States Constitution or by the Montana "same transaction" statutes even though defendant had been tried in another county on a similar charge. The information filed in the other county named different defendants and was filed after the information in the present

case. If a valid objection did exist in this area, it would have been proper to make the objection upon the filing of the second information in the other county. St. v. Bretz, 185 M 253, 605 P2d 974 (1979).

New Trial Granted Because of Lost Transcript Notes: Defendant did not oppose an order granting him a new trial because the court reporter lost his trial notes but alleged double jeopardy when he failed to get acquitted at the second trial. No valid double jeopardy claim existed because the defendant was not forced to accept retrial. He had available to him procedures under 46-20-304, albeit not totally sufficient, to appeal without benefit of an actual verbatim transcript. Allegations of violation of the right to a speedy trial were unfounded since the initial trial was timely. St. v. Hodgson, 184 M 394, 603 P2d 246 (1979).

Vacating of Prior Acquittal: Olson was found not guilty of rape in 1971 by reason of insanity and committed to the state hospital. He was promptly "released" as a conditional, albeit self-determined, releasee and avoided contact with the police for 5 years. He was arrested in 1977 while assaulting a woman, and it was determined at that time that his release 5 years earlier was unauthorized. Upon being returned to the state hospital he petitioned for release, and in St. v. Olson, 181 M 323, 593 P2d 724 (1979), the Supreme Court remanded the case to the District Court with instructions to make specific findings. On remand the District Court vacated the 1971 acquittal on the basis that it was procured by Olson's fraud upon the court. This action by the District Court is invalid because it exposes Olson to double jeopardy. St. v. District Court, 184 M 346, 602 P2d 1002 (1979).

Defendant Not Subjected to Double Jeopardy When Single Act an Offense Against Two Statutes: Charging defendant with practicing medicine without a license and practicing chiropractic without a license for the same acts did not subject the defendant to double jeopardy. The statutes set forth separate offenses. A single act may be an offense against two statutes, and if each statute requires proof of an additional fact which the other does not, acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other. St. v. Blinzler, 183 M 300, 599 P2d 349 (1979).

Conviction of Lesser Included Offense as Bar to Subsequent Prosecution: A subsequent prosecution is barred by a prior conviction if the subsequent prosecution: (1) is based upon the same acts as was the prior conviction; (2) is for an offense of which the offense in the prior conviction is a lesser included offense; and (3) is in a court which is part of the same sovereign as the court involved in the prior conviction. Because the offense of disturbing the peace essentially requires no proof beyond that required for conviction of first-degree assault, it is a lesser included offense of the greater offense of assault. Yother v. St., 182 M 351, 597 P2d 79 (1979).

Jeopardy — When Attaches in Jury Trial — United States Constitution: The Montana statute (46-11-503) providing that jeopardy does not attach until the first witness is sworn cannot constitutionally be applied in a jury trial. The federal rule that jeopardy attaches in a jury trial when the jury is empaneled and sworn is an integral part of the United States Constitution's guaranty against double jeopardy (similar to Art. II, sec. 25, Mont. Const.) and is binding on the states. Crist v. Bretz, 437 US 28, 98 S Ct 2156 (1978), followed in St. v. Carney, 219 M 412, 714 P2d 532, 43 St. Rep. 54 (1986).

Separate Offenses — Lack of Common Elements: The court did not err in permitting the trial and conviction of defendants on two separate offenses, nor did it violate the constitutional guarantee against double jeopardy since the statutes defining the offenses have, in the ordinary situation, no common elements. St. v. Davis & Close, 176 M 196, 577 P2d 375 (1978).

Double Jeopardy — Insufficiency of Filed Information — United States Constitution: The U.S. government's appeal from the dismissal of an information charging a nontribal member with trespassing on Indian land was barred by the Double Jeopardy Clause of the United States Constitution (similar to Art. II, sec. 25, Mont. Const.) since the dismissal, which was based on the grounds that the information failed to state an offense, was granted prior to any declaration of guilt or innocence. A successful government appeal would not justify reversal with instructions to reinstate a general finding of guilt. Finch v. U.S., 434 US 927, 97 S Ct 2909 (1977).

Pretrial Evidentiary Hearing: In a pretrial evidentiary hearing on the defense of mental defect excluding responsibility, defendant was never once placed in jeopardy because he was never subjected to the possibility of conviction of the crime charged. St. v. Hagerud, 174 M 361, 570 P2d 1131 (1977).

Retrial: Double jeopardy provision prohibits one from being twice placed on trial, as well as being twice punished for the same offense; however, it does not prohibit retrial for the same offense if the first trial results in a hung jury. But, where the jury during its deliberations reached a unanimous verdict of acquittal on three charges which were not returned to the court due to

confusion over jury instructions, it would be a violation of the double jeopardy provision to retry the accused on those particular three charges. St. v. Herron, 169 M 193, 545 P2d 678 (1976), distinguished in St. v. White Clay, 1998 MT 244, 291 M 147, 967 P2d 370, 55 St. Rep. 1014 (1998).

Legislative Determination of When Jeopardy Attaches: Article II, sec. 25, Mont. Const., does not define when jeopardy attaches, and Legislature is free to make that determination. A statutory provision providing that jeopardy attaches upon the swearing of the first witness did not violate this provision. St. v. Cunningham, 166 M 530, 535 P2d 186 (1975); Cunningham v. District Court, 406 F. Supp. 430 (D.C. Mont. 1975). See Crist v. Bretz, 437 US 28, 98 S Ct 2156 (1978), as to jury trial.

DECISIONS UNDER 1889 CONSTITUTION

SELF-INCRIMINATION

Evidence Discovered by Lawful Search: Admission of evidence of crime discovered by lawful search incident to arrest for which there was probable cause did not compel defendant to be a witness against himself. St. v. Harris, 159 M 425, 498 P2d 1222 (1972).

Voluntariness of Confession — Pre-Miranda Criteria: Involuntary nature of defendant's confession was not established under pre-Miranda criteria by findings that defendant was 16 at the time, the confession was made during in-custody interrogation, and defendant was advised, before making any admissions, that he could have a lawyer and did not have to say anything. St. v. White, 158 M 238, 490 P2d 720 (1971).

Comment by Prosecutor — Voir Dire: Prosecutor's statement to jury on voir dire that rape case has only two witnesses, the people involved, and that jury must weigh their respective testimony if defendant chooses to testify did not prejudice defendant's case by compelling him to testify. St. v. Anderson, 156 M 122, 476 P2d 780 (1970).

Instruction as to Duty to Explain Possession of Stolen Property:

Portion of court's instruction to jury which stated that failure of defendant to explain his possession of stolen property pointed to his guilt did not amount to forbidden comment on defendant's failure to testify since explanation could have been given by defendant, by having another person testify, or by introducing real evidence. St. v. Branch, 155 M 22, 465 P2d 821 (1970).

Instruction that mere unexplained possession of stolen property was not sufficient to justify conviction but that one found in possession of property that may have been stolen must explain such possession in order to remove effect of that fact as circumstance to be considered with other evidence pointing to guilt did not deprive defendant of his right to remain silent. St. v. Gray, 152 M 145, 447 P2d 475 (1968).

Comment by Prosecutor — Final Argument: Conviction was reversed and new trial granted where prosecutor in final argument to jury made comment to jury which could only have been construed as reflecting prejudicially on defendant's failure to take stand and testify. St. v. Hart, 154 M 310, 462 P2d 885 (1969), followed in Columbus v. Harrington, 2001 MT 258, 307 M 215, 36 P3d 937 (2001), to the extent that a prosecutor's comment was error (although harmless) as an improper reference to defendant's decision not to testify when defendant was the only person who could have offered contradictory evidence.

Instruction on Defendant's Credibility:

In prosecution for second-degree assault, court did not err in giving general instruction that prescribed standard by which jury might judge defendant's credibility as authorized by former section. St. v. Manning, 149 M 517, 429 P2d 625 (1967).

While it is the general rule that a court ought not in its instructions single out a particular witness and direct the attention of the jury to his testimony, former section 2442, 1895 Penal Code (now repealed), made an exception to the rule, and the court could properly instruct that the jury, in judging the credibility of one on trial for a crime and the weight to be given to his testimony, could take into consideration the fact that he was the defendant and the nature and enormity of the crime of which he stood charged. St. v. De Lea, 36 M 531, 93 P 814 (1907).

Instruction Placing Burden on Defendant to Explain Possession of Stolen Property: An instruction which has the effect of placing the burden on defendant to explain his possession of stolen property was erroneous. St. v. Greeno, 135 M 580, 342 P2d 1052 (1959); explained in St. v. Branch, 155 M 22, 465 P2d 821 (1970); overruling St. v. Sparks, 40 M 82, 105 P 87 (1909), and St. v. Willette, 46 M 326, 127 P 1013 (1912).

Applicability to Civil Cases: The protection afforded by Art. III, sec. 18, 1889 Mont. Const., was accorded a person although the proceeding in which he was to testify was a civil one. State ex rel. Neilson v. District Court, 128 M 445, 277 P2d 536 (1954).

Compelling Deposition: When petition for deposition alleges facts which show that the person whose testimony is desired could be charged with a felony, to compel the person to testify would violate Art. III, sec. 18, 1889 Mont. Const. State ex rel. Neilson v. District Court, 128 M 445, 227 P2d 536 (1954).

Introduction of Testimony at Inquest — Defendant Unaware of Right to Remain Silent: When one charged with homicide without being informed of his right to counsel, that he could refuse to testify, and that his statements might be used against him was required to answer questions at the inquest put to him by the County Attorney under the belief that he had to obey his orders, and at trial the State introduced his entire testimony, admission was in violation of defendant's constitutional rights. St. v. Allison, 116 M 352, 153 P2d 141 (1944).

Protection Applies to All Testimony of Defendant: The constitutional guaranty against self-incrimination in a criminal proceeding applies to any testimony given by defendant, regardless of whether a confession, admission, or simply a statement of facts pertinent to the issues and tending to prove other facts of guilt. St. v. Allison, 116 M 352, 153 P2d 141 (1944).

Waiver to Be Informed and Intelligent: While the constitutional rights guaranteed to one accused of crime may be waived, waiver must be informed and intelligent. There can be no waiver by one who does not know his rights or what he is waiving, and courts indulge every reasonable presumption against waiver of such rights. St. v. Allison, 116 M 352, 153 P2d 141 (1944).

Articles Owned by Defendant: When defendant on trial for attempting to maim horses by shooting them with a shotgun was found in bed when arrested, the officer, who testified that he had a search warrant, properly seized a pair of shoes standing near the bed and a box of shells in plain sight, as well as a shotgun, and the articles were properly admitted in evidence over objection that by their use defendant was being compelled to become a witness against himself. St. v. Benson, 91 M 21, 5 P2d 223 (1931).

Instruction on Defendant's Credibility When Defendant Did Not Testify: When defendant did not testify in his own behalf, an instruction in the words of former section that if defendant did testify, the jury, in judging of the credibility and weight of his testimony, could take into consideration the fact that he was the defendant and the nature and enormity of the crime, though unnecessary, was harmless. St. v. Kessler, 74 M 166, 239 P 1000 (1925); St. v. Stevens, 60 M 390, 199 P 256 (1921).

Testimony of Defendant — Scope of Cross-Examination: When a witness waives his constitutional privilege by testifying in his own behalf, he renders himself liable to be cross-examined upon all facts relevant and material to the issue raised by his denial of the commission of the offense imputed to him. St. v. Smith, 57 M 349, 188 P 644 (1920).

Testimony of Defendant Subject to Cross-Examination: Although no compulsion may be exercised upon a person charged with crime to make him testify against himself, if the accused goes upon the witness stand in his own behalf, he is subject to cross-examination, although in doing so he may be compelled to incriminate himself. St. v. Vanella, 40 M 326, 106 P 364 (1910).

Instruction That Comment on Defendant's Failure to Testify Prohibited: An instruction, submitted to the jury in a criminal case, embodying the provisions of former section which prohibited comment on defendant's failure to testify, was not open to the objection that it deprived accused of the presumption of innocence. St. v. Farnham, 35 M 375, 89 P 728 (1907).

Defendant — May Waive Privilege: The privilege that "no person shall be compelled to testify against himself in a criminal proceeding" may be waived by consent, either expressly or by implication. St. v. Fuller, 34 M 12, 85 P 369 (1906).

Evidence Obtained by Use of Defendant's Shoes: Evidence obtained by taking the shoes of defendant against his consent and comparing them with footprints leading from the place of the crime is admissible, and its use does not deprive him of this constitutional guaranty. St. v. Fuller, 34 M 12, 85 P 369 (1906).

Application to Disbarment Proceeding: A disbarment proceeding is not a criminal prosecution. The court is not therefore precluded under former section from taking into consideration the accused's failure to be sworn in his own behalf. In re Wellcome, 23 M 450, 59 P 445 (1899).

DOUBLE JEOPARDY

Sentence Increase: Increase of sentence did not constitute double jeopardy. St. v. Henrich, 162 M 114, 509 P2d 288 (1973).

Prosecution in Different Jurisdiction: Defendant who had been acquitted on directed verdict in federal court of charge of assaulting FBI agent could not subsequently be prosecuted in state court for assault arising out of same transaction, even though basis for federal acquittal was

failure to prove that victim was acting in performance of duties. St. v. LeCoure, 158 M 340, 491 P2d 1228 (1971).

Defective Information: Information charging a drug offense was insufficient where it failed to contain the identity of informer, specific facts concerning the offense, and identity of time and place so as to protect accused from double jeopardy. State ex rel. Offerdahl v. District Court, 156 M 432, 481 P2d 338 (1971).

Excess Weight Penalty: Statute providing for a penalty for any excess freight weight is a penalty in addition to other penalties provided by statute and violates neither double jeopardy provision nor statute providing that when action is punishable under different provisions of Code, punishment may be had under only one of them. State ex rel. Olson v. District Court, 151 M 12, 438 P2d 560 (1968).

Separate Counts Stating Separate Offenses: Information in five counts, three of which alleged larceny of more than one cow, did not violate former jeopardy provision in that each count stated separate offense under grand larceny statute, making theft of each animal separate and distinct offense, and in view of further statute permitting information to charge more than one offense in separate counts. St. v. Johnson, 149 M 173, 424 P2d 728 (1967).

Not Applicable to Probationary Rules: Jeopardy, as applied to double punishment in the constitutional sense, requires punishment imposed as such and for that purpose and has no application to probationary rules placing reasonable restraints on a person's actions and conduct for the purpose of his rehabilitation. In re Williams, 145 M 45, 399 P2d 732 (1965), distinguished in Maldonado v. Crist, 162 M 240, 510 P2d 887 (1973).

Conviction on One Count — Not Bar to Prosecution for Other Offenses: When the defendant was charged with 22 counts of statutory rape, conviction on one or more of those counts could not be imposed as a bar to a prosecution for any of the other offenses charged, and when they were set forth separately in the information, there was no violation of constitutional prohibitions. St. v. Boe, 143 M 141, 388 P2d 372 (1963), followed in St. v. Hamilton, 2007 MT 223, 339 M 92, 167 P3d 906 (2007).

Dismissal of Complaint on Demurrer: Defendant charged with sale of intoxicating liquor to a minor was not placed in former jeopardy by a dismissal of the complaint upon his demurrer without any further proceedings. St. v. Moore, 138 M 379, 357 P2d 346 (1960).

Test for Multiple Counts: The test to be applied in determining whether conviction on any one of the counts, all arising out of the same act, will bar conviction of any of the others, is whether the same evidence would sustain a conviction under each count; hence where each count required proof of a fact which the others did not, the constitutional guaranty is not violated. St. v. Marchindo, 65 M 431, 211 P 1093 (1922).

"Jeopardy" Defined as of Adoption of Constitution: The right to immunity from a second prosecution is constitutional, and that right is to be measured by the meaning of the term "jeopardy" as employed in the constitutional provision. This is to be ascertained from the state of the law when the Constitution was adopted, not from subsequent legislation; and as so ascertained, the term was not intended to apply merely to those cases where a verdict has been rendered but it applies as well to every case where the defendant has been brought to trial. St. v. Gaimos, 53 M 118, 162 P 596 (1916).

Discharge of Jury at Former Trial: Defendant was charged with murder, was tried three times, and at the third trial found guilty of manslaughter. The jury disagreed upon the second trial and was discharged. At the third trial the plea of once in jeopardy was interposed on the ground that the jury had been discharged at the second trial without necessity, which defense was overruled by the District Court. Under these circumstances, the disagreement of the jury and their consequent discharge did not operate to bring the defendant within the provision of Art. III, sec. 18, 1889 Mont. Const. St. v. Keerl, 33 M 501, 85 P 862 (1905).

Protection Limited to Prohibition of Second Trial After Conviction or Acquittal: The constitutional security a person has against being twice put in jeopardy for the same offense prevents only a second prosecution after the first has resulted in a conviction or acquittal. Intermediate steps, such as the dismissal of an indictment on technicalities, give him no such security. St. v. Vinn, 50 M 27, 144 P 773 (1902).

Not Applicable to New Trial on Defendant's Motion: The plea of former jeopardy cannot be maintained on a second trial which a defendant has obtained upon his own motion. St. v. Thompson, 10 M 549, 27 P 349 (1891); Territory v. Hart, 7 M 489, 17 P 718 (1888), followed in St. v. Biehle, 251 M 257, 824 P2d 268, 49 St. Rep. 47 (1992).

Law Review Articles

Criminal Procedure—Montana Law and the Federal Impact, Elison, 38 Mont. L. Rev. 27 (1977).

The Uniform Rules of Evidence as Affected by the Federal Constitution, and as Adopted by One State, Harvey, 29 Mont. L. Rev. 137 (1968).

Constitutional Law—Fifth Amendment Privilege Extended to Lawyers in Disciplinary Proceedings, Daly, 28 Mont. L. Rev. 235 (1967).

Double Jeopardy: Appeal by the State as Subjecting Defendant to Double Jeopardy, Replogle, 7 Mont. L. Rev. 56 (1946).

Section 26. Trial by jury.

Convention Notes

Revises 1889 constitution by permitting a defendant to waive a jury trial in felony cases as well as civil and misdemeanor cases and by requiring all jurors (rather than 2/3) agree before a defendant may be convicted of a misdemeanor.

Compiler's Comments

Former Constitutional Provision: This section is similar to Art. III, sec. 23, 1889 Mont. Const.

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DECISIONS UNDER 1972 CONSTITUTION

Waiver of Right to Jury Trial — Defense Counsel's Motion Satisfies Signature Requirement: The defendant was charged with felony aggravated assault and initially did not waive his right to a jury trial. His counsel, however, later filed a motion to vacate the jury trial and proceed with a bench trial. On the first day of the bench trial and with both the defendant and his counsel present in the courtroom, the judge stated that the defendant had waived his right to a jury trial and neither objected. Following his conviction, the defendant claimed that he had not waived his right to a jury trial because he had not personally signed a waiver as required under 46-16-110(3). The Supreme Court disagreed, ruling that the defense counsel's signature on the motion to vacate satisfied the statute. Also, by not objecting to the District Court's statement regarding his waiver on the first day of trial, the defendant had ratified the statement. St. v. Reim, 2014 MT 108, 374 Mont. 487, 323 P.3d 880.

Evidence of Prior Rape Conviction Introduced at Trial — Violation of Right to Fair Trial: During his trial on charges of sexual intercourse without consent, the defendant gave notice that he intended to establish that the victim, with whom he had been in a long-term relationship, had a violent character. The defendant was advised that were he to discuss her character, his own full criminal history could be discussed at trial. During the trial, the prosecutor mentioned the defendant's prior rape conviction. After his conviction, the defendant appealed, arguing that the discussion of his prior rape conviction violated his right to a fair trial. The Supreme Court agreed, noting that there was a reasonable possibility that the evidence of his prior rape conviction had influenced the defendant's conviction, and remanded the matter for a new trial. St. v. Rogers, 2013 MT 221, 371 Mont. 239, 306 P.3d 348.

Sleeping Jurors Not Observed by District Court — Motion for New Trial Properly Dismissed Without Hearing: After a jury found him guilty of 10 sexual crimes, the defendant moved for a new trial on multiple grounds, including an allegation that several jurors may have been asleep during portions of the trial testimony. The District Court received briefs and denied the motion without conducting a hearing. On appeal, the Supreme Court affirmed and determined that the defendant's allegations were inconsistent with the District Court's own personal observations. Moreover, it was not an abuse of discretion for the District Court to deny the motion for a new trial based on the briefing of the parties without conducting a hearing. St. v. Geren, 2012 MT 307, 367 Mont. 437, 291 P.3d 1144.

Allen Instruction Given to Potentially Hung Jury — Insufficient Evidence to Trigger Plain Error Review: The Supreme Court declined to review under the plain error doctrine the defendant's mere assertions that the Municipal Court's supplemental Allen instruction dynamited the jury and resulted in a conviction when there would otherwise have been a hung jury, holding that the

record lacked sufficient evidence to support the assertions. Billings v. Edward, 2012 MT 186, 366 Mont. 107, 285 P.3d 523.

Award of Restitution When Causation Not Element of Offense — No Constitutional Violation: The defendant was involved in a collision between her vehicle and the victim's bicycle, but because she apparently was unaware of the collision, she drove away from the scene of the accident. After the jury found the defendant guilty of failure to remain at the scene of an accident in violation of 61-7-103 and failure to notify authorities of an accident in violation of 61-7-108, the defendant's sentence included an order to pay the victim $4,148.60 in restitution. The defendant argued that her constitutional rights to procedural and substantive due process were violated because the jury did not determine causation as an element of either offense and the restitution was not adjusted to account for the victim's comparative negligence. The Supreme Court disagreed and affirmed, concluding that the jury was not required to determine causation or comparative negligence, but only to decide whether the victim's losses resulted from the defendant's commission of the offenses. Additionally, the court found that the defendant had failed to properly preserve a comparative negligence defense because she raised it for the first time on appeal. Billings v. Edward, 2012 MT 186, 366 Mont. 107, 285 P.3d 523.

Failure to Appear at Final Pretrial Conference — Mistake by Counsel — Waiver of Right to Jury Trial: The defendant requested a jury trial for driving with a blood alcohol concentration of 0.08% or greater. Due to a mistake in his counsel's scheduling, neither the defendant nor his counsel attended the final pretrial conference, and the Justice's Court set the matter for a nonjury trial. After the Justice's Court found the defendant guilty, the defendant appealed to the District Court, which affirmed. On appeal to the Supreme Court, the defendant argued that the Justice's Court had erred when it concluded that the defendant had waived his right to a jury trial by not attending the final pretrial conference. The Supreme Court also affirmed, concluding that although the right to a jury trial is inviolate, it may be waived by a defendant's failure to appear, even if that failure is due to a mistake by counsel. St. v. Trier, 2012 MT 99, 365 Mont. 46, 277 P.3d 1230.

Claim of Enhanced Right to Jury Trial Unsupported: The defendant appealed his sentence of life imprisonment, arguing that the right to a jury trial requires that the existence of facts, including a prior conviction, used to enhance a prison sentence beyond a statutory maximum must be submitted to a jury. The Montana Supreme Court, noting that the United States Supreme Court decided in Almendarez-Torres v. U.S., 523 US 224 (1998), that a court may determine that a prior conviction exists to enhance a sentence without infringing on a defendant's right to a jury trial, concluded that the defendant failed to meet his burden of establishing that the Montana Constitution affords an enhanced right to a jury trial when the defendant cited no background supporting his claim. St. v. Covington, 2012 MT 31, 364 Mont. 118, 272 P.3d 43.

Allen-Instruction Language Modified: The Supreme Court, after an examination of an Allen instruction encouraging a jury to reach a verdict in a criminal case, modified Montana Criminal Jury Instruction 1-121 to eliminate the "final test" language. St. v. Norquay, 2011 MT 34, 359 Mont. 257, 248 P.3d 817, cited in Billings v. Edward, 2012 MT 186, 366 Mont. 107, 285 P.3d 523.

Change in Credit Agreement Via "Bill Stuffer" Insufficient Notice on Which Unilateral Change to Contract Acceptable — Enforcement of Arbitration Clause: Defendant issued plaintiff a credit card and subsequently sent a "bill stuffer" with plaintiff's monthly statement that significantly changed the terms of the credit agreement. The change provided for arbitration of all credit disputes and prohibited jury trials and class actions. When plaintiff later filed a claim against defendant for multiple fair debt collections, defendant attempted to compel arbitration, asserting that plaintiff agreed to the credit agreement change through plaintiff's continued use of the credit card. The District Court agreed with defendant, issued an order compelling arbitration, and dismissed plaintiff's action. Plaintiff appealed and the Supreme Court reversed. Making a change in the credit agreement through use of a "bill stuffer" did not provide sufficient consumer notice on which acceptance of a unilateral change to a contract of adhesion could expressly or implicitly be found, including plaintiff's waiver of the fundamental constitutional right to a jury trial. The case was reversed for further proceedings. Kortum-Managhan v. Herbergers NBGL, 2009 MT 79, 349 M 475, 204 P3d 693 (2009), following Keesun Partners v. Ferdig Oil Co., Inc., 249 M 331, 816 P2d 417 (1991), and followed in Riehl v. Cambridge Ct. GF, LLC, 2010 MT 28, 355 Mont. 161, 226 P.3d 581. See also Kloss v. Edward D. Jones & Co., 2002 MT 129, 310 M 123, 54 P3d 1 (2002).

No-Show Constitutes Waiver: Cox was charged in Missoula Municipal Court with driving while under the influence of alcohol and striking an unattended vehicle and failing to leave information at the scene. He entered a plea of not guilty. A jury trial was set for August 30, 2006,

and the court issued a corresponding notice of jury confirmation hearing, set for August 25, 2006. The notice stated that the defendant and counsel must appear and that failure to appear by defendant and counsel would be considered a waiver of jury. Because Cox did not appear with his defense counsel at the hearing, the court concluded that he had waived his right to a jury trial, and issued a notice of a judge trial set for November 9, 2006. The judge trial was twice continued on Cox's motion and was finally set for January 12, 2007. Two days before his scheduled trial, Cox filed an objection to the Municipal Court holding a nonjury trial. Cox did not appear for his trial. After hearing argument on Cox's objection from defense counsel, the court overruled the objection and proceeded with the judge trial in Cox's absence, finding him guilty of both charges. Cox appealed his conviction to the District Court on the grounds that he was denied his constitutional right to a jury trial in the Municipal Court. The District Court affirmed the Municipal Court conviction, concluding that pursuant to Article II, section 26, of the Montana Constitution, Cox's failure to appear at the jury confirmation hearing resulted in a waiver of his right to a jury trial. Cox appealed. The Supreme Court found that this section is plain on its face and that Cox waived his right to a jury trial by failing to appear at the jury confirmation hearing. City of Missoula v. Cox, 2008 MT 364, 346 M 422, 196 P3d 452 (2008), distinguished in Missoula v. Girard, 2013 MT 168, 370 Mont. 443, 303 P.3d 1283, holding that the defendant had valid medical reasons for not appearing at a pretrial hearing and that the failure to appear does not automatically constitute a waiver of the right to a jury trial. See also St. v. Trier, 2012 MT 99, 365 Mont. 46, 277 P.3d 1230.

Defendant's Right to Counsel and Right to Trial Not Violated During Four Prior DUI Prosecutions — Enhancement of New DUI Charge to Felony Proper: Walker's 2005 DUI arrest was enhanced to a felony charge when driving records indicated that Walker had six prior DUI convictions. Walker alleged that four of the prior convictions were constitutionally infirm because Walker had not been advised of the right to counsel, the right to compel attendance of witnesses, the right to a trial by a jury, and penalty enhancement provisions. The District Court concluded that the four convictions did not violate Walker's constitutional rights and held that the prior convictions could be used to enhance the 2005 DUI to a felony. Walker appealed, and the Supreme Court considered each assertion in turn to determine whether Walker's waiver of the right to counsel and right to trial during the prior prosecutions was made knowingly, intelligently, and voluntarily. The initial appearance arraignment documents that Walker signed after being charged with the prior DUI offenses adequately informed Walker of the right to counsel, and Walker indicated an understanding of that right and that an attorney was not desired. A waiver of rights form and a waiver of counsel form that Walker signed evidenced that understanding. It was also sufficient that Walker was informed of the right to call witnesses to attend the proceedings, even though the Constitution does not confer a right to compel witnesses to testify. Walker was also adequately informed of the right to a trial by jury and to a unanimous verdict, but it was unnecessary for the District Court to explain all the nuances or effects of waiving the right to a trial by jury. Lastly, the documents informed Walker that there might be indirect consequences of a guilty plea, including the possible loss of driving privileges and the use of the conviction in the event Walker was convicted of a crime in the future, but the District Court was not required to specifically inform Walker of the indirect consequence that a fourth or subsequent DUI might result in a felony charge, because whether Walker committed a fourth or subsequent DUI was clearly within Walker's sole control and was an indirect consequence of guilty pleas to the prior DUI offenses. Thus, Walker's prior guilty pleas were entered knowingly, intelligently, and voluntarily, and the District Court did not err in allowing the use of the prior convictions to elevate Walker's 2005 DUI to a felony. St. v. Walker, 2008 MT 244, 344 M 477, 188 P3d 1069 (2008).

Failure of Defense Counsel to Question Jurors Regarding Ethnic and Racial Bias Not Considered Ineffective Assistance Warranting New Trial: Defendant was convicted of distribution of dangerous drugs and appealed on grounds that because of defendant's ethnicity, defense counsel's failure to question potential jurors regarding ethnic or racial bias constituted ineffective assistance of counsel and deprived defendant of a fair trial. The Supreme Court found no indication that: (1) ethnic or racial issues were intertwined with the drug offense; (2) the offense was racially motivated; (3) an ethnic issue was connected with the trial in any way; and (4) any witness, an attorney, the trial judge, a member of the court staff, or any member of the venire panel was ethnically or racially biased. Thus, defendant was not denied the right to an impartial jury. Defense counsel's performance did not fall below the range of competence required of attorneys in criminal cases simply because jurors were not questioned about ethnic or racial bias, so defendant was not denied effective assistance of counsel. St. v. Ibarra-Salas, 2007 MT 173, 338 M 191, 164 P3d 898 (2007). See also Rosales-Lopez v. U.S., 451 US 182 (1981).

Consideration of Sentencing Factors in Sentencing Persistent Felony Offender Not Violative of Right to Trial by Jury: Following conviction for an eighth DUI, Vaughn was sentenced as a persistent felony offender to a 50-year term in the state prison. Relying on the proposition in Blakely v. Wash., 542 US 296 (2004), that factual findings that serve to enhance a sentence beyond the statutory maximum must be determined by a jury beyond a reasonable doubt, Vaughn appealed the felony sentence, asserting that the 50-year sentence imposed under 46-18-502 served to enhance the sentence beyond the maximum 13-month commitment to the Department of Corrections followed by a suspended sentence of up to 5 years authorized for felony DUI in 61-8-731 and that therefore the persistent felony offender sentence should have been determined by a jury on the facts. The Supreme Court first noted that the Blakely proposition applies to a fact other than the fact of a prior conviction and that it is the fact of a defendant's prior felony conviction that authorizes an enhanced sentence under 46-18-501 and 46-18-502. Here, Vaughn's enhanced felony DUI sentence was based on the sentencing court's finding that Vaughn had a prior felony DUI conviction. That factual determination may properly be made by the sentencing court rather than by a jury. The prior DUI was a sentencing factor that was an aggravating or mitigating circumstance supporting the imposition of a sentence within the range authorized for a persistent felony offender. Thus, Vaughn's right to a trial by jury was not violated by the sentencing court's findings of fact in support of a sentence as a persistent felony offender. The sentence was affirmed. St. v. Vaughn, 2007 MT 164, 338 M 97, 164 P3d 873 (2007). See also Apprendi v. N.J., 530 US 466 (2000).

Constitutionality of Waiver of Jury Trial by Defendant Over State's Objection — Writ of Supervisory Control Granted: Defendant Courville was charged in Justice's Court with speeding, DUI, and possession of an open container. Courville requested a waiver of a jury trial, and the state objected. The Justice's Court granted the waiver, finding that the statute violated Art. II, sec. 24, Mont. Const. The state filed an application for a writ of supervisory control and a motion for stay of proceedings pending the Supreme Court's review of the application. Courville argued that only a defendant, and not the state, has the constitutional right to a jury trial and the corresponding ability to waive the right despite statutory language to the contrary in 46-17-201. The Supreme Court vacated the waiver of a jury trial, holding that this section provides a right of a jury trial to the state and that both parties in a criminal trial must consent to waiver. State ex rel. Long v. Justice's Court, 2007 MT 3, 335 M 219, 156 P3d 5 (2007), overruling State ex rel. Nelson v. District Court, 262 M 70, 863 P2d 1027 (1993).

Unanimity Instruction Required Regarding Criminal Acts Corresponding to Elements of Crime: At Hausauer's trial for operating a drug lab, the District Court instructed the jury that all jurors must agree in order to reach a verdict of guilt or innocence. On appeal, the Supreme Court reversed on other grounds, but noted that because the right to a unanimous jury verdict is a constitutional right, unanimity instructions should fully and fairly instruct the jury on the applicable law, including substantial agreement as to the principal factual elements underlying a specific offense. St. v. Hausauer, 2006 MT 336, 335 M 137, 149 P3d 895 (2006).

No Implied Presumption of Parole Eligibility — Federal Constitutional Protections Not Violated by Sentence of Life Imprisonment Without Parole — Montana Constitutional Protections Not Addressed: Garrymore was sentenced to life in prison without parole for the deliberate homicide of his adopted infant child. Garrymore appealed the parole restriction and sought to have the sentence vacated on grounds that 45-5-102(2) contains an implicit presumption of parole eligibility. Garrymore contended that under the statute, standing alone and without the operation of 46-18-202, he was entitled to a parole-eligible sentence, subject to 46-23-201, that was taken away by the sentencing judge in violation of due process and a trial by jury. The Supreme Court found nothing in sentencing statutes that creates a presumption in favor of parole eligibility that must be overcome in order for a sentencing judge to impose a parole restriction. Rather, sentencing courts have broad discretion under 46-18-202 to impose parole eligibility restrictions on felony sentences, and the Legislature has placed no limitation on the exercise of that authority. A parole-eligible sentence was not taken away from Garrymore because he was not entitled to such a sentence to begin with. Additionally, although the judge must state the reasons for a parole eligibility restriction when one is imposed, no particular finding of fact need be included among those reasons. Therefore, because the statutory maximum for violating 45-5-102(1)(a) is life in prison without parole, restricting Garrymore's parole eligibility did not violate any federal constitutional rights. The Supreme Court also declined to address Garrymore's undeveloped argument that the parole eligibility restriction violated the Montana Constitution's greater jury trial right absent a compelling reason why Montana's greater jury trial right dictated a different

result. St. v. Garrymore, 2006 MT 245, 334 M 1, 145 P3d 946 (2006), followed in St. v. Rosling, 2008 MT 62, 342 M 1, 180 P3d 1102 (2008).

Statute Providing No Right to Jury Trial in Parental Rights Termination Cases Not Unconstitutional: The father argued that the language in 41-3-607 providing that there is no right to a jury trial in a proceeding to terminate parental rights violates the guarantee of a jury trial contained in Montana's Constitution. The Supreme Court, citing previous cases and decisions of other jurisdictions, held that the right to a jury trial exists only if that right existed at the time that the 1889 Montana Constitution was adopted and noted that parental termination proceedings did not exist at that time. The Supreme Court also noted that in 1972, the delegates to the constitutional convention considered whether the right to jury trials should be extended to all cases but did not expand the right to a jury trial. In re M.H. & G.H., 2006 MT 208, 333 M 286, 143 P3d 103 (2006).

Clarification of When Two Jury Trials Available: Although Woirhaye v. District Court, 1998 MT 320, 292 M 185, 972 P2d 800 (1998), requires a jury trial in a Justice's Court and in a District Court de novo on appeal as a general rule in misdemeanor cases, there are instances when the accused is entitled to only one jury trial. It is the Legislature's prerogative to provide for subject matter jurisdiction, whether original, exclusive, or concurrent jurisdiction. When the Legislature has provided for concurrent jurisdiction of an offense in Justice's Court and in District Court, the accused is entitled to only one jury trial if the case is filed in the first instance in the District Court. In addition, 3-10-115 provides for Justices' Courts of record and provides that the appellate role of the District Court vis-a-vis these courts is limited to reviewing the record and questions of law. See Art. VII, sec. 4(2), Mont. Const., providing that the District Court "shall hear appeals from inferior courts as trials anew unless otherwise provided by law". Accordingly, although the accused is entitled to a jury trial in the Justice's Court of record, the accused is not entitled to a second bite of the jury trial apple in the District Court because, by statute, the latter court serves only to review the record from the Justice's Court of record and questions of law. St. v. Rensvold, 2006 MT 146, 332 M 392, 139 P3d 154 (2006).

Charge of Single Criminal Act — No Unanimity Instruction Required Absent Possibility of Jury Confusion: In Vernes' attempted deliberate homicide and attempted deliberate homicide by accountability trial, Vernes asserted that a unanimity instruction should have been given to the jury to prevent a conviction occurring as a result of different jurors concluding that Vernes committed different unlawful acts when a single count alleged more than one unlawful act, so that the jury would be required to agree unanimously on specific facts that constituted the elements of each offense. The trial court declined to give a unanimity instruction, and Vernes appealed, but the Supreme Court affirmed. In St. v. Weaver, 1998 MT 167, 290 M 58, 964 P2d 713 (1998), the Supreme Court held that a specific unanimity instruction to the jury was required when different criminal acts were charged in one count. Although different jurors may generally be persuaded by different pieces of evidence, even when they agree on the bottom line, in this case, the state did not charge Vernes in the alternative, but rather brought two charges stemming from a single attack. Thus, jurors were free to determine that different pieces of evidence supported proof of a material step taken by Vernes to carry out the attacks, as long as the jurors unanimously agreed on the same set of facts, so a unanimity instruction was not required. St. v. Vernes, 2006 MT 32, 331 M 129, 130 P3d 169 (2006), followed in St. v. Russell, 2008 MT 417, 347 M 301, 198 P3d 271 (2008).

Failure of Counsel to Request Unanimity Instructions on Two Counts of Criminal Endangerment Not Considered Ineffective Assistance: Gallagher was convicted of two counts of criminal endangerment and asserted on appeal that failure of defense counsel to request specific unanimity instructions on the two charges constituted ineffective assistance and denied Gallagher the right to a fair trial. Based on the record, the Supreme Court disagreed. Both defense and prosecution counsel argued each count to the jury in closing arguments, linking appropriate facts and specific victims to each count, so juror confusion was extremely unlikely, nor could the court conclude that the trial outcome was prejudiced by the lack of a specific unanimity instruction on the endangerment charges that denied Gallagher a fair trial. Gallagher's convictions were affirmed. St. v. Gallagher, 2005 MT 336, 330 M 65, 125 P3d 1141 (2005).

Error in Excusing Juror for Cause Before Voir Dire — Error Harmless Absent Showing of Prejudice: Prior to voir dire in defendant's trial for sexual intercourse without consent and incest, the prosecutor requested that juror no. 43 be excused. The juror had recently worked in the County Attorney's office and had access to a wide range of information relating to issues that defendant had been involved in, and the prosecutor had recently fired the juror for unsatisfactory performance. The trial judge dismissed the juror because of concerns that the juror might have

feelings or predilections for one side or the other and because of the possibility of the juror communicating with other prospective jurors. Following conviction, defendant appealed the decision to excuse the juror for cause prior to voir dire. The Supreme Court concluded that the trial court erred in excusing the juror without an in-court examination to determine actual bias; however, the error was not a material failure to substantially comply with statutes governing procurement of a trial jury, so the dismissal was subject to harmless error review. Defendant could not demonstrate prejudice because even if juror no. 43 had not been dismissed, the juror would not have been on the jury because the last juror empaneled was juror no. 36. The Supreme Court affirmed. St. v. Bearchild, 2004 MT 355, 324 M 435, 103 P3d 1006 (2004), distinguishing St. v. Lamere, 2000 MT 45, 298 M 358, 2 P3d 204 (2000), and St. v. Blem, 610 NW 2d 803 (S. Dak. 2000).

Presumption of Punishment for Going to Trial Based on Difference Between Pretrial Offer and Actual Sentence — Remand: As set out in St. v. Baldwin, 192 M 521, 629 P2d 222 (1981), when a District Court becomes involved in plea negotiations and an offer is made, any difference in the sentencing after trial must point out the factors justifying an increased sentence, and failure to enumerate the factors leads to the presumption that a greater sentence has been imposed for a vindictive purpose. Here, when the District Court failed to justify having an 11-year sentence run consecutively rather than concurrently with another sentence, the Baldwin standard requiring an explanation for imposing a harsher sentence than that offered in plea negotiations was not met, constituting reversible error. The case was remanded for resentencing. St. v. Hall, 2003 MT 253, 317 M 356, 77 P3d 239 (2003).

Preclusion of Wrongful Discharge Suit by Collective Bargaining Agreement Not Unconstitutional Impediment to Access to Courts: When plaintiff filed a wrongful discharge claim, defendant pointed out that the employment was covered by a union collective bargaining agreement (CBA) and that 39-2-912(2) precludes an employee covered by a CBA from seeking relief under the Wrongful Discharge From Employment Act. Plaintiff argued that if she was precluded from bring a wrongful discharge claim solely because her employment was covered by a CBA, then 39-2-912 unconstitutionally violated her access to courts, full redress, and a jury trial. However, constitutionality of a statute is presumed unless the person challenging it proves unconstitutionality beyond a reasonable doubt. Here, plaintiff presented nothing to overcome the presumption of constitutionality. Plaintiff's argument concerning lack of legal redress also failed because a possible action against the union was still available. LaFournaise v. Mont. Developmental Center, 2003 MT 240, 317 M 283, 77 P3d 202 (2003).

Appeal to District Court Allowed Only After Trial in Lower Court, Not After Forfeiture of Bond — Exclusive Statutory Remedy for Appeals From Courts of Limited Jurisdiction: Kempin was charged in Justice's Court with seven fish and game violations but failed to appear for trial, so the appearance bonds that Kempin had posted were forfeited and Kempin's hunting, fishing, and trapping privileges were suspended for 10 years. Kempin appealed to the District Court within 10 days of the Justice's Court judgment, but the appeal was dismissed for lack of jurisdiction and because Kempin had no statutory right to appeal the forfeitures as a matter of law, so Kempin appealed to the Supreme Court. Under Art. VII, sec. 4, Mont. Const., District Courts must hear appeals from inferior courts as trials de novo unless otherwise provided by law, and appeal of a criminal conviction from a court of limited jurisdiction is governed exclusively by 46-17-311, which provides three circumstances under which a criminal defendant may appeal to District Court for a trial de novo: (1) when a defendant pleads guilty or nolo contendere but preserves legal issues raised by pretrial motion for appeal; (2) when a defendant files written notice of intention to appeal within 10 days after a judgment is rendered following a trial; and (3) when a defendant appeals revocation of a suspended sentence. Here, Kempin claimed that denial of a District Court trial by jury following forfeiture in Justice's Court violated his due process rights. However, Kempin raised no appealable pretrial issues, nor was the case an appeal of a suspended sentence, so the first and third circumstances did not apply. Kempin did appeal the judgment within 10 days, but there was no trial, so Kempin was not constitutionally entitled to a trial de novo when there had been no trial initially, nor is 46-17-311 unconstitutionally vague for not explicitly proscribing an appeal following a forfeiture. The Supreme Court agreed with the District Court's explanation in declining jurisdiction—that if a defendant was automatically entitled to a trial de novo on appeal without first having a trial in Justice's Court, a defendant could avoid Justice's Court altogether by not appearing and forfeiting the Justice's Court bonds and then pursuing a trial in District Court, which would render the Justice's Court system meaningless. Kempin's other due process arguments were also not compelling because Kempin waived his trial rights by failing to appear in Justice's Court to assert any constitutional rights

and in light of his stated intention to forfeit the bonds and the advance notice of the suspension of the hunting, fishing, and trapping privileges. Absent any statutory basis for an appeal, dismissal of the appeal by the District Court was affirmed. St. v. Kempin, 2001 MT 313, 308 M 17, 38 P3d 859 (2001). See also St. v. Feight, 2001 MT 205, 306 M 312, 33 P3d 623 (2001), and St. v. Schulke, 2005 MT 77, 326 M 390, 109 P3d 744 (2005).

Failure to Instruct Jury Regarding Need for Unanimous Verdict on Alternative Charges — Reversible Error: Hardaway was initially charged with burglary, and the information was amended to charge that Hardaway knowingly entered or remained unlawfully in an unoccupied structure with intent to commit theft or a sexual crime. Hardaway contended that the jury instructions were improperly given in the alternative, allowing the jury to convict even though some members believed that he intended theft, while others believed that he intended a sexual crime. The Supreme Court agreed. This section requires a unanimous verdict in all criminal actions. Unanimity requires more than a conclusory agreement that the accused is guilty of some charged offense. The jury must agree as to the principal factual elements underlying a specified offense, so when an accused is charged in the alternative, the jury must be clearly instructed that it is required to reach a unanimous verdict as to each individual alternative. Absent such an instruction, Hardaway was denied his right to a unanimous verdict, constituting reversible error. St. v. Hardaway, 2001 MT 252, 307 M 139, 36 P3d 900 (2001).

Punitive Damages Case Considered Civil Action — Requirement That Punitive Damages Award Be Unanimous Unconstitutional: Under this section, in all civil actions, two-thirds of the jury may render a verdict that has the same force and effect as if the entire jury had concurred in the decision. A civil action is prosecuted for the enforcement or protection of a right or the redress or prevention of a wrong. Here, Finstad was injured by asbestos in defendant's mine and sued for redress and to prevent defendant from committing similar wrongful conduct. Thus, Finstad's suit, including the claim for punitive damages, constituted a civil action. Punitive damages are merely a component of recovery of the underlying civil cause of action, imposed as enlarged damages for a civil wrong, not a substitute for criminal punishment. Because punitive damages are civil actions, the portion of 27-1-221(6) that requires that an award of punitive damages be unanimous as to liability and amount directly conflicts with this section and is unconstitutional. Finstad v. W.R. Grace & Co., 2000 MT 228, 301 M 240, 8 P3d 778, 57 St. Rep. 934 (2000).

Jury Poll Indicating Lack of Unanimity of Verdict in Criminal Case — Error in Failing to Direct Further Deliberation or Discharge Jury: Following Pyatt's jury trial for felony stalking, the jury was polled in open court as to whether each juror agreed with the verdict. One juror said no, stating that he went along with the verdict because he was outnumbered. Recognizing that a unanimous verdict was required, the court then inquired whether the juror had voted yes in the jury room, and the juror said that he voted in favor of the majority in the end, so his vote was yes. The remainder of the jury also voted yes, so the court ruled that the verdict was unanimous, and Pyatt was convicted and sentenced to the Department of Corrections for 5 years. In polling a jury, the court is to inquire into the jurors' present states of mind as of the time of the poll. To fulfill the jury poll's purpose of safeguarding a defendant's right to a unanimous verdict, the jury poll must afford a juror an opportunity to make an unambiguous reply as to that juror's present state of mind. Here, the juror's response indicated disagreement with the verdict, and the court's further conversation was inappropriate. No juror should surrender an honest opinion as to the weight or effect of evidence or the innocence or guilt of a defendant because the majority of the jury feels otherwise or to return a unanimous verdict or prevent a mistrial. Once the juror indicated disagreement with the verdict, the court should have either directed the jury to deliberate further or discharged the jury, and failure to do so constituted reversible error. St. v. Pyatt, 2000 MT 136, 300 M 25, 1 P3d 953, 57 St. Rep. 555 (2000), following St. v. Holloway, 740 P2d 711 (N. Mex. App. 1987).

Failure to Summon Entire Panel by Telephonic Juror Summoning — New Trial Warranted: Of the 200-juror panel randomly drawn for Lamere's murder trial, over one-third of the prospective jurors were excluded from possible jury service by virtue of the manner in which a telephone-only notification method skewed the random nature and objectivity of the statutory jury selection procedures. By failing to summon the entire panel or array drawn for the trial, the purpose of juror notification was undermined. Jury duty cannot be lightly shirked, as a telephone summoning system allowed, without doing violence to the democratic nature of the jury system. Because the substantial failure to comply with the statutory requirements materially undermined the jury selection process, Lamere was granted a new trial. St. v. Lamere, 2000 MT 45, 298 M 358, 2 P3d 204, 57 St. Rep. 214 (2000), following Thiel v. S. Pac. Co., 328 US 217, 90 L Ed 1181, 66 S Ct 984 (1946), and applied retroactively in Robbins v. St., 2002 MT 116, 310 M 10, 50 P3d 134 (2002).

See also St. v. Groom, 49 M 354, 141 P 858 (1914), and State ex rel. School District v. Carroll, 87 M 45, 284 P 1008 (1930).

Substantial Compliance Standard Clarified With Regard to Statutory Process for Forming Jury: The objective statutory procedures established by the Legislature for the random selection of jurors are intended to protect a defendant's fundamental right to a fair and impartial jury and must be substantially complied with. Under Montana case law, the substantial compliance standard is not an absolute rule inasmuch as it permits minor deviations from statutory procedure. These technical deviations do not constitute a substantial failure to comply and therefore do not give rise to a presumption of prejudice. In clarifying the substantial compliance standard, the Supreme Court took guidance from federal case law developed under the federal Jury Selection and Service Act of 1968, 28 U.S.C. 1861, et seq. In order to establish a violation under the federal Act, a defendant must show that the government substantially failed to comply with the methods set forth by statute for jury selection. Substantial failure has been construed as a violation that contravenes one of two basic principles: (1) random selection of jurors; and (2) determination of juror disqualification, excuses, exemptions, and exclusion on the basis of objective criteria. A successful challenge to the jury panel may be founded only on a material departure from the law, a deviation amounting to more than a technical irregularity. Thus, a substantial or material statutory departure that affects the random nature or objectivity of the jury selection process establishes a violation independently of the departure's consequences in an individual case, while a technical or nonmaterial violation constitutes nonprejudicial error under the substantial compliance standard. St. v. Lamere, 2000 MT 45, 298 M 358, 2 P3d 204, 57 St. Rep. 214 (2000), overruling St. v. Robbins, 1998 MT 297, 292 M 23, 971 P2d 359, 55 St. Rep. 1213 (1998).

Telephone Jury-Summoning Procedure Violative of Statutory Selection Process — Showing of Substantial Compliance, Not Prejudice, Required — Reversible Error: Lamere, charged with killing Brownlee, filed a pretrial motion to strike the jury panel, but the motion was denied. The question on appeal was whether the District Court erred in concluding that Lamere failed to show that the telephone-dependent summoning procedure used in Cascade County prejudiced Lamere's substantial rights to a jury drawn and summoned according to law. The Supreme Court applied St. v. Robbins, 1998 MT 297, 292 M 23, 971 P2d 359, 55 St. Rep. 1213 (1998), in holding that the method of summoning jurors by telephone failed to comply with statutes governing the impaneling of a jury because jurors were neither served by mail nor served personally by the Sheriff. However, to warrant reversal, Robbins also required a showing of actual prejudice in addition to a substantial failure to comply with statutory law in drawing a jury panel. The Supreme Court chose to return to the per se rule of reversal for failure to substantially comply with statutes governing procurement of a trial jury, overruling the Robbins requirement of prejudice. The decision turned on the U.S. Supreme Court's contemporary distinction between trial error, to which harmless error review applies, and structural error, to which harmless error review is inapplicable (see Johnson v. U.S., 520 US 461, 137 L Ed 2d 718, 117 S Ct 1544 (1997), and its predecessors). In Lamere's case, the automatic rule of reversal prevailed because errors in the jury selection process are structural in nature, affecting the very framework within which a trial proceeds—errors that indelibly affect the essential fairness of the trial itself. A material failure to substantially comply with Montana statutes governing procurement of a trial jury may not be treated as harmless error because: (1) it precedes the presentation of evidence to the jury and cannot be analyzed as a mere trial error without resorting to speculation; (2) it precedes the trial process and cannot be quantitatively assessed for its prejudicial impact relative to the evidence introduced at trial; (3) it affects the very framework within which the trial proceeds; and (4) the impartiality of the jury goes to the very integrity of the justice system and because the right to an impartial jury is so essential to the concept of a fair trial that its violation cannot be considered harmless error. The substantial compliance standard vindicates not only the rights of the individual defendant but also the rights of the public in ensuring that the jury system remains inviolate, protecting a defendant's right to an impartial jury by encouraging reasonably strict compliance with statutory procedures intended to implement the fair cross-section guarantee of the sixth amendment of the U.S. Constitution. St. v. Lamere, 2000 MT 45, 298 M 358, 2 P3d 204, 57 St. Rep. 214 (2000), following Chapman v. Calif., 386 US 18, 17 L Ed 2d 705, 87 S Ct 824 (1967), Satterwhite v. Tex., 486 US 249, 100 L Ed 2d 284, 108 S Ct 1792 (1988), and Ariz. v. Fulminante, 499 US 279, 113 L Ed 302, 111 S Ct 1246 (1991), followed in St. v. Lopez, 2001 MT 97, 305 M 218, 26 P3d 745 (2001), and applied retroactively in Robbins v. St., 2002 MT 116, 310 M 10, 50 P3d 134 (2002).

Limitation to One Jury Trial Held Unconstitutional: In 1997, the Legislature enacted the provisions codified at 46-7-102(1)(g), 46-17-201(3), and 46-17-311(1), providing that a person

tried for a misdemeanor in Justice's or City Court who appeals to the District Court has the right to only one jury trial. Woirhaye was charged with misdemeanor DUI and requested a jury trial in Missoula County Justice's Court. Upon his conviction by the Justice's Court jury, Woirhaye appealed to the District Court for a trial de novo pursuant to Art. VII, sec. 4(2), Mont. Const., and 46-17-311. Woirhaye asked that the District Court declare 46-17-201(3) unconstitutional, but the District Court denied his motion. Woirhaye then petitioned the Supreme Court for a writ of supervisory control, which was granted on the grounds that Woirhaye would otherwise be denied a fundamental right. The Supreme Court held that Woirhaye's right to a jury trial in both the Justice's Court or City Court and the District Court was a fundamental right guaranteed by Art. II, sec. 24, Mont. Const., and this section. The Supreme Court pointed out that the right to a jury trial is guaranteed by Art. III, sec. 2, clause 3, of the U.S. Constitution and the sixth amendment to the U.S. Constitution and also that even if that were not the case, Montana may, under the rationale of St. v. Bullock, 272 M 361, 901 P2d 61 (1995), provide rights in excess of those guaranteed by the U.S. Constitution. The Supreme Court noted, in response to the state's argument that Art. II, sec. 24, Mont. Const., guarantees "a" jury trial, that the state's argument was not persuasive against the language of this section. The Supreme Court also distinguished Ludwig v. Mass., 427 US 618 (1976), holding that Art. VII, sec. 4(2), Mont. Const., was not implicated in the case, and stated that any language in N. Cent. Serv., Inc. v. Hafdahl, 191 M 440, 625 P2d 56 (1981), indicating that a requirement for a jury trial applicable to Small Claims Court was satisfied if the right was granted at the District Court level, was dicta and could not be relied upon to support the state's case that only one jury trial was required. Consequently, the Supreme Court held 46-7-102(1)(g), 46-17-201(3), and 46-17-311(1) to be unconstitutional as violating Woirhaye's right to a jury trial. Woirhaye v. District Court, 1998 MT 320, 292 M 185, 972 P2d 800, 55 St. Rep. 1298 (1998), followed in In re Young, 1999 MT 195, 295 M 394, 983 P2d 985, 56 St. Rep. 759 (1999), and followed and clarified in St. v. Rensvold, 2006 MT 146, 332 M 392, 139 P3d 154 (2006).

Reversal of Conviction for Accepting Oral, Rather Than Written, Waiver of Right to Jury Trial: The constitutional right to a jury trial was violated, requiring reversal, when defendant did not file the statutorily required written consent to waive a jury trial and his attorney stated to the court at the beginning of the trial that defendant waived his right to a jury trial. The court would not examine the totality of the circumstances to determine whether the waiver was knowing and voluntary. St. v. Dahlin, 1998 MT 113, 289 M 182, 961 P2d 1247, 55 St. Rep. 446 (1998), overruling St. v. McCartney 179 M 49, 585 P2d 1321 (1978). However, see St. v. Reim, 2014 MT 108, 374 Mont. 487, 323 P.3d 880, holding that the signature of defense counsel on a motion to vacate satisfies the requirement of 46-16-110(3) for the defendant.

Juror's Affidavit of Juror Misconduct — Inadmissible Under Ahmann Exception — No Evidence of External Influence — Right to Fair and Impartial Jury Not Violated: Berg argued that he was entitled to a new trial because of jury misconduct and attached to his motion the affidavit of juror Flinders stating that juror Carroll said at one point during the trial, in regard to witness testimony: "That's it; that's all I need to hear; it's all over." The affidavit also stated that juror Carroll pointed to another juror and said in regard to the juror, "That's one we'll have to convince." The Supreme Court noted that although affidavits are usually used to prove juror misconduct under 25-11-102(2), they may also, under the exception rationale used in Ahmann v. Am. Fed. Sav. & Loan Ass'n, 235 M 184, 766 P2d 853 (1988), be used pursuant to 25-11-102(1) when the only two people with knowledge of the infraction are a juror and another person. However, the Supreme Court found that the Ahmann exception did not apply when the communication was between jurors. The Supreme Court also discussed the applicability of Rule 606(b), M.R.Ev. (Title 26, ch. 10), and determined that the comments made by juror Carroll were not an external influence upon the jury and therefore did not fall within the exception to the general prohibition against use of juror affidavits to impeach a jury contained in Rule 606(b). Regarding Berg's final argument that the jury misconduct violated the District Court's instructions and Berg's right to a fair and impartial jury, the Supreme Court reviewed California case law raised by Berg and concluded that it was inapplicable in Montana. State ex rel. St. Comp. Mut. Ins. Fund v. Berg, 279 M 161, 927 P2d 975, 53 St. Rep. 1098 (1996).

Jury Trial Not Statutorily Mandated in Driver's License Suspension Case — Not Violative of Right to Trial by Jury: Section 61-8-403 dictates that the court examine the facts and determine the merits of a petition challenging the suspension or revocation of a license but does not contemplate the role of a jury in the hearing, presuming instead that a jury will not be present, through assignment of tasks to the court. The inviolate right to a trial by jury is not a prospective right that is automatically granted in every new proceeding that may arise. Rather,

the right that is constitutionally preserved is that right to a jury trial that existed at the time that the constitution was enacted. There is not and has never been a right to a jury trial in purely equitable actions in Montana. Suspension or revocation of a driver's license pursuant to the implied consent law is a civil administrative sanction, not a criminal penalty, and is intended to protect the public rather than punish the driver. The hearing to determine the propriety of a driver's license suspension is an action in equity because compensatory or punitive damages are not allowed. Further, the reinstatement fee does not constitute a punishment that converts the equitable action into a criminal action because the fee is dedicated to the public purpose of funding county drinking and driving prevention programs. Therefore, a driver is not entitled to a trial by jury in a proceeding to determine the propriety of a driver's license suspension. Supola v. Dept. of Justice, 278 M 421, 925 P2d 480, 53 St. Rep. 984 (1996).

City Court Error to Refuse Waiver of Jury Trial — Error Waived by De Novo Appeal: McCarvel was charged with DUI within the city limits of Billings and scheduled for trial in the City Court. The city demanded a jury trial, but McCarvel waived his right to trial by jury. The City Court refused to accept the waiver, and the jury convicted McCarvel. On appeal to the District Court, McCarvel moved to dismiss on the grounds that the City Court committed error. The District Court refused to dismiss, and McCarvel changed his plea to guilty. Citing St. v. O'Brien, 35 M 482, 90 P 514 (1907), the Supreme Court held that because the trial in District Court is a trial de novo, in which a defendant has an opportunity for a trial without a jury, the opportunity for a District Court trial cured whatever prejudice resulted from the City Court's refusal to grant the right to a waiver provided under the provisions of 46-17-201. Billings v. McCarvel, 262 M 96, 863 P2d 441, 50 St. Rep. 1460 (1993).

Constitutionality of Defendant's Waiver of Jury Trial in Criminal Case Over Objection of State: Hill waived his right to a jury trial on charges of felony assault (now assault with a weapon), resisting arrest, and obstructing a peace officer. The state objected and demanded a jury trial on all factual issues, contending that this section requires that before a jury trial can be waived, both parties must consent and that therefore a jury trial cannot be waived over the objection of the state. Pursuant to the 1972 change in this section, a jury trial is no longer required as a matter of constitutional law in all felony criminal cases, and nothing in the intent of the framers of the constitution indicated that approval of the state was required to allow waiver of the right. In fact, the constitutional revision was implemented expressly for the benefit of the accused. The Legislature has provided a statutory procedure for waiver of the right to jury trial through the 1991 amendment to 46-16-110, which provides that a trial by jury in a criminal case may be waived, without approval of the state, upon written consent of the defendant. The procedure is consistent with the constitutional intent and is therefore not violative of this section. State ex rel. Nelson v. District Court, 262 M 70, 863 P2d 1027, 50 St. Rep. 1447 (1993), distinguishing Patton v. U.S., 281 US 276, 74 L Ed 854, 50 S Ct 253 (1930), and Singer v. U.S., 380 US 24, 13 L Ed 2d 630, 85 S Ct 783 (1965).

Corrective and Preventive Orders Not in Violation of Right to Jury Trial: The right to a jury trial is not violated by the provision contained in 49-2-506, which states that upon finding that a person or entity is engaged in discrimination, the Human Rights Commission must order an end to the conduct and may require any reasonable measure to correct the conduct and rectify any harm to the person discriminated against. Vainio v. Brookshire, 258 M 273, 852 P2d 596, 50 St. Rep. 529 (1993).

Juror Outburst — Court's Removal of Child Witness From Stand — No Prejudice to Defendant: A juror's request to be dismissed when defense counsel persisted in questioning a 9-year-old witness who repeatedly broke down in tears at a certain point in questioning and the court's removal of the witness from the stand did not warrant a mistrial. There was no showing that the juror's outburst resulted in prejudice to defendant, and removal of the witness did not deprive defendant of the right to confront and cross-examine witnesses when the court gave defense counsel the option to resume questioning at a later time. St. v. McNatt, 257 M 468, 849 P2d 1050, 50 St. Rep. 365 (1993), followed in St. v. Gollehon, 262 M 293, 864 P2d 1257, 50 St. Rep. 1564 (1993), and cited in St. v. Brandon, 264 M 231, 870 P2d 734, 51 St. Rep. 244 (1994).

Jury Trial — ERISA Action: A jury trial is appropriate when suit is brought in state court based on a breach of contract claim under ERISA to recover benefits under a group health insurance plan when issues of fact are controverted. Head v. Cent. Reserve Life of N. America Ins. Co., 256 M 188, 845 P2d 735, 50 St. Rep. 20 (1993).

Lack of Standing to Raise Constitutional Issues Absent Wrongful Discharge: A jury found that plaintiffs were not discharged wrongfully. On appeal, plaintiffs raised numerous issues regarding the constitutionality of the Wrongful Discharge From Employment Act, contending

that the Act violated the right of trial by jury and the Montana Constitution's privileges and immunities clause, equal protection clause, impairment of contracts clause, and due process clause. The Supreme Court, citing Jones & Harriot v. Judge, 176 M 251, 577 P2d 846 (1978), and Stelling v. Rivercrest Ranches, Inc., 224 M 313, 730 P2d 388 (1986), found that plaintiffs lacked standing to challenge the constitutionality of the Act because consideration of the issues was rendered moot by the jury verdict, resulting in no adverse effect on plaintiffs by the challenged statutes. Allmaras v. Yellowstone Basin Properties, 248 M 477, 812 P2d 770, 48 St. Rep. 519 (1991), followed in Lutey Constr. v. St., 257 M 387, 851 P2d 1037, 50 St. Rep. 321 (1993).

Whether Question of Fact Exists Not Question of Fact — No Right to Jury Trial Absent Evidence of Fact Question: Defendants asserted error in the District Court's denial of their request for a trial by jury, claiming that their affirmative defense constituted a breach of contract claim. However, before there was an entitlement to a jury trial, there had to be issues of fact for a jury to decide. Whether or not there is sufficient evidence to raise an issue of fact is a question of law for the court and not an issue of fact. The right of jury trial on any issue of fact presented by the pleadings is provisional, and if the evidence fails to form an issue of fact, the right of jury trial disappears. The Supreme Court cited numerous cases in holding that when, as in this case, insufficient evidence is presented to have the issue raised by an affirmative defense submitted to a jury, denial of a request for a jury trial is not prejudicial. Fed. Land Bank of Spokane v. Snider, 247 M 508, 808 P2d 475, 48 St. Rep. 285 (1991).

No Constitutional Right to Jury Trial in Racial Discrimination Suit: In a racial discrimination suit, the plaintiff argued that a statute requiring him to file his complaint with the Commission for Human Rights denied him his constitutional right to a jury trial. The Supreme Court ruled that when the Legislature creates a new "public right", it can assign the adjudication of that right to an administrative agency without violating the constitutional mandate of preserving the jury trial in suits at common law. Romero v. J&J Tire, 238 M 146, 777 P2d 292, 46 St. Rep. 1159 (1989), followed in Vainio v. Brookshire, 258 M 273, 852 P2d 596, 50 St. Rep. 529 (1993).

Manifest Error in Failing to Remove Jurors for Cause: It was manifest error for the District Court to fail to remove one juror who had a fixed scruple against punitive damages and had followed his scruple in a previous trial, and to remove a second juror who not only stated he preferred the management side but appeared to have difficulty in hearing and speaking. Plaintiff's counsel was therefore forced to waste peremptory challenges to remove the jurors when he might have used the challenges elsewhere on the panel. Mahan v. Farmers Union Cent. Exch., Inc., 235 M 410, 768 P2d 850, 46 St. Rep. 96 (1989).

Attempt by Jury Foreman to Convey Information on Defendant's Criminal Record to Jury — Remand for New Trial: The jury foreman heard in a third-party conversation that "defendant had a criminal record as long as your arm" and attempted to convey the information to the rest of the jury. Although the jury declined to hear the offered information, the injury to defendant had already occurred when the foreman heard the prejudicial comments and informed the remaining jurors that he had reliable information from the Sheriff's office. The District Court denied a motion for mistrial after examining three jurors, but the Supreme Court would not assume that the entire panel was safeguarded from contamination. In remanding for a new trial, the Supreme Court held that the presumption of prejudice that was created when uncontroverted evidence established that prejudicial statements reached one or more jurors was not rebutted when no evidence existed to rebut the presumption other than testimony of three of the jurors. St. v. DeGraw, 235 M 53, 764 P2d 1290, 45 St. Rep. 2154 (1988), distinguishing St. v. Murray, 228 M 125, 741 P2d 759, 44 St. Rep. 1394 (1987), St. v. Counts, 209 M 242, 679 P2d 1245 (1984), and St. v. Gillham, 206 M 169, 670 P2d 544 (1983).

Aggravating Circumstances Related to Sentencing — Jury Determination Not Required: Defendant argued that the aggravating circumstances with which the trial court justified the death penalty were equivalent to a finding of malice and that he was therefore entitled to have a jury determine facts constituting the aggravating circumstances. The Supreme Court held that defendant was not entitled to a jury determination because the aggravating circumstances were related to sentencing only and were not elements of the crime charged. Capital sentencing procedures do not require jury participation. St. v. Dawson, 233 M 345, 761 P2d 352, 45 St. Rep. 1542 (1988).

Mistrial Denied Despite Juror Misconduct — No Error: A juror disregarded trial court instructions by talking with a County Attorney, who assisted in the prosecution, about the propriety of allowing evidence of child abuse in open court. Another juror was seen entering Department of Social and Rehabilitation Services (now Department of Public Health and Human Services) offices after evidence was allowed showing the agency was peripherally involved in

the case, and there was evidence the juror discussed the defendant and her children during a conversation at a restaurant. Arguably, the jury misconduct tended to injure the defendant, and therefore prejudice should be presumed; however, the trial judge could determine that there was sufficient evidence to rebut the presumption. Since there was not clear and convincing evidence of error in denying a motion for mistrial, the ruling was affirmed. St. v. Murray, 228 M 125, 741 P2d 759, 44 St. Rep. 1394 (1987).

Declaratory Judgment on Requiring Prepayment of Jury Fees by Party Demanding Jury: The Supreme Court took original jurisdiction of, and heard, a petition for a declaratory judgment that it was unconstitutional to require prepayment, by a party requesting a civil jury trial, of each day's jury fees at or before the end of the prior day. The requirement was contained in Rule 14F, M.J.C.R.Civ.P. (Title 25, ch. 22, superseded 1990). There was a justiciable controversy of statewide impact in that the rule applied to all justice courts; delay could abridge vital constitutional rights of litigants; the purpose of the declaratory judgment would serve the office of a writ, and the court has jurisdiction to issue, hear, and determine writs; and it would promote judicial economy to accept jurisdiction rather than force piecemeal litigation on the constitutionality of the rule. The court said that the prepayment requirement was contained in the rule and 3-15-203, which provided that "In civil actions, the jurors' fees must be paid by the party demanding the jury and taxed as costs against the losing party", and declared both the statute and rule unconstitutional. Hammer v. Justice Court, 222 M 35, 720 P2d 281, 43 St. Rep. 1040 (1986).

Prepayment of Juror Fees Invalid: In a challenge to 3-15-203, requiring the prepayment of juror's fees for trial by jury in Justice Court, the court found the statute invalid as a violation of Art. II, sec. 26, Mont. Const. The court said the statute restricted the inviolate right to jury trial. The court found that the statute conflicted with the plain meaning of the constitution. The court said that the statutory scheme whereby the prepaid jury fees were taxed as costs against the losing party suggested that the statute was not a true mechanism for recovery of costs but rather a device to discourage the exercise of the right to jury trial. Hammer v. Justice Court, 222 M 35, 720 P2d 281, 43 St. Rep. 1040 (1986).

Right to Jury Trial — Not Applicable to Suspended Sentence Revocation Proceedings: Since a trial by jury under the seventh amendment to the U.S. Constitution and Art. II, sec. 26, Mont. Const., is guaranteed only in "criminal prosecutions", it does not apply in proceedings for revocation of a suspended sentence. St. v. Watts, 221 M 104, 717 P2d 24, 43 St. Rep. 670 (1986).

Remedy in Contract or in Tort — Motion for Separate Trials: An insurer requested a separate trial on the affirmative defenses raised by cross-claim and requested that the trial of the remaining issues raised by the insured be postponed until after the final determination of the affirmative defenses. The Supreme Court noted that the insured, having a choice of two remedies, one in contract and one in tort, elected to pursue his claim in tort. Recovery by him on his claim in tort would have the effect of barring his claim for breach of contract. If the motion for separate trials had been granted, it would have converted insured's claim for tort to one for breach of contract. Insured would then have been precluded from presenting any evidence as to consequential damages for the tort, let alone any evidence relating to punitive damages. His right to trial by jury of his tort claim, guaranteed by the seventh amendment to the U.S. Constitution and Art. II, sec. 26, Mont. Const., would have been prejudiced. Denial of the motion to bifurcate was proper. Britton v. Farmers Ins. Group, 221 M 67, 721 P2d 303, 43 St. Rep. 641 (1986).

Initial Verdict Not Unanimous — No Mistrial: In considering the criminal charge against the defendant, the jury returned to the courtroom and disclosed its vote of 10 to 2 in favor of conviction. The judge did not make a prohibited inquiry of the jury as to its numerical division, nor was it reversible error for the judge to ask the jury to return to the jury room for a reasonable time to attempt to reach a unanimous decision when he emphasized that no juror should think any pressure was being placed on him to reach a unanimous decision. Given the manner in which the jury disclosed its initial vote, the trial court was correct in refusing to grant a mistrial because of the initial verdict. St. v. George, 219 M 377, 711 P2d 1379, 43 St. Rep. 26 (1986).

Jury Passed for Cause — Partiality Issues Waived: Defendant could not successfully argue that the jury was not fair and impartial when defendant passed the jury for cause. Tribby v. NW. Bank of Great Falls, 217 M 196, 704 P2d 409, 42 St. Rep. 1133 (1985).

All Parties in Equity Court Entitled to Have Their Legal Claims and Counterclaims Tried by Jury: Although, in the past, the court has purported to permit a court of equity to rule on all questions in a case, the court has never held that a court sitting in equity may try those issues of fact raised by plaintiff in a legal cause of action. The modern merger of law and equity courts and the liberal joinder provisions of the Rules of Civil Procedure force reevaluation of the traditional justification for permitting an equity court to decide legal issues. Upon timely demand, all parties

are entitled to have their legal claims and counterclaims tried by jury. Gray v. Billings, 213 M 6, 689 P2d 268, 41 St. Rep. 1910 (1984). (To the extent that Butler Bros. Dev. Co. v. Butler, 111 M 329, 108 P2d 1041 (1941), and its progeny have been interpreted to deny plaintiff a right to jury trial of his legal claims, the cases are overruled.)

Termination of Parental Rights — No Right to Jury Trial: The State began termination of parental rights proceedings in the District Court. The parents filed a jury demand. The court denied the motion, citing 41-3-607. The court consolidated the adjudicatory and dispositional hearings, found the youths to be "in need of care", found that the parents had not complied with the approved treatment plan, found them to be beyond rehabilitation, and terminated their parental rights. The parents appealed the denial of the jury trial, alleging that 41-3-607(4) was unconstitutional pursuant to Art. II, sec. 24, of the 1972 Montana Constitution. The Supreme Court held that in Montana the state constitution guarantees the right to a jury trial only in the class of cases in which the right was enjoyed when the constitution was adopted. When the constitution was first adopted in 1889, there was no right to a jury trial in parental rights termination proceedings because such proceedings did not exist. Because there was no right to a jury trial for civil proceedings to terminate parental rights when the Montana Constitution was adopted in 1889 and recodified in 1972, such right could not be brought within the protection of Art. II, sec. 26, of the 1972 Montana Constitution. Because the adjudicatory and dispositional hearings may be consolidated, as was the case here, the court held it was unlikely the Legislature intended to provide for a jury trial at the adjudicatory hearing but not at the dispositional hearing. In re C.L.A. & J.A., 211 M 393, 685 P2d 931, 41 St. Rep. 1444 (1984).

Denial of Demand for Jury Trial — Interlocutory Order Not Appealable: Defendants, sued to recover money due on promissory notes, did not demand a jury trial in their original answer, but after several delays and withdrawal of counsel, defendants acting pro se filed an amended answer with a request for jury trial. Upon objection by plaintiffs and examination of the pleadings, the District Court denied the demand for jury trial. The Supreme Court dismissed the defendants' appeal of the denial as premature, holding that the denial of a request for a jury trial, whether the request was timely or belated, was not a final judgment appealable under former Rule 1, M.R.App. Civ.P (now Montana Rules of Appellate Procedure, now superseded). Such an interlocutory order may be appealable only if specifically provided for in a rule or statute. Heidema v. First Bank, 211 M 178, 682 P2d 1374, 41 St. Rep. 1291 (1984).

Jury Assessment of Damages Against Party in Default: A party in default has no statutory or constitutional right to have a jury assess the damages against him. Johnson v. Murray, 201 M 495, 656 P2d 170, 39 St. Rep. 2257 (1982).

Consent of Both Parties Required to Withdraw Demand for Jury Trial: The insurance agent made several misrepresentations concerning the insured when filling out an application for Safeco insurance. Safeco paid a $300,000 claim and then brought suit against the insurance agency and its agent. The insurance agency initially demanded a jury trial but then over the objection of Safeco was allowed to withdraw its demand for a jury trial. On appeal, the Supreme Court held that the District Court erred in ordering a trial by judge. When one party has made a demand for a jury trial, the other party may rely on it. If at a later date the demanding party waives the demand, the opposing party has the right to determine whether to consent to a trial before a judge or to insist upon a jury trial. On appeal, the Supreme Court directed that judgment be entered in favor of Safeco on the issue of liability but held that the insurance agency was not entitled to a new trial because it had already had its trial. Safeco Ins. Co. v. Lovely Agency, 200 M 447, 652 P2d 1160, 39 St. Rep. 1861 (1982). See also Holm-Sutherland Co., Inc. v. Shelby, 1999 MT 150, 295 M 65, 982 P2d 1053, 56 St. Rep. 595 (1999).

Right to Jury Trial — Not Applicable to Equity Cases: A June 1976 agreement between the parties provided that plaintiff would advance money for the downpayment in the purchase of real property in Billings and would receive certain benefits, including a 50% interest in the property, in return. Plaintiff was to control any contractual arrangements until defendant had contributed, by payment of the monthly installments, a sum equal to the downpayment. In 1977, prior to the equalization of contributions, plaintiff entered negotiations to sell the property. No agreement between plaintiff and defendant was reached regarding the sale, and plaintiff filed suit seeking specific performance of the agreement. Defendant's demand for a jury trial was denied, and plaintiff was granted summary judgment allowing him exclusive control of contractual negotiations concerning the land for 1 year. Defendant contended he was denied his constitutional right to a jury trial. The Supreme Court, relying on decisions under the 1889 Montana Constitution and the transcripts of the 1972 Constitutional Convention, held that the power to enforce specific performance is vested solely in courts having equitable jurisdiction. The

right of trial by jury does not extend to equitable actions, and the judge is not bound by any jury's findings. The District Court's denial of a jury trial was upheld. Downs v. Smyk, 200 M 334, 651 P2d 1238, 39 St. Rep. 1786 (1982).

Jury Trial — Right in Federal Court: The defendant has maintained three cabins on the C.M. Russell Game Range since 1947. The United States brought an action to enjoin defendant from trespassing on the range and to collect damages for the unauthorized use of the land. The U.S. Court of Appeals held that the defendant had a right to a jury trial under the seventh amendment to the United States Constitution (similar to Art. II, sec. 26, Mont. Const.). The court held that there is a right to a jury trial when the issue presented would have been heard at common law and where the defendant made timely demand for a jury trial. The District Judge's statements, made without objection, that the parties had agreed to submit the case to the court on the record were sufficient to constitute an oral stipulation to a nonjury trial, however. U.S. v. Missouri R. Breaks Hunt Club, 641 F2d 689 (9th Cir. 1981).

Unanimous Verdict: The defendant argued that a jury must be instructed that it must make unanimous findings of specific acts constituting a specific offense before a verdict of guilty could be rendered. The court concluded that failure to require the jury to specify the theory on which it convicted did not deprive the defendant of his right to a unanimous verdict. McKenzie v. Osborne, 195 M 26, 640 P2d 368, 38 St. Rep. 1745 (1981), distinguished in St. v. Weldy, 273 M 68, 902 P2d 1, 52 St. Rep. 729 (1995).

Unanimous Verdict Requirement — Instruction in Disjunctive: Petitioner alleged that he was denied his constitutionally required unanimous verdict because the jury was instructed on the crimes of robbery, kidnapping, and homicide in the disjunctive. He alleged that the jury might not have agreed on which crimes were committed. In this case the jury was instructed as to the requirement of a unanimous verdict. The court also determined that there was substantial evidence to support all of the alternatives set forth in the instructions. The requirement of unanimity was met. Fitzpatrick v. St., 194 M 310, 638 P2d 1002, 38 St. Rep. 1448 (1981), followed in St. v. Warnick, 202 M 120, 656 P2d 190, 39 St. Rep. 2369 (1982). See also St. v. Canon, 212 M 157, 687 P2d 705, 41 St. Rep. 1659 (1984); St. v. Madera, 206 M 140, 670 P2d 552, 40 St. Rep. 1558 (1983). However, see St. v. Weldy, 273 M 68, 902 P2d 1, 52 St. Rep. 729 (1995), and St. v. Weaver, 1998 MT 167, 290 M 58, 964 P2d 713, 55 St. Rep. 668 (1998), holding the jury instruction inadequate.

Mandatory Submission of Claims to Panel — Jury Trial: Mandatory submission of claims to the panel does not unconstitutionally interfere with the right to trial by jury. A claimant is free to continue to jury trial no matter what the decision of the panel, and the jury remains the final determiner of fact. Further, the panel decision is not binding, nor is it admissible at trial. Submission to the panel is merely a permissible delay in the path to the ultimate jury verdict. Linder v. Smith, 193 M 20, 629 P2d 1187, 38 St. Rep. 912 (1981).

Increase of Sentence in Retaliation for Insistence on Jury Trial: To protect a criminal defendant's constitutional rights in plea bargaining situations and to help preserve public confidence in the judicial process, the Supreme Court adopted ABA Standard 14-sec. 1.8(b). To implement that standard and to facilitate judicial review, a sentencing court that becomes involved in the plea bargaining process and imposes a harsher sentence after trial than was offered in exchange for a guilty plea must specifically point out the factors that justify the increased sentence. In this case, the court could not tell from the record why the trial court offered a very lenient sentence (45 days' jail time) in exchange for a plea of guilty. Nor could the Supreme Court tell why the court found imposition of a harsher sentence appropriate after jury trial (10 years' jail time). Increased sentencing for exercising a constitutional right is a basic due process violation. Because the Supreme Court was without assurance from the record that the trial court did not increase the sentence in retaliation for defendant's insistence on a jury trial, it remanded the case for resentencing. St. v. Baldwin, 192 M 521, 629 P2d 222, 38 St. Rep. 882 (1981), distinguished in St. v. Smith, 276 M 434, 916 P2d 773, 53 St. Rep. 459 (1996), St. v. Brown, 2003 MT 166, 316 M 310, 71 P3d 1215 (2003), and St. v. English, 2006 MT 177, 333 M 23, 140 P3d 454 (2006).

Defendant's Challenge of Jurors — Discretion of Judge in Ruling on Challenges: The defendant in a deliberate homicide case appealed his conviction in part on the basis that the trial court erred in denying his challenge to the jury panel as a whole and to one juror in particular. While noting that the right to a trial by an impartial jury is an unqualified one, the Supreme Court said that the pertinent inquiry was whether or not the jury empaneled was able to render an impartial judgment based solely upon the evidence presented at trial. Considering that each juror gave an assurance of impartiality and that the trial judge made cautionary remarks to the jury that they had a duty to lay aside their opinions and impressions, the Supreme Court

held that under the circumstances the trial judge did not abuse his discretion by denying the defendant's challenge to the jury panel. With respect to the individual juror, the reviewing court noted that the judge had questioned the juror and that she had made it clear that she could put her emotions aside and judge the defendant fairly and solely upon the evidence presented at trial. St. v. Bashor, 188 M 397, 614 P2d 470 (1980).

Circumstances Favoring Withdrawal of Guilty Plea: The defendant was not made aware of the different elements of assault as set forth in 45-5-201 and 45-5-202, and the District Court had before it evidence indicating that defendant was under the influence of a combination of drugs and alcohol and was possibly suffering from mental distress or instability at the time of the alleged assault. Under those circumstances the judge should not have accepted defendant's guilty plea, and defendant should be allowed to withdraw the plea. St. v. Nelson, 184 M 491, 603 P2d 1050 (1979).

Waiver of Jury Trial: Section 46-16-102(2) (renumbered 46-16-110) is not such a mandate that failure to comply with its provisions rendered the trial a nullity since, by examining the totality of the circumstances, the Supreme Court determined that the defendant did make a voluntary and intelligent waiver, which is the primary objective of the statute, and was not deprived of his right to trial by jury. St. v. McCartney, 179 M 49, 585 P2d 1321 (1978). See, however, St. v. Dahlin, 1998 MT 113, 289 M 182, 961 P2d 1247, 55 St. Rep. 446 (1998).

DECISIONS UNDER 1889 CONSTITUTION

GENERAL

Deliberations by Jury — Juror Misconduct: Court did not err in denying plaintiff's motion for a new trial on the ground of misconduct of the jury during its deliberations, supported by affidavits of four jurors indicating that the irregularity was not on a material matter in dispute, where plaintiff was properly not prejudiced by juror's misconduct in improperly referring to prior litigation in which plaintiff had been involved, the poll of the jury showing an 8-to-4 verdict for the plaintiff. When the jury retires to the jury room it should be concerned only with the evidence and the law. The verdict is the result of a fair expression of opinion by all the jurors. Schmoyer v. Bourdeau, 148 M 340, 420 P2d 316 (1966).

Pretrial Conference:

Provisions granting the court permission to require a pretrial conference do not violate the constitutional guarantee of a jury trial. State ex rel. Kennedy v. District Court, 121 M 320, 194 P2d 256 (1948).

The effect of the pretrial practice act (now repealed, but see former Rule 16, M.R.Civ.P., now superseded) was not such as to deprive a litigant, in a case involving questions of fact, of the right to have controverted fact questions disposed of by a jury as prescribed by the Constitution. State ex rel. Carlin v. District Court, 118 M 127, 164 P2d 155 (1945).

Right as of Time Constitution Adopted Preserved:

The guaranty of a right to trial by jury does not grant or enlarge the right of a jury trial but merely preserves it as it existed at the time the Constitution was adopted. Moore v. Capitol Gas Corp., 117 M 148, 158 P2d 302 (1945).

The right of trial by jury is the right as it existed at the time the Constitution was adopted. Bull v. Butte Elec. Ry., 69 M 529, 223 P 514 (1924). See also In re McLure, 68 M 556, 220 P 527 (1923).

The Constitution must be construed in view of the conditions existing at the time of its adoption, and the right of trial by jury guaranteed under this broad declaration is the right as it then existed and not one created or extended, except by express terms, by the instrument itself. This rule extends to both civil and criminal trials. Mont. Ore Purchasing Co. v. Boston & Mont. Consol. Copper & Silver Min. Co., 27 M 288, 70 P 1114 (1902); State ex rel. Jackson v. Kennie, 24 M 45, 60 P 589 (1901).

WHEN RIGHT TO JURY TRIAL EXISTS

Declaratory Judgment: A party has a right to a jury trial on demand where the suit is for a declaratory judgment and there are triable issues of fact. State ex rel. Indus. Indem. Co. v. District Court, 169 M 10, 544 P2d 438 (1975); Mehan v. Hardland, 147 M 78, 410 P2d 156 (1966).

Recovery on Foreign Judgment: An action to recover a money judgment on a foreign judgment and to recover specific personal property with damages is clearly an action at law and is an action in which a party cannot be denied a jury trial. Little v. Little, 127 M 152, 259 P2d 343 (1953).

Directed Verdict in Criminal Case: It was error for the court to instruct and direct the jury to return a verdict of guilty when the evidence was in conflict. St. v. Baillargeron, 126 M 310, 249 P2d 799 (1952).

Inconvenience to Jurors Irrelevant: Inconvenience or loss to prospective jurors or lack of adequate travel, hotel, or eating facilities for them constitutes no excuse for depriving a litigant of his constitutional right to prompt disposition of his litigation, and when case is to be tried by a jury, Supreme Court will direct court, by mandamus, to call a jury and try the case. State ex rel. Carlin v. District Court, 118 M 127, 164 P2d 155 (1945).

Action on Lease: An action to compel the release of an oil and gas lease of record on the ground that the lessee had failed to commence drilling operations within the time fixed in the lease and for the recovery of the statutory penalty, damages, and attorney's fees is one at law, entitling plaintiff to a jury trial. Solberg v. Sunburst Oil & Gas Co., 70 M 177, 225 P 612 (1924).

Action at Law: When the primary purposes of an action against a corporation were to recover on promissory notes, to enforce liability of its directors as comakers and guarantors, and to penalize for failure to file the annual statements required by statute, and the only equitable relief prayed for was the foreclosure of a mortgage given by one of the directors on lots as security for the notes, and answers of defendants contending the defendants were entitled to a trial by jury of the strictly legal issues presented by the pleadings, denial of a jury trial was error. Benson-Stabeck Co. v. Farmers Elevator Co., 66 M 395, 214 P 600 (1923).

Applicable to Civil and Criminal Cases: The provision of Art. III, sec. 23, 1889 Mont. Const., that the right of trial by jury shall be secured to all and remain inviolate, applied only to cases where right of trial by jury existed at the time of the adoption of the Constitution. It referred in terms to "civil cases" and "criminal cases". Cunningham v. NW. Improvement Co., 44 M 180, 119 P 554 (1911).

Same as Federal Right: The right guaranteed by Art. III, sec. 23, 1889 Mont. Const., is the same as that guaranteed by the seventh amendment to the federal Constitution, because the federal Constitution was the fundamental law of the territory at the time of its admission as a state, and the right as it then existed was preserved in the state Constitution. Consol. Gold & Sapphire Min. Co. v. Struthers, 41 M 565, 111 P 152 (1910); Chessman v. Hale, 31 M 577, 79 P 254 (1905).

Action for Damages and Injunction: Plaintiff is entitled, without request, to a trial by jury of his right to damages, although he also asks for the equitable relief of injunction to restrain the continuance of acts complained of. Chessman v. Hale, 31 M 577, 79 P 254 (1905).

Right Cannot Be Abridged by Legislature: The right of trial by jury, as it existed at the time of the adoption of the Constitution, still exists and cannot be taken away by legislative enactment. Chessman v. Hale, 31 M 577, 79 P 254 (1905).

WHEN JURY TRIAL NOT REQUIRED

Equitable Actions: In action to foreclose mortgage securing promissory notes, defendant was not entitled to jury trial as matter of right on his cross-complaint and counterclaim for damages, since actions for mortgage foreclosures are equitable and triable by court without jury and cannot be transformed into actions at law merely by raising an issue of law in answer. Citizens St. Bank v. Duus, 154 M 18, 459 P2d 696 (1969).

Not Applicable to Equity Actions:

Action by corporation against one of its directors to decree and enforce a trust of mining claims located by director and necessary to development and operation of plaintiff's property was one in equity, and defendant did not have right to demand jury trial since such right did not exist at time of adoption of the Constitution. Golden Rod Min. Co. v. Bukvich, 108 M 569, 92 P2d 316 (1939).

The right of trial by jury guaranteed by Art. III, sec. 23, 1889 Mont. Const., is the right as it existed at the time the Constitution was adopted. Since the right to a jury trial in an equity case did not exist at that time, it does not exist now. Merchants Fire Assurance Corp. v. Watson, 104 M 1, 64 P2d 617 (1937).

In a proceeding under 11067, R.C.M. 1921 (now repealed), to abate as a common nuisance a roominghouse where intoxicating liquor was being illegally kept and sold, providing that "the action shall be brought and tried as an action in equity", the defendant is not entitled to a jury trial. St. v. Mercier, 70 M 333, 225 P 802 (1924).

Action Involving Drain District: The proceeding by which a drain district is created and managed is not an ordinary civil action but a special statutory proceeding in which the trial by jury did not exist at the time the state Constitution was adopted, and hence the constitutional

right of trial by jury is not denied by failure of the statute to make the question of benefits received or damages suffered by a landowner determinable by a jury. In re Drain District, 64 M 545, 211 P 218 (1922).

Contested Divorce: The right of trial by jury is preserved as it existed at the time the Constitution was adopted, and since the right to a trial of a contested divorce suit did not exist at that time, a party to such a suit may not now demand, as a matter of right, a jury trial of the issues raised by the pleadings. Davidson v. Davidson, 52 M 441, 158 P 680 (1916).

Mandamus Proceeding: If the relator, in a mandamus proceeding, must litigate any private right to damages which he may have against the respondent arising out of the wrong to which the mandate is directed, the adversary must submit. Thus, a cause of action at law becomes summarily justifiable without a jury, notwithstanding the fact that both parties are entitled to a jury and cannot be compelled to submit to a summary adjudication. Bailey v. Edwards, 47 M 363, 133 P 1095 (1913).

Special Proceedings: Article III, sec. 23, 1889 Mont. Const., did not confer the right to trial by jury in a special proceeding. Cunningham v. NW. Improvement Co., 44 M 180, 119 P 554 (1911).

Action to Determine Adverse Claim to Real Property: Since parties in an action to determine an adverse claim to real property or an interest therein were not entitled to a jury trial prior to the adoption of the Constitution, a defendant in an action to try an adverse claim to a lode mining claim under the statute authorizing such an action, as reenacted subsequent to the Constitution, is not entitled to have the issues submitted to a jury. Mont. Ore Purchasing Co. v. Boston & Mont. Consol. Copper & Silver Min. Co., 27 M 288, 70 P 1114 (1902).

Creditors' Suit for Fraudulent Sale: The direction of a verdict in a creditors' suit to set aside a sale as fraudulent was not an infringement on the defendant's right to a trial by jury, though the testimony in the case was conflicting, since such cases were within the exclusive jurisdiction of chancery at the time the Constitution was adopted, and the Constitution did not enlarge the right of trial by jury. Finch v. Kent, 24 M 268, 61 P 653 (1900).

Security to Keep the Peace: Under Art. III, sec. 23, 1889 Mont. Const., the party complained of, in a proceeding in a Justice's Court to compel him to give security to keep the peace, is not entitled to a jury trial. No such right existed when the Constitution was adopted, and there is nothing in the Constitution extending the right to any case in which it did not exist at the date of its adoption. State ex rel. Jackson v. Kennie, 24 M 45, 60 P 589 (1900).

WAIVER OF RIGHT

Waiver in Felony Case: If a defendant is charged with a felony and desires a trial, he shall have one before a jury. He may not waive a jury trial in favor of one by the court. However, he may waive trial entirely by entering a plea of guilty; in such event he admits the issue of fact and presents nothing to go before a jury. St. v. Scalise, 131 M 238, 309 P2d 1010 (1957).

Procedure for Waiver: The modes prescribed by statute for waiving right to a trial by jury are exclusive. Moore v. Capitol Gas Corp., 117 M 148, 158 P2d 302 (1945).

Manner of Waiver — Exclusive: The provision of Art. III, sec. 23, 1889 Mont. Const., that a jury may be waived in the manner prescribed by law was mandatory and prohibitory. It is the duty of the court to grant to litigants the rights given them by the constitutional provision. The Constitution, in effect, commanded that a jury trial, if waived, should be waived in a certain manner and prohibited its being waived in any other manner. Chessman v. Hale, 31 M 577, 79 P 254 (1905).

Law Review Articles

Something Upon Which We Can All Agree: Requiring a Unanimous Jury Verdict in Criminal Cases, Morris, 62 Mont. L. Rev. 1 (2001).

Jury Trial in Civil Cases, Clark, 10 Mont. L. Rev. 38 (1949).

Damages: The Doctrine of Remittitur in Montana, Harlow, 3 Mont. L. Rev. 111 (1942).

Section 27. Imprisonment for debt.

Convention Notes

Identical to 1889 constitution. Safeguards the right of a person in debt to be free from imprisonment.

Compiler's Comments

Former Constitutional Provision: This section is similar to Art. III, sec. 12, 1889 Mont. Const.

Section 28. Criminal justice policy — rights of the convicted.

Convention Notes

Revises 1889 constitution by deleting reference to capital punishment and providing that rights a person loses when convicted of a crime are automatically restored when he has served his sentence.

Compiler's Comments

1998 Amendment by Referendum: Constitutional Amendment No. 33, proposed by Ch. 313, L. 1997, and approved at the general election held November 3, 1998, in (1) inserted "public safety, and restitution"; and made minor changes in style. Amendment effective July 1, 1999.

Former Constitutional Provision: This section is similar to Art. III, sec. 24, 1889 Mont. Const.

Prohibition Against Death Penalty Rejected: A prohibition against the death penalty was submitted separately and rejected by the electorate adopting the 1972 Montana Constitution. For the text of the rejected prohibition, see the Adoption Schedule compiler's comment under the annotations to the Transition Schedule.

Case Notes

DECISIONS UNDER 1972 CONSTITUTION

Probation Search of Purse Based on Reasonable Suspicion — Motion to Suppress Correctly Denied: As a condition of her probation, the defendant was required to inform her probation officer of her prescriptions. During a home visit, the officer searched her purse because of her suspicious behavior. Her purse contained illegal pills, and the state filed a petition to revoke her probation. The defendant filed a motion to suppress the evidence from the purse search, contending that the officer lacked reasonable grounds to search it. The District Court denied the motion to suppress and on appeal, the Supreme Court affirmed the denial. While a probation officer may not go through a probationer's belongings unless there is reasonable suspicion of a violation, in this case, the defendant's nervous behavior and excuses about her pills constituted reasonable grounds. St. v. Fischer, 2014 MT 112, 374 Mont. 533, 323 P.3d 891.

Sentencing Condition Lacked Nexus — No History of Substance Use or Abuse: A 17-year-old defendant was charged as an adult with one count of sexual intercourse without consent and one count of sexual assault. Subsequently, the defendant was sentenced and one of the conditions required him to report the conviction to all medical providers, as well as reporting addiction history and prescriptions for narcotics or medical marijuana. On appeal, the Supreme Court relied on St. v. Ashby, 2008 MT 83, 342 Mont. 187, 179 P.3d 1164, and reversed the reporting requirement on the grounds that the sentencing conditions lacked a nexus to either the offense or the offender. St. v. Dietsch, 2013 MT 245, 371 Mont. 460, 308 P.3d 111.

DUI Sentencing Scheme Reasonably Related to Rehabilitation and Protection of Society — Felony DUI Considered Constitutionally Appropriate: Blue asserted that the DUI sentencing scheme violated the constitutional provision that punishment for crime must be based on principles of prevention, reformation, public safety, and restitution for victims. The Supreme Court noted that rather than escalating punishment for the same offense, the DUI statutes provide discrete punishments for discrete convictions, and that it is within the power of the Legislature to distinguish among criminal offenses and to establish punishments. The DUI sentencing limitations and conditions are reasonably related to the objectives of rehabilitation and protection of the victim and society, and the enhanced penalty for felony DUI is a constitutionally appropriate sentence. St. v. Blue, 2009 MT 304, 352 M 382, 217 P3d 82 (2009), distinguishing Missoula v. Shea, 202 M 286, 661 P2d 410 (1983). See also St. v. Bruns, 213 M 372, 691 P2d 817 (1984).

Home Visit of Probationer's Residence by Supervising Officer Not Considered Search — Diminished Expectation of Privacy — When Reasonable Cause Required to Search Probationer's Residence: As part of Moody's conditions of probation, the sentencing court required that Moody's home be open and available for the probation and parole officer to visit as required by state policy. Moody objected to the condition on grounds that it obviated the reasonable cause requirement for searches of probationers' homes and thus violated the constitutional rights of privacy and protection from unreasonable search and seizure. The Supreme Court noted that in Montana, a probation officer may search a probationer's residence without a warrant if the officer has reasonable cause for the search. The reasonable cause standard is substantially less than the probable cause standard required for searches of other citizens' homes because probationers do not enjoy the absolute liberty and heightened expectations of privacy afforded every Montana citizen. Rather, probationers are subject to conditional liberty that is properly dependent upon special restrictions. A convicted felon who is unambiguously aware of the clearly expressed

condition that the residence be open and available for home visits does not have a reasonable expectation of privacy that precludes home visits, and because there is no reasonable expectation of privacy, there is no search. Therefore, home visits conducted as a routine and reasonable element of supervising a convicted person are not searches and are not subject to the reasonable cause standard. Although a home visit has the potential to turn into a search pursuant to an officer's plain view observations, it must remain within the parameters of a home visit unless and until reasonable cause exists for the officer to engage in a search. A probationer's diminished expectation of privacy during supervision nevertheless provides that the enclosed areas of the probationer's residence, such as closets, cabinets, and drawers, cannot be searched without reasonable cause. Thus, Moody's constitutional rights to privacy and to be free from unreasonable searches were not violated by the home visit probation condition. St. v. Moody, 2006 MT 305, 334 M 517, 148 P3d 662 (2006), followed in St. v. Greeson, 2007 MT 23, 336 M 1, 152 P3d 695 (2007).

Sentencing Condition Unrelated to Underlying Offense Stricken: Attorney Holt pleaded not guilty to five counts of felony theft of clients' funds. As a condition of a suspended sentence, the trial court prohibited Holt from possessing or consuming alcohol and from establishing a checking or credit card account. Holt appealed both sentencing conditions. The Supreme Court noted that under St. v. Ommundson, 1999 MT 16, 293 M 133, 974 P2d 620 (1999), and St. v. Lucero, 2004 MT 248, 323 M 42, 97 P3d 1106 (2004), a sentencing limitation or condition must have some correlation to the underlying offense in order to be reasonably related to the objectives of rehabilitation and protection of the victim and society. In this case, there was no evidence that alcohol contributed to the offenses in question, so the Supreme Court struck that condition from the judgment. However, there was a correlation between Holt being allowed to establish a checking or credit card account and the crime of theft of clients' funds, so imposition of that condition was not improper and was affirmed. St. v. Holt, 2006 MT 151, 332 M 426, 139 P3d 819 (2006), followed in St. v. Armstrong, 2006 MT 334, 335 M 131, 151 P3d 46 (2006), and St. v. Greeson, 2007 MT 23, 336 M 1, 152 P3d 695 (2007). However, see St. v. Green, 2012 MT 87, 364 Mont. 515, 276 P.3d 929.

Mandatory Life Sentence Not Violative of Due Process, Cruel and Unusual Punishment, or Separation of Powers — Exception Properly Considered: Webb pleaded guilty to second offense sexual intercourse without consent and was sentenced to life in prison without parole pursuant to 46-18-219. Webb appealed the sentence on grounds that the mandatory life sentence violated procedural and substantive due process, the prohibition against cruel and unusual punishment, and the separation of powers doctrine. Webb also asserted that the sentencing court failed to properly consider the exception to mandatory sentencing set out in 46-18-222(3). The Supreme Court affirmed. The sentencing court properly considered the exception and did not abuse its broad discretion in finding no unusual and substantial distress. The sentencing court offered Webb all the procedural due process necessary and did not violate substantive due process because the sentence fit within the statutory sentencing limits. Webb's contention that life without parole was cruel and unusual punishment failed because the sentence was commensurate with the gravity of the crime and consistent with state sentencing and correctional policy. The argument that mandatory sentences violate the separation of powers doctrine also failed because it is in the Legislature's province to distinguish between criminal offenses and to establish punishments, and enactment of 46-18-219 was based on constitutional principles and Montana public policy. St. v. Webb, 2005 MT 5, 325 M 317, 106 P3d 521 (2005). See also St. v. Bruns, 213 M 372, 691 P2d 817 (1984), and St. v. Dahms, 252 M 1, 825 P2d 1214 (1992).

Order for Restitution Upon Imposition of Deferred or Suspended Sentence — 1999 Amendments to Sentencing Statute Clarified: Heath was convicted of theft and possession of burglary tools and sentenced to 10 years in prison with 2 years suspended upon conditions, including payment of restitution. Heath appealed on grounds that the 1999 amendments to 46-18-201 no longer allowed a sentencing court to impose restitution as a condition of a suspended or deferred sentence. Upon amendment in 1999, an internal reference in 46-18-201(5) was not changed to reflect the renumbering of the other subsections, which resulted in an ambiguity in the plain language of the 46-18-201, potentially rendered 46-18-237 and 46-18-251(2) meaningless, created uncertain directives for payment of restitution for all victims in 46-18-241(1) and 46-18-244(2), and created a potentially absurd application of 46-18-201(1). Because of the potentially absurd consequences of the 1999 amendment, the Supreme Court looked beyond the words of the statute and inquired whether the Legislature intended to make any change in the substance and effect of 46-18-201. The court concluded that the 1999 amendment was a simple codification error that resulted in a cross-reference problem that was completely inconsistent with legislative intent to authorize sentencing courts to impose restitution when necessary for rehabilitation or for the protection

of the victim or society if there is an appropriate correlation to the offense committed. Heath's argument failed, and the imposition of restitution as a condition of Heath's suspended sentence was affirmed. (Note: The erroneous internal reference in 46-18-201(5) was deleted in 2003.) St. v. Heath, 2004 MT 126, 321 M 280, 90 P3d 426 (2004), followed in St. v. McDanold, 2004 MT 167, 322 M 31, 97 P3d 1076 (2004), and St. v. McIntire, 2004 MT 238, 322 M 496, 97 P3d 576 (2004).

Sex Offender Registration and Disclosure Requirements Not Violative of Privacy or Right of Convicted to Restoration of Rights: Mount was convicted of sexual intercourse without consent and served his sentence. Nine days after final discharge from prison in 1996, Mount registered as a sexual offender, but he was convicted in 2000 of failing to update the registration as required in 46-23-507. On appeal, Mount asserted that the ongoing registration and disclosure requirements of the Sexual or Violent Offender Registration Act violated the right to privacy under Art. II, sec. 10, Mont. Const., and constitutional and statutory provisions for reinstatement of the rights of a citizen under 46-18-801 and this section. The Supreme Court disagreed. As a fundamental right, the right to individual privacy may be infringed only by a compelling state interest; however, protection of the public from the recidivism of sex offenders, prevention of the victimization of vulnerable children, and assistance in keeping track of sex offenders constitute the requisite compelling interest. Further, 46-18-801 and this section apply only to the restoration of civil and political rights, and a conviction for sexual intercourse without consent does not fall under this category of protected rights. Thus, Mount was not deprived of any rights by the registration and disclosure requirements of the Sexual or Violent Offender Registration Act. St. v. Mount, 2003 MT 275, 317 M 481, 78 P3d 829 (2003), followed in Wagner v. St., 2004 MT 31, 319 M 413, 85 P3d 750 (2004). See also St. v. Brooks, 2012 MT 263, 367 Mont. 59, 289 P.3d 105 (ruling that SVORA did not violate privacy rights of a violent offender).

No Constitutional Liberty Interest in Being Housed Exclusively at State Prison: Following a conviction for deliberate homicide and use of a firearm, Wright was sentenced in 1996 to the state prison in Deer Lodge for 75 years, where he was originally placed. Over the years, Wright was placed at various other institutions, including out-of-state and in-state regional detention and private correctional centers. Wright filed a writ of prohibition to prevent the state from housing him anywhere but the state prison in Deer Lodge, pursuant to the terms of the written judgment. Under the law in effect at the time of Wright's sentencing, the Deer Lodge prison was the only adult male correctional facility in Montana, but the statutory definition has since been expanded to include other facilities. Wright contended that application of the amended definition to his sentence was unconstitutionally ex post facto, in violation of his liberty interests. The Supreme Court disagreed. Pursuant to Meachum v. Fano, 427 US 215 (1975), Wright's conviction sufficiently extinguished Wright's liberty interest to empower the state to confine him in any of its prisons, and under Olim v. Wakinekona, 461 US 238 (1983), Wright also had no justifiable expectation that he would be imprisoned in any particular state. Further, in order for the state to create a liberty interest, under McDermott v. Dept. of Corrections, 2001 MT 134, 305 M 462, 29 P3d 992 (2001), it must first enact a law that establishes a right of real substance, and then even those statutorily defined interests are restricted to freedom from atypical and significant hardships in relation to the ordinary incidents of prison life or restraints that inevitably affect the duration of the prisoner's confinement. The Supreme Court held that even if the 1995 definition of state prison did confer a right of real substance, being transferred from one prison to another, even out of state, did not meet the McDermott test for hardship or duration of confinement. Thus, Wright had neither a federal nor a state constitutional liberty interest in being housed exclusively at the state prison in Deer Lodge, and the state has authority to transfer Wright from that facility. Wright v. Mahoney, 2003 MT 141, 316 M 173, 71 P3d 1195 (2003).

Prison Behavior Modification Plans Violative of Excessive Sanction Protection and Equal Protection — State Directed to Revise Incarceration Procedures: Walker, an inmate with diagnosed mental illness, alleged that conditions at the state prison violated constitutional sanctions against excessive punishment and equal protection guarantees because of his mental condition. Although Walker had been released from the state prison when his petition for postconviction relief was considered by the Supreme Court, the case was not moot, as the state contended, because the prison programs remained in place. The court went on to consider whether behavior modification programs used at the prison unconstitutionally exacerbated inmates' mental health conditions and concluded that they do. The plain meaning of the dignity clause in Art. II, sec. 4, Mont. Const., commands that the intrinsic worth and basic humanity of persons may not be violated, and if the particular conditions of confinement cause serious mental illness to be greatly exacerbated or deprive inmates of their sanity, those conditions then cross into the realm of psychological torture. Thus, prison behavior modification programs and living conditions in

maximum security constitute an affront to the inviolable right to human dignity and constitute cruel and unusual punishment when they exacerbate an inmate's mental health condition. The prison was directed to conform the operations of its administrative segregation units to the requirements of this opinion. Walker v. St., 2003 MT 134, 316 M 103, 68 P3d 872 (2003). See also Campbell v. Mahoney, 2001 MT 146, 306 M 45, 29 P3d 1034 (2001), and Wilson v. St., 2010 MT 278, 358 Mont. 438, 249 P.3d 28.

Authority to Condition Parole on Participation in Sexual Offender Program — Parole Considered Privilege, Not Right: McDermott pleaded guilty to four counts of assault and one count of bail-jumping in exchange for dismissal of four counts of incest and was sentenced to 30 years in prison. Because of the violent nature of the assaults and the fact that they were committed against young victims, the sentencing court found that McDermott was a substantial danger to society and designated him a dangerous offender for purposes of parole. When he began serving his sentence, an initial needs assessment concluded that he suffered from severe sexual problems and recommended participation in the prison sexual offender program (SOP). McDermott chose not to participate in the SOP, and the Board of Pardons and Parole later considered that fact during evaluations for placement in a prerelease center and for purposes of parole and inmate classification. The Board recommended that McDermott participate in the SOP to enhance success on parole. McDermott again declined to participate and, as a result, four points were added to his classification status for noncompliance with the Board's recommendation. McDermott then petitioned the Supreme Court for a writ of habeas corpus ordering his immediate release and rescinding the four points. McDermott argued that the Board did not have the authority to consider his lack of participation in the SOP as a basis for denying his early release on parole, citing St. v. Ommundson, 1999 MT 16, 293 M 133, 974 P2d 620 (1999), and St. v. Field, 2000 MT 268, 302 M 62, 11 P3d 1203 (2000). The Supreme Court distinguished both Ommundson and Field, noting that under Montana and federal precedents, parole is a privilege, not a right. Because parole is granted as a matter of grace rather than right, the state may offer that grace under and subject to conditions that are considered most conducive to accomplish the desired purpose. Rather than restricting the Board's authority to set conditions precedent to parole, 46-23-201 obligates the Board to ensure that no prisoner is released on parole who cannot meet the statutory criteria, and the Board may also consider factors that may not be considered by the District Court at trial and sentencing and evidence of offenses that were charged in dismissed counts. Even though McDermott was not a convicted sex offender, he did have four counts of incest dismissed and was identified as having severe sexual problems. Thus, his completion or lack of completion of the SOP was pertinent to his ability to be released without detriment to the community and to fulfill the obligations of a law-abiding citizen. The Board was well within its authority to consider McDermott's failure to enroll in the SOP when his petition for early release was denied. McDermott's petition for a writ of habeas corpus was denied. McDermott v. McDonald, 2001 MT 89, 305 M 166, 24 P3d 200 (2001). See also Christopher v. U.S. Bd. of Pardons, 589 F2d 924 (7th Cir. 1978), and Robinson v. Hadden, 723 F2d 59 (10th Cir. 1983).

Liberty Interest in Parole by Inmates Who Committed Offenses Prior to 1989 — Due Process Consideration: As a general rule, inmates have no liberty interest in parole. However, prior to amendment in 1989, 46-23-201 required the Board of Pardons (now Board of Pardons and Parole) to release on parole any prison inmate when the Board determined that there was a reasonable probability that the prisoner could be released without detriment to the prisoner or the community. The U.S. Supreme Court subsequently held in Bd. of Pardons v. Allen, 482 US 369 (1987), that this mandatory statutory language created a liberty interest in parole that was protected by the federal constitutional due process clause. Although the mandatory language was removed in 1989, the Montana Supreme Court later held in Worden v. Bd. of Pardons & Parole, 1998 MT 168, 289 M 459, 962 P2d 1157 (1998), that inmates who committed offenses prior to 1989 continue to enjoy a federally protected liberty interest in parole. In the present case, McDermott committed his offenses in 1985 and 1986, so pursuant to Allen and Worden, his liberty interest in parole could not be denied without due process. McDermott v. McDonald, 2001 MT 89, 305 M 166, 24 P3d 200 (2001), followed in George v. Bd. of Pardons, 2001 MT 163, 306 M 115, 30 P3d 1065 (2001).

Defendant Incarcerated Prior to Sentencing Entitled to Ten Days a Month of Good Time Credit: Sebastian argued that the policy of awarding 10 days of good time allowance a month for presentence incarceration served under 53-30-105 (now repealed) constituted a wealth-based classification, in violation of MacPheat v. Mahoney, 2000 MT 62, 299 M 46, 997 P2d 753 (2000). The Supreme Court noted that it had previously addressed the good time issue in Corcoran v. Mahoney, No. 00-346 (July 2000), an unpublished opinion holding that because security levels

in county jails are consistent with close custody security classifications at the state prison, defendants who are incarcerated prior to sentencing are entitled to 10 days a month of good time credit under the former good time statute. The court found the policy determination that pretrial detainees are entitled to no more than 10 days of good time credit to be reasonable and declined to apply the classification system in MacPheat to pretrial detainees. Sebastian v. Mahoney, 2001 MT 88, 305 M 158, 25 P3d 163 (2001).

Petition for Writ of Habeas Corpus Not Necessarily Mooted by Release of Petitioner From Physical Custody: Sebastian argued that he was entitled to a writ of habeas corpus because he was being unlawfully imprisoned under the Department of Corrections good time policy. The state contended that the legality of Sebastian's imprisonment was moot because he had been released from incarceration. Sebastian argued that even though he was released from prison, he was still suffering under an unlawful restraint on his liberty because the discharge date of the 10-year suspended sentence that he was serving depended on good time credit to which he was entitled. The Supreme Court noted that release from custody may moot some habeas corpus petitions because the relief requested, i.e., release from unlawful imprisonment, can no longer be granted. However, release from physical custody does not necessarily moot the petition when the court can still grant effective relief. In this case, the completion date of Sebastian's suspended sentence depended on the discharge date of his term of confinement and was thus based on the jail good time credit to which he was entitled. If the good time policy was in fact unlawful and its application to Sebastian's prison term led to an erroneous discharge date, the completion date of the suspended sentence would also be incorrect. Thus, despite the fact that Sebastian was no longer imprisoned, it was still within the power of the court to grant relief to prevent the possible unlawful restraint on Sebastian's liberty, so the petition was not moot, and the court went on to address the merits of the petition. Sebastian v. Mahoney, 2001 MT 88, 305 M 158, 25 P3d 163 (2001).

Mental Disease Not Affecting Ability to Appreciate Criminality of Behavior — Prison Sentence, Rather Than Hospitalization, Appropriate: Smith contended that the District Court erred in concluding that he did not suffer from a mental disease or defect that rendered him unable to appreciate the criminality of his behavior or to conform it to the requirements of law, pursuant to 46-14-311 and 46-14-312, and that because of his personality disorder, he should have been sentenced to the state hospital rather than the state prison for felony assault and assault on a peace officer in order to satisfy state principles of prevention and reformation in light of his unique and particular posture as a mentally ill person. However, even assuming that Smith had a mental disease or defect, the District Court found that Smith's mental condition did not have the effect of rendering him unable to appreciate the criminality of his behavior or to conform it to the requirements of law. Smith failed to satisfy this additional element of 46-14-311, so hospitalization was not required under 46-14-312. St. v. Smith, 2000 MT 57, 299 M 6, 997 P2d 768, 57 St. Rep. 272 (2000).

Sentencing Condition Required to Have Correlation or Connection to Underlying Offense: Ommundson pleaded guilty to felony DUI. In imposing sentence, the District Court considered a presentence investigation that documented Ommundson's criminal history, which included more than 10 convictions for indecent exposure. The court also considered a sex offender evaluation, which determined that Ommundson qualified for community-based treatment. The court committed Ommundson to the Department of Corrections for 54 months, with all but 6 months suspended on condition that Ommundson participate in a sex offender treatment program and not have any contact with children without adult supervision. Ommundson did not object to the condition prohibiting contact with children, so that issue was not cognizable on appeal. However, on the issue of whether the District Court had authority to impose a condition of participation in a sex offender program as a penalty for DUI, the Supreme Court held that 46-18-202 allows only the imposition of sentencing limitations reasonably related to the objectives of rehabilitation and the protection of the victim and society. That authority is broad, but not without limit. In order to be reasonably related, a sentencing limitation or condition must have some correlation or connection to the underlying offense for which the defendant is being sentenced. In the present case, the requirement that Ommundson participate in a sex offender program was not reasonably related to the rehabilitation of a DUI offender or to the protection of society from drunk drivers. The Supreme Court reversed the part of Ommundson's sentence requiring that he participate in a sex offender program. St. v. Ommundson, 1999 MT 16, 293 M 133, 974 P2d 620, 56 St. Rep. 70 (1999), following St. v. Sullivan, 197 M 395, 642 P2d 1008, 39 St. Rep. 412 (1982), and St. v. Black, 245 M 39, 798 P2d 530, 47 St. Rep. 1677 (1990), distinguishing Dahlman v. District Court, 215 M 470, 698 P2d 423, 42 St. Rep. 550 (1985), St. v. Shaver, 233 M 438, 760 P2d 1230, 45 St. Rep. 1617

(1988), and St. v. Blanchard, 270 M 11, 889 P2d 1180, 52 St. Rep. 54 (1995), and followed in St. v. Horton, 2001 MT 100, 305 M 242, 25 P3d 886 (2001), St. v. Setters, 2001 MT 101, 305 M 253, 25 P3d 893 (2001), St. v. Smith, 2001 MT 111, 305 M 298, 27 P3d 39 (2001), St. v. Watson, 2001 MT 143, 306 M 33, 29 P3d 1026 (2001), and St. v. Armstrong, 2006 MT 334, 335 M 131, 151 P3d 46 (2006). In St. v. Ashby, 2008 MT 83, 342 M 187, 179 P3d 1164 (2008), the Ommundson nexus rule was expanded to allow a sentencing judge to impose a particular condition of probation as long as the condition has a nexus either to the offense for which the offender is being sentenced or to the offender. However, offender-related conditions may be imposed only in cases in which the history or pattern of conduct to be restricted is recent and significant or chronic. A passing, isolated, or stale instance of behavior or conduct is insufficient to support a restrictive probation condition imposed in the name of offender rehabilitation. Ashby was followed in St. v. Bullplume, 2013 MT 169, 370 Mont. 453, 305 P.3d 753.

Discovery of Shotgun Case During Routine Walk-Through of Probationer's Residence Constituting Reasonable Grounds for Further Warrantless Search: Probationer Stucker allowed a voluntary tour of his residence by probation officers, who discovered two weapons cases in plain view in the master bedroom. One case contained a bow, which Stucker was allowed to possess under the terms of his probation; the other contained a semiautomatic shotgun, which constituted contraband under the probation conditions. The discovery of the shotgun case in plain view constituted reasonable grounds for the officers to conduct a warrantless search of the residence to determine if additional weapons were present. The District Court did not err in denying Stucker's motion to suppress the fruits of the search. St. v. Stucker, 1999 MT 14, 293 M 123, 973 P2d 835, 56 St. Rep. 65 (1999).

Illegal Search of Person but Lawful Search of Vehicle — Vehicle Search Upheld as Probation Search and Not "Fruit of Poisonous Tree": Deputy Turner watched New make several turns in his vehicle without signaling and, after determining by his vehicle license plate that New was on probation, stopped the vehicle and searched New. Upon discovering drugs in New's pocket, Turner impounded the vehicle. Detective Jacobs questioned New, and New gave Jacobs approval to search the vehicle. Then Jacobs talked to Forsyth, New's probation officer, who conducted the search of New's vehicle with Jacobs. Turner's search of New's pockets was subsequently held illegal but the District Court refused to quash evidence taken from the vehicle as a result of Forsyth's search. The Supreme Court affirmed, holding that the search of the vehicle was not the "fruit of the poisonous tree", the illegal personal search of New, but was justified upon the independent grounds that Forsyth had previously determined that he wanted to search New's vehicle because of pending charges of violations of the conditions of New's probation. St. v. New, 276 M 529, 917 P2d 919, 53 St. Rep. 510 (1996).

Restoration of Rights — Federal Limit: The automatic restoration of rights under Montana law does not preclude the federal government from regulating the possession of firearms by a convicted felon. U.S. v. Dahms, 938 F2d 131 (9th Cir. 1991).

Warrantless Search by Probation Officer Lawful if Based on Reasonable Suspicion of Probation Violation: Defendant's deferred sentence was revoked after a warrantless search initiated by her probation officer pursuant to the terms of her probation revealed that defendant possessed dangerous drugs in violation of the terms of her probation. Search by a probation officer of his probationer's car, premises, or other belongings is lawful if it is based on the probation officer's reasonable suspicion of a probation violation. St. v. Small, 235 M 309, 767 P2d 316, 46 St. Rep. 9 (1989), followed in St. v. New, 276 M 529, 917 P2d 919, 53 St. Rep. 510 (1996), and St. v. Olmsted, 1998 MT 301, 292 M 66, 968 P2d 1154, 55 St. Rep. 1235 (1998).

Warrantless Police Search of Probationers' Car and Residence Allowed — Reasonable Grounds Standard — Fogarty Overruled: A police officer's warrantless search of the probationers' car and residence based on the officer's observations and with permission of the probation officer, in compliance with probationary conditions, did not violate the fourth amendment. St. v. Fogarty, 187 M 393, 610 P2d 140 (1980), is specifically overruled and the "reasonable grounds" standard of Griffin v. Wis., 483 US 868, 97 L Ed 2d 709, 107 S Ct 3164 (1987), is adopted. Police cooperation with probation officers is to be encouraged as an important aid to effective administration of the probation system. To impose a warrant requirement for residential searches, on the basis of rights enjoyed by persons not on probation, would artificially raise a probationer's privacy interest to a level inconsistent with conditional liberty status. St. v. Burke, 235 M 165, 766 P2d 254, 45 St. Rep. 2278 (1988), followed in St. v. Hawkins, 239 M 404, 781 P2d 259, 46 St. Rep. 1786 (1989), St. v. Boston, 269 M 300, 889 P2d 814, 51 St. Rep. 1142 (1994), St. v. Burchett, 277 M 192, 921 P2d 854, 53 St. Rep. 590 (1996), St. v. Stucker, 1999 MT 14, 293 M 123, 973 P2d 835, 56 St. Rep. 65 (1999), and St. v. Moody, 2006 MT 305, 334 M 517, 148 P3d 662 (2006), and clarified,

regarding the fact that probation officers, other than the one assigned to a probationer, are not precluded from authorizing a probationary search, in St. v. Olmsted, 1998 MT 301, 292 M 66, 968 P2d 1154, 55 St. Rep. 1235 (1998). See also St. v. Charlie, 2010 MT 195, 357 Mont. 355, 239 P.3d 934, and St. v. Fischer, 2014 MT 112, 374 Mont. 533, 323 P.3d 891.

Ineligibility for Parole Not in Conflict With Rehabilitation: Defendant asserted that his designation as ineligible for parole conflicted with society's desire to rehabilitate him because serving a minimum 40-year term would make him a permanent public charge, discourage his pursuit of education and development of skills, and wither his religious faith. However, it was within the discretion of the District Court, in light of the violence associated with defendant's crimes and the frequency of their commission, to restrict defendant's opportunity for parole in order to protect society. In re Petition of Arledge, 232 M 450, 756 P2d 1169, 45 St. Rep. 1188 (1988).

Inability to Pay Restitution — Not Violative of Equal Protection in Light of State Correctional Policy and Previous Offenses: A defendant convicted of felony theft was sentenced to 5 years in the state prison with 2 years suspended and, in addition, was ordered to pay restitution. The defendant asserted on appeal that he was sentenced to a prison term because of his indigency, in violation of his right to equal protection. However, the District Judge specifically noted the prison term was necessary to protect the property of others and that the defendant's criminal record contained three previous misdemeanor thefts. The Supreme Court found these to be sufficient reasons to support incarceration and upheld the state's correctional policy outlined in 46-18-101. The court noted that the sentence was well within the parameters of punishment for felony theft in 45-6-301. Finding no abuse of discretion or violation of the defendant's constitutional rights, the District Court was affirmed. St. v. Carroll, 220 M 466, 716 P2d 212, 43 St. Rep. 531 (1986).

Lengthy Sentence — Based on Prevention of Future Crimes: On conviction of deliberate homicide the defendant received the maximum allowable sentence, 100 years, and was determined ineligible for designation as a nondangerous offender, or for parole. On appeal, he argued the sentence was not based on any credible evidence presented at the sentencing hearing or contained in the presentence report, but was motivated by the trial court's desire for vengeance on behalf of the victim's family. The court indicated it imposed the sentence because it believed defendant should be removed from society. The Supreme Court held that the sentence did not violate Art. II, sec. 28, Mont. Const., which prior to the 1998 amendment required that "laws for the punishment of crime shall be founded on the principles of prevention and reformation", nor did it violate 46-18-101, which provides that the policy behind sentencing is the rehabilitation, if possible, of convicts. Article II, sec. 28, Mont. Const., allows a trial court in its discretion to base a sentence on the principle of prevention of future crimes. This includes the power to remove a person from society, as the court found necessary in this case. Also, the sentence is within the permissible statutory range, and in the absence of clear abuse of discretion is properly reviewed by the Sentence Review Division. St. v. Beach, 217 M 132, 705 P2d 94, 42 St. Rep. 1080 (1985), followed in St. v. Valcourt, 254 M 174, 835 P2d 753, 49 St. Rep. 686 (1992).

Constitutional Requirement Satisfied by Sentence Founded on Prevention and Reformation: The defendant, who has an extensive record of driving under the influence of alcohol, was convicted on three counts of driving under the influence (DUI). She was sentenced to serve time in the county jail. The defendant contends her sentence violates the constitution as it does not provide for her rehabilitation. Article II, sec. 28, Mont. Const., which prior to the 1998 amendment required that laws for punishment of crime be founded on the principles of prevention and reformation. The defendant's sentence furthers the prevention principle through her incarceration, addresses the reformation principle through ordering her to abstain from the use of alcohol, and provides the avoidance of further incarceration as an incentive to reform. Thus, the constitutional requirement is satisfied. St. v. Bruns, 213 M 372, 691 P2d 817, 41 St. Rep. 2178 (1984).

Objection to Sentence for Punishment Rather Than Prevention and Reformation — Lack of Proof: Objection that sentence was for punishment rather than for prevention of further crime and reformation of defendant was clearly without merit, as there was no evidence or authority cited by appellant to establish that the sentence will not deter him or others from future wrongful conduct or that the sentence would not lead to reformation. St. v. Stroud, 210 M 58, 683 P2d 459, 41 St. Rep. 919 (1984).

Mention of "Setting an Example" at Sentencing — Not Error Viewed in Context: Although the trial court did mention "setting an example" when imposing sentence, that is not a reason for remanding for resentencing as a violation of Art. II, sec. 28, Mont. Const., because the judge's use of the presentencing report and his reasons for the length of the sentence indicate no impropriety in the sentencing. St. v. DeSilva, 209 M 169, 679 P2d 1237, 41 St. Rep. 620 (1984).

Persistent Offender Statute:

Article II, sec. 28, does not prevent increases in punishment for repeat offenders, whether under the persistent felony offender statutes or otherwise. Thus, where the defendant was convicted under 45-8-316 of carrying a concealed weapon, the increase in his sentence allowed by that section because of a prior felony conviction was not unconstitutional. St. v. Sanders, 208 M 283, 676 P2d 1312, 41 St. Rep. 338 (1984).

Article II, sec. 28, Mont. Const., grants an offender who has served his sentence a fair opportunity to enjoy the rights that law-abiding citizens enjoy. It does not grant him immunity from being treated as a persistent felony offender. St. v. Radi, 176 M 451, 578 P2d 1169 (1978). See St. v. Gafford, 172 M 380, 563 P2d 1129 (1977).

Rather than involving any civil or political "right", increasing the sentence of a persistent felony offender is entirely consistent with the constitutional mandate that "laws for the punishment of crime shall be founded on the principles of prevention and reformation". St. v. Maldonado, 176 M 322, 578 P2d 296 (1978).

Escalating Fines for Parking Violations — Unconstitutional: An escalating fine schedule for parking violations where the amount to be paid depends on the length in the delay in paying after being cited is in violation of the basic principle of law that punishment must be for the violation and proportional to the gravity of the offense and hence is violative of Art. II, sec. 28, Mont. Const., which provides that laws for punishment of crime shall be founded on principles of prevention and reformation. Missoula v. Shea, 202 M 286, 661 P2d 410, 40 St. Rep. 91 (1983).

Alcoholics — Refraining as Condition of Parole or Suspended Sentence: One who, because of addiction or character disorder, is unable to control his excessive drinking of alcoholic beverages has no constitutional or statutory right to release free from limitations on his use of alcohol, either on parole or pursuant to a suspended sentence. There was no merit to appellant's contention that it was vindictive and unreasonable or illegal to require him, an acknowledged alcoholic, to refrain from drinking as a condition of his probation or parole. St. v. Sullivan, 197 M 395, 642 P2d 1008, 39 St. Rep. 412 (1982), followed, with regard to the requirement for nexus between the sentencing limitation or condition and the underlying offense, in St. v. Ommundson, 1999 MT 16, 293 M 133, 974 P2d 620, 56 St. Rep. 70 (1999).

Death Penalty — Public Attitude Considered: Petitioner alleged that the death penalty is imposed so rarely that it does not deter crime and serves no legitimate state interest. The U.S. Supreme Court has held that the death penalty is not per se cruel and unusual. Inhumane punishment is forbidden, as is punishment that does not suit the crime. The court looks to "objective indicia that reflect the public attitude toward a given sanction", because an assessment of contemporary values concerning the infliction of a challenged sanction is relevant to the application of the eighth amendment to the United States Constitution (Art. II, sec. 22, Mont. Const.). Montana voters elected to retain capital punishment, and the Legislature voted to reject an attempt to change the penalty to a different means of inflicting death. The State appears to have retained a legitimate interest in capital punishment. The District Judge properly dismissed the claim. Fitzpatrick v. St., 194 M 310, 638 P2d 1002, 38 St. Rep. 1448 (1981).

Sentencing — Restrictions on Parole and Furlough Permissible: Section 46-18-202 provides that whenever a sentence of imprisonment in the state prison for a term exceeding 1 year is given, the court may impose the restriction that the defendant be ineligible for parole and participation in the prisoner furlough program while serving his term. If the court finds the restriction necessary, it shall impose the restriction as part of the sentence and set forth its reasons for imposing the statute. It does not permit District Judges to add any time beyond the statutory maximum underlying the offense. Petitioners, who both pleaded guilty, were represented by counsel and were given presentence hearings. Parole and participation in the furlough program are privileges, not rights. Petitioners were not denied due process or equal protection in being sentenced under 46-18-202. Cavanaugh v. Crist, 189 M 274, 615 P2d 890, 37 St. Rep. 1461 (1980).

Unlimited Search and Polygraph Provisions on Probation Unconstitutional: As conditions for imposition of a suspended sentence, defendant was required to submit to an unlimited search provision by any lawful authorities and to submit to a polygraph examination upon the request of any law enforcement officer. The Supreme Court when reviewing the revocation of defendant's suspended sentence held that the unlimited polygraph examination condition was overly broad and thus an invalid condition of probation and that the unlimited warrantless search provision is an unconstitutional condition of probation. The Supreme Court said that a sentencing court cannot inject prosecuting attorneys or law enforcement officials into the probation process by granting them direct rights to search the probationer, his home, or vehicle. A type of probable cause or some identifiable reason is required before a search clause may be exercised to search

the probationer or his vehicle. The legal interests of innocent third persons living with a probationer are to be protected by requiring a search warrant before searching the probationer's home. Polygraph examinations as a condition of probation can be effectively contained within constitutional parameters by confining the right to demand a polygraph examination to the probation officer. St. v. Fogarty, 187 M 393, 610 P2d 140 (1980), overruled in St. v. Burke, 235 M 165, 766 P2d 254, 45 St. Rep. 2278 (1988).

Review of Death Sentence — Disproportionate Application: The Supreme Court, in reviewing a death sentence to determine whether it is disproportionate, reviews the circumstances of the crime of which the defendant is accused and, in light of those circumstances, the judgment and the sentence thereupon imposed. It examines cases involving similar crimes to make certain that, as far as the defendant in this particular case is concerned, there has been no discriminatory action on the part of the sentencing judge, no abuse of discretion by the sentencing judge, and that the sentencing judge has considered and applied fairly and without discrimination the applicable law. The Supreme Court looks for the even-handed application of death sentences without regard to sex, color, creed, or race or any other discriminating consideration. When this has occurred, as here, the death sentence must be upheld. St. v. Coleman, 185 M 299, 605 P2d 1000 (1979), followed in St. v. Langford, 248 M 420, 813 P2d 936, 48 St. Rep. 492 (1991).

Failure to Reenact Capital Punishment Authorization: The failure to specifically reenact the authorization for the death penalty contained in Art. III, sec. 24, 1889 Mont. Const., might have significance had not the Constitutional Convention given the people the option of adopting into the 1972 Constitution language expressly prohibiting the enactment of the death penalty. The people voted to retain the death penalty. Such a vote negates any argument that the death penalty violates contemporary standards of decency. St. v. McKenzie, 171 M 278, 557 P2d 1023 (1976), followed in St. v. Langford, 248 M 420, 813 P2d 936, 48 St. Rep. 492 (1991), and in St. v. Gollehon, 262 M 1, 864 P2d 249, 50 St. Rep. 1250 (1993).

DECISIONS UNDER 1889 CONSTITUTION

Penalty Assessment on Forfeited Bail and Fines: Insofar as statute provided for penalty assessment on forfeited bail and on fines, it was void as violation of constitutional provision that laws for punishment of crime should be founded on principles of reformation and prevention. State ex rel. Sanders v. Butte, 151 M 171, 441 P2d 190 (1968).

Attorney General's Opinions

Validity of Ordinance Allowing Escalating Penalty for Failure to Obtain Business License: A Lewistown city ordinance that allows an escalating monthly penalty for failure to obtain a local business license is valid despite Missoula v. Shea, 202 M 286, 661 P2d 410, 40 St. Rep. 91 (1983). The Shea case determined that escalating penalties for parking violations were criminal penalties and violative of Art. II, sec. 28, Mont. Const. In analyzing the Lewistown ordinance, the Attorney General observed that the crucial issue is whether the penalty imposed is civil or criminal in nature. Applying the five factors outlined in Brown v. Multnomah County District Court, 570 P2d 52 (Ore. 1977), he concluded that the instant ordinance imposed civil penalties and that the ordinance was valid. 40 A.G. Op. 75 (1984).

Official Misconduct Conviction — Right to Run for Subsequent Term: Section 45-7-401, providing that a public servant convicted of official misconduct "shall permanently forfeit his office", mandates forfeiture of the rest of his term of office and forbids reinstatement, reappointment, or reelection to that term but does not bar him from running for another term of that office after state supervision for the offense has ended. To conclude that 45-7-401 prevents him from running for a subsequent term after the end of state supervision would violate this section's provision for full restoration of rights upon termination of state supervision for an offense against the state. 39 A.G. Op. 61 (1982).

Prisoner Voting Rights: No person may vote in the state of Montana while serving a sentence in a penal institution resulting from conviction of a felony. 37 A.G. Op. 125 (1978).

Law Review Articles

The Death Penalty in Montana: A Violation of the Constitutional Right to Individual Dignity, Eklund, 65 Mont. L. Rev. 135, (2004).

Dam the RFRA at the Prison Gate: The Religious Freedom Restoration Act's Impact on Correctional Litigation, Cooper, 55 Mont. L. Rev. 325 (1995).

Section 29. Eminent domain.

Convention Notes

Retains provisions in 1889 constitution on eminent domain and expands its protection by guaranteeing that a property owner who goes to court and is awarded more money than offered for his property being condemned will be reimbursed for the necessary expenses of the lawsuit (such as appraiser and attorneys fees).

Compiler's Comments

Former Constitutional Provision: This section is similar to Art. III, sec. 14, 1889 Mont. Const.

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DECISIONS UNDER 1972 CONSTITUTION

Attorney Fees on Prior Appeal: The plaintiffs sued the city related to the widening of a city road and the taking of their property for that purpose. The city lost in District Court and appealed the decision to the Supreme Court. The Supreme Court affirmed in part and reversed in part and remanded the case to the District Court to recalculate the amount of damages owed to the plaintiffs. The city claimed that the plaintiffs were not entitled to fees and costs incurred during the appeal because they did not prevail on their cross-appeal. The plaintiffs argued that they were the prevailing party and thus were entitled to fees and costs incurred during both the underlying litigation and the appeal. The District Court agreed and awarded fees and costs as requested by the plaintiffs. The city appealed. The Supreme Court affirmed the award, noting that the plaintiffs had a constitutional right to be made whole in a condemnation case in which the landowner prevails. Wohl v. Missoula, 2014 MT 310, 377 Mont. 148, 339 P.3d 58.

Lis Pendens Not Unconstitutional Taking: The filing of a lis pendens does not constitute an unconstitutional taking because a lis pendens does not create substantive rights; it only serves to put prospective purchasers of real property on notice of a pending lawsuit involving a title issue. LeMond v. Yellowstone Dev., LLC, 2014 MT 181, 375 Mont. 402, 336 P.3d 345.

Inverse Condemnation Compensation Based on Value of Land When Land Is Seized: Due to inconsistencies between original surveys and actual square footage found near a right-of-way, Missoula claimed extra area belonged to the city rather than to adjacent landowners, and during litigation, the city completed improvements on the disputed land. The District Court determined that landowners should be compensated for the encumbrance and awarded compensation based on the amount the land was worth after the improvements. On appeal, the city cited 70-30-302, which provides that compensation should be based on value on the date of the summons. The Supreme Court declined to apply 70-30-302 to an inverse condemnation, noting that the proper compensation for an inverse condemnation is the value of the land at the time it is seized. Wohl v. Missoula, 2013 MT 46, 369 Mont. 108, 300 P.3d 1119.

Landowners Entitled to Compensation for Property Taking: Due to inconsistencies between original surveys and actual square footage found near a right-of-way, Missoula claimed extra area belonged to the city rather than to adjacent landowners, and during litigation, the city seized the land and completed improvements on it. The District Court determined Missoula was not entitled to claim the extra area under its right-of-way. On appeal, Missoula claimed that the landowners were not entitled to compensation because the District Court had enlarged the landowners' land and the landowners had not paid taxes on the increase. The Supreme Court found that no legal evidence was presented regarding the relevance of tax payment for the compensation for takings and that the District Court had made no findings as to payment of taxes. During trial, the parties stipulated that the land in question belonged to the landowners. The litigation question had been whether the excess land was encumbered by a city right-of-way, not over the ownership of the land, so the landowners were properly entitled to compensation. Wohl v. Missoula, 2013 MT 46, 369 Mont. 108, 300 P.3d 1119.

Application for Mining Permit Not Protected Entitlement When Department Retains Discretion to Deny Application — Compensation May be Required for Certain Zoning Regulations: Helena Sand and Gravel, Inc., (HSG) received a gravel mining permit from the Department of Environmental Quality (DEQ) that applied to 110 of its approximately 421 acres located north of East Helena. Subsequently, the Lewis and Clark County Board of Commissioners adopted a special district based on a citizens' petition that included all of HSG's property and prohibited

sand and gravel mining within the district's boundaries. HSG brought suit alleging that the county had improperly prohibited HSG from mining sand and gravel on its property. The District Court granted summary judgment to the county and concluded that HSG failed to show a protected entitlement to a mining permit, but the court did not separately consider HSG's ownership interest in the real property. On appeal, HSG first asserted that DEQ would have been required by statute to issue HSG a permit or permit amendment for the remaining 311 acres, and thus the regulations adopted by the Board amounted to a taking of private property. The Supreme Court disagreed and held that the statutory language gave DEQ leeway to withhold its approval of a permit application unless the application satisfied 14 separate requirements outlined in 82-4-434. Because DEQ retained discretion to deny unacceptable applications, HSG did not have a constitutionally protected property interest in its right to apply for a mining permit. Additionally, HSG asserted that the impact of the zoning regulations on the value of its property was a taking. The court concluded that under its decision in Kafka v. Mont. Dept. of Fish, Wildlife & Parks, 2008 MT 460, 348 Mont. 80, 201 P.3d 8, because justice and fairness may require that a person deprived of an established property interest be compensated for the loss even when that compensable property interest retains some economic value, the case had to be remanded for the District Court to consider the magnitude of the economic impact of the county's regulations and the degree to which those regulations interfered with HSG's legitimate property interests. Helena Sand & Gravel, Inc. v. Lewis & Clark County Planning & Zoning Comm'n, 2012 MT 272, 367 Mont. 130, 290 P.3d 691.

Denial of Subdivision — No Taking: Plaintiff claimed that the county's denial of his subdivision constituted a regulatory taking. The Supreme Court affirmed the District Court's grant of summary judgment to the county, concluding that the plaintiff could not allege economic loss when he purchased his property fully aware that he could subdivide the land only with county approval. Richards v. Missoula County, 2012 MT 236, 366 Mont. 416, 288 P.3d 175.

No Protected Property Interest in Use of Public Right-of-Way — Inverse Condemnation Claim Denied: Plaintiff property owner filed an inverse condemnation action against the Department of Transportation after its reconstruction of a portion of highway adjacent to the plaintiff's property significantly reduced the amount of space between the plaintiff's garage and the highway, although it did not encroach on the plaintiff's property itself. The Supreme Court held that no taking occurred since the plaintiff did not have a protected property interest in the use of the public right-of-way. Malpeli v. St., 2012 MT 181, 366 Mont. 69, 285 P.3d 509, distinguishing St. Highway Comm'n v. Keneally, 142 Mont. 256, 384 P.2d 770 (1963).

Implied Easement by Necessity — Negated by Eminent Domain Power: In the context of federal checkerboard land grants to railroads, the claimant of an implied easement by necessity traced common ownership of the dominant and servient parcels to the federal government, and the necessity for the easement arose when the parcels were severed from the federal government's common ownership, thus satisfying the unity of ownership requirement. However, the easement failed because the United States' power of eminent domain negated the "strict necessity" requirement, and the claimant failed to produce evidence regarding the government's intent to reserve an easement and its inability to condemn an easement. Yellowstone River, LLC v. Meriwether Land Fund I, LLC, 2011 MT 263, 362 Mont. 273, 264 P.3d 1065.

Public Utility — Authority for Condemnation: In a condemnation proceeding, the District Court dismissed a public utility's complaint for condemnation on the basis that the utility did not possess the power of eminent domain and had no authority to take private property. The Supreme Court reversed on the basis that the District Court's order conflicted with HB 198 (Ch. 321, L. 2011), which clarified a public utility's eminent domain power, codified that authority into the Major Facility Siting Act, and applied retroactively to the issues in the case. MATL, LLP v. Salois, 2011 MT 126, 360 Mont. 510, 255 P.3d 158.

City Council Denial of Subdivision Exemption Not Violative of Constitutional Protections: The Missoula City Council denied plaintiffs' applications for exemptions from subdivision requirements, and plaintiffs appealed on grounds that denial of the applications constituted violations of constitutional rights of equal protection and public participation, was a taking, and was a tortious violation of the city council's statutory duties. The District Court granted summary judgment for the city on all the claims and plaintiffs appealed, but the Supreme Court affirmed. The equal protection argument was merely a bald assertion that was largely unclear and poorly supported, failing to demonstrate a discriminatory purpose, and was properly dismissed on summary judgment. The takings claim failed because plaintiffs never possessed a right to obtain an exemption, but instead only lost the opportunity to obtain an exemption, and the discretion to grant or deny the exemption was properly exercised by the city council. Plaintiffs raised the

public participation claim in District Court but failed to discuss the issue in briefs on appeal, so the Supreme Court declined to consider the issue. The claim of a tortious violation of the city council's statutory duties also failed as a cognizable negligence claim because plaintiffs failed to prove that the council's actions damaged plaintiffs. Roe v. Missoula, 2009 MT 417, 354 M 1, 221 P3d 1200 (2009). See also Gudmundsen v. State ex rel. Mont. St. Hosp. Warm Springs, 2009 MT 56, 349 M 297, 203 P3d 813 (2009).

Res Judicata Applicable to Action Regarding County's Failure to Transfer Conditional Use Permit: Plaintiff filed an 18-count complaint for damages contending that Flathead County did not follow zoning regulations and violated plaintiff's due process and property rights when the County Board of Adjustment failed to transfer a conditional use permit to plaintiff to allow a gravel pit on property plaintiff purchased. However, plaintiff's petition for a writ of mandamus to compel the Board to transfer the conditional use permit was properly dismissed (see Beasley v. Flathead County Bd. of Adjustment, 2009 MT 120, 350 M 171, 205 P3d 812 (2009)), so the County argued that the damage complaint was res judicata. Plaintiff had appealed the Board's decision pursuant to 76-2-227 but moved to dismiss the appeal with prejudice after a local citizens' group intervened to defend the Board's decision. The District Court held that the damage complaint involved the same issues as the appeal of the decision to deny transfer of the conditional use permit, so the damage complaint was dismissed as res judicata. On appeal, the Supreme Court affirmed. Plaintiff failed to establish a protected property interest in obtaining the transfer of the permit, so the constitutional claims were properly dismissed. Likewise, plaintiff's purported tort claims involved the same subject matter and issues as the prior appeal, so res judicata applied. Plaintiff's opportunity to challenge the legality of the Board's decision to deny transfer of the permit ended when plaintiff elected to dismiss the appeal under 76-2-227 with prejudice. Section 76-2-227 remained an available remedy if plaintiff chose to apply for a conditional use permit in his own right and the application was denied, but that remedy was no longer available for the current challenges. Beasley v. Flathead County, 2009 MT 121, 350 M 177, 206 P3d 915 (2009).

Absent Disputed Facts, Liability in Takings Case Considered Question of Law for Court, Not Question of Fact for Jury: In a case of first impression, the Supreme Court was presented with the issue of whether liability for a categorical or regulatory taking was a question of law to be decided by a court or a question of fact for a jury. While declining to adopt a bright-line rule regarding the role of the jury in the takings context, the court noted that given the primarily legal nature of takings inquiries, a jury determination should be required only in cases in which resolution of a factual dispute is necessary to determine whether a taking has occurred. In the present case, the District Court determined that the issue of takings liability was a question of law that, absent factual disputes, would be determined by the court, and that if liability was found, the question of damages would be presented to the jury. Under these particular circumstances, the District Court did not err in deciding the takings liability question without the presence of a jury. Buhmann v. St., 2008 MT 465, 348 M 205, 201 P3d 70 (2008).

No Categorical Takings Claim if Property Retains Beneficial Use: In a game farm takings case following the passage of Initiative No. 143, the District Court rejected the notion that plaintiffs' alternative livestock could be the object of a categorical taking pursuant to Lucas v. S. Car. Coastal Council, 505 US 1003 (1992), and plaintiffs appealed. A categorical taking occurs when a regulation or state action forces an owner to sacrifice all economically beneficial uses for the common good, leaving the property economically idle. Lucas implied that only land, not personal property, could be subject to a categorical taking, but plaintiffs cited Maritrans, Inc. v. U.S., 342 F3d 1344 (Fed. Cir. 2003), for the proposition that personal property can in fact form the basis for a categorical takings claim. Without resolving the question of whether personal property, by itself, can form the object of a categorical takings claim, the Supreme Court concluded that plaintiffs' categorical takings claim failed because the alternative livestock still retained beneficial uses following passage of the initiative. Thus, the District Court was affirmed. Buhmann v. St., 2008 MT 465, 348 M 205, 201 P3d 70 (2008).

State and Federal Constitutional Takings Protection Considered Coextensive: In a game farm takings case following the passage of Initiative No. 143, the District Court considered the rights afforded under both Art. II, sec. 29, Mont. Const., and the Fifth Amendment to the U.S. Constitution and ultimately concluded that the takings analysis based on federal law under Penn Cent. Transp. Co. v. New York City, 438 US 104 (1978), applied to the regulatory takings claim brought against the state. Plaintiffs asserted that the Montana Constitution afforded greater constitutional protection against the taking of private property than the U.S. Constitution and that the court erred in concluding otherwise. On appeal, the Supreme Court reaffirmed the position taken in Kafka v. Mont. Dept. of Fish, Wildlife & Parks, 2008 MT 460, 348 M 80, 201

P3d 8 (2008), that the takings protection in the Montana Constitution is coextensive with the protection granted under the U.S. Constitution, so a takings analysis based on federal law is to be applied to takings claims brought under either the state or federal constitution. Buhmann v. St., 2008 MT 465, 348 M 205, 201 P3d 70 (2008).

Initiative Prohibiting Fee Shooting on Game Farms Not Unconstitutional Taking: In 2000 Montana voters approved Initiative No. 143 prohibiting the shooting of alternative livestock on game farms for a fee. Plaintiff game farm owners claimed that the initiative constituted a taking of their private property by the state without compensation in violation of Art. II, sec. 29, Mont. Const., because it removed the expectation of profitability from their businesses. The District Court held that the initiative did not constitute a regulatory taking of compensable property interests in plaintiffs' lands and that plaintiffs were not entitled to compensation for damage to the goodwill and going concern value of their businesses. On appeal, the Supreme Court affirmed. Compensable property interests can exist in government-issued licenses or permits if the licenses or permits are free from express statutory language precluding the formation of a property right in combination with the presence of the right to transfer and the right to exclude. In this case, the state retained the power at all times to revoke or change plaintiffs' licenses if it chose to do so, so plaintiffs possessed no common-law property right to the licenses. Therefore, the licenses were not compensable property interests under Art. II, sec. 29, Mont. Const. Further, an expectation of profitability in a highly regulated field of business that requires a license or permit for participation is virtually never considered a compensable property interest, so plaintiffs were not entitled to compensation for damage to the goodwill and going concern value of their businesses. Plaintiffs should reasonably have anticipated that the game farm industry might be phased out because of health and safety concerns over chronic wasting disease or even that the state might make the regulatory burden so onerous that game farms would no longer be profitable enterprises, and the elimination of the in-state market for fee shooting should have been within plaintiffs' reasonable investment-backed expectations given the absence of assurances from the state on that point. That expectation factor also weighed against finding of a compensable regulatory taking of plaintiffs' alternative livestock. Kafka v. Mont. Dept. of Fish, Wildlife & Parks, 2008 MT 460, 348 M 80, 201 P3d 8 (2008), distinguishing NRG Co. v. U.S., 24 Fed. Cl. 51 (Cl. Ct. 1991), and Cienega Gardens v. U.S., 331 F3d 1319 (Fed. Cir. 2003). See also Penn Cent. Transp. Co. v. New York City, 438 US 104 (1978), Lucas v. S. Car. Coastal Council, 505 US 1003 (1992), Members of Peanut Quota Holders Ass'n, Inc. v. U.S., 421 F3d 1323 (Fed. Cir. 2005), Huntleigh USA Corp. v. U.S., 75 Fed. Cl. 642 (2007), and Buhmann v. St., 2008 MT 465, 348 M 205, 201 P3d 70 (2008).

Costs of Litigation in Inverse Condemnation Cases: In providing for costs of litigation in condemnation cases, the Montana Constitution does not distinguish between condemnation litigation initiated by a government entity and condemnation cases initiated by the property owner, and Montana statutes do not distinguish between inverse condemnation and traditional condemnation cases. The only requirement for an award of litigation expenses is that the condemnee prevail by obtaining a judgment in excess of the condemnor's pretrial offer. In the present case, defendant asserted that under 70-31-303, plaintiff was not entitled to litigation expenses in an inverse condemnation case because federal money was not involved, but the Supreme Court affirmed that litigation expenses must be awarded in inverse condemnation cases when the condemnee prevails, as provided in 70-30-305. K&R Partnership v. Whitefish, 2008 MT 228, 344 M 336, 189 P3d 593 (2008). See also Wohl v. Missoula, 2013 MT 46, 369 Mont. 108, 300 P.3d 1119.

Initiative Banning Cyanide Mining — Reverse Condemnation Against State not Justiciable in Federal Court: Initiative Measure No. 137, enacting 82-4-390, which barred use of cyanide leaching in mining, could not be the basis of a reverse condemnation action in federal court because a reverse condemnation action against a state in federal court is barred by the 11th amendment to the U.S. Constitution. The 11th amendment bar cannot be avoided under the application of Ex parte Young, 209 US 123 (1908), because reverse condemnation actions are a form of retroactive relief, not a claim for prospective relief. Seven Up Pete Venture v. Schweitzer, 523 F3d 948 (9th Cir. 2008).

Reasonable Access Not Denied by Highway Reconstruction Project — Inverse Condemnation Claim Properly Denied: Plaintiffs sued the state for inverse condemnation and taking for constructing a highway improvement project that allegedly impaired access by large trucks to plaintiffs' business on a main street in Dillon. Plaintiffs presented evidence that it was difficult for large trucks to back into plaintiffs' receiving area without encroaching on the street and running off of curbs. The state presented evidence that a large truck could access the receiving

area through curb cuts without falling off the curbs. The business manager testified that larger truck-trailer combinations could be unhooked to make them shorter and that a power unit could then push the trailers into the receiving area, that the plant was set up for pneumatic delivery and could receive almost all its products in this manner, precluding the necessity of maneuvering large trucks, and that it was possible to request delivery of the product in any size truck and trailer combination. The jury evaluated the conflicting evidence and concluded that plaintiffs' access was reasonable, and on appeal, the Supreme Court declined to disturb the verdict. Williams Feed, Inc. v. St., 2007 MT 79, 336 M 493, 155 P3d 1228 (2007).

Showing of Constitutionally Protected Property Interest Required — Federal and State Claims: Plaintiff brought property interest claims against a city and city council members on several state and federal grounds after a state liquor license was denied. The city had enacted ordinances disallowing the sale of alcohol in the city without a conditional use permit and then denied plaintiff's application for a permit. The District Court held that plaintiff's property interest claims were invalid, and plaintiff appealed. The Supreme Court noted that to establish a viable claim under 42 U.S.C. 1983, a plaintiff must first establish that it possesses a protected liberty or property interest and has a legitimate claim of entitlement to that interest. Under state due process and takings law, a plaintiff must also establish a property interest, and a property interest exists only when the Legislature has so narrowly circumscribed the issuing agency's discretion that approval of the interest is virtually assured. Receipt of a liquor license is a privilege and not a right. Plaintiff had yet to obtain a state liquor license at the time that the ordinances were passed and thus had no property interest in operating a bar, nor could plaintiff assert ultimate entitlement to a liquor license. Therefore, plaintiff's inability to demonstrate a protected property interest in operating property as a bar precluded the establishment of federal or state property claims against the city and City Council members, nor did the city deprive plaintiff of a protected property interest by enacting the ordinances or denying a conditional use permit. The District Court was affirmed. Germann v. Stephens, 2006 MT 130, 332 M 303, 137 P3d 545 (2006), following ISC Distrib., Inc. v. Trevor, 273 M 185, 903 P2d 170 (1995), and Kiely Constr. v. Red Lodge, 2002 MT 241, 312 M 52, 57 P3d 836 (2002).

Initiative Banning Cyanide Mining Not Unconstitutional Taking or Impairment of Contract — Opportunity to Apply for Mining Permit Not Property Right: Plaintiffs had an operating permit pending for a cyanide leach pit gold mine when voters passed Initiative Measure No. 137 (I-137) that prohibited cyanide mining in Montana. Plaintiffs sued on grounds that I-137 interfered with their property right in the permit, constituted an unconstitutional regulatory taking for which they should be compensated, and violated the contract clause in Art. II, sec. 31, Mont. Const. The District Court found for the state on all issues, and plaintiffs appealed, but the Supreme Court affirmed. Plaintiffs' mere opportunity to seek a mining permit did not constitute a property right, given the state's wide discretion to reject the application even without the passage of I-137. Further, I-137 did not constitute a taking because plaintiffs had not yet obtained a right to mine that the initiative took away. Moreover, even though the District Court incorrectly held that plaintiffs' corporate mining agreement was not substantially impaired by I-137, the court nonetheless correctly concluded that there was no contract clause violation because I-137 was reasonably related to the legitimate and significant public purpose of protecting the environment. Seven Up Pete Venture v. St., 2005 MT 146, 327 M 306, 114 P3d 1009 (2005).

Oil Well Not Considered Mine to Which Right-of-Way May Be Obtained Through Eminent Domain — No Condemnation Power of Private Individuals and Corporation Except Through Legislative Grant — Condemnation Statutes Strictly Construed: Plaintiff filed a federal action seeking to condemn an access easement and right-of-way across defendant's ranch land for access to drill and operate oil wells. The federal District Court certified two questions to the Montana Supreme Court regarding whether: (1) exploration and development of a federal oil and gas lease are considered a mine that constitutes a public use under 70-30-102; and (2) 82-2-201 grants the owner of a federal oil and gas lease the power, as the owner of a "mining claim", to condemn a right-of-way across land of another for access to explore and develop the lease. The Supreme Court answered both questions in the negative. Private individuals and corporations, like state agencies, have no inherent power of eminent domain, so their authority to condemn derives only from a legislative grant. Public uses for which the power of eminent domain are granted must be interpreted pursuant to the plain language set forth by the Legislature and may not be implied. Because eminent domain interferes with the fundamental constitutional right to the private ownership of real property, any statute that allows condemnation of private property must be strictly construed, giving the statute its plain interpretation but favoring the person's fundamental rights. Under the plain meaning of 70-30-102, oil wells are not considered mines to

which rights-of-way for roads may be obtained through eminent domain proceedings. Further, exploration and development of a federal oil and gas lease are not a mine that constitutes a public use, so the owner of an oil and gas lease has no power under 82-2-201 to condemn a right-of-way. McCabe Petroleum Corp. v. N Bar Ranch, LLC, 2004 MT 73, 320 M 384, 87 P3d 995 (2004), following St. v. Aitchison, 96 M 335, 30 P2d 805 (1934), and Bozeman v. Vaniman, 264 M 76, 869 P2d 790 (1994), and distinguishing Mid-Northern Oil Co. v. Walker, 65 M 414, 211 P 353 (1922), Rice Oil Co. v. Toole County, 86 M 427, 284 P 145 (1930), and Mont. Talc Co. v. Cyprus Mines Corp., 229 M 491, 748 P2d 444 (1987).

Determination of Fair Market Value Proper — Expert Testimony Properly Allowed: In condemning a parcel of defendants' property for a state highway project, the state's expert testified considering possible depreciation of the remainder of the property based on how the property was being used, the impact of any buildings on the property, no unreasonable impairment of access to the remainder of the property, comparable land sales in the area, and the value of comparable land without highway access. This testimony regarding fair market value was not considered speculative or conjectural, and the District Court properly allowed it. Dept. of Transportation v. Simonson, 2004 MT 60, 320 M 249, 87 P3d 416 (2004).

Lack of Evidence on Impact of Taking on Value of Remaining Property — Jury Instructions on Compensation for Taking of Access Proper: The District Court instructed the jury that defendants were not entitled to compensation merely because traffic access was diverted because of road construction or for defendants' loss of business resulting from the taking of a part of defendants' property. Defendants contended that the instructions were an abuse of discretion because they were not seeking compensation for access impairment, traffic diversion, or loss of business, but rather that those factors had caused severance damages when the remaining property's commercial value sustained a permanent market value loss, entitling defendants to a new trial. The Supreme Court disagreed. Defendants failed to offer any evidence of a loss of revenue from their business and the impact of the loss on the fair market value of the remainder of the property. Thus, the jury instructions did not materially affect defendants' substantial rights, and the motion for a new trial was properly denied. Dept. of Transportation v. Simonson, 2004 MT 60, 320 M 249, 87 P3d 416 (2004).

No Constitutional Right to Privacy for Nonhuman Entities — Protection of Trade Secrets Under Other Constitutional and Statutory Schemes: Montana's constitutional individual privacy exception to the public's right to know is limited to natural human individuals only and does not apply to nonhuman entities such as corporations. However, nothing in Art. II, sec. 9, Mont. Const., requires disclosure of trade secrets and other confidential proprietary information when that data is protected from disclosure elsewhere in the state or federal constitution or by statute. Great Falls Tribune v. Mont. Pub. Serv. Comm'n, 2003 MT 359, 319 M 38, 82 P3d 876 (2003), overruling Mtn. States Tel. & Tel. v. Dept. of Public Service Regulation, 194 M 277, 634 P2d 181 (1981), and its progeny to the extent that those decisions relied on the constitutional balancing test of the right to individual privacy against the public's right to examine documents or observe governmental deliberations as a basis of protecting trade secrets and other confidential proprietary information of nonhuman entities.

Denial of Application for Subdivision — Failure to State Claim for Inverse Condemnation: Madison River R.V. Ltd. (RV) applied to build a recreational vehicle park in Ennis, but the application was denied. RV's petition to the District Court included a claim that denial of the project amounted to an inverse condemnation of RV's property without just compensation. The District Court dismissed the claim on grounds that RV had not alleged facts from which the court could find that RV had suffered a taking, citing Kudloff v. Billings, 260 M 371, 860 P2d 140, 50 St. Rep. 1108 (1993). The Supreme Court affirmed. There was nothing in the record to suggest that the effect of the denial of the application denied RV all economically beneficial use of the property in question. Madison River R.V. Ltd. v. Ennis, 2000 MT 15, 298 M 91, 994 P2d 1098, 57 St. Rep. 84 (2000).

Criminal Defendant Entitled to Interest Earned on Cash Deposited as Bail Bond — Constitutional Issues: Richland County sought to retain the interest earned on a defendant's $50,000 cash bail bond that had been deposited with the court in an interest-bearing account and to apply the money to the county's general fund. Applying the general rule in Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 US 155, 66 L Ed 2d 358, 101 S Ct 446 (1980), the Supreme Court held that, absent a statutory provision allowing retention of the interest, the county is no more entitled to retain interest on a cash bail bond than it would be to retain accruing dividends on a deposit of stocks or bonds or the appreciated value on a pledge of real estate under 46-9-401. Retention of interest by the county would also violate several constitutional provisions

as well, including: (1) the guarantee in Art. II, sec. 17, Mont. Const., that a citizen cannot be deprived of property without due process of law; (2) the guarantee in this section that property cannot be taken for public use without just compensation; and (3) a potential thwarting of Art. II, sec. 24, Mont. Const., which guarantees a speedy trial, through the incentive by the county to prolong a criminal prosecution as long as possible in order to earn more interest on a bond deposit. Therefore, if the Clerk of Court deposits bond money in an interest-bearing account, then interest earned on the deposit belongs to the owner of the funds that generated the interest. Siroky v. Richland County, 271 M 67, 894 P2d 309, 52 St. Rep. 343 (1995), distinguishing Fresno Firefighters' Local 753 v. Jernagan, 222 Cal. Rep. 886, 177 Cal. App. 3d 403 (Cal. Ct. App. 5th Dist. 1986).

Condemnation Including Private Offices — Evidence to Be Considered — Due Process of Law: The state condemned part of the Vanimans' land for a highway interchange, rest area, and visitor center. The city of Bozeman, which funded part of the project, agreed with the Bozeman Chamber of Commerce that the Chamber would locate its corporate offices in the visitor center. The Vanimans objected to the condemnation as not being for a public purpose. The Supreme Court held that the District Court erred when it failed to consider evidence showing that the Bozeman Chamber of Commerce intended to locate its corporate offices in the proposed visitor center and that this failure constituted a denial of due process of law. Bozeman v. Vaniman, 264 M 76, 869 P2d 790, 51 St. Rep. 154 (1994).

Denial of Recovery for Previous Expenditures by Utilities Not Denial of Just Compensation: The Mountain Water Company (MWC) sought an increase in utility rates to cover previous expenditures that it had been compelled to provide for its customers under 69-4-511 (now repealed), seeking recovery through a 2-year amortization. The Public Service Commission (PSC) authorized recovery through rates of annual and prospective expenses, but denied recovery of previous expenditures. On appeal, the District Court held that PSC's refusal to allow recovery of back expenses failed to justly compensate MWC for the taking of its property under 69-4-511 (now repealed). The rule set out in Galveston Elec. Co. v. Galveston, 258 US 388, 66 L Ed 678, 42 S Ct 351 (1922), is that a utility may not set its rates so as to amortize past deficits, and the rule applies to a private as well as to a municipal utility. MWC was aware of the passage of 69-4-511 (now repealed) and could have applied for coverage of the utility costs prospectively, but failed to do so. The District Court erred in concluding that MWC was not justly compensated by PSC's denial of retroactive recovery. Mtn. Water Co. v. Dept. of Public Service Regulation, 254 M 76, 835 P2d 4, 49 St. Rep. 632 (1992).

Forfeiture of Water Rights Not Considered Unjust Taking Without Compensation: Former water rights holders who forfeited their rights through failure to meet the filing deadline contended that 85-2-226 was an unconstitutional taking without just compensation under state and federal laws because invalidating existing water rights for failure to file extended beyond what was reasonably necessary to preserve the public welfare. However, the deprivation occurred only as the result of the appropriators' neglect or the neglect of their predecessors and not as the result of excessive or unreasonable state action. Section 85-2-226 does not result in taking property without just compensation because the state is not required to compensate the owner for the consequences of the owner's own neglect. In re Adjudication of Existing Yellowstone River Water Rights, 253 M 167, 832 P2d 1210, 49 St. Rep. 413 (1992). See also Texaco, Inc. v. Short, 454 US 516, 70 L Ed 2d 738, 102 S Ct 781 (1982).

Stratified Sales Assessment Ratio — Unconstitutional: On October 12, 1990, the court issued its written order explaining that the use of 1990 tax values derived from the stratified sales assessment ratio study and the subsequent application of a percentage factor to certain residential properties, which in 1989 were assessed or appraised at or above their true market values, resulted in unfair discrimination by requiring those property owners to bear a disproportionate share of the state tax burden in violation of the equal protection and due process requirements of both the U.S. and Montana Constitutions. The court further found that application of the ratio violated statutory appraisal provisions requiring general and uniform appraisal, assessment, and equalization of all taxable property in the state. Dept. of Revenue v. Barron, 245 M 100, 799 P2d 533, 47 St. Rep. 1869 (1990), followed, with regard to the unconstitutionality of a 2% phasein of changes in real property value (revised Ch. 584, L. 1999) on equal protection grounds, in Roosevelt v. Dept. of Revenue, 1999 MT 30, 293 M 240, 975 P2d 295, 56 St. Rep. 125 (1999).

Property Interest Not Created by Constitution: Plaintiff claimed that a city's denial of water and sewer permits deprived him of his property interest in those permits without just compensation. However, plaintiff had no property interest in the permits that could be afforded constitutional protection. Property interests are not created constitutionally; they come from

independent sources, such as state law. Mogan v. Harlem, 238 M 1, 775 P2d 686, 46 St. Rep. 1043 (1989).

State as Condemning Agency — Compensation for Vagrant Surface Waters Required: The state, as a condemning agency, is held to a standard of paying just compensation for land when the diversion of vagrant surface waters causes damage to private lands. St. v. Feenan, 231 M 255, 752 P2d 182, 45 St. Rep. 589 (1988).

No Recovery if No Actual Taking: When a public improvement is made on property adjoining that of one who claims to be damaged by general factors like change of neighborhood, noise, dust, change of view, increased traffic, pollution, and inconvenience of ingress and egress, there can be no recovery if there has been no actual taking or severance of the claimant's property. Adams v. Dept. of Highways, 230 M 393, 753 P2d 846, 45 St. Rep. 298 (1988). However, see Knight v. Missoula, 252 M 232, 827 P2d 1270, 49 St. Rep. 230 (1992), wherein the District Court erred in its broad reading and application of Adams by summarily dismissing a case involving a dirt road in a residential area. The Supreme Court found that limited circumstances could arise in which problems associated with increased traffic may be compensable, and the court remanded for a finding of whether the increased traffic and resulting problems caused a depreciation in the value of adjoining residential property sufficient to give rise to compensation under the doctrine of inverse condemnation.

Necessary Expenses of Litigation Authorized Regardless of Form of Action: Plaintiff obtained a declaratory judgment that certain stream use legislation (Title 23, ch. 2, part 3) constituted an unconstitutional taking of private property without just compensation. The court held that under this section the right to just compensation, including necessary expenses of litigation, does not depend on the form of the action and is not limited to the traditional eminent domain proceeding in the form of a condemnation or inverse condemnation action, but extends to a declaratory judgment action as well. Galt v. St., 230 M 327, 749 P2d 1089, 45 St. Rep. 246 (1988).

Open-Pit Excavation Necessary for Backslope as Authorized Public Use — Landowner Notification Act Ineffectual to Prevent Condemnation: An open-pit excavation necessary to backslope the mining of an ore body is an authorized public use for which condemnation may be had. The Landowner Notification Act appears to preclude this kind of condemnation because under 82-2-303, an open-pit mine operator must obtain from the surface owner of private lands specific written approval of proposed work before commencing operations. However, the Supreme Court noted that the Act was aimed at the protection of private persons, while eminent domain law, constitutionally grounded and deriving from the power of sovereignty, was enacted to protect the public good. The court found it inconceivable that the Legislature intended provisions enacted for the benefit of private persons to overcome and supersede provisions preserving the public good. Therefore, the Landowner Notification Act was found not to adversely affect the right to use eminent domain against a nonconsenting landowner. Mont. Talc Co. v. Cyprus Mines Corp., 229 M 491, 748 P2d 444, 44 St. Rep. 2161 (1987). See also McCabe Petroleum Corp. v. N Bar Ranch, LLC, 2004 MT 73, 320 M 384, 87 P3d 995 (2004), in which the Supreme Court held that eminent domain condemnation provisions applicable to open-pit mines in Mont. Talc Co. did not apply to oil and gas leases and wells.

"Means End Test" — Owner Consent Statute Violative of Due Process, Impairment of Obligation of Contract, and Eminent Domain: Applying the "means end test" adopted in Lawton v. Steele, 152 US 133, 38 L Ed 385, 14 S Ct 499 (1894), wherein the state's authority on behalf of the public is balanced against the constitutional due process requirement in the protection of private property, the Supreme Court declared 82-4-224 (now repealed), the owner consent statute of the Montana Strip and Underground Mine Reclamation Act, to be unconstitutional. The court concluded that the denial of just compensation placed an unreasonable burden on mineral owners, in violation of due process, and that the statute does not bear the requisite relation to the public health, safety, morals, or general welfare. The statute does not address reclamation, conservation, or any other policy goal; does not prevent strip mining operations; does not regulate how mining or reclamation is performed; does not conserve agricultural land; and is inapplicable unless the surface rights have been severed from the mineral rights or the mineral estate is owned in fee by the federal government or in trust for an Indian tribe. W. Energy Co. v. Genie Land Co., 227 M 74, 737 P2d 478, 44 St. Rep. 904 (1987), distinguishing Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 US 470, 94 L Ed 2d 472, 107 S Ct 1232 (1987).

Public Recreational Use of Dearborn River — No Inverse Condemnation: Landowner along Dearborn River was sued by parties seeking a determination of the public's right to use the river for recreational uses. Landowner counterclaimed for inverse condemnation, basing the counterclaim on his claim to ownership of the riverbed. The Supreme Court held that the question of title to the

bed was irrelevant to determining navigability for use by the public; that landowner had no claim to the waters; that since there was no claim to the waters, nothing was taken and thus there was no ground for an inverse condemnation claim; and that, consequently, the District Court did not err in dismissing the counterclaim. Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984).

Inverse Condemnation — Damage Claim: When inverse condemnation of land occurs prior to its sale, purchaser is not entitled to claim damages for the condemnation. Howard v. St., 198 M 470, 647 P2d 828, 39 St. Rep. 1111 (1982).

"Taking" — Interference With Right to Use Property: A taking occurs not only when there is an interference with the actual use of the property but also, even if the land is unused, when there is an interference with the right to use the property. Howard v. St., 198 M 470, 647 P2d 828, 39 St. Rep. 1111 (1982).

Damages Recoverable for Diminution in Value of Land Caused by Change in Access: In an action to condemn 20.45 acres of land for the purpose of expanding a municipal airport, landowners appealed the commissioners' assessment to the District Court. Prior to trial, the District Court granted the airport board's motion in limine and excluded evidence on diminution of value of landowners' remaining land due to the abandonment of a county road contained in the condemned parcel, ruling that landowners had no legal interest in the continuance of a county road unless discontinuance of that road deprived them of access to their remaining property. The Supreme Court reversed, ruling that although condemnees cannot recover damages for a reduction in traffic flow caused by discontinuance of a county road, they can recover damages if the change in access has caused a substantial change in value in the condemnees' land and landowners should have been permitted to introduce evidence on this issue. McCone County v. James, 198 M 430, 646 P2d 1209, 39 St. Rep. 1107 (1982).

Inverse Condemnation by City: Where the city of Billings widened and developed a major arterial street adjacent to plaintiff's residentially zoned property, where property on opposite side of street was condemned by city in process of developing the street, and where plaintiff's property was significantly reduced in value because of the city's refusal to rezone plaintiff's property, the city, although exercising its police power properly, nonetheless interfered with plaintiff's private property interests so as to constitute taking by inverse condemnation. Knight v. Billings, 197 M 165, 642 P2d 141, 39 St. Rep. 385 (1982), distinguished in Adams v. Dept. of Highways, 230 M 393, 753 P2d 846, 45 St. Rep. 298 (1988), and in McElwain v. Flathead County, 248 M 231, 811 P2d 1267, 48 St. Rep. 410 (1991). See also Wohl v. Missoula, 2013 MT 46, 369 Mont. 108, 300 P.3d 1119.

Nature of Easement — When Deprivation of Property Occurs: A landowner brought an action to prevent the state from opening a fishing access site and from paving a road to the site, based on a claimed fee title to the roadway. The District Court granted the state a summary judgment as a matter of law. The Supreme Court found the landowner's interest was an ordinary easement. The words "private road" did not clearly indicate intent to create in him an "exclusive" easement. The state's use of the road cannot be declared inconsistent with the landowner's on the basis of speculation. Furthermore, under various statutory provisions, the state obtained its land lawfully. The plaintiff had not yet been deprived of his property interest. Any damages remained speculative at the time of the decision. The summary judgment was accordingly affirmed. Titeca v. St., 194 M 209, 634 P2d 1156, 38 St. Rep. 1533 (1981).

City as Public Utility — Cost of Relocating — "Taking" — Local Self-Government: A city acting in its proprietary capacity as an operator of water, sewer, and lighting facilities is a public utility; therefore, Title 60, ch. 4, part 4, applies. The city must pay 25% of the costs of relocating its water, sewer, and light systems incurred as a result of the Broadway Avenue-Federal Aid Urban System project. Necessary relocation of municipally owned utility systems is not a taking of private property requiring just compensation. The doctrine of local self-government does not prevent the application of 60-4-403 (now repealed) as an unconstitutionally imposed tax or compelled incurrence of debt. St. v. Helena, 193 M 441, 632 P2d 332, 38 St. Rep. 1283 (1981).

Attorney Fees and Costs Taxed After Final Judgment: When the condemnee filed its motion to tax costs and attorney fees, it was not entitled to a judgment on the award of the Commissioners because the time for appeal had not begun to run on the day that the motion was filed. The Supreme Court rejected the condemnor's contention that an appeal from the Commissioners' award must be perfected by one of the parties and thereafter, within 30 days, the condemnor must submit to the condemnee a written final offer of judgment before the condemnee is entitled to attorney fees and costs. That result is inconsistent with Art. II, sec. 29, Mont. Const. If a

condemnee prevails in litigation, he is entitled to recover his expenses. Bozeman Parking Comm'n v. First Trust Co. of Mont., 190 M 107, 619 P2d 168, 37 St. Rep. 1610 (1980).

Attorneys' Fees — Award for Services of Two Attorneys: An award for attorneys' fees for work of both an attorney representing respondent up to the appellate stage and a second attorney representing respondent through the appellate stage may properly be granted; within the contemplation of Art. II, sec. 29, Mont. Const., "reasonable, necessary expenses of litigation" include fees paid to two attorneys representing the same party, particularly where the work does not overlap and there is no prejudice to the appellant. St. v. Helehan, 189 M 339, 615 P2d 925, 37 St. Rep. 1516 (1980).

Attorneys' Fees — Reliance by Courts on Experts: In determining attorneys' fees, the court, as a jury, is not bound absolutely to the testimony of expert witnesses. It can reduce or increase the figures submitted to it by experts as reasonable attorneys' fees, and as long as its findings are not clearly erroneous, the determination made in its discretion will not be disturbed. St. v. Helehan, 189 M 339, 615 P2d 925, 37 St. Rep. 1516 (1980).

Necessary Cost of Litigation — Expert Who Doesn't Testify: Under Art. II, sec. 29, Mont. Const., "necessary expenses of litigation" include the cost of hiring an expert who doesn't actually testify. St. v. Helehan, 189 M 339, 615 P2d 925, 37 St. Rep. 1516 (1980).

Moving or Raising Utility Wires — Constitutional Exercise of Police Power: A police power regulation must be reasonably adapted to its purpose and must injure or impair property rights only to the extent reasonably necessary to preserve the public welfare. The standard of reasonableness is the constitutional measure of the proper exercise of the police power. As a general rule, acts conducted in the proper exercise of police power do not constitute a taking of property and do not entitle the owner of such property to compensation for the regulation or impairment thereof except in cases that exceed regulation or impairment and that entail an appropriation of property that amounts to a taking or deprivation of property for public use. The momentary raising of utility lines or their severing was under a statute which amounts to a regulation or impairment of utility property and not an actual taking or appropriation of property for the private use of another. The statute is a reasonable exercise of police power. Yellowstone Valley Elec. Co-op v. Ostermiller, 187 M 8, 608 P2d 491 (1980). The reasonableness standard was applied to enactment of septic regulations in McElwain v. Flathead County, 248 M 231, 811 P2d 1267, 48 St. Rep. 410 (1991).

Moving or Raising Utility Wires — Police Power, Not Eminent Domain: Under 69-4-603, a utility was required to move or raise utility wires so that oversized objects could be moved through public streets. The statute was determined to be an exercise of police power rather than sounding in eminent domain. Therefore, due process requirements of the 14th amendment may be met without compensation. Four factors were cited in the determination that the statute exercises police power: (1) public safety is concerned; (2) a public benefit is conferred; (3) a reasonable and necessary public use is allowed; and (4) the public's right to use the highways is recognized under the statute. Yellowstone Valley Elec. Co-op v. Ostermiller, 187 M 8, 608 P2d 491 (1980).

Attorney Fees — When Right Arises: The right to necessary costs of litigation provided by 70-30-305 does not arise when the suit is filed but vests only when the private property owner prevails, securing a verdict higher than the state's final offer. St. v. Burlingame, 182 M 298, 597 P2d 51 (1979).

Reasonableness of Contingent Attorney's Fee Based on Agreement Made Prior to 1977 Amendment Precluding Contingent Fees: In eminent domain proceeding, attorney's fee of $9,600 based on a contingent fee agreement entered into in May of 1977 was properly awarded when respondent had introduced evidence as to the reasonableness of the contingent percentage and the appellant offered no evidence as to either a reasonable hourly rate or the reasonableness of the contingent percentage. St. v. Rogers, 184 M 181, 602 P2d 560 (1979).

Attorney Fees — Inverse Condemnation: Because there is a clear constitutional requirement that attorney fees be paid in condemnation cases whenever the landowner prevails and because the words "condemnor" and "condemnee" were used in the statute implementing the constitutional provision, attorney fees were permitted in an inverse condemnation case. Rauser v. Toston Irrigation District, 172 M 530, 565 P2d 632 (1977). See also Wohl v. Missoula, 2013 MT 46, 369 Mont. 108, 300 P.3d 1119.

Inverse Condemnation: There may be a taking by the defendant in the form of inverse condemnation without a showing of negligence in design, construction, or operation if the damages are an inevitable result of the intentional undertaking of the project. It is enough to show the damages were proximately caused by and a reasonably foreseeable consequence of

the undertaking. Rauser v. Toston Irrigation District, 172 M 530, 565 P2d 632 (1977). See also Knight v. Missoula, 252 M 232, 827 P2d 1270, 49 St. Rep. 230 (1992).

Severance Damage to Remainder of Land When Condemnation Results in Excising Very Heart of Ranch: Damage award to remainder of ranch was inadequate for not allowing compensation for permanent interference with farming, as distinguished from temporary interference or inconvenience, when heart of ranch was excised by condemnation, as just compensation for a public taking of private land is computed by adding fair market value of land taken to "value of remainder before taking minus value of remainder after taking". Meagher County Newlan Creek Water District v. Walter, 169 M 358, 547 P2d 850 (1976).

Intent — Compliance — Effective Date: By enacting Art. II, sec. 29, Mont. Const., the Constitutional Convention intended to make the landowner whole in eminent domain proceedings in that a judgment would be a "net recovery" with the expenses of litigation being assessed against the state. The directive of this section cannot be frustrated by inadvertent or intentional violations of the statutory procedure. The right to costs vests upon judgment, and property owner is entitled to costs upon a verdict secured subsequent to the effective date. Dept. of Highways v. Olsen, 166 M 139, 531 P2d 1330 (1975).

Litigation Costs: Right to necessary cost of litigation does not arise at the time suit is filed but vests only when private property owner secures verdict higher than state's final offer. Thus, award of litigation costs was proper in case filed before enactment of new law but decided after law was in effect. Dept. of Highways v. Olsen, 166 M 139, 531 P2d 1330 (1975).

DECISIONS UNDER 1889 CONSTITUTION

GENERAL PROVISIONS

Examination of Mining Claim:

The court has the power to compel a defendant, upon the payment of the reasonable cost, to lower and hoist the agents of the plaintiff into and from the underground workings of a lode mining claim, while engaged in the inspection thereof, without infringing the provisions of Art. III, sec. 14, 1889 Mont. Const. State ex rel. Boston & Mont. Consol. Copper & Silver Min. Co. v. District Court, 30 M 206, 76 P 206 (1904).

An examination of a lode mining claim was not in contravention of Art. III, sec. 14, 1889 Mont. Const. State ex rel. Parrot Silver & Copper Co. v. District Court, 28 M 528, 73 P 230 (1903).

Provision — Mandatory, Prohibitory, and Self-Executing: Article III, sec. 14, 1889 Mont. Const., was both mandatory and prohibitory, and it was also self-executing. Less v. Butte, 28 M 27, 72 P 140 (1903).

Purpose of Provision: Article III, sec. 14, 1889 Mont. Const., was drafted in broad language for the express purpose of preventing unjust or arbitrary exercise of the power of eminent domain. Less v. Butte, 28 M 27, 72 P 140 (1903).

PUBLIC USE

Municipal Property: Property held by city is private property and, when taken by state for more necessary public use, must be paid for in same manner as if taken from a private owner. Three Forks v. Highway Comm'n, 156 M 392, 480 P2d 826 (1971).

Rights-of-Way of Necessity: For examples of implied reservations or implied grants of easement by necessity see: Thisted v. Country Club Tower Corp., 146 M 87, 405 P2d 432 (1965), which overruled Herrin v. Sieben, 46 M 226, 127 P 323 (1912) and Simonson v. McDonald, 131 M 494, 311 P2d 982 (1957). See also Violet v. Martin, 62 M 335, 205 P 221 (1922), overruled in Simonson v. McDonald, ibid.

Subdivision Public Park Dedication: Law, since repealed, requiring that a portion of platted subdivisions be dedicated to public park purposes was not an unconstitutional delegation of legislative authority to city and county authorities. The enforcement of this requirement was not a confiscation of private property without compensation or an invalid extension of the police power. Billings Properties, Inc. v. Yellowstone County, 144 M 25, 394 P2d 182 (1964).

State Housing Projects: Sections constituting the state housing law did not violate Art. III, sec. 14, 1889 Mont. Const., housing projects being devoted to a public use. The grant of right of eminent domain to the housing authorities and providing just compensation for property taken be made to the owners is within the constitutional provisions. Rutherford v. Great Falls, 107 M 512, 86 P2d 656 (1939).

Statutory Construction of Public Road Legislation: Public highways are such as have been established by the public authorities or were recognized by them and used generally by the public

or which had become such by prescription or adverse use at the time of the enactment of the statute. Peasley v. Trosper, 103 M 401, 64 P2d 109 (1936).

When Title Passes: Title to land condemned for a public use does not pass until payment is made or tendered. School District v. Powers, 62 M 151, 204 P 598 (1921).

Destruction of Infected Fruit: The statutes authorizing the state inspector of fruit pests to destroy infected fruit are valid although the destruction is without compensation to the owner. Colvill v. Fox, 51 M 72, 149 P 496 (1915).

Construction of Drains: Laws (since repealed) providing for the construction and maintenance of drains "wherever the same shall be conducive to the improvement or reclamation of agricultural lands, public health, convenience, or welfare" were not unconstitutional as permitting the taking of private property for other than a public use. Billings Sugar Co. v. Fish, 40 M 256, 106 P 565 (1910).

Vacation of Public Road: By the vacation of a public road, there was no taking of private property for public use, within the meaning of Art. III, sec. 14, 1889 Mont. Const. State ex rel. Johnson v. Bd. of Comm'rs, 19 M 582, 49 P 147 (1897).

JUST COMPENSATION

Waiver of Sovereign Immunity — Trespass Damages: When State took city property without first paying just compensation it waived its sovereign immunity, and measure of damages properly included trespass damages. Three Forks v. St. Highway Comm'n, 156 M 392, 480 P2d 826 (1971).

Just Compensation — Scope of Review:

When amount of just compensation as determined by jury is based on credible evidence as to market value of highest and best use for which land is available, the verdict and judgment will not be set aside. St. Highway Comm'n v. Vaughan, 155 M 277, 470 P2d 967 (1970).

In eminent domain proceedings the findings of the court will generally not be disturbed on appeal unless they are so obviously and palpably out of proportion to the injury done as to be in excess of just compensation provided for by Art. III, sec. 14, 1889 Mont. Const. St. Highway Comm'n v. Woodcock, 147 M 291, 411 P2d 357 (1966).

In eminent domain proceedings, the jury findings will generally not be disturbed on appeal unless they are so obviously and palpably out of proportion to the injury done as to be in excess of just compensation provided by Art. III, sec. 14, 1889 Mont. Const. St. v. Peterson, 134 M 52, 328 P2d 617 (1958).

Just Compensation — Evidence of Reconstruction Costs and Comparable Sales: When condemnee's house was between 50 and 60 years old and had been converted into a multiple family dwelling, court did not err in excluding evidence of reconstruction costs or comparable sales elsewhere in determining value of the property since there was no way of determining depreciation of the old house in arriving at reconstruction cost figures, nor were there sufficient comparable sales in the area. St. Highway Comm'n v. Tubbs, 147 M 296, 411 P2d 739 (1966).

Just Compensation — Conflicting Testimony: When there was conflicting testimony as to amount of damage to plaintiff's land after condemnation by state of part of that land, jury's finding as to amount of damage for the injury done was not so excessive as to be a violation of Art. III, sec. 14, 1889 Mont. Const., providing for just compensation. St. Highway Comm'n v. Biastoch Meats, Inc., 145 M 261, 400 P2d 274 (1965).

Easement as Property: A ditch is an easement and was property as used in Art. III, sec. 14, 1889 Mont. Const. It may not be taken for public purpose without just compensation. Colarchik v. Watkins, 144 M 17, 393 P2d 786 (1964).

Just Compensation — Evidence of Value: An owner may testify as to the reasonable value of the property for the general use to which he is putting it, but to go beyond that field, in estimating its worth, he must possess the qualifications required of a general witness as to value. St. Highway Comm'n v. Keneally, 142 M 256, 384 P2d 770 (1963); Alexander v. St. Highway Comm'n, 142 M 93, 381 P2d 780 (1963).

Suit by Landowner Not Inverse Condemnation Action: When party sued the State for damages and just compensation, the action was treated as any other damage action and on appeal plaintiff could not claim it to be an inverse condemnation action and require the State to pay into court the amount of damages prayed for in the complaint. State ex rel. St. Highway Comm'n v. District Court, 142 M 198, 383 P2d 481 (1963).

Announcement of Highway Route: When plaintiff's property was within the announced route of proposed interstate highway and he was unable to sell, lease, develop, or finance his property for a period of 5 years after the announcement, he was allowed no recovery under Art. III, sec. 14,

1889 Mont. Const., because no property was actually taken or damaged by the state. Bakken v. St. Highway Comm'n, 142 M 166, 382 P2d 550 (1963).

Private Road Action — Expenses: Under Art. III, sec. 15, 1889 Mont. Const., attorney's fees were not allowed as an expense of the proceedings to open a private road of necessity. Tomten v. Thomas, 125 M 159, 232 P2d 723 (1951), overruled in Callant v. Fed. Land Bank of Spokane, 181 M 400, 593 P2d 1036 (1979).

Private Road Action — Expenses to Successful Plaintiff: In action to open a private road, the Constitution and statutes providing for an award of expenses of the proceeding to defendant apply only when the plaintiff is successful. Kendrick v. Powell, 119 M 622, 178 P2d 859 (1947).

Subject to Statutes of Limitation: An action against a city to recover damages caused by the flooding of plaintiff's city property in consequence of the raising of a street level, based upon Art. III, sec. 14, 1889 Mont. Const., was subject to Statutes of Limitation which affect the remedy rather than the right. Stranahan v. Havre, 112 M 591, 119 P2d 629 (1941).

Appeal by Plaintiff: Contention that sections authorizing an appeal by plaintiff after payment of the judgment into court for defendant and after securing possession of the land were invalid under constitutional provision prohibiting the taking of private property for public use without paying just compensation therefor, and that the appeal should therefore be dismissed, held not meritorious. St. v. Bradshaw Land Co., 99 M 95, 43 P2d 674 (1935).

Payment or Tender of Compensation Condition Precedent:

By adopting Art. III, sec. 14, 1889 Mont. Const., the Convention modified the common-law rule which denied to the owner compensation for infringements upon his right of free access to his property by changes in the grade of the street upon which it abuts and secured to him the possession and enjoyment of it free from interference with it by any means for any public purpose, until just compensation has been ascertained and made or tendered to him. The making or tendering of compensation is a condition precedent. Eby v. Lewistown, 55 M 113, 173 P 1163 (1918); Less v. Butte, 28 M 27, 72 P 140 (1903).

Private property cannot be taken for a public use in invitum, except upon compensation first being made to the owner. In other words, the payment or tender of compensation, the amount of which has been ascertained in the manner provided by law, is made a condition precedent to the acquisition of any right by the public. Possession taken from the owner without compliance with this condition is wrongful, and ejectment will lie in favor of the owner to recover it. The fact that the wrongdoer is a municipal corporation does not affect the right to maintain the action. Eby v. Lewistown, 55 M 113, 173 P 1163 (1918); Postal Telegraph-Cable Co. v. Nolan, 53 M 129, 162 P 169 (1916); Flynn v. Beaverhead County, 49 M 347, 141 P 673 (1914).

Statute Limiting Time for Claims Unconstitutional: Laws (since repealed) that cast upon the owner of city or town realty embraced within the limits of a proposed special improvement district the burden of ascertaining the amount of damages likely to ensue to the property by reason of its creation and making claim for the amount within a specified time or being barred thereafter from doing so were in violation of Art. III, sec. 14, 1889 Mont. Const. Eby v. Lewistown, 55 M 113, 173 P 1163 (1918).

Damages Caused by Street Grading:

The right to compensation for damages to property occasioned by the grading of a street from contour to established grade was guaranteed by Art. III, sec. 14, 1889 Mont. Const. State ex rel. Butte v. District Court, 48 M 614, 139 P 791 (1914).

A landowner is entitled to compensation for damages owing to the grading of a street on which his property abuts, in accordance with a grade established by a city, notwithstanding the fact that such grade is the first one ever fixed. Less v. Butte, 28 M 27, 72 P 140 (1903).

Applicable to Railroads: The assumption that a railroad has, through being given authority by the Legislature to construct its line, rights to which the rights of adjacent property holders are subordinated is limited by the principle that no person can be deprived of property without due process of law and compensation first being made to the owner. Wine v. N. Pac. Ry., 48 M 200, 136 P 387 (1913).

Condemnor Entitled to Property on Appeal: A railway company is entitled to possession of condemned property upon making a deposit of the damages awarded by the commission. Title pending appeal is merely provisional, and the fact that an appeal has been taken does not abrogate the award of the commission. Until revised by appeal such award was just compensation and Art. III, sec. 14, 1889 Mont. Const., had been complied with thereby. State ex rel. Volunteer Min. Co. v. McHatton, 15 M 159, 38 P 711 (1894).

Private Road Action — Mining Claims: The provisions of Art. III, sec. 15, 1889 Mont. Const., did not abrogate statute granting to the owners of mining claims a right-of-way across the claims

of others and providing for the assessment of damages by Commissioners but merely modified the statute as to the method of determining the damages, leaving the jurisdiction and procedure in other respects unchanged. State ex rel. Coleman v. District Court, 14 M 476, 37 P 7 (1894).

Law Review Articles

Was the Big Sky Really Falling? Examining Montana's Response to Kelo v. City of New London, Mudd, 69 Mont. L. Rev. 79 (2008).

Evidence of Revenue Produced From Property Taken by Eminent Domain Held Relevant to Determining Market Value, Fredricks, 22 Mont. L. Rev. 80 (1960).

Collateral References

Eminent Domain in Montana, Evans, Legislative Environmental Policy Office (2001).

Section 30. Treason and descent of estates.

Convention Notes

No change except in grammar.

Compiler's Comments

Former Constitutional Provision: This section is similar to Art. III, sec. 9, 1889 Mont. Const.

Case Notes

DECISIONS UNDER 1972 CONSTITUTION

Deletion of Hanging as Form of Capital Punishment Not Bill of Attainder: Pursuant to the version of 46-19-103 that was in effect at the time that Langford was sentenced for execution, he affirmatively elected that death be imposed by hanging rather than lethal injection. Langford appealed to the District Court for a declaration that execution by hanging was cruel and unusual punishment that violated the eighth amendment to the U.S. Constitution. The District Court denied the motion, holding that Langford's choice of hanging rendered the cruel and unusual punishment argument moot. Langford appealed to the appropriate federal courts for a writ of habeas corpus, applying the same argument. During the pendency of Langford's federal habeas corpus proceedings, the Montana Legislature met and amended 46-19-103 by removing the hanging option, rendering the federal proceedings moot and nonjusticiable. Langford asserted that the amendment to 46-19-103 constituted a bill of attainder in violation of this section, inflicting punishment without a judicial trial. However, 46-19-103 does not inflict punishment, but simply delineates the procedure by which a previously imposed sentence is carried out. Thus, the amendment to 46-19-103 as not a bill of attainder. Langford v. St., 287 M 107, 951 P2d 1357, 54 St. Rep. 1522 (1997).

1983 Amendments Not Bill of Attainder: Chapter 411, L. 1983, amended 46-19-103 to allow the defendant to choose death by lethal injection as an alternative to hanging. Section 7 makes the act applicable to death sentences whether first pronounced before or after its effective date, making the act specifically retroactive. The act is not a bill of attainder as argued by the defendant who was convicted before the effective date of the act and sentenced to death after its effective date. St. v. Fitzpatrick, 211 M 341, 684 P2d 1112, 41 St. Rep. 1400 (1984).

DECISIONS UNDER 1889 CONSTITUTION

Forfeiture of Estate: Prohibiting wife who pleaded guilty to voluntary manslaughter in death of her husband from taking of his estate by intestate succession or dower and from taking his share of jointly owned property and making her a constructive trustee of that property for the benefit of beneficiaries and devisees under her husband's will did not violate Art. III, sec. 9, 1889 Mont. Const. Sikora v. Sikora, 160 M 27, 499 P2d 808 (1972).

Section 31. Ex post facto, obligation of contracts, and irrevocable privileges.

Convention Notes

Identical to 1889 constitution.

Compiler's Comments

Former Constitutional Provision: This section is similar to Art. III, sec. 11, 1889 Mont. Const.

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DECISIONS UNDER 1972 CONSTITUTION

EX POST FACTO

New Conditions of Parole Imposed After Original Sentence — No Increase in Punishment — No Ex Post Facto Violation: The criminal defendant had originally been sentenced to 30 years in prison with 10 years suspended. After being discharged to serve the suspended portion of his sentence, he violated the conditions of his parole. The District Court imposed a new suspended sentence with 14 new conditions, and the defendant argued the imposition of the conditions violated ex post facto laws. The state argued that the conditions did not violate ex post facto laws because they did not increase the defendant's original sentence and were standard conditions placed on sex offenders who are on parole. On appeal, the Supreme Court agreed that the new conditions were not punitive in nature and therefore affirmed the sentence. St. v. Piller, 2014 MT 342, 377 Mont. 374, 343 P.3d 153.

Extended Statute of Limitations for Criminal Offense Applicable to Offenses Not Barred at Time of Amendment: When a statute is amended to extend the limitations period for a criminal offense, the extended limitations period applies to all offenses not barred at the time that the amendment was enacted. Mordja v. District Court, 2008 MT 24, 341 M 219, 177 P3d 439 (2008), overruling Penrod v. Hoskinson, 170 M 277, 552 P2d 325 (1976), and other cases reaching conclusions to the contrary.

Extension of Criminal Statute of Limitations Not Considered Retroactive: The 1989 version of 45-1-205 provided that if the victim of sexual intercourse without consent was a minor at the time of the offense, the offender could be prosecuted up to 5 years after the victim turned 18 years old. In 2001, the Legislature extended the statute of limitations to expire 10 years after the victim turned 18 years old. The victim in this case turned 18 in 2001, and Mordja was charged in 2007, 5 years and 10 months after the victim turned 18. Mordja moved to dismiss the charges against him on grounds that the statute of limitations had expired. The District Court denied the motion, holding that because 45-1-205 was amended before the original statute of limitations expired in Mordja's case, the new limitations period applied to Mordja. On appeal, the Supreme Court affirmed. A defendant cannot have a vested right in a statute of limitations that has not yet expired. The statute of limitations did not expire in Mordja's case before 45-1-205 was amended, so Mordja did not have any vested right in an affirmative defense. Application of the 2001 amendment to Mordja's case was not retroactive within the meaning of 1-2-109 because it did not affect Mordja's vested rights or impose any additional obligations or detriments on Mordja. Thus, the state had the right to prosecute Mordja at any time within the newly extended limitations period, and the District Court did not err in denying Mordja's motion to dismiss. Mordja v. District Court, 2008 MT 24, 341 M 219, 177 P3d 439 (2008), following St. v. Wright, 2001 MT 282, 307 M 349, 42 P3d 753 (2001), and Stogner v. Calif., 539 US 607 (2003).

Res Judicata Not Bar to Correction of Manifest Error in Prior Decision — Illegal Sentence Reversed: In 1998, when Southwick committed two felonies, 46-18-201 limited commitment to the Department of Corrections (DOC) to 5 years. In 1999, the Legislature amended the statute to allow a longer DOC commitment up to the maximum time that a defendant could be sentenced for a particular offense, provided that all but the first 5 years of commitment are suspended. When Southwick's parole was subsequently revoked in 2003, the District Court revoked the suspended portion of Southwick's commitments to the DOC, even though Southwick had discharged his unsuspended commitments to the DOC, and ordered Southwick to be recommitted to the DOC for an additional 5 years in each case. Southwick petitioned the Supreme Court for a writ of habeas corpus on grounds that the sentence was illegal, but the petition was denied on grounds of res judicata. Southwick also moved the District Court for resentencing on grounds that the sentence was illegal, but the motion was denied, and Southwick appealed. The Supreme Court noted that res judicata generally precludes reviewing an issue already decided and that relitigation of issues in criminal cases is barred if: (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application; (2) the prior determination was on the merits; and (3) the ends of justice would not be served by reaching the merits of the subsequent application. The court also noted that when a criminal defendant is potentially subject to a facially illegal sentence, the ends of justice suggest that res judicata should not bar rehearing the issues even if the first two criteria are met. In this case, the District Court applied a statute that was not in effect at the time that Southwick committed the crimes, which violated

the prohibition on ex post facto laws. Because the District Court did not have authority to impose the sentence, the sentence was illegal and facially invalid. The 5-year DOC commitment for each offense was valid, but not the suspended portions following Southwick's commitment. Southwick had discharged the maximum time that he could have been committed to DOC before the petition to revoke was filed, and the District Court had no authority to revoke a suspended commitment that was illegally imposed. Therefore, the Supreme Court vacated the order revoking the suspended portion of Southwick's commitments. St. v. Southwick, 2007 MT 257, 339 M 281, 169 P3d 698 (2007).

Imposition of More Burdensome Prison Sentence in Place of Placement With Department of Corrections — Illegal Ex Post Facto Application of Former Sentencing Statute: Tracy's original sentence in Cascade County was for 10 years suspended with the Department of Corrections, to run concurrently with two other sentences that Tracy received in Yellowstone County. Tracy eventually discharged the incarceration portions of both Yellowstone County sentences. When Tracy violated his release conditions, the District Court in Cascade County revoked the original 10-year sentence to the Department of Corrections and resentenced Tracy to 10 years at the state prison. Tracy appealed the imposition of the prison sentence. Under the version of 46-18-203 in effect at the time of Tracy's original offense in 1996, if Tracy violated the terms of his suspended sentence, the District Court could revoke the sentence and require Tracy to serve either the sentence imposed or a lesser sentence. The statute was later amended to require an offender to serve either the sentence imposed or any sentence that could have been imposed as long as the sentence is not longer than the original sentence. The Supreme Court held that a prison sentence was not the same or less than the original sentence with the Department of Corrections in an appropriate facility or program. Rather, the new sentence imposed an additional, more burdensome condition requiring Tracy to go to prison. Although the new sentence was appropriate under the amended 2003 version of 46-18-203, application of the 2003 version to a crime committed in 1996 was an ex post facto application that could not pass constitutional muster, so the Supreme Court vacated the prison sentence and remanded for resentencing under the version of 46-18-203 in effect at the time of the original judgment. St. v. Tracy, 2005 MT 128, 327 M 220, 113 P3d 297 (2005), followed in St. v. Graves, 2015 MT 262, 381 Mont. 37, 355 P.3d 769.

No Error in Allowing Parole Officer to Set Restitution Schedule — Refusal to Waive Administrative Fees Proper: Denham contended that it was error for the sentencing court to delegate the scheduling of monthly restitution payments to a parole officer because the version of 46-18-244 in effect at the time of the crime did not provide for that delegation of authority. The Supreme Court held that the amendments to the statute were purely procedural and did not constitute retroactive legislation, impair Denham's rights, or impose additional duties on Denham, so allowing the parole officer to set the restitution schedule was not error. Denham also appealed the $60,099 restitution and the 10% administrative fee and minimal surcharges. However, Denham assured the court at sentencing of his ability to pay the restitution amount, so it was reasonable to assume that he also had the ability to pay the administrative fee and surcharges. The sentencing court was affirmed. St. v. Denham, 2005 MT 26, 326 M 24, 107 P3d 1263 (2005).

Sexual or Violent Offender Registration Act Nonpunitive — Not Considered Ex Post Facto Legislation: Defendant was convicted of failing to update registration as a violent sexual offender. The District Court found that the Sexual or Violent Offender Registration Act, Title 46, ch. 23, part 5, was ex post facto because 46-23-504 subjected defendant to enhanced punishment based on a prior conviction. The state appealed. Applying Smith v. Doe, 538 US 84, 123 S Ct 1140 (2003), which dealt with an Alaskan registration act similar to the Montana Act, the Supreme Court noted that if both the declared purpose and the structure of a sexual violent offender registration law are nonpunitive, then the intent is to enact a civil regulatory scheme. The court then conducted an indepth analysis of the intent and effects of Montana's law, finding that the legislative intent was clearly nonpunitive, noting that codification of the law in the Montana code of criminal procedure did not in itself transform the law from a nonpunitive civil regulatory scheme into a criminal one. As to effects, the court applied the factors in Kennedy v. Mendoza-Martinez, 372 US 144 (1963), finding the regulatory scheme to be a reasonable effort on the part of the Legislature to tailor what information may and may not be disclosed, and held that the registration requirements were not excessive. As a nonpunitive act designed for public protection, the Sexual or Violent Offender Registration Act does not violate the ex post facto clauses of the state or federal constitution. The District Court was reversed, and the charges against defendant were reinstated. St. v. Mount, 2003 MT 275, 317 M 481, 78 P3d 829 (2003), followed in St. v. Murphy, 2003 MT 276, 317 M 500, 78 P3d 843 (2003).

Use of Langford Test to Analyze Ex Post Facto Challenges in Criminal Contexts: Three slightly different tests have emerged in case law since 1963 for analyzing ex post facto challenges in criminal cases. The most recent formulation, set out in Langford v. St., 287 M 107, 951 P2d 1357 (1997), states that a law is ex post facto if it (1) punishes as a crime an act that was not unlawful when committed; (2) makes punishment for a crime more burdensome; or (3) deprives a person charged with a crime of any defense available under the law at the time that the crime was committed. Given that this test is more comprehensive and is in line with the progression of ex post facto jurisprudence, the Langford test will henceforth be used in analyzing ex post facto challenges in criminal contexts. St. v. Mount, 2003 MT 275, 317 M 481, 78 P3d 829 (2003), followed in St. v. Murphy, 2003 MT 276, 317 M 500, 78 P3d 843 (2003).

No Constitutional Liberty Interest in Being Housed Exclusively at State Prison: Following a conviction for deliberate homicide and use of a firearm, Wright was sentenced in 1996 to the state prison in Deer Lodge for 75 years, where he was originally placed. Over the years, Wright was placed at various other institutions, including out-of-state and in-state regional detention and private correctional centers. Wright filed a writ of prohibition to prevent the state from housing him anywhere but the state prison in Deer Lodge, pursuant to the terms of the written judgment. Under the law in effect at the time of Wright's sentencing, the Deer Lodge prison was the only adult male correctional facility in Montana, but the statutory definition has since been expanded to include other facilities. Wright contended that application of the amended definition to his sentence was unconstitutionally ex post facto, in violation of his liberty interests. The Supreme Court disagreed. Pursuant to Meachum v. Fano, 427 US 215 (1975), Wright's conviction sufficiently extinguished Wright's liberty interest to empower the state to confine him in any of its prisons, and under Olim v. Wakinekona, 461 US 238 (1983), Wright also had no justifiable expectation that he would be imprisoned in any particular state. Further, in order for the state to create a liberty interest, under McDermott v. Dept. of Corrections, 2001 MT 134, 305 M 462, 29 P3d 992 (2001), it must first enact a law that establishes a right of real substance, and then even those statutorily defined interests are restricted to freedom from atypical and significant hardships in relation to the ordinary incidents of prison life or restraints that inevitably affect the duration of the prisoner's confinement. The Supreme Court held that even if the 1995 definition of state prison did confer a right of real substance, being transferred from one prison to another, even out of state, did not meet the McDermott test for hardship or duration of confinement. Thus, Wright had neither a federal nor a state constitutional liberty interest in being housed exclusively at the state prison in Deer Lodge, and the state has authority to transfer Wright from that facility. Wright v. Mahoney, 2003 MT 141, 316 M 173, 71 P3d 1195 (2003).

Conviction of Felony Nonsupport Prior to Legislative Creation of Felony Offense Considered Improper Ex Post Facto Application Warranting Reversal — Common-Law Plain Error Doctrine Applied: Price was convicted of felony nonsupport for failure to make payments from 1988 through 1996 and was given the maximum 2-year sentence; however, the felony nonsupport statute was not enacted until 1993. On appeal, Price contended that the manner in which the felony nonsupport statute was applied violated the fundamental constitutional right to be free from ex post facto laws. The state argued that because Price failed to object at trial, the issue could not be raised on appeal. The issue of whether Price was convicted of felony nonsupport that occurred before the statute was enacted brought into question the fundamental fairness of Price's trial. The Supreme Court held that because a fundamental right was at issue, the common-law plain error doctrine applied despite Price's failure to preserve the issue at trial. A jury instruction allowed the jury to find Price guilty based on acts committed from 1988 through 1996 and thus subjected Price to increased punishment for conduct that occurred prior to enactment of the felony statute. This was an unconstitutional ex post facto application of the felony nonsupport law, constituting reversible error. St. v. Price, 2002 MT 284, 312 M 458, 59 P3d 1122 (2002).

Plenary Review of Criminal Sentence by Supreme Court Even Though No Objection Made at Sentencing: Brister was sentenced to 20 years for felony sexual assault with 10 years suspended, served the 10-year prison sentence, and then was released and began the 10-year suspended sentence. About 6 years into the suspended sentence, Brister was arrested for felony theft and for violating various parole conditions. The District Court then revoked the suspended sentence and reimposed another 10-year suspended sentence to run consecutively with a 5-year felony theft sentence. The new suspended sentence included 26 additional conditions. Brister did not object to any of the conditions when they were imposed, but filed a motion objecting to the sentence 2 months later, claiming that the conditions were not and could not have been included in the original suspended sentence, and thus violated double jeopardy and ex post facto laws. The state maintained that Brister waived any objections to the conditions by failing to contemporaneously

object when the sentence was pronounced, and that the appeal from the sentence was not timely filed. The Supreme Court disagreed and reversed. Under St. v. Lenihan, 184 M 338, 602 P2d 997 (1979), the court will review a sentence imposed in a criminal case if it is alleged that the sentence is illegal or exceeds statutory mandates, even if no objection is made at the time of sentencing. Further, Brister provided the District Court with an opportunity to correct any sentencing errors by filing an objection under 46-18-117 (now repealed), which allowed 120 days for correction of an illegal sentence, so Brister retained the right to appeal the purportedly illegal sentence. St. v. Brister, 2002 MT 13, 308 M 154, 41 P3d 314 (2002), overruling St. v. Taylor, 2000 MT 202, 300 M 499, 5 P3d 1019 (2000), St. v. St. John, 2001 MT 1, 304 M 47, 15 P3d 970 (2001), and St. v. Smith, 2001 MT 111, 305 M 298, 27 P3d 39 (2001), to the extent that those cases held that failure to raise a contemporaneous objection to an illegal sentence at the time of hearing resulted in waiver of defendant's objection, and followed in St. v. Muhammad, 2002 MT 47, 309 M 1, 43 P3d 318 (2002). See also St. v. Southwick, 2007 MT 257, 339 M 281, 169 P3d 698 (2007).

Retroactivity of New Judicial Rules and Judicial Interpretation — Section 46-23-1012 (1999) Applied Retroactively to Parole Revocations Between April 28, 1999, and May 1, 2001: On April 26, 2001, the Supreme Court held that a probable cause hearing was mandatory only when an offender had been arrested pursuant to a warrant issued by a judge. On May 4, 2001, Goebel petitioned the court to look beyond the plain language of 46-23-1012 and hold that the probable cause hearing was mandatory only when an offender has been arrested by a probation officer rather than pursuant to a warrant issued by a judge. Effective May 1, 2001, the Legislature amended 46-23-1012 to delete the requirement for a probable cause hearing. On May 9, 2001, Giddings filed a petition for rehearing, asking the court to direct the District Court to dismiss the petition to revoke Giddings' suspended sentence on grounds that the District Court lacked jurisdiction to revoke the suspended sentence because of the amendment to 46-23-1012, contending that application of the new statute would violate the constitutional ban on ex post facto legislation. The Supreme Court declined to modify the decision in either Goebel or Giddings because no material fact or question decisive of the cases themselves was overlooked and the decisions did not conflict with any express statute or controlling decision. However, the court did discuss the retroactive application of judicial rules of criminal procedure and the judicial interpretation of a statute, as well as the claim that the retroactive application of 46-23-1012 was a violation of the ex post facto clause. Citing Rivers v. Roadway Express, 511 US 298 (1994), the court held that a court's interpretation of a statute is never new law because the decision declares what the statute meant from the day of its enactment, not from the date of the decision. In determining whether a statute violates the ex post facto clause, the court referred to the test in St. v. Duffy, 2000 MT 186, 300 M 381, 6 P3d 453 (2000), which provided that to be in violation of the clause, a statute must be retrospective and must disadvantage the offender affected by it. In this case, Giddings was not disadvantaged because the statutory change did not alter the definition of or punishment for the probation violation that Giddings was charged with. Further, the error that was the basis for reversal of Giddings' case was jurisdictional, so all proceedings in the District Court were void ab initio, and the state was entitled to proceed anew, following the procedure outlined in the newly amended version of 46-23-1012. The Supreme Court's decisions based on the 1999 version of 46-23-1012 were applicable retroactively to persons whose probation or parole was revoked between April 28, 1999, and May 1, 2001. Thus, if a person was arrested during that period pursuant to a warrant issued by a judge and was not afforded a probable cause hearing within 36 hours of arrest, then the District Court did not have jurisdiction to hold a revocation hearing, so the state could refile the petition to revoke the person's probation pursuant to the 2001 version of 46-23-1012, as long as the probationer was still under the custody or supervision of the Department of Corrections on May 1, 2001. If the person was afforded a probable cause hearing within 36 hours of arrest, then the District Court did have jurisdiction to hold a revocation hearing. St. v. Goebel, 2001 MT 155, 306 M 83, 31 P3d 340 (2001), followed in St. v. Finley, 2003 MT 239, 317 M 268, 77 P3d 193 (2003), and St. v. Van Haele, 2005 MT 153, 327 M 400, 114 P3d 225 (2005).

Sentences Reviewed for Legality Only — Change in Standard of Review Not Ex Post Facto Violation: Application of the clarified standard of review of sentences is not an ex post facto violation. Kills On Top v. St., 2000 MT 340, 303 M 164, 15 P3d 422, 57 St. Rep. 1444 (2000).

Procedural Change in Statute of Limitations Not Violative of Ex Post Facto Protection: At the time that Duffy was alleged to have committed sexual intercourse without consent and incest with his daughter in 1986, the applicable statute of limitations provided that a prosecution be commenced within 5 years after the offense if the victim was less than 16 years old at the time that the offense occurred. In 1989, the statute was amended to provide that a prosecution be commenced within 5 years after the victim reached 18 years of age if the victim was less than

18 at the time of the offense. In Duffy's case, if the statute of limitations had not been amended, prosecution would have been barred, so Duffy maintained that applying the 1989 statute of limitations was an unlawful application of the constitutional ex post facto provisions. The Supreme Court applied the ex post facto test in St. v. Leistiko, 256 M 32, 844 P2d 97 (1992), which established that an ex post facto violation occurs when: (1) the law is retrospective; and (2) the law disadvantages the offender. Duffy failed to satisfy the second part of the Leistiko test because the 1989 change in the statute of limitations did not alter the definition of or punishment for the crimes, but merely expanded the time in which the punishment might be imposed and thus did not violate constitutional ex post facto provisions. The conduct of which Duffy was accused was illegal and punishable both before and after the statute of limitations was extended. St. v. Duffy, 2000 MT 186, 300 M 381, 6 P3d 453, 57 St. Rep. 734 (2000). See also U.S. v. Marrow, 177 F3d 272 (5th Cir. 1999).

Youth Court Transfer Provision Illegal Mechanism to Rectify Youth's Failure to Pay Restitution — Ex Post Facto: As a teenager, Young entered a consent decree to dispose of three felony property offenses. He was ordered to pay $3,788 in restitution while on probation, but paid only $125. Later, Young was adjudicated as delinquent and sentenced to the Department of Corrections until age 18, with conditions. Restitution was not required, but the prior restitution was reinstated. Young then committed new offenses and was institutionalized until age 19, but restitution was not made by the time that he was 19. Young's cases were then transferred to District Court pursuant to 41-5-208, and he was placed on probation until the restitution was paid. Young appealed the transfer of the case, contending that he had successfully completed a residential treatment program in Utah according to the court's disposition order and that applying 41-5-208 violated state and federal constitutional ex post facto provisions because the law was not in effect when he committed any of the offenses and because applying the transfer provisions would increase the possible penalty for offenses that he previously admitted. The Supreme Court found that ex post facto application of the transfer provisions did not provide a lawful mechanism to rectify Young's failure to pay restitution. Applying the two-part test in St. v. Leistiko, 256 M 32, 844 P2d 97 (1992), the court held that the transfer provision was retrospective because it was not in effect when Young committed the offenses and that 41-5-208 is more onerous than the prior law because it changed the legal consequences by allowing the Youth Court to extend probation for an additional 6 years through transfer to the District Court. Since Young had successfully completed the Utah residential treatment program and was age 20 at the time that the appeal was decided, the cases should be closed. In re Young, 1999 MT 195, 295 M 394, 983 P2d 985, 56 St. Rep. 759 (1999).

Deletion of Hanging as Form of Capital Punishment Not Ex Post Facto Application: Pursuant to the version of 46-19-103 that was in effect at the time that Langford was sentenced for execution, he affirmatively elected that death be imposed by hanging rather than lethal injection. Langford appealed to the District Court for a declaration that execution by hanging was cruel and unusual punishment that violated the eighth amendment to the U.S. Constitution. The District Court denied the motion, holding that Langford's choice of hanging rendered the cruel and unusual punishment argument moot. Langford appealed to the appropriate federal courts for a writ of habeas corpus, applying the same argument. During the pendency of Langford's federal habeas corpus proceedings, the Montana Legislature met and amended 46-19-103 by removing the hanging option, rendering the federal proceedings moot and nonjusticiable. Langford asserted that the amendment to 46-19-103 constituted an ex post facto law in violation of this section because it effectively removed his defense of arguing that hanging was cruel and unusual punishment. However, Langford was not asserting a defense to a crime with which he was charged; he had already pleaded guilty and been sentenced, and the validity of the convictions was not at issue. The Supreme Court found no ex post facto violation because Langford's purely conjectural assertions that he potentially would have a due process-type right to avoid execution under the earlier version of the statute did not create a current substantive right that would be infringed by an amendment altering only the procedure by which his sentence would be carried out. Langford v. St., 287 M 107, 951 P2d 1357, 54 St. Rep. 1522 (1997). See also McKenzie v. Day, 57 F3d 1461 (9th Cir. 1995).

Requirement of Payment of Reinstatement Fee Not Violation of Ex Post Facto Law: Cooney argued that under the law as it existed prior to 1989, the revoked status of his license would have been removed whether or not he paid any fee when his license expired by its own terms and that therefore the application of the new law requiring payment of a fee before the revoked status of a license may be changed was an ex post facto violation as applied to him. The Supreme Court held that the application of the law did not violate the ban on ex post facto legislation because it

did not change the legal consequences of Cooney's prior conduct and that in addition, the 1989 amendment was intended to clarify that a period of revocation continues until a defendant pays the required fee. St. v. Cooney, 284 M 500, 945 P2d 891, 54 St. Rep. 967 (1997).

Parolee and Probationer Supervision Fee Not Violative of Ex Post Facto Restriction: Frazier asserted that because he was sentenced prior to the enactment of 46-23-1031, the supervisory fee assessed in that section against parolees and probationers could not be retroactively applied to him or other parolees and probationers similarly situated. For a criminal or penal statute to be ex post facto, it must: (1) be retrospective, applying to events occurring before its enactment; and (2) disadvantage the affected offender. A civil sanction will implicate ex post facto concerns only if it can be fairly characterized as punishment. The legislative history of 46-23-1031 indicated that the supervisory fee was assessed to help defray the costs of supervision and to hold parolees and probationers accountable, rather than to punish. Because the fee is administrative rather than punitive, it does not violate the prohibition against ex post facto laws. Frazier v. Dept. of Corrections, 277 M 82, 920 P2d 93, 53 St. Rep. 551 (1996), distinguishing St. v. Leistiko, 256 M 32, 844 P2d 97 (1992).

Defendant to Be Sentenced Under Statute Existing at Time of Original Sentencing: Suiste argued that the District Court had violated the ban against ex post facto legislation by designating him as a dangerous offender when it revoked his suspended sentence for a crime that he was originally convicted of in 1979. By so doing, Suiste argued that the court was subjecting him to a harsher penalty than he could have received at the time that he committed the offense. The Supreme Court held that the defendant was entitled to be sentenced under the statute in effect at the time of the original sentencing. St. v. Suiste, 261 M 251, 862 P2d 399, 50 St. Rep. 1309 (1993).

Increase in Restitution Based on Revised Sentencing Provisions Barred as Ex Post Facto: At a sentence revocation hearing, the District Court considered Leistiko's motion to reduce his monthly restitution payments based on his financial situation. The court reduced payments for 3 months but increased the total restitution by $10,000. Leistiko relied on the 1983 version of 46-18-203 that was in effect at the time of the crime and the initial sentencing, contending that the court did not have authority to apply the 1991 revised version of 46-18-203 to increase restitution. Under Weaver v. Graham, 450 US 24, 67 L Ed 2d 17, 101 S Ct 960 (1981), an increase in the severity of a criminal punishment compared with that authorized at the time the act was committed is a criminal conduct measure coming within the ban on ex post facto laws. The Supreme Court applied the test set out in Miller v. Fla., 482 US 423, 96 L Ed 2d 351, 107 S Ct 2446 (1987), in determining whether the constitutional ban on ex post facto laws was violated: (1) the law must be retrospective; and (2) it must disadvantage the offender affected by it. The revised version of 46-18-203 changed the legal consequences of Leistiko's crime by allowing the District Court to change the sentence, placing a more onerous burden on Leistiko than he could have foreseen at the time he committed the crime and entered into the original plea agreement. The portion of the order imposing additional restitution was vacated under this section. St. v. Leistiko, 256 M 32, 844 P2d 97, 49 St. Rep. 1104 (1992), cited in St. v. Brander, 280 M 148, 930 P2d 31, 53 St. Rep. 1340 (1996), which upheld that there was no ex post facto violation but reversed because of the court's improper consideration of an expunged DUI conviction, and followed, as to an ex post facto application of law, in St. v. Cooney, 284 M 500, 945 P2d 891, 54 St. Rep. 967 (1997), St. v. Beckman, 284 M 459, 944 P2d 756, 54 St. Rep. 977 (1997), St. v. Pratt, 286 M 156, 951 P2d 37, 54 St. Rep. 1349 (1997), In re Young, 1999 MT 195, 295 M 394, 983 P2d 985, 56 St. Rep. 759 (1999), St. v. Shockley, 2001 MT 180, 306 M 196, 31 P3d 350 (2001), and St. v. Brister, 2002 MT 13, 308 M 154, 41 P3d 314 (2002).

Retroactive Enforcement of Incest Statute — Unconstitutional Ex Post Facto Application: An April 1983 amendment added "stepdaughter" to the list of prohibited incestuous relationships; however, the amendment did not become effective until October 1, 1983, a fact that went unnoticed through trial and sentencing for acts committed July 2, 1983. The imposition of a sentence for a conviction under statutes not in force at the time the offense was committed was held to be an ex post facto application of the law and therefore unconstitutional under Art. II, sec. 31, Mont. Const. St. v. Hall, 224 M 187, 728 P2d 1339, 43 St. Rep. 2120 (1986), reversed regarding double jeopardy, 481 US 400, 95 L Ed 2d 354, 107 S Ct 1825 (1987).

Ex Post Facto Rule — Inapplicable to Tax Delinquency Proceedings: The prohibition against ex post facto laws applies only to penal or criminal matters. The collection of delinquent taxes by the assessment of interest and penalties on the amounts due does not change a civil proceeding to a penal or criminal matter. Thus the ex post facto rule does not apply to a legislative enactment that retroactively applied an increase in the rate of interest charged on delinquent tax payments. O'Shaughnessey v. Wolfe, 212 M 12, 685 P2d 361, 41 St. Rep. 1557 (1984).

Parole Eligibility — Ex Post Facto Application: Defendant committed a crime in 1975 for which he was tried and convicted in 1979. In sentencing defendant, the trial court declared him a dangerous offender under 46-18-404 (now repealed) and declared him ineligible for parole under 46-18-202. Both of these statutes became effective July 1, 1977. Application of a law which eliminates or delays a defendant's parole eligibility after the criminal offense has been committed is ex post facto as applied to that defendant and is therefore unconstitutional. St. v. Beachman, 189 M 400, 616 P2d 337, 37 St. Rep. 1558 (1980).

Sentencing Under Statutes Amended After Date of Crime: The sentencing of the defendant to death for a conviction of aggravated kidnapping under statutes amended after section 94-5-304, R.C.M. 1947 (now repealed), was declared unconstitutional did not violate the constitutional prohibition against ex post facto laws. The amendments were ameliorative in nature and did not deprive defendant of a substantial right or immunity that he possessed at the time the crime was committed. St. v. Fitzpatrick, 186 M 187, 606 P2d 1343 (1980).

Amendment of Procedure to Apply Death Penalty: When, after the commission of the crime of homicide, the U.S. Supreme Court found the death penalty statute unconstitutional and the state Legislature took only the procedural step of redefining the punishment and not the crime, there is no ex post facto violation in upholding the previous death penalty imposed, since the defendant had "fair warning" of the consequences of homicide. St. v. Coleman, 185 M 299, 605 P2d 1000 (1979).

Ex Post Facto Laws — Persistent Felony Offender Statute: The persistent felony offender statute, as applied to defendant, did not violate constitutional safeguards dealing with ex post facto laws because the law did not punish him for conduct prior to enactment of this section but merely notified defendant he was subject to increased punishment if he in the future committed an additional felony crime. St. v. Maldonado, 176 M 322, 578 P2d 296 (1978), followed in St. v. Brander, 280 M 148, 930 P2d 31, 53 St. Rep. 1340 (1996), which upheld that there was no ex post facto violation but reversed because of the court's improper consideration of an expunged DUI conviction.

IMPAIRMENT OF CONTRACTS

Initiative Banning Cyanide Mining Not Unconstitutional Taking or Impairment of Contract — Opportunity to Apply for Mining Permit Not Property Right: Plaintiffs had an operating permit pending for a cyanide leach pit gold mine when voters passed Initiative Measure No. 137 (I-137) that prohibited cyanide mining in Montana. Plaintiffs sued on grounds that I-137 interfered with their property right in the permit, constituted an unconstitutional regulatory taking for which they should be compensated, and violated the contract clause in this section. The District Court found for the state on all issues, and plaintiffs appealed, but the Supreme Court affirmed. Plaintiffs' mere opportunity to seek a mining permit did not constitute a property right, given the state's wide discretion to reject the application even without the passage of I-137. Further, I-137 did not constitute a taking because plaintiffs had not yet obtained a right to mine that the initiative took away. Moreover, even though the District Court incorrectly held that plaintiffs' corporate mining agreement was not substantially impaired by I-137, the court nonetheless correctly concluded that there was no contract clause violation because I-137 was reasonably related to the legitimate and significant public purpose of protecting the environment. Seven Up Pete Venture v. St., 2005 MT 146, 327 M 306, 114 P3d 1009 (2005).

Question of Whether Change in Tax Law Impaired County Bond Contract Moot When Bonds Paid in Full: Big Horn County argued that legislation that imposed a fixed tax rate on coal, oil, and natural gas and exempted the proceeds from local mill levies impaired the contract of the county with purchasers of the county's general obligation bonds. The Supreme Court held that because the bonds had been paid in full, there was no justiciable controversy and therefore the question of contract impairment was moot. Powder River County v. St., 2002 MT 259, 312 M 198, 60 P3d 357 (2002).

Grant of Preliminary Injunction — Prima Facie Showing of Violation of Constitutional and Contract Rights: A 1963 contract between the city of Billings and the Billings Heights County Water District fixed water rate charges and limited any subsequent rate increase charged the district unless the same percentage increase was applied to all city water users. Needing to raise additional revenue, in 1993, the city raised average water rates by 9.2% and the district rates by 32%. The district relied on the contract and increased its payments by 9.2%. In 1994, the city initiated an action to recover from the district the difference between the 1993 rate and the rate that the district paid from that time. In 1996, the city raised rates again, resulting in a 123% increase to the district and no such dramatic increase to any other city water customer. The

district applied for a preliminary injunction to prevent the city from imposing the 1996 rate until the 1994 action had been addressed, but the application was denied and the district appealed. The Supreme Court found that the district made: (1) a sufficient showing that application of 69-7-101, granting the city control over utility rates, substantially impaired the district's rights under the 1963 contract; and (2) a prima facie case that application of 69-7-101 violated its rights under contract clauses of the U.S. and Montana Constitutions. Without ruling on the merits of the case, the court held that the district was thus entitled to the temporary injunction. Billings v. County Water District of Billings Heights, 281 M 219, 935 P2d 246, 54 St. Rep. 144 (1997).

1989 Retirement Benefit Increase Not Applicable to Judge Who Retired After Date of Enactment but Before Effective Date of Legislation: Gulbrandson was an active member of the judges' retirement system at the time of enactment of Ch. 664, L. 1989, which provided an increase in state funding to the system and an increase in retirement benefits for those years served by a judge after the 15th year. Implementation of the increase under 19-5-502 was delayed until July 1, 1991. Gulbrandson voluntarily retired prior to the delayed effective date. The Supreme Court held that based on the plain meaning of the statute, Gulbrandson was not entitled to the increased retirement benefit upon his retirement prior to July 1, 1991. Denial of the benefit did not impair Gulbrandson's contract with the system in violation of this section because the statute affecting his contract at the time of retirement did not include the benefit increase. Moreover, denial of the benefit does not violate equal protection provisions of Art. II, sec. 4, Mont. Const., because although Ch. 664 effectively created two classes of retired judges, it operates equally upon those within each class. Nearly all such legislation creates classifications regarding applicability, benefits, and recipients of retirement benefits. The fact that some of the classifications are imperfect does not necessarily mandate a conclusion that they violate equal protection. Under the rational basis test, which is the proper test in this case, the legitimate government interest of encouraging judges with significant years of service to remain in service longer was met. Thus, the 1989 amendment to 19-5-502 was not unreasonable or arbitrary or devoid of rational basis. Gulbrandson v. Carey, 272 M 494, 901 P2d 573, 52 St. Rep. 843 (1995), following Hughes v. Judges Retirement Bd., 282 NW 2d 160 (Mich. 1979), and distinguishing Leonard v. Seattle, 503 P2d 741 (Wash. 1972).

Implementation of Department Directors' Pay Plan Prevented by Governor — No Violation of Separation of Powers — No Impairment of Contract: Directors of two Executive Branch agencies notified employees that employees would be eligible for reinstatement of pay plan steps lost to multigrade promotions. The Governor prohibited the proposed plan. Plaintiffs sued, claiming that the Governor acted unconstitutionally. The Supreme Court held that the Department of Administration's broad powers and duties relating to the state pay plan must be read in conjunction with the Governor's statutory duties of supervision, approval, appointment, and direction over executive agency departments while also taking into consideration the Governor's constitutional status as chief executive officer of the state. The doctrine of separation of powers is not violated when the Governor exercises the very sorts of powers and duties authorized by the Legislature in the statutes enacted. Because the directors' offer was gratuitous and there was no consideration for the offer, no contract was formed under which the employees gained any vested rights to the reinstatement of the lost step. Past consideration (the employees' prior work) is not sufficient to support a promise. Because there was no contract, there were no contractual obligations that were impaired by the Governor's action. Mont. Pub. Employees Ass'n v. Office of Governor, 271 M 450, 898 P2d 675, 52 St. Rep. 523 (1995).

Forfeiture of Water Rights Not Impairment of Contracts: Former water rights holders who forfeited their rights through failure to meet the filing deadline contended that 85-2-226 constituted an impairment of contracts by rendering invalid water rights upon which substantial contractual relationships were based. However, failure to demonstrate the existence of any specific contract, let alone its impairment, was fatal to the impairment of contracts claim under either the state or federal constitution. In re Adjudication of Existing Yellowstone River Water Rights, 253 M 167, 832 P2d 1210, 49 St. Rep. 413 (1992).

Lack of Standing to Raise Constitutional Issues Absent Wrongful Discharge: A jury found that plaintiffs were not discharged wrongfully. On appeal, plaintiffs raised numerous issues regarding the constitutionality of the Wrongful Discharge From Employment Act, contending that the Act violated the right of trial by jury and the Montana Constitution's privileges and immunities clause, equal protection clause, impairment of contracts clause, and due process clause. The Supreme Court, citing Jones & Harriot v. Judge, 176 M 251, 577 P2d 846 (1978), and Stelling v. Rivercrest Ranches, Inc., 224 M 313, 730 P2d 388 (1986), found that plaintiffs lacked standing to challenge the constitutionality of the Act because consideration of the issues was

rendered moot by the jury verdict, resulting in no adverse effect on plaintiffs by the challenged statutes. Allmaras v. Yellowstone Basin Properties, 248 M 477, 812 P2d 770, 48 St. Rep. 519 (1991), followed in Lutey Constr. v. St., 257 M 387, 851 P2d 1037, 50 St. Rep. 321 (1993).

No Vested Contract Right in Human Rights Discrimination Claim: Unlike a workers' compensation claimant, a claimant in a human rights discrimination action has no vested contract right to application of the laws in effect at the time of the injury. Even though the alleged discriminatory acts could be termed a breach of the implied employment contract, the gravamen of the claim is still discrimination. Because there is no vested contract right, the exclusive remedy provision of 49-2-509 (now repealed) does not violate the claimant's right to contract. Harrison v. Chance, 244 M 215, 797 P2d 200, 47 St. Rep. 1539 (1990), distinguishing Carmichael v. Workers' Comp. Court, 234 M 410, 763 P2d 1122 (1988).

Beneficial Use Tax on Investor-Owned Utilities Upheld: A contract between individuals cannot have the effect of depriving the state or any municipal subdivision of any power of taxation otherwise belonging to it. So long as the state does not violate a fundamental right of the individual, the state is free to vary the existing mode of taxation. Pac. Power & Light Co. v. Dept. of Revenue, 237 M 77, 773 P2d 1176, 46 St. Rep. 636 (1989).

Retroactive Application of Workers' Compensation Mediation Procedure — Unconstitutional Impairment of Contracts: The 1987 amendments to the Workers' Compensation Act concerning dispute resolution and mediation may not be applied retroactively to cases in which a petition was filed prior to July 1, 1987, because such application would unconstitutionally impair a contractual obligation. In analyzing a contract clause challenge, the court adopted a three-tier analysis: (1) Is the state law a substantial impairment of contractual relationship? (2) Does the state have a significant and legitimate purpose for the law? (3) Does the law impose reasonable conditions reasonably related to achieving a legitimate and public purpose? The court held that the delay occasioned by the requirement to mediate a dispute represents a substantial impairment of the employee's contractual rights under the insurance policy, that the state has a legitimate and significant purpose for the law because it is intended to encourage out-of-court settlements and lessen the volume of cases in the Workers' Compensation Court, and that there is insufficient evidence to show that the mediation process would achieve a more manageable caseload for the Workers' Compensation Court. Carmichael v. Workers' Comp. Court, 234 M 410, 763 P2d 1122, 45 St. Rep. 2012 (1988). See also Billings v. County Water District of Billings Heights, 281 M 219, 935 P2d 246, 54 St. Rep. 144 (1997), wherein the three-tiered Carmichael analysis was applied to a water rate contract.

"Means End Test" — Owner Consent Statute Violative of Due Process, Impairment of Obligation of Contract, and Eminent Domain: Applying the "means end test" adopted in Lawton v. Steele, 152 US 133, 38 L Ed 385, 14 S Ct 499 (1894), wherein the state's authority on behalf of the public is balanced against the constitutional due process requirement in the protection of private property, the Supreme Court declared 82-4-224 (now repealed), the owner consent statute of the Montana Strip and Underground Mine Reclamation Act, to be unconstitutional. The court concluded that the denial of just compensation placed an unreasonable burden on mineral owners, in violation of due process, and that the statute does not bear the requisite relation to the public health, safety, morals, or general welfare. The statute does not address reclamation, conservation, or any other policy goal; does not prevent strip mining operations; does not regulate how mining or reclamation is performed; does not conserve agricultural land; and is inapplicable unless the surface rights have been severed from the mineral rights or the mineral estate is owned in fee by the federal government or in trust for an Indian tribe. W. Energy Co. v. Genie Land Co., 227 M 74, 737 P2d 478, 44 St. Rep. 904 (1987), distinguishing Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 US 470, 94 L Ed 2d 472, 107 S Ct 1232 (1987).

Workers' Compensation — Employer Not Liable for Contribution or Indemnity Despite Express Indemnity Agreement: When a third party was sued by an injured worker, the third party joined the employer as a third-party defendant, seeking contribution or indemnity, on the basis of an express indemnity agreement. On certification from the federal District Court, the Montana Supreme Court held that an employer can assert the statutory prohibition against third-party claims for contribution or indemnity as a complete defense to a third-party claim based on an express agreement. The statute serves a significant and legitimate public purpose of perpetuating Montana's workers' compensation system and does not violate the constitutional prohibition against impairment of obligation of contracts. Raisler v. Burlington N. RR, 219 M 254, 717 P2d 535, 42 St. Rep. 1997 (1985).

Title to and Public Recreation on Dearborn River — Ex Post Facto, Contract Clause, and Irrevocable Privileged Considerations: The Supreme Court held that the State, not the landowner

along the Dearborn River, held title to the bed of the river under the federal test of navigability (at the time Montana became a state) for purposes of determining title to the riverbed. The court also held that landowner had no right to exclude the public from recreational use of the waters of the Dearborn. Because of these holdings, landowner's questions relating to ex post facto laws, violation of the contract clause of the constitution, and irrevocable rights and privileges were not germane to the case. Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984).

Retroactive Filing of Exemption Held Not to Impair Obligations of Contract: The Supreme Court reversed a District Court decision and held that an amendment to the homestead exemption statutes allowing the filing of a homestead declaration after an auditor obtained a judgment applied retroactively to allow exemption of homesteads from judgments obtained prior to the effective date of the amendment. The Supreme Court also held that the retroactive application did not violate the provisions of the state and federal constitutions prohibiting interference with obligations of contracts. Under the rationale of Energy Reserves Group, Inc. v. Kansas Power and Light Co., 459 US 400, 74 L Ed 2d 569, 103 S Ct 697 (1983), the Supreme Court determined that the amendment did not substantially impair the obligations of the contract between the parties because: (1) the area of law of homestead exemptions had been heavily regulated by statute in the past; (2) when the defendant bank made its loan to the plaintiff, it was made subject to further state regulation of homestead exemptions; and (3) the bank should have been aware that the exemption had been increased over the last 50 years, knew that the plaintiff's home would be subject to a homestead exemption, and took its chances that the State might increase the exemption. Moreover, because the loan was not secured by a mortgage on the home, the bank could not have relied on the plaintiff's continued ownership of the home. For these reasons, the bank's reasonable contract expectations were not impaired by the State's amendment of the statute. Neel v. First Fed. S & L Ass'n, 207 M 376, 675 P2d 96, 41 St. Rep. 18 (1984).

Impairment of Contract and Diminution of Salary — Preventing Legislative Meddling in Judicial Decisions: Plaintiff contended 3-2-104 and 3-5-212 (now repealed), which imposed sanctions on judges if decisions were not reached or opinions were not written within the procedural constraints and time limits set by the statutes, were unconstitutional. The penalty provisions of both statutes required a 1-month salary forfeiture in the event of a violation. Plaintiff contended the penalty violated the impairment of contract and diminution of judicial salary provisions of the Montana Constitution. Defendant contended that since the judiciary imposed the sanctions, the constitution was not violated. The constitutional prohibition against diminution of salaries is designed to prevent lawmakers from exerting control over the judiciary. Even if the court were to allow the indirect violation by allowing the Legislature to mandate a scheme administered by the courts, the statutes would violate the impairment of contract prohibition. Public employment gives rise to certain obligations protected by the contract clause of the constitution. Promised compensation is one such protected right. Once vested, the right to compensation cannot be eliminated without unconstitutionally impairing the contract obligation. Coate v. Omholt, 203 M 488, 662 P2d 591, 40 St. Rep. 586 (1983).

Substantial Impairment of City's Contractual Obligations — Retrospective Application: On November 25, 1978, a city and a private garbage collection service entered into a contract in which the latter was to provide garbage collection services for the city from November 1, 1978, through June 30, 1979. On June 30, 1979, the city voted to provide its own garbage service. Retroactive application of 7-13-4107, relating to compensation of private garbage carriers, would clearly substantially impair the contractual obligations of the city. Whether it constitutes an unconstitutional impairment of contract was not decided because the contract expired before the effective date of the statute. D & F Sanitation Serv. v. Red Lodge, 196 M 490, 640 P2d 461, 39 St. Rep. 287 (1982).

Impairment of Contracts — Alcoholic Beverage Code: The Montana Alcoholic Beverage Code appears to be a valid exercise of the state police power, and it is not repugnant to the federal constitutional provisions prohibiting impairment of contracts or similar language in the Montana Constitution. Libbey II v. Jos. Schlitz Brewing Co., 34 St. Rep. 1254 (1977).

Repeal of Ordinance Establishing Longevity Pay for Firefighters: A contract was created for the benefit of firefighters by the city's adoption of a resolution concerning longevity pay; therefore, a subsequent resolution repealing the provision was unconstitutional as applied to firefighters covered by the contract in effect between the city and labor organization representing the firefighters at time of the repeal. Local 8 Int'l Ass'n of Firefighters v. Great Falls, 174 M 53, 568 P2d 541 (1977).

Liens on Property of Welfare Recipients: Section releasing all liens held by the Department of Social and Rehabilitation Services (now Department of Public Health and Human Services) on real property of welfare recipients did not violate this provision since state had no vested rights in its liens. Carkulis v. Doe, 164 M 315, 521 P2d 1305 (1974).

IRREVOCABLE PRIVILEGES, FRANCHISES, OR IMMUNITY

No Demonstration Beyond a Reasonable Doubt That the Statute is Unconstitutional: Plaintiffs argued that 39-71-413 of the Workers' Compensation Act violated various Montana constitutional provisions including the right to equal protection, the prohibition against legislation conferring any irrevocable grant of special privileges, franchises, or immunities, and the prohibition against special legislation. Statutes are presumed to be constitutional, and the court concluded that the plaintiffs failed to meet their burden of demonstrating beyond a reasonable doubt that 39-71-413 is unconstitutional. Alexander v. Bozeman Motors, Inc., 2010 MT 135, 356 Mont. 439, 234 P.3d 880.

Franchise Not Irrevocable — Constitutionality: On cross-appeal, respondent city of Billings contended that 7-2-4736 violated Art. II, sec. 31, Mont. Const., because it granted an irrevocable franchise to appellant private garbage haulers. The Supreme Court in Glodt v. Missoula, 121 M 178, 190 P2d 545 (1948), defined franchise as a "special privilege conferred by the government on an individual which does not belong to the citizens generally". In this case, the court agreed that 7-2-4736 conferred a special privilege or franchise upon the garbage haulers, but noted that the franchise was not an irrevocable one within the meaning of Art. II, sec. 31, Mont. Const., since the privilege could be terminated by either a showing that the private carrier was unable or refused to provide adequate service or by written request of a majority of residents after a set period of time. Therefore, 7-2-4736 was held to be constitutional under Art. II, sec. 31, Mont. Const. D & F Sanitation Serv. v. Billings, 219 M 437, 713 P2d 977, 43 St. Rep. 74 (1986).

DECISIONS UNDER 1889 CONSTITUTION

EX POST FACTO

Repeal of Criminal Statute — Effect of Saving Clause: General saving clause interpreted so as to preserve for prosecution all criminal offenses committed prior to repeal, absent an express legislative intent to contrary contained in repealing act, did not violate Art. III, sec. 11, 1889 Mont. Const., as constituting ex post facto legislation. State ex rel. Huffman v. District Court, 154 M 201, 461 P2d 847 (1969).

Ex Post Facto Application — Change of Parole Requirements: A parole and probation statute that had not been in effect at the time prisoner began serving his sentence but was in effect following a new trial in which prisoner was reconvicted and began again serving a 10-year sentence, which had the effect of increasing prisoner's time by allowing less time off for good behavior than did the prior probation law, was ex post facto as to that prisoner. State ex rel. Nelson v. Ellsworth, 142 M 14, 380 P2d 886 (1963).

Applies Only to Crimes: Article III, sec. 11, 1889 Mont. Const., had reference to crimes and not to matters which affect private rights retroactively, and as to the latter the only inhibition against retroactive legislation found therein was that such legislation must not impair the obligation of contract or interfere with vested rights. Durocher v. Myers, 84 M 225, 274 P 1062 (1929).

RETROACTIVE

Retroactive Intention to Be Clear: While no constitutional barriers, other than those stated in Art. III, sec. 11, 1889 Mont. Const., exist to restrain retroactive legislation in this state, and while a certain amount of retrospection is necessarily involved in many of our laws, it is nevertheless a fundamental rule of construction that retroactive effect is not to be given to a statute unless commanded by its context, terms, or manifest purpose. Falligan v. School District, 54 M 177, 169 P 803 (1917).

Retrospective Law Permissible: There was no prohibition in the Constitution against retrospective legislation other than that contained in Art. III, sec. 11, 1889 Mont. Const. The Legislature was therefore untrammeled and free, insofar as constitutional provisions are concerned, to pass any retrospective laws which did not violate the obligations of contracts or interfere with any vested rights. Bullard v. Smith, 28 M 387, 72 P 761 (1903).

IMPAIRMENT OF CONTRACTS

Relocation of Utility Facilities: The provisions of former section relating to the costs of relocating utility facilities did not violate Art. III, sec. 11, 1889 Mont. Const. Jones v. Burns, 138 M 268, 357 P2d 22 (1960).

Amendment of Veterans' Honorarium: Statute amending initiative act providing for honorarium for World War II veterans to make Korean War veterans eligible to receive honorariums did not violate Art. III, sec. 11, 1889 Mont. Const. Cottingham v. St. Bd. of Examiners, 134 M 1, 328 P2d 907 (1958), overruled on other grounds in State ex rel. Ward v. Anderson, 158 M 279, 491 P2d 868 (1971).

Agreement Between City Council and Housing Authority: When a city council created a housing authority and entered into a cooperative agreement with the housing authority, it could not later pass an ordinance which repudiated the cooperation agreement without violating Art. III, sec. 11, 1889 Mont. Const. State ex rel. Housing Authority v. Helena, 125 M 592, 242 P2d 250 (1952).

Impairment of Contract — Retirement Pay Interest: Retirement law that changed the rate of interest which a withdrawing member would receive was invalid. Clarke v. Ireland, 122 M 191, 199 P2d 965 (1948).

Change of Tax Rate on Trust: When trust was created in 1915 and the transfer was taxed on the inheritance tax rate in existence in 1945, the time of the settlor's death, there was no violation of Art. III, sec. 11, 1889 Mont. Const. In re Kohr, 122 M 145, 199 P2d 856 (1948).

Prohibition Against Counties Including Anticipated Tax Delinquencies in Budget: Section prohibiting consideration of anticipated loss of revenue for nonpayment of taxes does not offend against Art. III, sec. 11, 1889 Mont. Const., as impairing obligations of contracts of a county, since the budget law contemplates issuance of interest-bearing registered warrants up to budget appropriation if there be no money which may be budgeted for the succeeding year. Great N. Ry. v. Phillips County, 112 M 542, 118 P2d 754 (1941).

Levy to Fund Obligations Entered Into Prior to Repeal of Authorization: Although law authorizing issuance by counties of emergency relief warrants expired by its own terms, a county issuing such warrants during the life of the act would have authority to make necessary levies to pay the warrants after the act expired, since Legislature will not be said to have intended to impair the obligation of the county. Kraus v. Riley, 107 M 116, 80 P2d 864 (1938).

Exemptions From Execution: Section creating additional exemption on automobile of the value of not more than $300 in favor of head of a family or persons over 60 years of age was invalid under Art. III, sec. 11, 1889 Mont. Const., and federal Constitution when the judgment on which execution was issued was obtained on a contract antedating the effective date of the section. Rieger v. Wilson, 102 M 86, 56 P2d 176 (1936).

Contract Between Parties Not to Deprive State of Taxing Power:

Under the rule that a contract between individuals cannot deprive the state of any power of taxation otherwise belonging to it, sections (since repealed) did not impair the obligation of a contract when applied to royalty accruing under a contract executed before the enactment of the sections. Forbes v. Mid-Northern Oil Co., 100 M 10, 45 P2d 673 (1935).

Former law was not open to the objection that it impaired the obligation of a contract in that, at the time of the contract of lease between the operator and the lessor of oil land, the law contemplated but one assessment and that, in addition to the operator, it imposed part of the tax upon the lessor. A contract between individuals does not have the effect of depriving the state of its power of taxation. Byrne v. Fulton Oil Co., 85 M 329, 278 P 514 (1929).

Remission of Interest and Penalties: Law authorizing remission of interest and penalties was not violative of Art. III, sec. 11, 1889 Mont. Const. State ex rel. Sparling v. Hitsman, 99 M 521, 44 P2d 747 (1935).

Rights Based on Existing Contracts to Yield to Common Welfare: If a city ordinance can reasonably be said to be a proper exercise of the police power, it is of no consequence that it affects property rights or rights based upon existing contracts, since such rights must yield to the common welfare. Butte v. Roberts, 94 M 482, 23 P2d 243 (1933).

Liability of Directors: The liability of directors under section 15-407, R.C.M. 1947 (now repealed), not being founded in contract and there being no vested interest in an unenforced penalty, section 15-407, R.C.M. 1947 (now repealed), taking away the right of action against the directors of a corporation for incurring debts in excess of its subscribed capital stock, held not invalid as impairing the obligation of contract or interfering with vested rights. Cont. Oil Co. v. Mont. Concrete Co., 63 M 223, 207 P 116 (1922), overruled in Cont. Supply Co. v. Abell, 95 M 148, 24 P2d 133 (1933).

Street Railway Subject to Legislative Regulation: A municipal corporation does not stand in a position to assert against the state the benefit of the constitutional provision against the impairment of the obligation of contracts. While the grant of a street railway franchise and its acceptance constitute a contract, it is one subject to legislative restriction and regulation and control by the Public Service Commission and therefore cannot be claimed to be inviolable so as to prevent the grantee from discontinuing a part of a line of its system in face of a provision in the franchise requiring it to operate the line for the entire term of the grant, irrespective of the question of loss sustained in its operation. Helena v. Helena Light & Ry., 63 M 108, 207 P 337 (1922).

Impairment of Contract — Authorization to Sell Corporate Property: Law authorizing the directors of a mining corporation to sell the board's property did not impair the obligation of contracts. Somerville v. St. Louis Min. & Milling Co., 46 M 268, 127 P 464 (1912); Allen v. Ajax Min. Co., 30 M 490, 77 P 47 (1904).

Judgment — Not a Contract: A judgment is in the nature of a contract, but it is not a contract within the meaning of Art. III, sec. 11, 1889 Mont. Const., and a statute changing the rate of interest which a judgment bears after entry was not unconstitutional. Stanford v. Coram, 28 M 288, 72 P 655 (1903).

Degree of Impairment Immaterial: A statute that changes the terms of an agreement by imposing new conditions or dispensing with those expressed or implied is repugnant to the Constitution as being a law impairing the obligation of a contract, and the degree of impairment is immaterial. State ex rel. Sav. Bank v. Barret, 25 M 112, 63 P 1030 (1901).

Impairment of State Contract: The Legislature can no more impair the obligation of a contract entered into by the state than it can the obligation of a contract made between individuals. State ex rel. Sav. Bank v. Barret, 25 M 112, 63 P 1030 (1901).

IRREVOCABLE PRIVILEGES, FRANCHISES, OR IMMUNITY

Creation of Water Conservation Board: Sections relating to creation of Water Conservation Board were not unconstitutional as irrevocably granting special privileges, franchises, or immunities under Art. III, sec. 11, 1889 Mont. Const. State ex rel. Normile v. Cooney, 100 M 391, 47 P2d 637 (1935).

Allowance of On-Track Betting: Laws making it unlawful to record or register or to aid or abet in recording, reporting, or registering any bet or wager upon races held outside the state and which among other things allow betting on speed contests held within racetrack or fairground enclosures in this state are not in contravention of the provisions of Art. III, sec. 11, 1889 Mont. Const., prohibiting the irrevocable granting of any special privileges, franchises, or immunities. St. v. Rose, 40 M 66, 105 P 82 (1909).

Attorney General's Opinions

Board of Investments Allowed to Complete Grants Entered Between Board of Science and Technology Development and University System: In 1989, the Legislature created the Board of Science and Technology Development and allowed that Board to administer a statutorily allocated amount of money from the in-state investment fund for seed capital project loans. From 1989 to 1997, the Legislature continued to fund the Board of Science and Technology Development, which used the money to enter into research and development loans with different units of the Montana University System. In 1997, the Legislature deleted the Board of Science and Technology Development's authority to make loans that had been authorized in previous sessions, effective July 1, 1999, but authorized the Board of Science and Technology Development to grant up to $2 million of interest and income from investments to university research and development projects during the interim between 1997 and 1999. Relying on that authority, the Board of Science and Technology Development entered into six separate grant agreements with the University System, and the various units relied on the grants to secure matching federal funds for the projects. In 1999, in an attempt to make the coal tax permanent trust fund whole, the Legislature dismantled the Board of Science and Technology Development and directed the Board of Investments to administer agreements entered into by the Board of Science and Technology Development that had been funded with coal tax permanent trust funds and, at the same time, eliminated the funds set aside for the completion of the agreements, creating an inherent statutory conflict. Nevertheless, the agreements were fully integrated, binding contracts. The Attorney General concluded that the 1999 elimination of the Board of Investment's ability to complete the grant obligations to the University System would constitute a substantial impairment of contracts. Further, without the funds, the University System would not be able to complete the projects and federal matching funds would be jeopardized. To harmonize the conflict

and avoid a contract impairment, the Attorney General held that the Board of Investments could complete the payment of grants to the University System from interest and income derived from Board of Science and Technology Development loans. 49 A.G. Op. 2 (2001).

Unified Retirement — Firefighters Entitled to Prior Benefits: In converting to the Unified Retirement System, all eligible firefighters are entitled to all pension benefits accrued to them under the old retirement system. A firefighter's pension constitutes an element of compensation, and a vested contractual right to pension benefits, which are stated in the retirement plan during the firefighter's employment, accrues when he begins paying into the retirement fund. Vested pension rights include the provisions that were used to compute the adjusted benefits under the old system. Firefighters hired before July 1, 1973, and who retired during the period from July 1, 1973, and July 1, 1981, are entitled to all pension benefits accrued to them under the old retirement system. 39 A.G. Op. 51 (1982).

Appropriation for Salaries — Impairment of Contract: House Bill 747, L. 1974, provided for a salary adjustment "in lieu of all forthcoming, broad-based salary increases in the 1975 biennium". Because this provision would have reduced the salary increases to be received under contracts entered into between union bargaining units and state agencies, it was an impairment of contract, and the employees were entitled to the salary increases contained in the contracts. 35 A.G. Op. 89 (1974).

Law Review Articles

Montana's Survival Statute—A Constitutional Quandary, Anderson, 24 Mont. L. Rev. 123 (1963).

Corporate By-Law Dispensing with Cumulative Voting Held Void as a By-Law and Unenforceable as a Contract, Wilson, 22 Mont. L. Rev. 185 (1961).

The Improvement of Conveyancing in Montana by Legislation—A Proposal, Cromwell, 22 Mont. L. Rev. 26 (1960).

Section 32. Civilian control of the military.

Convention Notes

Identical to 1889 constitution.

Compiler's Comments

Former Constitutional Provision: This section is similar to Art. III, sec. 22, 1889 Mont. Const.

Section 33. Importation of armed persons.

Convention Notes

Identical to 1889 constitution.

Compiler's Comments

Former Constitutional Provision: This section is similar to Art. III, sec. 31, 1889 Mont. Const.

Law Review Articles

"No Armed Bodies of Men"—Montanans' Forgotten Constitutional Right, Natelson, 63 Mont. L. Rev. 1 (2002).

Section 34. Unenumerated rights.

Convention Notes

Identical to 1889 constitution.

Compiler's Comments

Former Constitutional Provision: This section is the same as Art. III, sec. 30, 1889 Mont. Const.

Case Notes

Deletion of Hanging as Form of Capital Punishment Not Denial of Ability to Present Argument Regarding Cruel and Unusual Punishment: Pursuant to the version of 46-19-103 that was in effect at the time that Langford was sentenced for execution, he affirmatively elected that death be imposed by hanging rather than lethal injection. Langford appealed to the District Court for a declaration that execution by hanging was cruel and unusual punishment that violated the eighth amendment to the U.S. Constitution. The District Court denied the motion, holding that Langford's choice of hanging rendered the cruel and unusual punishment argument moot. Langford appealed to the appropriate federal courts for a writ of habeas corpus, applying the same argument. During the pendency of Langford's federal habeas corpus proceedings, the Montana Legislature met and amended 46-19-103 by removing the hanging option, rendering the federal proceedings moot and nonjusticiable. Langford asserted that the amendment to

46-19-103 violated numerous constitutional provisions by denying him the ability to present the cruel and unusual punishment argument to the federal courts. The Supreme Court found no merit in Langford's argument that the state Attorney General advised the Legislature to amend 46-19-103 in order to deny Langford the grounds for appeal, because the Attorney General supported but did not initiate the legislation. Further, the court did not agree with Langford's assertion that the amendment rendered the time that Langford spent in pursuing the cruel and unusual punishment argument retroactively useless and chargeable to the state as a form of cruel and unusual punishment in itself, because the eighth amendment argument was not the only claim that Langford pursued. Therefore, the entire time could not be charged to the state as being related to the amendment to 46-19-103. Having concluded that Langford failed to establish any constitutional violations, his petition for writ of injunction staying his execution was denied. Langford v. St., 287 M 107, 951 P2d 1357, 54 St. Rep. 1522 (1997).

Section 35. Servicemen, servicewomen, and veterans.

Convention Notes

New provision allowing legislature to give servicemen, servicewomen, and veterans special treatment in the law.

Case Notes

DECISIONS UNDER 1972 CONSTITUTION

Permissive Provision: This section is permissive and does not provide an independent ground for finding that the veterans' preference was more than a mere governmental gratuity. Femling v. Mont. St. Univ., 220 M 133, 713 P2d 996, 43 St. Rep. 235 (1986).

Claimed Veterans' Preference Not Protected by Due Process Provision: A claimed veterans' preference is not property within the meaning of Art. II, sec. 17, of the Montana Constitution or the Due Process Clause of the 14th amendment to the United States Constitution. A veterans' preference is a gratuity, not a contractual right, nor may a reliance interest in a veterans' preference be obtained before the preference is actually received. Nick v. Dept. of Highways, 219 M 168, 711 P2d 795, 42 St. Rep. 1926 (1985).

Retroactivity of Employment Preference — No Equal Protection Violation: A provision (Ch. 1, sec. 14, Sp. L. 1983) in the 1983 employment preference law (Title 39, ch. 30), making the repeal of the former law retroactive, is not a violation of Art. II, sec. 4, of the Montana Constitution or the Equal Protection Clause of the 14th amendment to the United State Constitution. The proper standard of review in this case is the rational basis test since the employment preference law neither burdens a fundamental right nor involves a suspect class. The law is valid under the rational basis test since it was a rational response to the Legislature's legitimate concerns of fiscal integrity, employee competence, and academic freedom created by the implications of the decision in Crabtree v. Mont. St. Library, 204 M 398, 665 P2d 231, 40 St. Rep. 963 (1983). Nick v. Dept. of Highways, 219 M 168, 711 P2d 795, 42 St. Rep. 1926 (1985).

Veterans' Preference Gratuity — Not Vested Right: Plaintiff served in the capacity of deputy clerk of the Supreme Court for 20 years. He ran for the Clerk of Court position but was defeated. The newly elected Clerk terminated plaintiff and appointed a new deputy. Plaintiff contended that as a veteran he was entitled to a preference in employment and that the Legislature's repeal of the former veterans' preference law was invalid. On appeal, the Supreme Court held that the veterans' preference rights granted under the repealed portion of the veterans' preference law are not rights earned through years of service to the state, but are a gratuity given to citizens of Montana by the state to show its appreciation for service in the armed forces. They do not amount to rights vested in the veterans. The Legislature could properly repeal the law by majority vote at any time, and veterans acting under the old law are considered to have acted in contemplation of the Legislature's power of repeal. Conboy v. St., 214 M 492, 693 P2d 547, 42 St. Rep. 120 (1985).

DECISIONS UNDER 1889 CONSTITUTION

Korean War Honorarium: Statute amending initiative act providing for honorarium for World War II veterans so as to make Korean veterans eligible to receive honorariums did not violate Art. III, sec. 27, 1889 Mont. Const. Cottingham v. St. Bd. of Examiners, 134 M 1, 328 P2d 907 (1958), overruled on other grounds in State ex rel. Ward v. Anderson, 158 M 279, 491 P2d 868 (1971).

Attorney General's Opinions

Fee Waivers for Veterans for Extra Studies: The Board of Regents may not require veterans qualifying under the provisions of 10-2-311 (now repealed) to pay fees for extension or continuing education courses offered by units of the Montana University System. 37 A.G. Op. 167 (1978).

ARTICLE III

GENERAL GOVERNMENT

Section 1. Separation of powers.

Convention Notes

Identical to 1889 constitution except for substitution of the word "branches" for "departments." This distinguishes the three branches of government from the 20 departments in the executive branch.

Compiler's Comments

Former Constitutional Provision: This section is similar to Art. IV, sec. 1, 1889 Mont. Const.

Case Notes

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DECISIONS UNDER 1972 CONSTITUTION

LEGISLATIVE BRANCH

Legislative Employee's Fiscal Assumptions Cannot Trigger Tax Credits — Unlawful Delegation of Power — Invasion of Executive Branch Power Impermissible: Legislative Referendum 123 (LR-123) provided a potential tax credit, tax refund, or payment to individuals when a certain level of surplus revenue was in the state treasury at the close of the fiscal year. As part of the process of determining whether there was surplus revenue, the Legislative Fiscal Analyst (LFA) was required to perform two dozen steps or calculations, including discretionary projections of balances, revenues, transfers, appropriations, and reversions. The Supreme Court held that the delegation of authority to the LFA violated Article V, section 1, of the Montana Constitution as an unlawful delegation of legislative power, similar to the unlawful delegation of authority to a legislative interim committee in State ex rel. Judge v. Legislative Fin. Comm., 168 Mont. 470, 543 P.2d 1317 (1975). Moreover, the requirement that the LFA exercise judgment and interpretations regarding the law violated the separation of powers under Article III, section 1, of the Montana Constitution, since these are Executive Branch functions. MEA-MFT v. McCulloch, 2012 MT 211, 366 Mont. 266, 291 P.3d 1075.

Mandatory Life Sentence Not Violative of Due Process, Cruel and Unusual Punishment, or Separation of Powers — Exception Properly Considered: Webb pleaded guilty to second offense sexual intercourse without consent and was sentenced to life in prison without parole pursuant to 46-18-219. Webb appealed the sentence on grounds that the mandatory life sentence violated procedural and substantive due process, the prohibition against cruel and unusual punishment, and the separation of powers doctrine. Webb also asserted that the sentencing court failed to properly consider the exception to mandatory sentencing set out in 46-18-222(3). The Supreme Court affirmed. The sentencing court properly considered the exception and did not abuse its broad discretion in finding no unusual and substantial distress. The sentencing court offered Webb all the procedural due process necessary and did not violate substantive due process because the sentence fit within the statutory sentencing limits. Webb's contention that life without parole was cruel and unusual punishment failed because the sentence was commensurate with the gravity of the crime and consistent with state sentencing and correctional policy. The argument

that mandatory sentences violate the separation of powers doctrine also failed because it is in the Legislature's province to distinguish between criminal offenses and to establish punishments, and enactment of 46-18-219 was based on constitutional principles and Montana public policy. St. v. Webb, 2005 MT 5, 325 M 317, 106 P3d 521 (2005). See also St. v. Bruns, 213 M 372, 691 P2d 817 (1984), and St. v. Dahms, 252 M 1, 825 P2d 1214 (1992).

Admissibility of Proof of Refusal to Take Sobriety Test Not Violative of Separation of Powers Doctrine: Robertson claimed that by enacting 61-8-404, regarding admission of evidence of a person's refusal to take a sobriety test, the Legislature unconstitutionally infringed on the function of courts to determine the admissibility of evidence, in violation of the separation of powers doctrine. The Supreme Court disagreed, noting that ultimately, the admissibility of evidence lies with the court pursuant to Rule 104, M.R.Ev. (Title 26, ch. 10). The Legislature routinely passes laws that determine whether certain kinds of evidence are admissible, without violating the separation of powers doctrine in the process. Further, "admissible" means that evidence may, but is not required, to be admitted. Missoula v. Robertson, 2000 MT 52, 298 M 419, 998 P2d 144, 57 St. Rep. 250 (2000). See also St. v. Long, 778 P2d 1027 (Wash. 1989).

Supreme Court Power to Review Legislative Act for Constitutional Conformity Not Violative of Separation of Powers Doctrine: Although the Montana Constitution confers upon the Legislature the exclusive power to set appropriate punishments for criminal acts, the Supreme Court is constitutionally vested with the exclusive power to review whether a particular legislative act conforms to the constitution. Thus, the court's holding that the Montana weapon enhancement statute was violative of state constitutional double jeopardy protections was not a violation of the separation of powers doctrine. St. v. Guillaume, 1999 MT 29, 293 M 224, 975 P2d 312, 56 St. Rep. 117 (1999). See also In re License Revocation of Gildersleeve, 283 M 479, 942 P2d 705, 54 St. Rep. 735 (1997), and St. v. Walker, 2001 MT 170, 306 M 159, 30 P3d 1099 (2001).

Law Clerk or Master Not a Public Officer — No Violation of Constitution by Legislator: A law clerk acting as an employee of the court is not exercising the sovereign power of the state since he or she is subject to the supervision of the judge or justice who is the employer. A master, although having duties and obligations of a judicial officer, acts in an advisory capacity and does not sit as a court. Therefore, neither a law clerk nor a master is a public officer. A person who holds these positions while holding office as a state legislator does not violate the constitutional provision requiring separation of powers. State ex rel. Paugh v. Bradley, 231 M 46, 753 P2d 857, 45 St. Rep. 419 (1988).

Valid Reason for Mandatory Retirement — Legislative, Not Judicial Task: Since compulsory game warden (now game wardens' and peace officers') retirement statute contained no qualifications or justification, it would be in excess of the authority of a court hearing a warden's suit challenging the statute's validity to hold a factfinding hearing to determine whether there was a basis for the age discrimination grounded in the reasonable demands of the position. That is a legislative function; the effort would be great; and the Legislature, not the courts, has the resources for such an undertaking. Taylor v. Dept. of Fish, Wildlife, & Parks, 205 M 85, 666 P2d 1228, 40 St. Rep. 1112 (1983).

Budget Information — Legislative Finance Committee: Sections 5-12-302 and 5-12-303 do not impose unconstitutional burden upon state government, since power to approve appropriation bills and budget is in legislative branch, and committee may require such information from other branches as is reasonably necessary to form rational basis for budget determinations. State ex rel. Judge v. Legislative Fin. Comm., 168 M 470, 543 P2d 1317 (1975).

Interim Committees — Power to Approve Budget Amendments Unconstitutional: Those parts of 5-12-102, 5-12-401, and 5-12-402 (now repealed) empowering finance committee to approve budget amendments are declared invalid as unconstitutional delegations of legislative power since this power is properly exercisable only by either entire Legislature or executive officer or agency, not by interim committee. State ex rel. Judge v. Legislative Fin. Comm., 168 M 470, 543 P2d 1317 (1975).

Subpoena Power of Legislature — Unavailable to Attorney General: The Attorney General cannot exercise the subpoena powers of the Legislature in the course of investigating public offenses disclosed by an audit performed by the Legislative Auditor. State ex rel. Woodahl v. District Court, 167 M 514, 540 P2d 312 (1975).

JUDICIAL BRANCH

Statutory Filing Deadline Not Jurisdictional — District Court to Allow Equitable Relief Upon Remand — Separation of Powers Implicated: Because of a calendaring error, the plaintiff railway's counsel missed the deadline imposed by 49-2-505 for an appeal of a decision of the

Human Rights Bureau to the Human Rights Commission but submitted an out-of-time appeal. The defendant argued that the 14-day deadline imposed by 49-2-505 was jurisdictional, and the Commission and the District Court, in issuing an order to enforce the order of the Human Rights Bureau, agreed. Citing Davis v. St., 2008 MT 226, 344 Mont. 300, 187 P.3d 654, Miller v. Eighteenth Jud. Dist., 2007 MT 149, 337 Mont. 488, 162 P.3d 121, and St. v. Johnston, 2008 MT 318, 346 Mont. 93, 193 P.3d 925, among other cases, for the proposition that "categorical time prescriptions" or filing deadlines do not withdraw subject matter jurisdiction from a District Court, the Supreme Court reversed. The Supreme Court held that the District Court was not deprived of jurisdiction and that, upon remand, the District Court should consider the issue of why the railway's counsel missed the deadline and should, if it finds good cause, exercise its equitable powers to allow the appeal. The dissent argued that the majority's opinion implicated the separation of powers doctrine because the majority had no authority to allow an exception to the statutory filing deadline. BNSF Ry. Co. v. Cringle, 2010 MT 290, 359 Mont. 20, 247 P.3d 706. See also BNSF Ry. Co. v. Cringle, 2012 MT 143, 365 Mont. 304, 281 P.3d 203, and St. v. Robertson, 2015 MT 341, 381 Mont. 520, 363 P.3d 427.

Full-Time District Court Reporters Subject to Statutory Workweek Requirement — Recordkeeping Required — Designation of Court Reporter's "Workstation": A District Court reporter who is treated as a full-time salaried county employee is subject to the statutory 40-hour workweek requirement in 7-5-2108, and recordkeeping to document a court reporter's working hours, including overtime, annual leave, and sick leave, must be as determined by the District Court Judge who employs the court reporter. However, any method used to fulfill these requirements must comport with the District Court Judge's authority to control court assistants because allowing a Board of County Commissioners to enforce county personnel policies on court reporters would infringe on that authority. Any mandatory location of work for a court reporter that is set by anyone but the District Court Judge would interfere with the necessary flexibility of the judge. Thus, a court reporter's "workstation" is wherever that reporter is required to be to perform the duties for the judge for whom that court reporter works. Bd. of County Comm'rs v. District Court, 2000 MT 258, 301 M 496, 10 P3d 805, 57 St. Rep. 1061 (2000).

Statutes Granting Child Support Enforcement Division Judicial Power to Make and Enforce Child Support Orders Violative of Constitutional Separation of Powers: As part of a marriage dissolution, the District Court ordered that the husband pay monthly child support in a specific amount. The Child Support Enforcement Division (CSED) subsequently notified the court that it intended to modify the order pursuant to its authority in 40-5-272 and 40-5-273. The court, sua sponte, then enjoined CSED from modifying any child support orders issued by a Montana District Court, asserting that CSED's actions in modifying a court order violated the constitutional separation of powers clause. On appeal, CSED maintained that the statutes did not violate the separation of powers clause because: (1) the statutory scheme was merely a quasi-judicial function that did not threaten the institutional integrity of the Judicial Branch; (2) the statutes in question were a reasonable response to both the federal legal requirements for expedited child support modification and the sheer magnitude of child support collection in Montana; (3) CSED was empowered to modify a support order only if the facts changed; (4) every contested modification was subject to a hearing before an administrative law judge; (5) all modifications were subject to judicial review; and (6) the Legislature's grant of jurisdictional authority to CSED was not exclusive. The District Court responded that the statutes were an unconstitutional violation of separation of powers because: (1) they gave CSED judicial power that is exclusively reserved to the judiciary; (2) they gave CSED statutory authority to modify a child support order, file it with the District Court, and then enforce the order as a District Court judgment; and (3) the procedure for judicial review of a CSED modification was not automatic and was limited by the scope of the Montana Administrative Procedure Act. The Supreme Court concluded that 40-5-272 and 40-5-273 are an unconstitutional violation of the separation of powers clause to the extent that they grant CSED the judicial power to make and enforce child support orders without automatic and mandatory judicial review. Although appreciative of the magnitude of the agency's modification and enforcement tasks, the court found that that fact did not justify unbridled departure from constitutional norms respecting the autonomy of the individual branches of government. Seubert v. Seubert, 2000 MT 241, 301 M 382, 13 P3d 365, 57 St. Rep. 1006 (2000), distinguishing Chastain v. Chastain, 932 SW 2d 396 (Mo. 1996), and State of Iowa ex rel. Sara Allee v. Gocha, 555 NW 2d 683 (Iowa 1996).

Admissibility of Proof of Refusal to Take Sobriety Test Not Violative of Separation of Powers Doctrine: Robertson claimed that by enacting 61-8-404, regarding admission of evidence of a person's refusal to take a sobriety test, the Legislature unconstitutionally infringed on the

function of courts to determine the admissibility of evidence, in violation of the separation of powers doctrine. The Supreme Court disagreed, noting that ultimately, the admissibility of evidence lies with the court pursuant to Rule 104, M.R.Ev. (Title 26, ch. 10). The Legislature routinely passes laws that determine whether certain kinds of evidence are admissible, without violating the separation of powers doctrine in the process. Further, "admissible" means that evidence may, but is not required, to be admitted. Missoula v. Robertson, 2000 MT 52, 298 M 419, 998 P2d 144, 57 St. Rep. 250 (2000). See also St. v. Long, 778 P2d 1027 (Wash. 1989).

Statute Allowing Transfer of Jurisdiction of Juvenile to District Court Not Violative of Constitutional Separation of Powers Doctrine: Bedwell was 17 when he was charged with burglary, theft, and misdemeanor criminal mischief. The motion to charge him as an adult under 41-5-206 was granted. Bedwell moved to dismiss on grounds that 41-5-206 unconstitutionally violated the separation of powers doctrine, impermissibly vesting the court with prosecutorial powers to determine the manner in which to enforce laws with respect to specified juvenile offenders, by allowing the courts discretion to decide whether a juvenile should be treated as an adult. The District Court agreed, finding that courts were allowed to indirectly determine what charges should be filed against a juvenile by determining the legal forum in which a juvenile proceeding should be prosecuted, and remanded for filing in Youth Court. The state appealed. The Supreme Court reversed. In determining whether to accept jurisdiction, a District Court is not making a prosecutorial decision on how the law should be enforced or deciding whether a prosecution should go forward or what charges should be brought. The statute merely allows District Courts a proper judicial function to exercise discretion in determining whether to accept or reject jurisdiction over juvenile offenders under specified circumstances, which does not usurp or intrude into prosecutorial duties and powers of the County Attorney or intrude a court into Executive Branch powers. Thus, 41-5-206 is not violative of the separation of powers doctrine. St. v. Bedwell, 1999 MT 206, 295 M 476, 985 P2d 150, 56 St. Rep. 805 (1999).

Requirement for Arrangement of Transportation for Delinquent Youth by District Court Held Constitutional — Counties Required to Pay Transportation Costs Only Within State — Unfunded Mandate Unaddressed: After the District Youth Court found that J.A. was a delinquent youth, the court committed J.A. to the custody of the Department of Corrections (DOC) for placement at a treatment center in Texas and ordered the DOC to pay the costs of transporting J.A. to that center. When the DOC refused to pay those costs, Lake County paid the costs but later challenged the constitutionality of 52-5-109 as being a violation of the doctrine of the separation of powers and, in addition, argued that 52-5-109 is an unfunded mandate in violation of 1-2-116 and that 52-5-101 and 52-5-109 require Lake County to pay for transportation costs only within Montana. The Supreme Court held that the requirement of 52-5-109 that the District Court "arrange the transportation" of a committed youth does not encroach on judicial authority, require the judiciary to exercise executive power, or interfere with internal judicial operations, but, in the context of the statutes, is only an administrative detail. The Supreme Court also held that it was logical to assume that the DOC, being a Montana state agency, would receive custody only within Montana and not in some other state. The Supreme Court pointed out that 52-5-101 names only in-state institutions for the commitment of youth and that neither that statute nor 52-5-109 makes any mention of out-of-state facilities and, for those reasons, ruled that the DOC must pay for transportation costs of a committed youth outside of the State of Montana. Because the Supreme Court considered its holding "dispositive", it declined to address the issue of whether 52-5-109 is an unfunded mandate in violation of 1-2-116. In re J.A., 1999 MT 148, 295 M 46, 983 P2d 327, 56 St. Rep. 585 (1999).

Court Order for Suitable Jury Room — Supervisory Control Properly Used — Inherent Powers Not Implicated — Findings Not Clearly Erroneous: Judge Moran issued an order pursuant to 3-5-404 (now repealed) for the Gallatin County Sheriff to provide a specific space in the Gallatin County courthouse for use as a jury room and to have the room remodeled and for the expenses to be paid from the Gallatin County general fund. Gallatin County requested the Supreme Court to take supervisory control to prevent protracted litigation, a request with which Judge Moran joined. However, Judge Moran asked that a District Court Judge be appointed to make findings and conclusions. The Supreme Court accepted jurisdiction in order to prevent protracted litigation of the issues and appointed a neutral District Court Judge, Judge Wilson, to hold a hearing and make findings and conclusions. The Supreme Court held that Judge Moran had the authority under 3-5-404 (now repealed) to issue an order to the Sheriff to provide a suitable jury room; that the space provided by the Sheriff pursuant to the order was "suitable", within the dictionary definition of that word; that because the Legislature provided the authority under which Judge Moran acted, the implied powers of the District Court and the separation of powers doctrine were

not implicated by Judge Moran's action; and that the findings of fact concerning the suitability of the room provided by the Sheriff and the suitability of another alternative jury room designated by the County Commissioners were not clearly erroneous. Gallatin County v. District Court, 281 M 33, 930 P2d 680, 54 St. Rep. 46 (1997).

Court Suggestion of Alternative Charging Options in Stalking Case Not Violative of Separation of Powers: Following denial of a state motion for leave to file an information charging stalking, because of a lack of probable cause, the court suggested that alternative charges concerning breach of a restraining order or breach of a lower court order at the time of arraignment might provide an adequate remedy. The state contended that the comments constituted a violation of the separation of powers doctrine. However, on appeal, the Supreme Court found no constitutional violation because the conduct did not infringe on the state's prosecutorial discretion and could not be construed as an attempt to dictate what charges the state could bring. St. v. David, 266 M 365, 880 P2d 1308, 51 St. Rep. 844 (1994).

Separation of Powers Doctrine Not to Preclude Compliance With Employee Grievance Procedure by Justice's Court: A Justice of the Peace involved in a disciplinary action against the court office manager contended that a grievance hearing before the County Commission would violate the separation of powers doctrine by interfering with the independence of the court by requiring the Justice of the Peace to be an adverse witness against court personnel, allowing the Justice of the Peace's decision on personnel matters to be overruled by another branch of government, and possibly requiring the Justice of the Peace to accept an employee believed to be unsatisfactory. However, as established in Hillis v. Sullivan, 48 M 320, 137 P 392 (1913), the hiring by the County Commission of a clerk to assist a court does not violate the separation of powers doctrine. In addition, the County Commission is statutorily required to provide a Justice of the Peace with clerical assistance. Thus, a grievance hearing before the County Commission does not violate the separation of powers doctrine because the County Commission's independent hiring of the office manager is consistent with the doctrine; nor does the County Commission's hearing of the grievance constitute an exercise of authority belonging to the Judicial Branch. Clark v. Dussault, 265 M 479, 878 P2d 239, 51 St. Rep. 642 (1994).

Failure of District Court to Grant Motions to Dismiss as Directed by Attorney General for Government Misconduct — Violation of Separation of Powers: The Attorney General directed the Lincoln County Attorney to file motions to dismiss charges against certain criminal defendants for the reason that outrageous government misconduct had occurred in the course of the prosecution. The Lincoln County Attorney filed the motions, but they were denied by the District Court. In a proceeding for supervisory control, the Supreme Court held that the Attorney General was within his authority to direct the County Attorney to move to dismiss the charges and held that the Attorney General's conclusion that there had been outrageous government misconduct in the cases served as a basis under 46-13-401(1) for the District Court to dismiss the charges. The refusal of the District Court to dismiss the charges was an abuse of discretion and a violation of the doctrine of separation of powers. By refusing to grant the motions to dismiss, the District Court intruded upon the lawful functions of the County Attorney and the Attorney General, who belong to the Executive Branch of government. State ex rel. Fletcher v. District Court, 260 M 410, 859 P2d 992, 50 St. Rep. 992 (1993). See also St. v. Schneiderhan, 261 M 161, 862 P2d 37, 50 St. Rep. 1242 (1993).

Authority to Award Damages — Delegation to Human Rights Commission: The grant of authority to the Human Rights Commission to award reasonable damages does not grant unbridled authority and does not constitute an unlawful delegation of judicial and legislative powers. Vainio v. Brookshire, 258 M 273, 852 P2d 596, 50 St. Rep. 529 (1993).

Validity of Attorney License Tax: A $25 license tax on attorneys, along with the attendant penalty provision for nonpayment, has the effect of regulating the practice of law in that an attorney may not practice law in Montana without paying the tax. The tax is a minimal and inoffensive intrusion on the Supreme Court's constitutional prerogatives and is valid as a legislative enactment in aid of the power of the court to regulate the practice of law. In re Application of Kradolfer v. Smith, 246 M 210, 805 P2d 1266, 47 St. Rep. 1861 (1990).

Mandatory Transfer of Prosecution of Older Youth to District Court — Not Violation of Doctrine of Separation of Powers: The automatic transfer provisions of 41-5-206(3), providing for the prosecution of older youth for certain offenses in District Court rather than Youth Court, are not a usurpation of the judiciary's power to hear and decide motions and is not in violation of the Montana Constitution's requirement for separation of powers. The transfer provision is within the Legislature's inherent power to create other courts under Art. VII, sec. 1, Mont. Const. The 1987 amendment providing for transfer without hearing on mitigating factors was merely

a revision of protection afforded youth under earlier legislative action and not a violation of the separation of powers doctrine. In re Wood, 236 M 118, 768 P2d 1370, 46 St. Rep. 228 (1989).

Separation of Powers — Commitment by Youth Court: Pursuant to 41-5-523 (renumbered 41-5-1512), the Youth Court committed a delinquent youth to the Department of Family Services (now Department of Public Health and Human Services) for placement in an appropriate facility. The youth appealed the placement, contending that the judiciary is the proper decisionmaking body for the placement of delinquent youths. In response to the youth's allegation that it is a violation of the separation of powers clause of the state constitution for the Department to make the placement decision, the Supreme Court held that there is no violation because the statute provides authority to the Youth Court to decide the commitment of delinquent youths and youths in need of supervision (now youths in need of intervention) and that authority is not diminished through granting the Department placement power. The court has the authority to review the placement decision to determine if it is in the best interests of the minor. In re Peterson, 235 M 313, 767 P2d 319, 46 St. Rep. 13 (1989).

Law Clerk or Master Not a Public Officer — No Violation of Constitution by Legislator: A law clerk acting as an employee of the court is not exercising the sovereign power of the state since he or she is subject to the supervision of the judge or justice who is the employer. A master, although having duties and obligations of a judicial officer, acts in an advisory capacity and does not sit as a court. Therefore, neither a law clerk nor a master is a public officer. A person who holds these positions while holding office as a state legislator does not violate the constitutional provision requiring separation of powers. State ex rel. Paugh v. Bradley, 231 M 46, 753 P2d 857, 45 St. Rep. 419 (1988).

Violation of Right to Know — Exhaustion of Remedies Not Applicable Under Separation of Powers: Plaintiff was negotiating his salary with the school board. The board closed their meeting to discuss plaintiff's salary request. Plaintiff contacted counsel and began proceedings against the board for violating the open meeting law. The board met at another closed meeting and withdrew its offer of employment. The board contended plaintiff was required to exhaust his administrative remedies before filing suit in District Court. The Supreme Court held that the exhaustion doctrine does not apply to constitutional issues. Plaintiff claimed violation of his constitutional right to observe deliberations of a public body under the constitution's right to know provisions. Constitutional questions are properly decided by a judicial body, not an administrative official, under the separation of powers doctrine. Jarussi v. Bd. of Trustees, 204 M 131, 664 P2d 316, 40 St. Rep. 720 (1983).

Time Limits on Judicial Decisions — Solely Within Judicial Sphere: Plaintiff contended 3-2-104 and 3-5-212 (now repealed), which imposed sanctions on judges if decisions were not reached or opinions were not written within the procedural constraints and time limits set by the statutes, were unconstitutional. On appeal, the Supreme Court held that under the separation of powers doctrine the legislative branch of government is without constitutional authority to limit the judicial branch of government in respect to when it shall hear or determine any cause of action within its lawful jurisdiction. The time limits within which judicial decisions must be rendered were held to be a sphere of activity so fundamental and necessary to a court that to divest it of its absolute control would be to make meaningless the very phrase "judicial power". Coate v. Omholt, 203 M 488, 662 P2d 591, 40 St. Rep. 586 (1983).

Lobbying — Initiative 85 — Attorneys — Constitutionality: Initiative 85, as emended in Mont. Auto. Ass'n v. Greely, 193 M 378, 632 P2d 300, 38 St. Rep. 1174 (1981), is not so vague as to be unconstitutionally uncertain, nor does it intrude on the power of the Supreme Court to regulate the conduct of attorneys. The act applies equally to attorneys and nonattorneys acting in the nonlegislative lobbying field. The right of the court to supervise the conduct of the members of the bar is undiminished by any provision of the Initiative. St. Bar of Mont. v. Krivec, 193 M 477, 632 P2d 707, 38 St. Rep. 1322 (1981).

Constitutionality of Judicial Nomination Procedure: The established procedures for filling judicial vacancies in Montana are constitutional and not repugnant to applicable provisions of the Montana Constitution. Jones v. Judge, 176 M 251, 577 P2d 846 (1978).

Termination of Judge by City Commission Unconstitutional: Provision of 7-3-4462, prior to amendment in 1977, which allowed termination of a police judge at the will of the City Commission, was unconstitutional as a violation of the mandate of the doctrine of separation of powers. State ex rel. Morales v. City Comm'n, 174 M 237, 570 P2d 887 (1977).

DELEGATION OF LEGISLATIVE AUTHORITY

24/7 Sobriety and Drug Monitoring Program Testing Fee — Permissible Delegation of Legislative Authority: The District Court held that 44-4-1204 of the Montana 24/7 Sobriety and Drug Monitoring Program Act unconstitutionally delegated legislative power to the executive branch because it lacked any objective criteria to guide the Attorney General in imposing fees, other than requiring that the fees be reasonable. On appeal, the Supreme Court reversed, concluding that 44-4-1204 is a permissible delegation of legislative authority because the section limits fees to reasonable amounts necessary to pay for the administration of the program and does not give the Attorney General unfettered discretion when implementing fees. St. v. Spady, 2015 MT 218, 380 Mont. 179, 354 P.3d 590.

Constitutional Authority of Public Employees' Retirement Board to Make Actuarial Calculations — No Overbroad Delegation of Legislative Authority: The District Court held that 2001 amendments contained in House Bill No. 294, which included a definition of actuarial equivalent that changed the method by which the Public Employees' Retirement Board calculated certain benefits, unconstitutionally delegated unconstrained discretion to the Board in violation of the separation of powers doctrine in this section. On appeal, the Board asserted that Art. VIII, sec. 15, Mont. Const., gave the Board the authority to make actuarial evaluations and thus to implement the 2001 amendments, so there was no constitutional violation. The Supreme Court agreed. This section allows one branch of government to exercise power properly belonging to another branch if the constitution expressly directs or permits that exercise. Because Art. VIII, sec. 15, Mont. Const., delegated authority to the Board to make actuarial determinations, the District Court committed reversible error in concluding that the Legislature and House Bill No. 294 (2001) unconstitutionally delegated authority to the Board to make determinations allowed by another section of the constitution. Baumgardner v. Pub. Employees' Retirement Bd., 2005 MT 199, 328 M 179, 119 P3d 77 (2005), following Duck Inn, Inc. v. Mont. St. Univ.-N., 285 M 519, 949 P2d 1179 (1997).

Establishment of Work and Construction Zone Speed Limits by Appropriate Entities Not Unconstitutional Delegation of Legislative Authority: Mathis was cited for speeding in a construction zone in violation of 61-8-314. Mathis challenged the constitutionality of the statute on grounds that the Legislature improperly delegated its authority to the Executive Branch by allowing speed limits in particular work and construction zones to be set by the Department of Transportation, local authorities, or private entities, such as utility companies and private contractors, rather than setting the speed limit by law. The Supreme Court disagreed. Although the authority to establish speed limits is legislative in nature, the delegation of authority in this case did not grant an unfettered discretion to other entities to establish traffic regulations in work and construction zones. The statute provided limitations on that discretion with reasonable clarity and provided policy guidelines to the entities. The rationale behind the statute is to protect drivers and workers in work and construction zones, as evidenced by the enhanced penalties applicable to the crime. Because of the diverse nature of work and construction zones, establishing a speed limit for every construction project would be an impractical if not impossible task for the Legislature, so it was rational for the Legislature to delegate that duty to the entities most familiar with the nuances of each project. Unable to overcome the implied constitutionality of 61-8-314, Mathis's assertion of improper delegation of legislative authority was properly rejected. St. v. Mathis, 2003 MT 112, 315 M 378, 68 P3d 756 (2003), following Duck Inn, Inc. v. Mont. St. Univ.-N., 285 M 519, 949 P2d 1179 (1997).

Department of Revenue's Activity in Proposing Tax Legislation Not Violation of Separation of Powers: In 1994 and 1995, the Department of Revenue engaged in a project to build a consensus between various parties on how best to achieve a simplification of oil and natural gas taxes. The Department proposed legislation to the 1995 Legislature, and it was passed as the Montana Oil and Natural Gas Production Tax Act. Certain counties and taxpayers challenged the law on the basis that neither the Legislature nor the Governor had granted the Department any power to conduct the project and that the Department's actions violated the doctrine of separation of powers. The Supreme Court upheld the tax law on the basis that the constitution requires the Governor to provide the Legislature with information and to recommend measures that the Governor considers necessary and further that 15-1-203 is an enabling statute allowing the Department to formulate and recommend legislation. Powder River County v. St., 2002 MT 259, 312 M 198, 60 P3d 357 (2002).

School Territory Transfer Statutes Unconstitutional — Insufficient Guidelines for Delegation of Legislative Authority: In 1994, the respondents, individuals residing in both Rosebud and Big Horn Counties but outside of the Northern Cheyenne Indian Reservation, petitioned their

respective County Superintendents of Schools requesting a territory transfer from the Lame Deer High School District (LDHSD—created in 1993) back to the Colstrip and Hardin High School Districts. The requests were granted. LDHSD appealed the decisions to the State Superintendent of Public Instruction, who reversed the decisions. The respective District Courts reversed the Superintendent of Public Instruction's decision. The Supreme Court reversed the District Courts' decisions on the grounds that the school territory transfer statute is an unconstitutional delegation of legislative power. The broad grant of discretion to a County Superintendent of Schools, unchecked by any standard, policy, or rule of decision, renders the statute unconstitutional. Hayes v. Lame Deer High School District, 2000 MT 342, 303 M 204, 15 P3d 447, 57 St. Rep. 1464 (2000). See also Belgrade Elementary & High School District No. 44 v. Morris, 2000 MT 347, 303 M 245, 15 P3d 482, 57 St. Rep. 1484 (2000), and In re Petitions to Transfer Territory, 2000 MT 348, 303 M 249, 16 P3d 1000, 57 St. Rep. 1486 (2000).

Implementation of Department Directors' Pay Plan Prevented by Governor — No Violation of Separation of Powers — No Impairment of Contract: Directors of two Executive Branch agencies notified employees that employees would be eligible for reinstatement of pay plan steps lost to multigrade promotions. The Governor prohibited the proposed plan. Plaintiffs sued, claiming that the Governor acted unconstitutionally. The Supreme Court held that the Department of Administration's broad powers and duties relating to the state pay plan must be read in conjunction with the Governor's statutory duties of supervision, approval, appointment, and direction over executive agency departments while also taking into consideration the Governor's constitutional status as chief executive officer of the state. The doctrine of separation of powers is not violated when the Governor exercises the very sorts of powers and duties authorized by the Legislature in the statutes enacted. Because the directors' offer was gratuitous and there was no consideration for the offer, no contract was formed under which the employees gained any vested rights to the reinstatement of the lost step. Past consideration (the employees' prior work) is not sufficient to support a promise. Because there was no contract, there were no contractual obligations that were impaired by the Governor's action. Mont. Pub. Employees Ass'n v. Office of Governor, 271 M 450, 898 P2d 675, 52 St. Rep. 523 (1995).

Authority to Award Damages — Delegation to Human Rights Commission: The grant of authority to the Human Rights Commission to award reasonable damages does not grant unbridled authority and does not constitute an unlawful delegation of judicial and legislative powers. Vainio v. Brookshire, 258 M 273, 852 P2d 596, 50 St. Rep. 529 (1993).

Subdivision and Platting Act Constitutional — Permissible Delegation of Legislative Authority: Plaintiff challenged the constitutionality of the Montana Subdivision and Platting Act on the grounds that the statutory preamble to the Act's exemptions amounted to an unconstitutional delegation or usurpation of legislative authority on the basis that the Act contains insufficient guidelines. The Supreme Court distinguished this case from cases relating to a legislative grant of rulemaking authority to administrative agencies based on differences in nature between agencies and local governments. The delegation of authority by the Legislature was not impermissible, and rules adopted by the county pursuant to the Act are constitutional when the rules are not inconsistent with or contradictory to the Act and when they give notice to the property owner as to what the county will look at in making a determination. State ex rel. Dreher v. Fuller, 257 M 445, 849 P2d 1045, 50 St. Rep. 349 (1993).

State Auditor as Member of Hail Board — Not Dual Office Holding: The State Auditor is a constitutional office with "such duties as are provided by law" (Art. VI, sec. 4, Mont. Const.). One of these prescribed duties is being a member of the Board of Hail Insurance established under 2-15-3003. The State Auditor does not hold dual offices by carrying out legislatively imposed duties. The only limitation on the Legislature in prescribing such duties is that the duties may not pertain to the legislative or judicial department of government. Mtn. States Ins. Co. v. St., 218 M 365, 708 P2d 564, 42 St. Rep. 1657 (1985).

Little Davis-Bacon Act — No Unconstitutional Delegation by Legislature: Appellant contended that 18-2-401(5)(b) is an unconstitutional delegation of authority from the Legislature to private parties for determination of the prevailing wage rate. The court held that such provision was not applicable to the facts of the case. The case is governed by 18-2-401(5)(a). Montana's Little Davis-Bacon Act authorizes the Commissioner of Labor to establish standard prevailing rates using union contracts and "other information" as guidelines. Therefore, collective bargaining agreements are advisory, but not compulsory, where there is other evidence of prevailing wage rates in the community as there was in the Bozeman area. No unconstitutional delegation of authority has occurred in 18-2-401(5)(a). Hunter v. Bozeman, 216 M 251, 700 P2d 184, 42 St. Rep. 784 (1985).

Delegation of Legislative Authority — Contingent Authorization Allowed: Plaintiff filed a complaint for declaratory judgment in the Supreme Court seeking to determine the validity of several acts of the Legislature allowing the issuance of state revenue bonds. Plaintiff contended that Ch. 705, L. 1983, granted the Board of Natural Resources and Conservation (BNRC) (now abolished) the power and authority to determine the feasibility of various water conservation projects and make recommendations on the projects to the Board of Examiners. Plaintiff contended the delegation was unconstitutional in that it failed to set forth adequate standards or to place limits on the discretion of the BNRC. The court found the standards imposed with reasonable clarity in 85-1-501 and 85-1-502. Under these statutes, the Department of Natural Resources and Conservation (DNRC) is required to study the economic and environmental feasibility of constructing and operating power generating facilities on water projects. Once DNRC has reached its determination, it is the BNRC's duty to determine feasibility and public interest. The court found the legislative enactments complete and sufficiently clear, definite, and certain to enable the agencies to know their respective rights and obligations. The court found that determinations of economic and environmental feasibility are more appropriate in the administrative than the legislative sector. The court found nothing improper in the Legislature's making its authorizations contingent upon administrative decisions properly made in the executive side of state government. Grossman v. St., 209 M 427, 682 P2d 1319, 41 St. Rep. 804 (1984).

Zoning Variance Based Solely on Neighbors' Consent: A zoning ordinance provided that a variance to place a mobile home in a residential district would be granted only if at least 80% of the landowners residing within 300 feet of the proposed location of the mobile home agreed and if all adjoining landowners also agreed. To be a lawful delegation of legislative power, a consent ordinance such as this must not be arbitrary or capricious and must contain standards or guidelines that can be used by the zoning authority to judge the propriety of a withholding of consent. This ordinance fails on both counts and is an unconstitutional delegation of legislative authority and an unwarranted application of the police power. Shannon v. Forsyth, 205 M 111, 666 P2d 750, 40 St. Rep. 1129 (1983).

Location of Legislative Chambers — Legislative Delegation to Committee of Power to Recommend: The provision in 5-17-102 (renumbered 2-17-805) that the Capitol Building and Planning Committee may decide the location of legislative chambers, when read together with the provision in 5-17-103 (renumbered 2-17-825) that the Committee shall report its recommendations to each regular session of the Legislature, means that the Committee must report its decision to the Legislature and that the Legislature is not bound by the decision of the Committee and may either approve or disapprove the decision. Since the decision must be approved by the Legislature, the Legislature did not unconstitutionally delegate its authority to the Committee in violation of this section. Goodover v. Dept. of Administration, 201 M 92, 651 P2d 1005, 39 St. Rep. 1975 (1982).

Permitted Delegation of Legislative Authority: Section 30-14-104 prescribes with reasonable clarity the limits of power delegated to the state administrative agency in defining unlawful or deceptive practices in trade and commerce and does not represent an unconstitutional delegation of legislative power to either the state administrative agency or to the Federal Trade Commission and the federal courts, whose determinations the state agency is empowered but not required to adopt. T & W Chevrolet v. Darvial, 196 M 287, 641 P2d 1368, 39 St. Rep. 112 (1982).

Impermissible Delegation of Legislative Authority — 55-Mile-Per-Hour Case: Section 61-8-304 (now repealed), which delegated a mandatory duty upon the Attorney General to issue proclamations setting Montana's highway speed limits in conformance with federal law, was an unconstitutional delegation of legislative authority under this section because its mandatory directions were a handing over of the sovereign power of this state to federal jurisdiction. To prevent loss of federal highway funds to the state, the effective date of this decision was prospective, to take effect October 1, 1981, or such earlier date as corrective legislation became effective. Lee v. St., 195 M 1, 635 P2d 1282, 38 St. Rep. 1729 (1981), rehearing denied, 195 M 1, 38 St. Rep. 1931 (1981).

Separation of Powers Argument Rejected: The Supreme Court rejected plaintiff's contention that the Medical Malpractice Panel Act violates the prohibitions against unlawful delegation of judicial and legislative power and infringes on the doctrine of separation of powers. The decision of the panel is not enforceable, and unlike the panel decisions in most states, it is not even admissible at trial. Consequently, there are no constitutional violations under the Montana act. Linder v. Smith, 193 M 20, 629 P2d 1187, 38 St. Rep. 912 (1981).

Sentencing — Not Delegation of Legislative Authority: Petitioners contend that 46-18-202(2) unlawfully delegates legislative authority to the judicial and executive branches of government. The thrust of this argument appears to be that the section vests too much discretion in District Judges and prosecuting attorneys. A District Judge is particularly well positioned to predict whether the restriction (ineligibility for parole or furlough) is necessary for the protection of society. The determination of whether to impose the restriction is manifestly with the District Judge alone. Cavanaugh v. Crist, 189 M 274, 615 P2d 890, 37 St. Rep. 1461 (1980).

Overdelegation of Legislative Authority: Section 32-2-231 (renumbered 32-2-271) directed the Department of Business Regulation (now Department of Labor and Industry) to rule on merger applications by savings and loan associations but provides no standards or guidelines either expressed or otherwise ascertainable. There is nothing in the statute to enable the agency to know its rights and obligations, and it is therefore an unconstitutional delegation of legislative power. In re Gate City S & L Ass'n, 182 M 361, 597 P2d 84 (1979).

Delegation to Agency — Guidelines Required: Plaintiff challenged the constitutionality of Ch. 533, L. 1975, which provided for development of renewable natural resources. Bonds were to be issued and the money used by the Board of Natural Resources and Conservation (now abolished) to make loans to farmers and ranchers for the development and preservation of natural resources. The loans could be made only on proper application to and recommendation by the Department of Natural Resources and Conservation. Total control over granting the loans was vested in the Department. When the Legislature confers authority on an administrative agency, it must lay down the policy or reasons behind the statute and also prescribe standards and guides for the grant of power given to the agency. The provisions of the statutes involved here were sufficiently clear, definite, and certain to enable the agency to know its rights and obligation. Douglas v. Judge, 174 M 32, 568 P2d 530 (1977).

Power to Regulate Parking on University Campuses: The authority of the Board of Regents to regulate student parking and motor vehicle registration was not an improper delegation of legislative powers. Mont. St. Univ. v. Ransier, 167 M 149, 536 P2d 187 (1975).

DECISIONS UNDER 1889 CONSTITUTION

GENERAL PROVISIONS

Counties: Counties are administrative or executive bodies of the state, and the same rules apply as apply to any state agency insofar as Art. IV, sec. 1, 1889 Mont. Const., is concerned. Plath v. Hi-Ball Contractors, Inc., 139 M 263, 362 P2d 1021 (1961).

Standing: One charged with unlawfully keeping, giving, and consuming intoxicating liquor and not with violating any rule of the Montana Liquor Control Board (now Department of Revenue) was not in a position to challenge the constitutionality of the State Liquor Control Act of Montana (now repealed) on the ground that it delegated legislative and judicial powers to the Board in authorizing it to make such regulations. St. v. Andre, 101 M 366, 54 P2d 566 (1936).

Unlawful Usurpation of Powers: The officials of one branch may not, under Art. IV, sec. 1, 1889 Mont. Const., usurp or exercise the powers of either of the others. State ex rel. DuFresne v. Leslie, 100 M 449, 50 P2d 959 (1935).

Division of Government — Powers Divided: The powers of state government are reposed in three departments. If a power is reposed in one department, the other two may not encroach upon or exercise that power, except as expressly directed or permitted in the Constitution. Mills v. Porter, 69 M 325, 222 P 428 (1924).

Extent of the Exception: The exception embodied in Art. IV, sec. 1, 1889 Mont. Const., was not intended to extend further than to matters arising out of some unforeseen menace, public calamity, accident, sudden emergency, extraordinary occurrence, or unprecedented climatic condition rendering immediate action imperative to prevent serious or irreparable injury to the public. State ex rel. Goodman v. Stewart, 57 M 144, 187 P 641 (1920).

Purpose: The purpose of Art. IV, sec. 1, 1889 Mont. Const., was to constitute each department an exclusive trustee of the power vested in it, accountable to the people alone for its faithful exercise, so that each may act as a check upon the other and may be prevented the tyranny and oppression which would be the result of a lodgment of all power in the hands of one body. State ex rel. Smith v. District Court, 50 M 134, 145 P 721 (1914); O'Neill v. Yellowstone Irrigation District, 44 M 492, 121 P 283 (1912); State ex rel. Schneider v. Cunningham, 39 M 165, 101 P 962 (1909).

Common Link: The separation of the government into three departments does not mean that there shall be no common link of connection or dependence but only that the powers properly

belonging to one shall not be exercised by the others. State ex rel. Hillis v. Sullivan, 48 M 320, 137 P 392 (1913).

Division of Government — Exceptions: The Constitution divided the powers of government into three distinct departments, the only exception being where some provision is found in the Constitution expressly providing otherwise. State ex rel. Schneider v. Cunningham, 39 M 165, 101 P 962 (1909).

Interference With Governmental Department: It is not lawful for any department or officer thereof to interfere with the power of any other department. Jordan v. Andrus, 26 M 37, 66 P 502 (1901).

County Attorney as Notary: A County Attorney may hold the office of notary public without violating the provisions of Art. IV, sec. 1, 1889 Mont. Const., and it is no objection to an affidavit used by the State, on a motion for a new trial, that the notary before whom it was taken was the County Attorney. St. v. Jackson, 9 M 508, 24 P 213 (1890).

LEGISLATIVE BRANCH

Legislative Interim Council: Laws creating legislative interim councils do not violate the doctrine of separation of powers required by Art. IV, sec. 1, 1889 Mont. Const. State ex rel. James v. Aronson, 132 M 120, 314 P2d 849 (1957), overruling State ex rel. Mitchell v. Holmes, 128 M 275, 274 P2d 611 (1954).

Legislature Not to Exercise Judicial Function Through Commission: Under Art. IV, sec. 1, 1889 Mont. Const., the Legislature could not, through the medium of the Public Service Commission, exercise judicial powers. State ex rel. P.S.C. v. District Court, 107 M 240, 84 P2d 335 (1938).

State Auditor as Member of Industrial Accident Board: The fact that the State Auditor is a member of the Industrial Accident Board (now Division of Workers' Compensation) does not render the Workers' Compensation Act unconstitutional on the ground that he holds two offices. The only limitation upon the Legislature in imposing duties upon that officer under Art. IV, sec. 1, 1889 Mont. Const., prohibited the imposition of duties appertaining to the legislative or judicial, not the executive, departments of government. Shea v. North-Butte Min. Co., 55 M 522, 179 P 499 (1919).

Legislature — Cannot Impose Ministerial or Executive Duties on Courts: The orderly disposition of the business of the state requires the faithful observance of Art. IV, sec. 1, 1889 Mont. Const., and the Legislature could not impose upon the Supreme Court or its Justices the performance of an act not judicial in its character but purely ministerial or executive. In re Weston, 28 M 207, 72 P 512 (1903).

EXECUTIVE BRANCH

Interference of Executive in Judiciary: Governor is not empowered to exclude or remove from office the duly elected, qualified, and acting judge of a judicial district or to order the judge of one district into another district. State ex rel. Bennett v. Bonner, 123 M 414, 214 P2d 747 (1950).

Delegation of Appointment Power to Courts: Generally speaking, the power of appointment is an executive function that cannot be delegated to the judiciary. Application of O'Sullivan, 117 M 295, 158 P2d 306 (1945).

Judicial Interference: A statute which authorizes District Judges to order the payment of claims against a county after disapproval by the Auditor would seem to violate Art. IV, sec. 1, 1889 Mont. Const., for the reason that it undertakes to cast upon District Court Judges a power which pertains exclusively to the executive branch of the government. State ex rel. Dolin v. Major, 58 M 140, 192 P 618 (1920).

JUDICIAL BRANCH

Disqualification of Judges Statute: Section dealing with disqualification of judges did not violate the separation of powers provision in that it does not impinge upon the existence or supremacy of the judicial system or alter its jurisdiction or duties but is a reasonable manner of providing a fair trial for all litigants. State ex rel. Peery v. District Court, 145 M 287, 400 P2d 648 (1965).

Judicial Discretion Not to Be Substituted for That of Board: Because of the division of governmental powers into three branches, neither the District Courts nor the Supreme Court may substitute its discretion for the discretion reposed in boards and commissions by legislative acts. Peterson v. Livestock Comm'n, 120 M 140, 181 P2d 152 (1947).

Courts Not to Change or Amend Venue Statute: When the court in State ex rel. Interstate Lumber Co. v. District Court, 54 M 602, 172 P 1030 (1918), held that the term "contract", as

used in the general venue statute, must be accepted in its broadest signification and as including every kind of contract, whether express or implied, and inserted into the statute the imperative word "must" in lieu of the permissive word "may", it entirely eliminated the application of the venue rule declared in the first sentence of the section, irrespective of whether or not any place of performance was stipulated, thereby changing and amending the statute, a power reserved to the Legislature. Hardenburgh v. Hardenburgh, 115 M 469, 146 P2d 151 (1944).

Courts — Not to Delete From or Add Words to Statute: Courts were enjoined by Art. IV, sec. 1, 1889 Mont. Const., from exercising powers properly belonging to the legislative department of the state government and therefore could not delete words from or add words to a statute. Such changes may be made only by the Legislature. State ex rel. Grant v. Eaton, 114 M 199, 133 P2d 588 (1943).

Court Not to Set Valuation of Property — Tax Purposes: That part of section authorizing action to recover taxes paid under protest on ground of overvaluation of property with trial by jury after the State Board of Equalization (now State Tax Appeal Board) has refused to grant relief was in conflict with Art. IV, sec. 1, 1889 Mont. Const., relating to the powers of the three departments of government, in that it attempts to impose upon the judiciary functions in factfinding matters that properly belong to another department of state government. IBM v. Lewis & Clark County, 111 M 384, 112 P2d 477 (1941).

Courts — Not to Interfere With Discretionary Powers of Railroad Commissioners: Under Art. IV, sec. 1, 1889 Mont. Const., courts could not interfere with the discretionary powers lodged in the Board of Railroad Commissioners (now Public Service Commission) in the administration of the motor vehicle laws, as long as it was acting within lawful authority. Fulmer v. Bd. of R.R. Comm'rs, 96 M 22, 28 P2d 849 (1934).

Separation of Powers — Bank Receivership: The Legislature in providing that a receiver appointed to take charge of an insolvent state bank shall conduct its affairs under the supervision of the State Bank Examiner did not intend for the District Court to be deprived of authority to give directions to him or confirm a sale of the bank's property. State ex rel. Rankin v. Yegen, 79 M 184, 255 P 744 (1927).

Administrative Powers of District Courts: Article IV, sec. 1, 1889 Mont. Const., did not forbid the conference on state District Courts the administrative powers in connection with and ancillary to their judicial functions. St. v. Johnson, 75 M 240, 243 P 1073 (1926); O'Neill v. Yellowstone Irrigation District, 44 M 492, 121 P 283 (1912). Compare State ex rel. Kellogg v. District Court, 13 M 370, 34 P 298 (1893); State ex rel. Hillis v. Sullivan, 48 M 320, 137 P 392 (1913); Porter v. Investors Synd., 287 US 346, 77 L Ed 354, 53 S Ct 132 (1932).

Judicial Powers: The legislative declaration that an emergency exists and that for that reason a certain act is necessary for the immediate preservation of the public peace and safety, making the act immune from a referendum of the people, is not conclusive, the question, backed by facts, whether the act is within the authority of the Legislature, being a judicial one determinable by the courts. State ex rel. Goodman v. Stewart, 57 M 144, 187 P 641 (1920).

Judge Not Ministerial Agent: The constitutional requirement that the several departments of government be kept distinct prevents a judge of court being made a ministerial agent to gather and furnish testimony for use by the Legislature in passing upon the qualifications of its members. State ex rel. Smith v. District Court, 50 M 134, 145 P 721 (1914).

Creation of Irrigation Districts — Duties Imposed on Courts: Section providing for the creation of irrigation districts was not violative of the provisions of Art. IV, sec. 1, 1889 Mont. Const., in conferring certain alleged nonjudicial powers and duties in that connection upon a District Judge. O'Neill v. Yellowstone Irrigation District, 44 M 492, 121 P 283 (1912).

When Courts May Control Governor by Mandamus: Article IV, sec. 1, 1889 Mont. Const., did not prevent the courts from controlling by mandamus the exercise of a purely ministerial duty by the Governor of the state. State ex rel. St. Publishing Co. v. Smith, 23 M 44, 57 P 449 (1899).

DELEGATION OF LEGISLATIVE AUTHORITY

Zoning: The provisions of sections granting zoning powers to city-county planning boards and to County Commissioners were invalid as an unauthorized delegation of legislative power to counties. Plath v. Hi-Ball Contractors, Inc., 139 M 263, 362 P2d 1021 (1961).

Guidelines Sufficient: Chapter giving County Commissioners power to establish zoning districts and to create a commission contained sufficient guidelines so that it is not an invalid delegation of legislative powers. Missoula v. Missoula County, 139 M 256, 362 P2d 539 (1961), explained in Plath v. Hi-Ball Contractors, Inc., 139 M 263, 362 P2d 1021 (1961); Doull v. Wohlschlager, 139 M 274, 362 P2d 542 (1961).

Health Districts: Former laws relating to rules by health districts violated Art. IV, sec. 1, 1889 Mont. Const., by delegating legislative power to a board. Bacus v. Lake County, 138 M 69, 354 P2d 1056 (1960), distinguished in Billings v. Smith, 158 M 197, 490 P2d 221 (1971), and followed in Hayes v. Lame Deer High School District, 2000 MT 342, 303 M 204 , 15 P3d 447, 57 St. Rep. 1464 (2000). See also Belgrade Elementary & High School District No. 44 v. Morris, 2000 MT 347, 303 M 245, 15 P3d 482, 57 St. Rep. 1484 (2000), and In re Petitions to Transfer Territory, 2000 MT 348, 303 M 249, 16 P3d 1000, 57 St. Rep. 1486 (2000).

Sale of Bonds: Initiative providing for the payment of a soldiers' bonus and authorizing the Board of Examiners (now Department of Administration) to issue bonds with which to pay the bonus and providing for an additional cigarette tax with which to retire the bonds was not a delegation of legislative powers to the Board, since standards are set up in the act. State ex rel. Graham v. Bd. of Examiners, 125 M 419, 239 P2d 283 (1952).

Sale of Debentures: The Highway Treasury Anticipation Debenture Act of 1945 (omitted), imposing a 5 cents a gallon gasoline tax on dealers and distributors, is not unconstitutional as delegating to the Highway Commission (now Transportation Commission) legislative authority to determine what debentures may be sold in the specified 10-year period. Therefore the authority to determine the extent of the indebtedness, in view of history of gasoline tax collections, removed question of payment from legislative discretion. Pioneer Motors, Inc. v. Highway Comm'n, 118 M 333, 165 P2d 796 (1946).

Armory Board: Sections (since repealed), creating the armory board and authorizing it to select and purchase sites and erect armories thereon and donate any to the state after payment of all indebtedness secured by such property, are not a delegation of legislative power because the state will not become the owner of any of the property until or unless donated to it by the board. Geboski v. Armory Bd., 110 M 487, 103 P2d 679 (1940).

Emergency Relief by Creation of High School Districts: In providing emergency relief by the creation of high school districts in counties having county high schools, the Legislature, by formulating the policy to be followed in broad terms and leaving the details to designated officers, did not delegate legislative power to administrative officers in violation of Art. IV, sec. 1, 1889 Mont. Const. State ex rel. Berthot v. School District, 102 M 356, 58 P2d 264 (1936).

Delegation to Board: While one of the three departments of state government cannot lawfully delegate any of its powers to either of the others, when a statute merely authorizes a board to carry out the expressed will of the Legislature, although procedural directions are specified only in general terms, the act is not vulnerable to the criticism that it delegates legislative powers contrary to Art. IV, sec. 1, 1889 Mont. Const. St. v. Andre, 101 M 366, 54 P2d 566 (1936).

Specific Direction Not Required: Sections in authorizing water conservation boards to carry out the expressed will of the Legislature but leaving certain matters of detail to it without specific direction as to how they shall be done was not a delegation of legislative authority in contravention of Art. IV, sec. 1, 1889 Mont. Const. State ex rel. Normile v. Cooney, 100 M 391, 47 P2d 637 (1935).

Criteria: A statute granting a board or commission certain powers to be exercised under general rules given for its guidance, with the requirement that it must find certain ultimate facts before taking a prescribed action, is not open to condemnation as delegating legislative power when because of multifarious fact conditions, which may properly be considered in the administration of the powers given, it is impossible to incorporate in the statute a more detailed recital of such conditions. N. Pac. Ry. v. Bennett, 83 M 483, 272 P 987 (1928).

Drainage Act: The drainage act does not attempt to delegate legislative power to the judiciary and therefore does not impinge upon the state Constitution, prohibiting the exercise of powers of a state department properly belonging to any other. In re Drain District, 64 M 545, 211 P 218 (1922).

Private Organizations: Section providing that any person who shall wear or use the insignia or ceremonies of any society, order, or organization of 10 years' standing in this state, "unless entitled to use or wear the same, under the constitution and by-laws, rules, and regulations of such society or organization", shall be guilty of a misdemeanor is unconstitutional and void. By allowing the different societies to supply in their secret work the description of the articles which it is unlawful to use or wear, the Legislature delegated legislative powers to the orders mentioned. St. v. Holland, 37 M 393, 96 P 719 (1908). See also State ex rel. Bennett v. St. Bd. of Examiners, 40 M 59, 104 P 1055 (1909); O'Neill v. Yellowstone Irrigation District, 44 M 492, 121 P 283 (1912); State ex rel. Smith v. District Court, 50 M 134, 145 P 721 (1914).

Attorney General's Opinions

Judicial Decision Invalidating Constitutional Amendments — Constitutional Language and Statutory Implementation Language Restored: In 2002, Montana voters approved Constitutional Amendment Nos. 37 and 38, along with statutory implementing provisions, to modify county distribution requirements for signatures to qualify an initiative petition for the ballot. In Mont. PIRG v. Johnson, CV 03-183-M-DWM (D.C. Mont. 2005), a federal District Court held that the amended distribution requirements resulted in an unequal treatment of qualified electors in different counties and were unconstitutional on their face and invalid. The Attorney General cited State ex rel. Woodahl v. District Court, 162 M 283, 511 P2d 318 (1973), in concluding that the nullification of the constitutional amendments by the judicial decision invalidating the county distribution requirements restored the language of the constitution and implementing statutes as they existed before the approval of the invalid amendments. 51 A.G. Op. 2 (2005).

Chief Water Judge Not Subject to State Leave Policies — Executive Branch Not to Supervise Judicial Branch: Although the Chief Water Judge is appointed and not elected, the Chief Water Judge is a judicial officer and is not subject to the vacation leave policies of the Department of Administration. This interpretation of the statutes is also required by the application of the separation of powers clause of the Montana Constitution. To hold otherwise would subject a judicial officer to control by the Executive Branch of state government and not to the control of the Montana Supreme Court or the Judicial Standards Commission. 48 A.G. Op. 2 (1999).

Line Item Appropriations and Conditions: Because the constitution is a limit on and not a grant of authority to the Legislature, line item appropriations and conditions attached thereto are permissible so long as they do not intrude into areas that distinctly and uniquely belong under the jurisdiction of the Board of Regents. 36 A.G. Op. 2 (1975).

Law Review Articles

Taking the Supreme Court at Its Word: The Implications for RFRA and Separation of Powers, Brant, 56 Mont. L. Rev. 5 (1995).

County Zoning in Montana: A New Look at an Old Constitutional Problem, Lundberg, 33 Mont. L. Rev. 63 (1972).

Energy in the Executive, Roeder, 33 Mont. L. Rev. 1 (1972).

Master Plan Zoning Statutes Held to Be an Unconstitutional Delegation of Legislative Authority, Andriolo, 23 Mont. L. Rev. 125 (1961).

Home Rule in Montana—Present and Proposed, Mason, 19 Mont. L. Rev. 79 (1957).

Constitutional Questions Raised by Montana's New Income Tax Law, Hendricks, 17 Mont. L. Rev. 203 (1956).

Section 2. Continuity of government.

Convention Notes

Revises 1889 constitution by removing provision which allowed seat of government to be moved by a vote of 2/3 of the people. No other change except in grammar.

Compiler's Comments

Former Constitutional Provision: This section is similar to Art. V, sec. 46, and Art. X, sec. 2 and 3, 1889 Mont. Const.

Section 3. Oath of office.

Convention Notes

Shortened version of oath contained in 1889 constitution.

Compiler's Comments

Former Constitutional Provision: This section is similar to Art. XIX, sec. 1, 1889 Mont. Const.

Case Notes

DECISIONS UNDER 1972 CONSTITUTION

Jurisdiction of Montana Courts' Over Tribal Member: Montana courts have jurisdiction over a tribal member whose actions involve significant contacts with the state outside reservation boundaries. By taking a constitutional oath of office to support, protect, and defend the Montana Constitution, a justice of the peace made himself subject to Montana courts when running for elective tribal office. Judicial Standards Comm'n v. Not Afraid, 2010 MT 285, 358 Mont. 532, 245 P.3d 1116.

Substitute Justice of the Peace Not Duly Authorized or Properly Called — Search Warrants Invalid: A Justice of the Peace submitted a written waiver request form for proposing substitute Justices of the Peace but failed to create a list of proposed substitutes as required in 3-10-231.

One of the designated substitutes took the judicial oath of office, but not in the form required by this section. The substitute justice was called by a Deputy Sheriff, who requested warrants allowing a search of defendant's property. The warrants were issued and executed, but the warrants were challenged by defendants on the grounds that the warrants were not issued by a properly authorized substitute justice. The state argued that the authorization and call-in of the substitute justice were in substantial compliance with the law and that any technical errors in the procedures should not operate to suppress evidence. Applying Potter v. District Court, 266 M 384, 880 P2d 1319 (1994), the Supreme Court held that substantial compliance was insufficient. The procedure used in authorizing the substitute justice with a variant form of the constitutional oath of office was a major discrepancy in the authorization process, and the procedure of providing law enforcement with a menu of substitutes from which to choose clearly violated Potter. The substitute Justice of the Peace was not duly authorized, thus the warrants issued by the substitute were void ab initio. St. v. Vickers, 1998 MT 201, 290 M 356, 964 P2d 756, 55 St. Rep. 859 (1998), distinguishing U.S. v. Leon, 468 US 897, 82 L Ed 2d 677, 104 S Ct 3405 (1984), and followed in Blodgett v. Justice's Court, 2012 MT 134, 365 Mont. 290, 280 P.3d 904.

DECISIONS UNDER 1889 CONSTITUTION

Creation of Legislative Council: Chapter 143, L. 1953 (sections 43-701 through 43-708, R.C.M. 1947, now repealed), which purported to create the "Montana Legislative Council" under which all of the members of the Council were members of the Legislature and which Council was permitted to accept grants or gifts of money from any person or corporation, is in direct conflict with and violative of the constitutional oath required by Art. XIX, sec. 1, 1889 Mont. Const. State ex rel. Mitchell v. Holmes, 128 M 275, 274 P2d 611 (1954), overruled in State ex rel. James v. Aronson, 132 M 120, 314 P2d 849 (1957).

Supreme Court — May Raise Question: Since, under the Constitution, judicial officers are required to take an oath that they will defend the federal and state Constitutions, the Supreme Court, in a case where decision of the question of constitutionality of a statute is decisive of the appeal, which question, however, was not raised by either party, may properly raise the question on its own motion. In re Clark's Estate, 105 M 401, 74 P2d 401 (1937).

Filing Requirement: Article XIX, sec. 1, 1889 Mont. Const., requiring every public officer to take the official oath therein prescribed, is self-executing, mandatory, and conclusive upon the Legislature; but it not being prohibited from requiring the filing of the oath, it could, as it did by 2-16-212, prescribe that such oath should be filed without thereby rendering the section unconstitutional. State ex rel. Wallace v. Callow, 78 M 308, 254 P 187 (1927).

Self-Executing: The provision of Art. XIX, sec. 1, 1889 Mont. Const., requiring every public officer within the state to take the oath therein prescribed, is self-executing. State ex rel. Scollard v. Bd. of Examiners, 52 M 91, 156 P 124 (1916).

Alderman — Oath Required: Before entering upon his duties, an alderman must swear that he will not knowingly receive, directly or indirectly, any money or other valuable thing for the performance or nonperformance of any act or duty pertaining to his office other than the compensation allowed by law. State ex rel. Ryan v. Bd. of Aldermen, 45 M 188, 122 P 569 (1912).

Section 4. Initiative.

Convention Notes

Revises 1889 constitution by requiring a petition to be signed by 5% of electors in 1/3 of the legislative districts instead of 8% in 2/5 of the counties.

Compiler's Comments

2002 Amendment by Referendum: Constitutional Amendment No. 38, proposed by Ch. 330, L. 2001, and approved at the general election held November 5, 2002, in (2) near middle of first sentence substituted "one-half of the counties" for "one-third of the legislative representative districts". Amendment effective July 1, 2003. (See text of referendum in final volume of 2003 Laws of Montana.)

Former Constitutional Provision: This section contains similar provisions to those contained in Art. V, sec. 1, 1889 Mont. Const.

Case Notes

DECISIONS UNDER 1972 CONSTITUTION

Repeal of City Resolution Via Referendum Invalid: Plaintiffs challenged a referendum approved by voters in the city of Whitefish, which repealed a city resolution that authorized the city to enter into an interlocal agreement with the county concerning planning and zoning

authority over a 2-mile area around the city, arguing that the resolution was not subject to the right of voter initiative and referendum. The District Court determined that the resolution was an administrative act by the city and was therefore not subject to repeal by referendum. On appeal, the Supreme Court applied the guidelines adopted in Whitehall v. Preece, 1998 MT 53, 288 Mont. 55, 956 P.2d 743, to determine whether the action by the city was administrative or legislative in nature and affirmed, concluding that the city's action had significant administrative characteristics, which made it not subject to repeal by referendum. Phillips v. Whitefish, 2014 MT 186, 375 Mont. 456, 330 P.3d 442.

Summary Ballot Statements Legally Sufficient: In an original proceeding challenging the legal sufficiency of a proposed ballot measure that sought to prohibit enforcement of the federal Patient Protection and Affordable Care Act (ACA) in Montana, petitioners argued that the ballot statements approved by the Attorney General were insufficient because the statements failed to explain to voters the substantive provisions of the ACA that would be void if the measure passed and failed to explain the far-reaching consequences that the measure would have on existing Montana programs. The Supreme Court denied the petitioners' challenge, concluding that the Attorney General's statement mentioned the topics that the petitioners claimed would be affected by the measure, thereby capturing the purpose, implication, and fiscal impacts in a summary fashion and sufficiently informing voters of the implications of a vote for or against the measure. Hoffman v. St., 2014 MT 90, 374 Mont. 405, 328 P.3d 604.

Attorney General Review of Ballot Initiative — No Power to Review Substantive Legality: The Attorney General's review of a ballot initiative for legal sufficiency is limited to determining whether the initiative complies with requirements governing the submission of the proposed issue to voters and does not include consideration of the substantive legality of the initiative if it were approved by voters. Montanans Opposed to I-166 v. St., 2012 MT 168, 365 Mont. 520, 285 P.3d 435, followed in Hoffman v. St., 2014 MT 90, 374 Mont. 405, 328 P.3d 604.

Challenge to Invalidate Signatures for Minimum Wage Initiative Rendered Moot by Election: Montanans for Equal Application of Initiative Laws (Montanans for Equal Application) filed an action to invalidate signatures gathered by supporters of Initiative Measure No. 151 (I-151), a proposal to raise the state minimum wage, and to enjoin the Secretary of State from including I-151 on the general election ballot. Supporters of I-151 filed a motion for summary judgment, contending that Montanans for Equal Application's challenge was barred by the 30-day limitation period then provided in 3-5-302 (see 13-27-317 for similar limitation). The District Court granted summary judgment for Raise Montana, ruling that Montanans for Equal Application's claim was untimely under 3-5-302 because it was not filed within the then-required 30 days after the date on which the Secretary of State notified the Governor that a sufficient number of signatures had been obtained to qualify for the ballot. Montanans for Equal Application appealed, arguing that the District Court ignored the plain meaning of 3-5-302, which allowed a challenge of a ballot issue "at any time" after discovery of illegal signatures. Raise Montana countered that not only did the District Court correctly interpret the former version of 3-5-302 to bar a claim filed 83 days after certification, but more importantly, this section, which prohibits a challenge of the sufficiency of an initiative after an election, rendered the challenge moot. Agreeing with Raise Montana, the Supreme Court ruled that Montanans for Equal Application did not begin their litigation in sufficient time to appeal the trial court's decision before the election and the unambiguous language of subsection (3) of this section became operative. Montanans for Equal Application of Initiative Laws v. St., 2007 MT 75, 336 M 450, 154 P3d 1202 (2007).

Expedited Hearing on Validity of Ballot Measure Not Violative of Procedural Due Process: Opponents to a ballot measure timely filed a challenge, and the District Court expedited the hearing and denied the proponents additional time for discovery. On appeal, the proponents asserted that their due process rights were violated by the District Court's actions. The Supreme Court disagreed. The requirements for a procedural due process claim are notice and opportunity for a hearing appropriate to the nature of the case. The proponents could not claim lack of notice because: (1) the opponents' complaint was sufficiently specific to put the proponents on notice that the opponents contested the validity of addresses listed by paid signature gatherers; (2) the proponents acknowledged that the Secretary of State notified them during the signature gathering process that complaints had been received related to address falsification; and (3) denial of additional time for discovery regarding address falsification did not prejudice the proponents because the signature gatherers were contacted, hired, and paid by the proponents, so any information regarding the true addresses was within the exclusive knowledge of the proponents. The due process claim of lack of a meaningful hearing was also denied by the Supreme Court. The record showed that the proponents failed to use the time allocated for discovery or to avail

themselves of available procedural remedies. The proponents did not answer the opponents' complaint, request any discovery, move for a continuance, take any depositions, file a pretrial brief, attend depositions conducted by the opponents, file proposed findings of fact or conclusions of law, or object to the District Court's proposed expedited schedule. Thus, any deprivation of a meaningful hearing was more a construct of the proponents' own failure to act than it was a function of the District Court's denial of more time for trial preparation. The proponents' due process claim failed. Montanans for Justice: Vote No on CI-98 v. St., 2006 MT 277, 334 M 237, 146 P3d 759 (2006), distinguishing Wilson v. Dept. of Public Service Regulation, 260 M 167, 858 P2d 368 (1993).

Signature Distribution Invalid: The 2002 amendment to this section requiring that signatures be gathered on a county basis rather than on a legislative district basis was unconstitutional on its face under the 14th amendment's equal protection clause and therefore invalid. Mont. PIRG v. Johnson, CV 03-183-M-DWM (D.C. Mont. 2005).

Guidelines for Distinguishing Between Legislative and Administrative Acts of Local Government — Initiative and Referendum Power Reserved for Legislative Acts Only: Beginning with Billings v. Nore, 148 M 96, 417 P2d 458 (1966), the Supreme Court recognized a distinction between legislative acts, which are subject to the powers of initiative and referendum, and administrative or quasi-judicial acts, which are not. Because local governments are empowered by Art. XI, sec. 4, Mont. Const., to exercise legislative, administrative, and other powers, the question arose as to whether 7-5-131 unconstitutionally limits local government referendum power to resolutions and ordinances within the legislative jurisdiction. In order to clarify the distinction between legislative and administrative acts of a local government, the Supreme Court adopted the following guidelines in Wichita v. Kans. Taxpayers Network, 874 P2d 667 (Kans. 1994): (1) An ordinance that makes new law is legislative, while an ordinance that executes an existing law is administrative. Permanency and generality are key features of a legislative ordinance. (2) Acts that declare public purpose and provide ways and means to accomplish that purpose generally may be classified as legislative. Acts that deal with a small segment of an overall policy question generally are administrative. (3) Decisions that require specialized training and experience in municipal government and intimate knowledge of the fiscal and other affairs of a city in order to make a rational choice may properly be characterized as administrative, even though they may also be said to involve the establishment of a policy. (4) No act of a governing body is likely to be solely administrative or legislative, and the operation of the initiative and referendum statute is restricted to measures that are quite clearly and fully legislative and not principally executive or administrative. In the present case, an ordinance that implemented the use of water meters as part of a town's water system improvement plan was an administrative act that was not subject to referendum. The District Court properly declared a referendum challenging the ordinance invalid. The Supreme Court affirmed the constitutionality of 7-5-131. Whitehall v. Preece, 1998 MT 53, 288 M 55, 956 P2d 743, 55 St. Rep. 219 (1998), followed in Phillips v. Whitefish, 2014 MT 186, 375 Mont. 456, 330 P.3d 442, and overruling Chouteau County v. Grossman, 172 M 373, 563 P2d 1125 (1977), and Dieruf v. Bozeman, 173 M 447, 568 P2d 127 (1977), to the extent that those decisions stand for the rule that a local government's act is administrative based solely on a statutory grant of authority.

Reasonableness of Time Periods: Under 13-27-316(2), certification by the Secretary of State to the Governor of qualification for the ballot triggers the time in which opponents to the measure may act. The opponents have 10 days following certification to file a challenge in District Court. The opponent has the time from the petition's initiation until its certification to prepare the action but is not required to act until it qualifies for the ballot. The statutes then provide for immediate access to the courts. This is a reasonable procedure for challenging the sufficiency of the title of an initiative. State ex rel. Boese v. Waltermire, 224 M 230, 730 P2d 375, 43 St. Rep. 2156 (1986).

Initiative Solicitation in School Polling Place Constitutional: Plaintiff was not allowed to gather signatures for an initiative petition on a general election day in a school building used as a polling place. The school district had a general policy prohibiting solicitation of any kind in school buildings. The District Court granted summary judgment to the school district. On appeal, the Supreme Court said that although 13-35-218 permits some manner of solicitation at polling places on election day, it does not guarantee the right. The court found the initiative process to be within the protection of Montana's counterparts of the first amendment. This does not assure that the process may not be regulated, however. The court, relying on the time, place, and manner regulations on the right to use public places for expressive activity found in Grayned v. City of Rockford, 408 US 104 (1972), and Tinker v. Des Moines School District, 393 US 503

(1969), found that the school district's policy was not narrowly tailored to further its interests in undisrupted school functioning. The policy applied regardless of whether classes were being held and applied to all solicitors regardless of whether they acted peaceably. Fear of disruption was not sufficient to overcome the right to freedom of expression. The school district's policy was found unconstitutional. Dorn v. Bd. of Trustees, 203 M 136, 661 P2d 426, 40 St. Rep. 348 (1983).

Prohibition Against Voters' Promise of Support as Unconstitutional: Section 5-7-102(7)(c)(i) from Initiative 85 is an unconstitutional infringement of the right of free speech and is therefore void. The prohibited conduct is nothing more than a standard and accepted means of involvement in the political process. It is a free expression of the only real power an elector possesses. Criticism of government is at the very center of the constitutional protection of free speech. No law could stand that would prevent an elector from voting for or against an incumbent. Likewise, no law can stand that would prevent a voter from expressing to an elected official an intention to vote for or against that official if certain action is or is not taken. Further, the first amendment applies to associations as well as individuals and protects the right of associations to engage in advocacy on behalf of their members. Mont. Auto. Ass'n v. Greely, 193 M 378, 632 P2d 300, 38 St. Rep. 1174 (1981).

Accounting Requirements Void for Vagueness: Subsections (5)(a)(i) and (5)(a)(iv) of section 5-7-208, enacted by Initiative 85, are void for vagueness. It is impossible to tell when "original and derivative" research is being performed; likewise, the court is unable to determine what additional information ought to be disclosed under the subheading of "news media". Mont. Auto. Ass'n v. Greely, 193 M 378, 632 P2d 300, 38 St. Rep. 1174 (1981).

Common Understanding and Judicial Precedent Sufficient to Show Compelling State Interest: The compelling need or state interest in enactment of Initiative 85 is demonstrated by both common understanding and judicial precedent, and no additional evidence need be presented to show compelling state interest. Mont. Auto. Ass'n v. Greely, 193 M 378, 632 P2d 300, 38 St. Rep. 1174 (1981).

Definition Subsections Impermissibly Vague: Subsections (7)(c)(iv), (7)(c)(v), and (7)(f) of 5-7-102, enacted by Initiative 85, are impermissibly vague, unconstitutional, and therefore void. (Following U.S. v. Dupree, 544 F2d 1050 (9th Cir. 1976).) The court asks rhetorically: Is there a form of "proper" economic reprisal? How does a lobbyist determine when he may retaliate lawfully against a public official? Can conduct which is potentially criminal be defined as "any means other than" the permitted means of argument on the merits? To "reflect discredit" is not sufficiently definite to give a person of ordinary intelligence fair notice that his conduct is forbidden. Mont. Auto. Ass'n v. Greely, 193 M 378, 632 P2d 300, 38 St. Rep. 1174 (1981).

Exemptions for Montana Citizens Unconstitutional: The exemption provided in subsection (2) of 5-7-101 and subsection (5)(b)(i) of 5-7-102, enacted by Initiative 85, for Montana citizens is constitutionally impermissible under the Privileges and Immunities Clause of the United States Constitution. There is no basis for creating an exception solely for individual Montana citizens. Citizens of other states may have an interest in some official action in Montana that warrants their efforts to influence the outcome of that action in Montana. The word "Montana" is void and without effect in both sections. Mont. Auto. Ass'n v. Greely, 193 M 378, 632 P2d 300, 38 St. Rep. 1174 (1981).

Language Requiring Nonlobbying Expenses to Be Disclosed — Unconstitutional: The words "regardless of whether it was paid solely" as used in subsection (5)(c) of 5-7-208, enacted by Initiative 85, are void as a violation of the first amendment right of association which exists as a necessary corollary to the freedoms of speech and assembly. The forced disclosure of contributions and membership fees "regardless of whether . . . paid solely for the purpose of lobbying" compels revelation of information that has no relationship to the ends that the lobbyist disclosure laws and Initiative 85 seek to achieve. That some money is in fact spent for lobbying does not lessen the repugnance of subsection (5)(c) of 5-7-208. Further, the forced disclosure of the name of an individual who contributed $250 reaches too broadly and too blindly into an area that is essential to the exercise of our most basic freedoms. Mont. Auto. Ass'n v. Greely, 193 M 378, 632 P2d 300, 38 St. Rep. 1174 (1981).

Statewide Vote Through Initiative as Demonstrating Compelling State Interest: The absence of factfinding capabilities in the initiative process is not proof of the absence of a compelling state interest in the enactment of Initiative 85. To so hold would result in the emasculation of the initiative process in Montana with a result that no initiative could withstand a first amendment challenge. The statewide vote on Initiative 85 is a demonstration of a compelling state interest in enactment of Initiative 85. Mont. Auto. Ass'n v. Greely, 193 M 378, 632 P2d 300, 38 St. Rep. 1174 (1981).

DECISIONS UNDER 1889 CONSTITUTION

Cigarette Tax: Constitutional prohibition against appropriations of money by initiative is directed solely to appropriations from the general funds; hence, Initiative Measure No. 54, L. 1951, p. 781 (16-11-111), which provides for an additional cigarette tax with which to pay a soldiers' bonus and that such additional tax is to go into a special fund and be used only for that special purpose, did not violate Art. V, sec. 1, 1889 Mont. Const. State ex rel. Graham v. Bd. of Examiners, 125 M 419, 239 P2d 283 (1952).

Initiative — Technical Objections to or Sufficiency of Petition Disregarded After Election: After the people have voted on a matter and a great majority of the voters have expressed their approval, the courts presume that the public interest was there and objections that there were not the required number of signatures on the petition are disregarded. State ex rel. Graham v. Bd. of Examiners, 125 M 419, 239 P2d 283 (1952), followed in Montanans for Equal Application of Initiative Laws v. St., 2007 MT 75, 336 M 450, 154 P3d 1202 (2007).

"Appropriation" Defined: An "appropriation", within the meaning of this section, has reference exclusively to the state general fund or a fund already in existence or for which provision has been made, rather than to money received in the treasury and credited to a fund for the sale of an authorized debenture issue, such as authorized by Initiative Measure No. 41, the 1938 debenture act. Martin v. St. Highway Comm'n, 107 M 603, 88 P2d 41 (1939).

Power of People to Initiate Laws Limited by the Constitution: In the exercise of their prerogative to initiate laws under Art. V, sec. 1, 1889 Mont. Const., the people are subject to the same constitutional limitations as are applicable to the Legislative Assembly. State ex rel. Bonner v. Dixon, 59 M 58, 195 P 841 (1921), overruled on other grounds in Bd. of Regents v. Judge, 168 M 433, 543 P2d 1323 (1975).

Procedure in Initiating a Measure: In initiating a measure under the power reserved to the people by Art. V, sec. 1, 1889 Mont. Const., a substantial compliance with the legislative direction contained in the provisions of sections 37-105 and 37-106, R.C.M. 1947 (now repealed), is necessary. State ex rel. Bonner v. Dixon, 59 M 58, 195 P 841 (1921), overruled on other grounds in Bd. of Regents v. Judge, 168 M 433, 543 P2d 1323 (1975).

Attorney General's Opinions

Signature Distribution Reverts to Legislative District Basis: A judicial decision (Mont. PIRG v. Johnson, CV 03-183-M-DWM (D.C. Mont. 2005)) invalidating the county distribution requirements for signatures to qualify an initiative petition for the ballot, as approved in Const. Amend. No. 37 and No. 38 and enacted in their implementing legislation, restores the language of the constitution and statutes as they existed before the approval of the invalid amendments. Therefore, the constitution reverts to the original legislative district basis for signature distribution. 51 A.G. Op. 2 (2005).

Initiative Inappropriate Process for Alteration of Method of Establishment and Collection of County Solid Waste Management District Service Charges: The initiative process may not be used to amend the resolution creating a county solid waste management district when the district encompasses an area smaller than the entire county and the initiative petition seeks to alter the method of establishing and collecting service charges. Such a proposed action is administrative in character rather than a legislative act subject to initiative or referendum. 45 A.G. Op. 5 (1993).

Legislative Power to Amend Voter-Initiated Act — Amendment Controls: It is within the power of the Legislature to modify initiatives enacted by the electorate, and in cases of conflict between the valid amendment and the initiative, the amendment controls. 42 A.G. Op. 21 (1987).

Gathering Initiative Petition Signatures at Primary Election Polling Places: The orderly gathering of initiative petition signatures at primary election polling places that does not interfere with the election process or obstruct voter access to the polling place may not be prohibited. Any interference with the initiative process must be narrowly construed in light of the state constitution's provisions guaranteeing an open initiative process. 39 A.G. Op. 62 (1982).

Law Review Articles

Signature Gathering in the Initiative Process: How Democratic Is It?, Ellis, 64 Mont. L. Rev. 35 (2003).

Section 5. Referendum.

Convention Notes

Revises 1889 constitution by allowing people to vote on any act of the legislature except appropriations and by requiring referendum petitions to be signed by 5% of the electors in 1/3 of the legislative districts instead of 8% of the electors in 2/5 of the counties. (1889 Constitution does

not allow referendums on laws "necessary for the immediate preservation of the public peace, health, or safety.")

Compiler's Comments

Former Constitutional Provision: This section contains provisions similar to those contained in Art. V, sec. 1, 1889 Mont. Const.

Case Notes

DECISIONS UNDER 1972 CONSTITUTION

Repeal of City Resolution Via Referendum Invalid: Plaintiffs challenged a referendum approved by voters in the city of Whitefish, which repealed a city resolution that authorized the city to enter into an interlocal agreement with the county concerning planning and zoning authority over a 2-mile area around the city, arguing that the resolution was not subject to the right of voter initiative and referendum. The District Court determined that the resolution was an administrative act by the city and was therefore not subject to repeal by referendum. On appeal, the Supreme Court applied the guidelines adopted in Whitehall v. Preece, 1998 MT 53, 288 Mont. 55, 956 P.2d 743, to determine whether the action by the city was administrative or legislative in nature and affirmed, concluding that the city's action had significant administrative characteristics, which made it not subject to repeal by referendum. Phillips v. Whitefish, 2014 MT 186, 375 Mont. 456, 330 P.3d 442.

Referendum — Issues Addressed Prior to Election Ballot — Justiciable Controversy: Legislative Referendum 123 (LR-123) was enacted by the Legislature in 2011 and was set to appear on the November 2012 general election ballot. The plaintiffs challenged the constitutionality of the referendum before it appeared on the ballot, and the Secretary of State claimed the challenge was not ripe and justiciable. The Supreme Court determined the constitutional issues could be raised and that a present case or controversy existed. In determining that the case could go forward, the Supreme Court reasoned that ripeness has both a constitutional dimension based on the case or controversy requirement and a prudential dimension that weighs the fitness of the issues for judicial decision and the hardship to the parties of withholding a decision. The issues were definite and concrete, and given the time and money involved, there was no prudential reason for allowing the election on LR-123 to proceed prior to addressing the constitutional issues. MEA-MFT v. McCulloch, 2012 MT 211, 366 Mont. 266, 291 P.3d 1075.

Preelection Challenge to Legislative Referendum — Constitutional Amendments by Statutory Referendum — Justiciable Where Proposed Law Facially Defective: The Legislature passed a bill to put a referendum on the ballot to change elections for Supreme Court justices from statewide to regional. Prior to the election, citizens from each of the seven proposed regions filed an action against the Secretary of State, seeking a declaratory judgment that the proposed referendum was unconstitutional as well as an injunction to bar the Secretary of State from putting the measure on the ballot. The District Court granted the plaintiffs summary judgment and the state appealed. The Supreme Court agreed with the District Court that the matter was justiciable even though the voters had not yet passed the referendum. Nevertheless, the Supreme Court concluded that preelection consideration of the appeal was appropriate because the proposed law was facially unconstitutional. The measure sought to amend the Montana Constitution by means of a statutory referendum, in clear violation of constitutional provisions. Therefore, the Supreme Court agreed the matter was justiciable and affirmed the District Court's granting of summary judgment. Reichert v. St., 2012 MT 111, 365 Mont. 92, 278 P.3d 455.

Guidelines for Distinguishing Between Legislative and Administrative Acts of Local Government — Initiative and Referendum Power Reserved for Legislative Acts Only: Beginning with Billings v. Nore, 148 M 96, 417 P2d 458 (1966), the Supreme Court recognized a distinction between legislative acts, which are subject to the powers of initiative and referendum, and administrative or quasi-judicial acts, which are not. Because local governments are empowered by Art. XI, sec. 4, Mont. Const., to exercise legislative, administrative, and other powers, the question arose as to whether 7-5-131 unconstitutionally limits local government referendum power to resolutions and ordinances within the legislative jurisdiction. In order to clarify the distinction between legislative and administrative acts of a local government, the Supreme Court adopted the following guidelines in Wichita v. Kans. Taxpayers Network, 874 P2d 667 (Kans. 1994): (1) An ordinance that makes new law is legislative, while an ordinance that executes an existing law is administrative. Permanency and generality are key features of a legislative ordinance. (2) Acts that declare public purpose and provide ways and means to accomplish that purpose generally may be classified as legislative. Acts that deal with a small segment of an overall policy question generally are administrative. (3) Decisions that require specialized training and experience in

municipal government and intimate knowledge of the fiscal and other affairs of a city in order to make a rational choice may properly be characterized as administrative, even though they may also be said to involve the establishment of a policy. (4) No act of a governing body is likely to be solely administrative or legislative, and the operation of the initiative and referendum statute is restricted to measures that are quite clearly and fully legislative and not principally executive or administrative. In the present case, an ordinance that implemented the use of water meters as part of a town's water system improvement plan was an administrative act that was not subject to referendum. The District Court properly declared a referendum challenging the ordinance invalid. The Supreme Court affirmed the constitutionality of 7-5-131. Whitehall v. Preece, 1998 MT 53, 288 M 55, 956 P2d 743, 55 St. Rep. 219 (1998), followed in Phillips v. Whitefish, 2014 MT 186, 375 Mont. 456, 330 P.3d 442, and overruling Chouteau County v. Grossman, 172 M 373, 563 P2d 1125 (1977), and Dieruf v. Bozeman, 173 M 447, 568 P2d 127 (1977), to the extent that those decisions stand for the rule that a local government's act is administrative based solely on a statutory grant of authority.

Suspension of Income Tax Law Pending Vote of the People Not Violation of Equal Protection: An increase in the state income tax passed by the Legislature was referred to the people, and its effect was suspended by petition pending that vote. Nicholson filed suit, arguing that the suspension of the law caused by the petition of a minority of voters vetoed the will of the majority, acting through their Legislature, in passing the income tax increase. The Supreme Court held that in adopting the constitutional provision providing for petition, referendum, and suspension, the majority had granted the minority the powers complained of and that in any event, the majority would have its opportunity to vote upon the tax increase at the referendum election. There was therefore no violation of the equal protection provisions of the constitution. Nicholson v. Cooney, 265 M 406, 877 P2d 486, 51 St. Rep. 579 (1994).

Tax Increase Not Appropriation of Money — Tax Increase Subject to Referendum: Natelson collected enough petition signatures on an income tax increase passed by the Legislature to suspend the increase and refer it to the people for a vote. Nicholson filed suit, claiming that the income tax increase was so inextricably tied to appropriation of the money raised by the tax as to constitute an appropriation itself, which is excepted from the referendum power of the people. Citing St. v. Dixon, 59 M 58, 195 P 841 (1921), the Supreme Court held that the income tax increase did not fit the definition of an appropriation. The Supreme Court also noted that the increase was purely revenue raising in nature, contained no provisions for expenditures, and was offered, debated, and voted upon separate from appropriation bills. Nicholson v. Cooney, 265 M 406, 877 P2d 486, 51 St. Rep. 579 (1994).

Governor's Signature Not Required on Legislative Referendum: As used in the Montana Constitution, the term "referendum measures" means both legislative and initiative referendums. The plain language of Art. VI, sec. 10, Mont. Const., and this section makes it clear that legislation calling for a referendum measure is not required to be signed by the Governor. State ex rel. Gould v. Cooney, 253 M 90, 831 P2d 593, 49 St. Rep. 410 (1992).

Referendum Measure Redirecting Coal Trust Fund Not Appropriation: A legislative referendum that redirected coal severance taxes from the permanent trust to a treasure state endowment trust was not on its face an appropriation of money subject to the provisions of this section, which prohibits the submission of an appropriation measure to electors as a ballot issue. State ex rel. Gould v. Cooney, 253 M 90, 831 P2d 593, 49 St. Rep. 410 (1992).

Validity of Voter Referendum — Paving of County Road: A proposed resolution for voter referendum to prevent the use of funds and acceptance of bids by the Board of County Commissioners to pave a county road was not subject to referendum since it concerned an administrative rather than legislative function. Chouteau County v. Grossman, 172 M 373, 563 P2d 1125 (1977).

Referendum of Ratification of Amendment of Federal Constitution: Submission of referendum to voters seeking their approval or rejection of the completed ratification by the Montana Legislative Assembly of the Equal Rights Amendment to the United States Constitution was enjoined as a useless act since the voters' approval or rejection would not affect the ratification. State ex rel. Hatch v. Murray, 165 M 90, 526 P2d 1369 (1974).

DECISIONS UNDER 1889 CONSTITUTION

Referendum — Not Applicable to Appropriation: Article V, sec. 1, 1889 Mont. Const., provided that the initiative and referendum powers reserved to the people did not extend to the appropriations of money, hence Referendum Measure No. 47, Ch. 217, L. 1943 (omitted), which required that the entire act should be submitted at an election, containing among other matters

an appropriation of $50,000 for expenses of such election, could not constitutionally be submitted to the people for approval or rejection and injunction from holding election granted. Burgan & Walker, Inc. v. St. Highway Comm'n, 114 M 459, 137 P2d 663 (1943).

Statutes Take Effect, When, and Remain in Effect Until When: Under 1-2-201, every statute, unless a definite time is prescribed therein, takes effect on July 1 (now amended to be October 1) of the year of passage and approval and remains in full force and effect during the interim in which the referendum clause of the Constitution may be resorted to by the people and the date of the subsequent election, unless it shall become "inoperative" by reason of the signing of a petition for referendum by 15% of the legal voters of a majority of the whole number of counties of the state; hence bonds sold under an operative law in full force and effect would be valid. Lodge v. Ayers, 108 M 527, 91 P2d 691 (1939).

Act Held Not Making Appropriation Within Meaning of This Provision: Title 16, ch. 3 and 4, known as the liquor control act, allocating license fees 50% to public school fund and 50% to public welfare fund is not an act relating to appropriations of public money and therefore not exempt from referendum, an "allocation" or apportionment to certain funds not doing away with the necessity of making an appropriation by legislative authority. State ex rel. Haynes v. District Court, 106 M 470, 78 P2d 937 (1938).

"Immediate Preservation of the Public": Under Art. V, sec. 1, 1889 Mont. Const., which provided that certain laws were not subject to a referendum, the Legislature's words regarding whether or not an enactment is an emergency enactment are facts, but the ultimate determination was for the courts. State ex rel. Haynes v. District Court, 106 M 470, 78 P2d 937 (1938).

Moot Questions — Suit Testing Constitutionality of Act Defeated on Referendum: An action attacking the constitutionality of the state insurance act (sections 173.2 through 173.20, R.C.M. 1935, repealed) defeated on referendum at the general election held on November 3, 1936, with the result that all contracts issued under the act became terminated, judgment of dismissal affirmed, for the reason that naught but moot questions remained for decision of which the Supreme Court does not take cognizance. Thomas v. St. Bd. of Examiners, 106 M 120, 75 P2d 789 (1938).

Interim Referred Act in Full Force: The state insurance act (sections 173.2 through 173.20, R.C.M. 1935, repealed) was in full force and effect during the interim, allowing the people to act between its operative date as declared in the act itself and the date of the declaration of the result of the election, at which time it becomes ineffective from the beginning, not by repeal but for lack of approval of a constitutional branch of the legislative department. The entire process of the referendum is legislative in character. Fitzpatrick v. St. Bd. of Examiners, 105 M 234, 70 P2d 285 (1937).

Emergency — Fact Determination for Court: The question whether an act passed as an emergency measure falls within the exception found in Art. V, sec. 1, 1889 Mont. Const., wherein the people reserve to themselves the right to approve or reject on referendum an act passed by the Legislature except as to laws necessary for "the immediate preservation of the public peace, health or safety"—i.e., matters arising out of some unforeseen menace, accident, sudden emergency, extraordinary occurrence, or unprecedented climatic conditions—is one of fact for the court's determination, and in determining it, the court may look to the act, the history of the legislation, contemporaneous declarations of the Legislature, and the evil to be remedied, and in case of doubt the question should be resolved in favor of the people. State ex rel. Veeder v. St. Bd. of Educ., 97 M 121, 33 P2d 516 (1934).

Signatures for Referendum: Under the amendment to Art. V, sec. 1, 1889 Mont. Const., a petition for referendum to be effective must be signed by 5% of all the legal voters of the state, and each of the two-fifths of all the counties must furnish as signers 5% of the legal voters of that county; if then the whole number from those counties does not make the required 5%, the petition may be rendered effective by a sufficient number of signers from other counties to supply the deficiency. State ex rel. Gleason v. Stewart, 57 M 397, 188 P 904 (1920).

"Emergency" Defined: Held, that the exception embodied in Art. V, sec. 1, 1889 Mont. Const., i.e., that acts necessary for the immediate preservation of the public health, peace, or safety shall not be subject to the referendum, was not intended to extend further than to matters arising out of some unforeseen menace, public calamity, accident, sudden emergency, extraordinary occurrence, or unprecedented climatic condition rendering immediate action imperative to prevent serious or irreparable injury to the public. State ex rel. Goodman v. Stewart, 57 M 144, 187 P 641 (1920).

Referendum Amendment to the Constitution: By force of the referendum amendment to the Constitution, a referable act does not become finally effective until the people have exercised

their reserved power, either by declining to refer it or by approving or disapproving it at the polls. State ex rel. Esgar v. District Court, 56 M 464, 185 P 157 (1919).

Referendum — Nature and Effect: The referendum, while in political effect a veto, is not such in the sense in which that term is used in our Constitution and is not an invasion of the executive function. Under it the people proceed toward bills enacted by the Assembly, expressing assent or dissent, in essentially the same manner as the Senate upon a bill which has passed the House; they are an additional body through which acts of the Legislature must pass in certain cases, and disapproval, when it occurs, is purely legislative. State ex rel. Esgar v. District Court, 56 M 464, 185 P 157 (1919); State ex rel. Hay v. Alderson, 49 M 387, 142 P 210 (1914).

Attorney General's Opinions

Applicability of Referendum Containing Retroactive Effective Date: Unless a law that has been suspended by referendum contains a specific effective date, upon approval by the voters, the law becomes effective upon completion of the canvass of the election results, as provided in 13-27-105. However, when a law that has been suspended by referendum contains a retroactive effective date, approval of the law by the voters also includes approval of its retroactive applicability. 45 A.G. Op. 20 (1993).

Legislative Power to Enact New Laws or Repeal Suspended Laws Dealing With Subject Matter of Pending Referendum: The Legislature may enact laws dealing with the subject matter encompassed in a referendum that is subject to a pending election, but the enactment may not change the text of the measure that will be put to a public vote, nor will any enactments in this area affect the necessity of holding the referendum election. However, the Legislature does not have the power to repeal a law that is suspended by referendum petition. Because the law is suspended pending further legislative action through the referendum process, it is not an effective statute and may not be repealed until the people have given it their approval. Once approved, the Legislature retains its power to maintain the law's effectiveness through amendment or repeal. 45 A.G. Op. 20 (1993).

Section 6. Elections.

Convention Notes

No change except in grammar.

Compiler's Comments

Former Constitutional Provision: This section contains provisions similar to those contained in Art. V, sec. 1, 1889 Mont. Const.

Case Notes

DECISIONS UNDER 1889 CONSTITUTION

"Special Election" as Used Herein Defined: Held, that the provision of Art. V, sec. 1, 1889 Mont. Const., as amended in 1905, that "all elections on measures referred to the people" shall be at the biennial regular election, except when the Legislature shall order a special election, by the use of the words "special election" means a special general election, i.e., a statewide election. State ex rel. Diederichs v. St. Highway Comm'n, 89 M 205, 296 P 1033 (1931).

Time of Election: There is not any repugnancy between the provision of Art. V, sec. 1, 1889 Mont. Const., which requires referred measures to be voted upon at biennial general elections, and the provisions of section 2041, R.C.M. 1907 (since repealed), which forbid a local option election to be held in any month in which a general election is held. They deal with different subjects, and each is controlling in its appointed sphere. State ex rel. Eagye v. Bawden, 51 M 357, 152 P 761 (1915).

Attorney General's Opinions

Power of Legislature to Adopt Date of Special Election on Initiative Referendum: The date of a referendum election is not essential to the efficacy of the referendum power, nor is the ability of the people to exercise the referendum power impaired by the fact that the people have returned to the Legislature the power to order a referendum election at a time other than a biennial general election. Therefore, the Legislature may order a statewide special election on an initiative referendum at a time other than a biennial general election if the issue is submitted at an election in which all qualified electors may vote and all statutory requirements for a special election are met. 45 A.G. Op. 18 (1993).

Law Review Articles

Montana Constitutional Amendment Referendum Requires Approval of Governor Before Submission to Electorate, Radonich, 22 Mont. L. Rev. 195 (1961).

Section 7. Number of electors.

Convention Notes

No change except in grammar.

Compiler's Comments

2002 Amendment by Referendum — Composite Section: Constitutional Amendment No. 37, proposed by Ch. 329, L. 2001, and approved at the general election held November 5, 2002, inserted (2) concerning number of qualified electors for purposes of constitutional amendment. Amendment effective July 1, 2003. (See text of referendum in final volume of 2003 Laws of Montana.)

Constitutional Amendment No. 38, proposed by Ch. 330, L. 2001, and approved at the general election held November 5, 2002, inserted (2) concerning number of qualified electors for purposes of statutory initiative. The Code Commissioner has designated subsection (2) enacted by Constitutional Amendment No. 38 as subsection (3) because of the enactment of a different subsection (2) by Constitutional Amendment No. 37. Amendment effective July 1, 2003. (See text of referendum in final volume of 2003 Laws of Montana.)

Former Constitutional Provision: This section contains provisions similar to those contained in Art. V, sec. 1, 1889 Mont. Const.

Section 8. Prohibition.

Convention Notes

New provision which differentiates the general initiative and referendum requirements from the special initiative and referendum requirements for amending the constitution.

Section 9. Gambling.

Convention Notes

Adds the word "gambling" to language of 1889 constitution. Makes it clear that all forms of gambling are prohibited. [See compiler's comment.]

Compiler's Comments

Former Constitutional Provision: This section is similar to Art. XIX, sec. 2, 1889 Mont. Const.

Adoption of Alternative Provision: This section became a part of the Constitution as a result of the approval by the electorate of a separately submitted provision. The adoption added the language: "unless authorized by acts of the legislature or by the people through initiative or referendum". For the text of the other alternative, see the Adoption Schedule compiler's comment in the annotations for the Transition Schedule.

Case Notes

DECISIONS UNDER 1972 CONSTITUTION

"Poker All Keno" Not Authorized by Card Games Law: A gambling game using 52 balls marked with playing card symbols that were mixed and drawn in the same manner as keno but paid off by the house based upon hands of various types of poker is not authorized under the card games law at Title 23, ch. 5, part 3, which was enacted pursuant to this section, because it is a "banking" type of game; the players vied against the house rather than against each other. Goott v. St., 193 M 108, 630 P2d 232, 38 St. Rep. 1037 (1981).

Groups Empowered to Legalize Gambling: The term "the people", as used in Art. III, sec. 9, Mont. Const., is synonymous with the voters of the entire state of Montana and not the voters of a local government unit. Therefore, the Legislature or "the people" of the entire state are the only two groups empowered to legalize forms of gambling in this state. Anaconda-Deer Lodge County v. Lorello, 181 M 195, 592 P2d 1381 (1979).

Effect on Prior Laws: Article III, sec. 9, Mont. Const., did not revive or make constitutional any gambling laws which had been held invalid under 1889 Constitution but merely provided that people or Legislature could legalize gambling by some affirmative act after effective date of new Constitution. State ex rel. Woodahl v. District Court, 162 M 283, 511 P2d 318 (1973), distinguished in State ex rel. Woodahl v. Straub, 164 M 141, 520 P2d 776 (1974).

DECISIONS UNDER 1889 CONSTITUTION

Initiative Lottery Measure Unconstitutional: The provisions of Art. XIX, sec. 2, 1889 Mont. Const., were both mandatory and prohibitory. Proposed initiative that would have legalized lotteries was unconstitutional. State ex rel. Steen v. Murray, 144 M 61, 394 P2d 761 (1964).

Purpose — Statutory Interpretation: The framers of the Constitution were seeking to suppress and restrain the spirit of gambling, which is cultivated and stimulated by schemes whereby one

is induced to hazard his earnings with the hope of large winnings. The statutes that define and prohibit lotteries must therefore be interpreted with this purpose in mind. St. v. Cox, 136 M 507, 349 P2d 104 (1960).

Valuable Consideration: When one is required to make an outlay of money in order to participate in a scheme whereby an award is made by chance, the participant pays valuable consideration for the chance to participate, notwithstanding the fact he may also receive merchandise at the same time that the outlay is made. St. v. Cox, 136 M 507, 349 P2d 104 (1960), distinguished in State ex rel. Stafford v. Fox Theatre Corp., 114 M 52, 132 P2d 689 (1942).

Lottery: Laws were unconstitutional as an attempt to authorize lotteries. St. v. Tursich, 127 M 504, 267 P2d 641 (1954).

Trade Stimulators: Sections (now repealed) authorizing and licensing trade stimulators such as punchboards were violative of this provision. State ex rel. Harrison v. Deniff, 126 M 109, 245 P2d 140 (1952).

Standing: Question whether a law authorizing the licensing of slot machines was in violation of Art. XIX, sec. 2, 1889 Mont. Const., could not be raised by a "citizen and taxpayer" in an action under the declaratory judgment act. Chovanak v. Matthews, 120 M 520, 188 P2d 582 (1948).

Nature of Provisions: While the first part of Art. XIX, sec. 2, 1889 Mont. Const., prohibiting legislative authorization of lotteries or gift enterprises is self-executing, the second part, commanding the enactment of laws, is not self-executing but requires legislative action to make it operative. State ex rel. Stafford v. Fox Theatre Corp., 114 M 52, 132 P2d 689 (1942).

Theater "Bank Night" Held Lottery: When part of theater admissions was used by proprietor to make up cash fund from which prizes were awarded to patrons whose numbers were drawn, there was consideration to the proprietor and the system constituted a lottery prohibited by Art. XIX, sec. 2, 1889 Mont. Const. State ex rel. Dussault v. Fox Theatre Corp., 110 M 441, 101 P2d 1065 (1940), overruled in Stafford v. Fox Theatre Corp., 114 M 52, 132 P2d 689 (1942).

ARTICLE IV

SUFFRAGE AND ELECTIONS

Article Compiler's Comments

Former Constitutional Provision: This article is similar to Art. IX, 1889 Mont. Const.

Article Collateral References

Election Laws, Interim Report, Montana Legislative Council (1977-78).

Election Reform, Interim Report, Montana Legislative Council (1973).

Section 1. Ballot.

Convention Notes

Revises 1889 constitution by adding the word "secret".

Compiler's Comments

Former Constitutional Provision: This section is similar to Art. IX, sec. 1, 1889 Mont. Const.

Case Notes

DECISIONS UNDER 1889 CONSTITUTION

Secret Ballot: The term "voting by ballot" means secret voting as distinguished from open voting. The privilege of secrecy is the essence of voting by ballot. State ex rel. Van Horn v. Lyon, 119 M 212, 173 P2d 891 (1946).

Voting Machines: The use of voting machines was not in contravention of Art. IX, sec. 1, 1889 Mont. Const. State ex rel. Fenner v. Keating, 53 M 371, 163 P 1156 (1917).

Section 2. Qualified elector.

Convention Notes

Revises 1889 constitution. Provides legislative rather than constitutional requirements for residence and registration. Convicted felon loses voting rights only while incarcerated. (18 is voting age established for ALL elections by 26th amendment to U.S. constitution ratified June 30, 1971).

Compiler's Comments

Former Constitutional Provision: This section derived from Art. IX, sec. 2, 3, 6, 8, and 12, 1889 Mont. Const.

Case Notes

DECISIONS UNDER 1972 CONSTITUTION

Exemptions for Montana Citizens Unconstitutional: The exemption provided in subsections (2) and (5)(b)(i) of 5-7-102 from Initiative 85 for Montana citizens is constitutionally impermissible under the Privileges and Immunities Clause of the United States Constitution. There is no basis for creating an exception solely for individual Montana citizens. Citizens of other states may have an interest in some official action in Montana that warrants their efforts to influence the outcome of that action in Montana. The word "Montana" is void and without effect in both sections. Mont. Auto. Ass'n v. Greely, 193 M 378, 632 P2d 300, 38 St. Rep. 1174 (1981).

Incarcerated Felons Excluded From Suffrage: The provisions of Montana's Constitution excluding incarcerated felons from suffrage are constitutionally permissible under the Equal Protection Clause, both in the federal and state constitutional versions. Further, 13-1-111, defining the qualifications of electors, also passes constitutional muster. Emery v. St., 177 M 73, 580 P2d 445 (1978).

DECISIONS UNDER 1889 CONSTITUTION

Debt or Liability — Provision Not Confined to Ad Valorem Funding: Since the U.S. Supreme Court held invalid the provisions of Art. IX, sec. 2, 1889 Mont. Const., restricting to taxpayers the right to vote on measures creating a debt or liability, there is no longer any reason to limit the requirement for approval by the voters to debts to be retired from ad valorem taxes. Therefore, measures authorizing the issuance of bonds secured by the pledge of portions of the constitutional sources of revenue, including income tax, corporation license tax, cigarette tax, and gasoline distributors' license tax, at least create liabilities within the meaning of Art. IX, sec. 2, 1889 Mont. Const., and are invalid unless approved by the electors. State ex rel. Ward v. Anderson, 158 M 279, 491 P2d 868 (1971), distinguishing Cottingham v. St. Bd. of Examiners, 134 M 1, 328 P2d 907 (1958).

Taxpayer Requirement Invalid: That portion of Art. IX, sec. 2, 1889 Mont. Const., that restricts the franchise in certain elections to taxpayers violates the Equal Protection Clause of the United States Constitution and is invalid. State ex rel. Ward v. Anderson, 158 M 279, 491 P2d 868 (1971).

Racial Discrimination Prohibited: Congress is empowered, as it did in the Voting Rights Act Amendments of 1970, 42 U.S.C. § 1973aa-1, to prohibit use of literacy tests or other devices used to discriminate against voters on account of their race in all state and national elections. Oreg. v. Mitchell, 400 US 112, 27 L Ed 2d 272, 91 S Ct 260 (1970).

Residence: As it did in the Voting Rights Act Amendments of 1970, 42 U.S.C. § 1973aa-1, Congress can prohibit states from disqualifying voters in elections for presidential and vice-presidential electors because they have not met state residency requirements and can set residency requirements and provide for absentee balloting in presidential and vice-presidential elections. Oreg. v. Mitchell, 400 US 112, 27 L Ed 2d 272, 91 S Ct 260 (1970).

Debt or Liability Provision Confined to Ad Valorem Funding: Article IX, sec. 2, 1889 Mont. Const., in adding the property holding qualification to voting on debts or liabilities, confined the additional qualification to only those debts or liabilities that look to ad valorem taxes for their retirement. Cottingham v. St. Bd. of Examiners, 134 M 1, 328 P2d 907 (1958), distinguished in State ex rel. Ward v. Anderson, 158 M 279, 491 P2d 868 (1971).

Electors in School Election: The fact that some electors in school bond elections pay taxes only on personal property does not disqualify them from voting at the election, for the names of such electors appear on the assessment roll the same as do those of the electors who pay taxes on real estate. Habel v. School District, 129 M 588, 292 P2d 349 (1956).

Objection to Be Raised Before Election: Under Art. IX, sec. 2, 1889 Mont. Const., and the statutes enacted supplementing it, the objection that a measure created a state debt, levy, or liability and that therefore it should have been placed upon a separate ballot to be voted upon by taxpayers is waived if not raised before the election. State ex rel. Graham v. Bd. of Examiners, 125 M 419, 239 P2d 283 (1952).

Application to Referendum Required by Article XIII, 1889 Constitution: The provisions of Art. IX, sec. 2, 1889 Mont. Const., relating to the qualifications of voters when the question submitted

concerns the creation of a levy, debt, or liability, applied to laws submitted to the people under Art. XIII, sec. 2, 1889 Mont. Const. Thomas v. Bd. of Examiners, 122 M 564, 207 P2d 553 (1949).

Questions Concerning Creation of Levy, Debt, or Liability: The constitutional provisions for submission of certain measures "to the people" or "to the people of the state" are qualified by the provisions that, if the question submitted concerns the creation of any levy, debt, or liability, the voter in addition to possessing general qualifications must also be a taxpayer. Pioneer Motors, Inc. v. Highway Comm'n, 118 M 333, 165 P2d 796 (1946).

Voting an Affirmative Act — Vote for Deceased Candidate Not Counted as Opposed to Write-In: The casting of a ballot at an election of public officers is an affirmative rather than a negative act. If it is the purpose of voters to defeat a certain candidate, that purpose can be accomplished only by voting for some person in opposition to him and not by voting for a person who died some weeks before election with the expectation that the vote cast for him would be counted as opposed to the person sought to be defeated. One who has died is no longer a person for whom, under Art. IX, sec. 2, 1889 Mont. Const., a voter may cast his ballot. State ex rel. Wolff v. Guerkink, 111 M 417, 109 P2d 1094 (1941).

When Objections to Electors' Qualifications Too Late: Under Art. IX, sec. 2, 1889 Mont. Const., which required that persons voting on a question under initiative and referendum concerning the creation of a public debt or liability must be taxpayers whose names appeared on the last preceding assessment roll, the point that some were permitted to vote who were not qualified, when raised after the election and where the measure carried by a vote of nearly 4 to 1, held not sufficient to defeat the act. Martin v. Highway Comm'n, 107 M 603, 88 P2d 41 (1939).

Absentee Voters: The absent voters law was a valid enactment and not open to the objection that in permitting a ballot to be delivered to the election officers by mail it violated the state Constitution. The contention that the section, by providing that an elector shall have resided in the state 1 year immediately preceding the election "at which he offers to vote", impliedly requires his personal presence at the polls was not tenable. Goodell v. Judith Basin County, 70 M 222, 224 P 1110 (1924).

Ownership of Property: In the absence of any property test for voters, a person who possesses the qualifications enumerated in this section and who is duly registered is entitled to vote without reference to his property holdings. State ex rel. Eagye v. Bawden, 51 M 357, 152 P 761 (1915).

"Qualified Elector": Except when otherwise indicated, the term "qualified elector" means a person who possesses the qualifications prescribed by the Constitution as necessary to entitle him to vote. It does not mean simply a registered voter. State ex rel. Lang v. Furnish, 48 M 28, 134 P 297 (1913).

Location of School: A section (since repealed) establishing county free high schools provided that the electors who favored the establishment of such a school were designated as the persons to determine the location of it. This was not a valid objection to its constitutionality as depriving those opposed to such school of the right to vote on the question of its location, contrary to Art. IX, sec. 2, 1889 Mont. Const. Evers v. Hudson, 36 M 135, 92 P 462 (1907).

Attorney General's Opinions

What Electors Considered Qualified Voters for County Zoning Initiatives: A zoning regulation is subject to citizen initiative, and nothing in county zoning law limits qualified electors to only voters living in the area affected by the zoning regulations. Thus, in the case of county zoning regulation initiatives effective in all unincorporated areas of a county, all county residents are considered qualified voters, including those residing within incorporated areas of the county. 52 A.G. Op. 6 (2008).

Voter Qualifications — Irrigation District Election: In order to vote in an irrigation district election under Title 85, ch. 7, part 17, an individual must be: (1) a landowner in the irrigation district; (2) a citizen of the United States; (3) 18 years of age or older; and (4) a resident of Montana and the county in which he offers to vote for at least 30 days. 42 A.G. Op. 47 (1987).

Election on Annexation of Portions of Yellowstone Park: Eligible residents of the portion of Yellowstone National Park proposed for annexation into Park County under Ch. 447, L. 1977, must be accorded the opportunity to vote on the question of annexation. A majority vote must be attained both among voters registered in Park County and among voters who reside in the area to be annexed in order to ratify the annexation. 37 A.G. Op. 161 (1978).

Eligibility as Trustee — Registered Voter: A person must be registered to vote in the school district to be eligible for the office of school trustee. "Eligibility", as used in 20-3-305, refers to the qualifications required of a school trustee to hold the office, not the qualifications to be elected. 37 A.G. Op. 145 (1978).

Prisoner Voting Rights: No person may vote in the state of Montana while serving a sentence in a penal institution resulting from conviction of a felony. 37 A.G. Op. 125 (1978).

Law Review Articles

Eighty Years of Indian Voting: A Call to Protect Indian Voting Rights, Jackson, 65 Mont. L. Rev. 269 (2004).

Section 3. Elections.

Convention Notes

Revises 1889 constitution. Provides legislative rather than constitutional establishment of requirements which are often affected by (and sometimes in conflict with) federal law and court decisions. When necessary to comply with federal requirements it is much easier to change the law than to amend the constitution. Second sentence specifically authorizes legislature to provide for voter registration at time and place of voting—rather than in advance of election.

Compiler's Comments

Former Constitutional Provision: This section derived from Art. IX, sec. 2 and 9, 1889 Mont. Const.

Case Notes

DECISIONS UNDER 1889 CONSTITUTION

Vacancy Based on Corrupt Practices Act: Under Art. IX, sec. 9, 1889 Mont. Const., the Legislature had the power to authorize the District Court, by means of the corrupt practices act, to find a vacancy in an office for violation of the provisions of such act. State ex rel. Kommers v. District Court, 109 M 287, 96 P2d 271 (1939). See also Tipton v. Sands, 103 M 1, 60 P2d 662 (1936).

Registration Not Elector Qualification: Registration is no part of the qualifications of an elector and adds nothing to them; it is merely a method of ascertaining who the qualified electors are in order that abuses of the elective franchise may be guarded against. State ex rel. Fadness v. Eie, 53 M 138, 162 P 164 (1916); State ex rel. Lang v. Furnish, 48 M 28, 134 P 297 (1913).

Law Review Articles

The Right to Participate, the Right to Know, and Electronic Voting in Montana, Miller, 69 Mont. L. Rev. 371 (2008).

Section 4. Eligibility for public office.

Convention Notes

Revises 1889 constitution by providing that a felon's right to seek public office is automatically restored after serving sentence.

Compiler's Comments

Former Constitutional Provision: This section is similar to Art. IX, sec. 10 and 11, 1889 Mont. Const.

Case Notes

DECISIONS UNDER 1889 CONSTITUTION

Laws Requiring Resignation on Candidacy for Other Office: Laws (since repealed) providing that the holder of a public office must tender his resignation upon becoming a candidate for another office did not violate Art. IX, sec. 11, 1889 Mont. Const., as prescribing qualifications for eligibility to public office in addition to those herein provided or as a limitation upon the right to seek another office. Mulholland v. Ayers, 109 M 558, 99 P2d 234 (1940).

Absence of Legislative Qualifications — Citizenship Required: When the Legislature, in creating an elective office, prescribes no limitations or qualifications, the right to hold it is an implied attribute of citizenship and is presumed to be coextensive with that of voting for that office. State ex rel. Shea v. Cocking, 66 M 169, 213 P 594 (1923).

Sex as Qualification for Office: By the adoption of the suffrage amendment to the Constitution, the sex attribute as a qualification to hold office was eliminated, and the use of the word "male" in a statute prescribing a qualification for office is of no effect. Rose v. Sullivan, 56 M 480, 185 P 562 (1919).

Superintendent of Schools: The Constitution prescribes no other qualifications for a County Superintendent of Schools than those provided for in Art. IX, sec. 10 and 11, 1889 Mont. Const.; that is, the person must be either a woman or a person qualified to vote at general elections and for state officers in this state. State ex rel. Chenoweth v. Acton, 31 M 37, 77 P 299 (1904).

Attorney General's Opinions

No Prohibition on City Employee Holding City Office: A municipality may not enact an ordinance prohibiting city employees from holding the office of councilman. 41 A.G. Op. 81 (1986).

Eligibility as Trustee — Registered Voter: A person must be registered to vote in the school district to be eligible for the office of school trustee. "Eligibility", as used in 20-3-305, refers to the qualifications required of a school trustee to hold the office, not the qualifications to be elected. 37 A.G. Op. 145 (1978). As to County Surveyor, see 35 A.G. Op. 85 (1974).

Section 5. Result of elections.

Convention Notes

No change except in grammar.

Compiler's Comments

Former Constitutional Provision: This section is similar to Art. IX, sec. 13, 1889 Mont. Const.

Case Notes

DECISIONS UNDER 1889 CONSTITUTION

Where Deceased Candidate Received Majority of Votes — Highest Write-In Candidate Held Elected: Where a candidate for reelection to a county office died 24 days before election, his death known generally to electors, but his name placed on ballot and majority voted for him supposing to retain his widow, appointed to fill the vacancy, until the next general election, a write-in candidate whom they intended to defeat, receiving the highest vote cast for any living person, held, on his application for Writ of Mandate to compel the county canvassing board to reconvene and cause certificate of election issued to him, that write-in candidate was elected and entitled to the office. State ex rel. Wolff v. Guerkink, 111 M 417, 109 P2d 1094 (1941).

Election Contest — Ouster: If section 94-1468, R.C.M. 1947 (now repealed), permits a candidate who did not receive the highest number of legal votes to be declared elected upon a judgment of ouster in a contest proceeding, it is void as in contravention of Art. IX, sec. 13, 1889 Mont. Const. Cadle v. Baker, 51 M 176, 149 P 960 (1915).

Attorney General's Opinions

Judicial Decision Invalidating Constitutional Amendments — Constitutional Language and Statutory Implementation Language Restored: In 2002, Montana voters approved Constitutional Amendment Nos. 37 and 38, along with statutory implementing provisions, to modify county distribution requirements for signatures to qualify an initiative petition for the ballot. In Mont. PIRG v. Johnson, CV 03-183-M-DWM (D.C. Mont. 2005), a federal District Court held that the amended distribution requirements resulted in an unequal treatment of qualified electors in different counties and were unconstitutional on their face and invalid. The Attorney General cited State ex rel. Woodahl v. District Court, 162 M 283, 511 P2d 318 (1973), in concluding that the nullification of the constitutional amendments by the judicial decision invalidating the county distribution requirements restored the language of the constitution and implementing statutes as they existed before the approval of the invalid amendments. 51 A.G. Op. 2 (2005).

Section 6. Privilege from arrest.

Convention Notes

1889 constitution reworded. Voter is immune from arrest during the voting process unless during such time he commits a felony or breach of peace.

Compiler's Comments

Former Constitutional Provision: This section is similar to Art. IX, sec. 4, 1889 Mont. Const.

Section 7. Ballot issues — challenges — elections.

Case Notes

Nonjusticiable Ballot Measure Controversy Dismissed: Proponents for a 2006 ballot measure petitioned the Supreme Court to reverse the District Court's invalidation of the legal sufficiency of the ballot measure to allow the measure to be placed on the ballot. However, the Supreme Court previously held in Montanans for Justice: Vote No on CI-98 v. St., 2006 MT 277, 334 M 237, 146 P3d 759 (2006), that the ballot measure was invalid and that no votes for the measure would be counted. Lacking jurisdiction over nonjusticiable matters, the Supreme Court may raise questions of justiciability sua sponte, but moot questions and advisory opinions are among matters that exceed the court's jurisdiction. A question becomes moot when effective relief can no longer be granted, and a justiciable controversy is one upon which the judgment of the court may effectively operate. In this case, even if the Supreme Court determined that the District

Court erred when it overruled the Attorney General's determination of legal sufficiency, votes for the initiative could not be counted because the Secretary of State's certification of the ballot measure was invalidated in Montanans for Justice. Additionally, the decision in Montanans for Justice ensured that any judgment in the present case would have no effect on the rights of the parties, so this appeal was reduced to a request for an advisory opinion that exceeded the court's jurisdiction. Thus, this nonjusticiable appeal was dismissed. Not in Montana: Citizens Against CI-97 v. St., 2006 MT 278, 334 M 265, 147 P3d 174 (2006).

Expedited Hearing on Validity of Ballot Measure Not Violative of Procedural Due Process: Opponents to a ballot measure timely filed a challenge, and the District Court expedited the hearing and denied the proponents additional time for discovery. On appeal, the proponents asserted that their due process rights were violated by the District Court's actions. The Supreme Court disagreed. The requirements for a procedural due process claim are notice and opportunity for a hearing appropriate to the nature of the case. The proponents could not claim lack of notice because: (1) the opponents' complaint was sufficiently specific to put the proponents on notice that the opponents contested the validity of addresses listed by paid signature gatherers; (2) the proponents acknowledged that the Secretary of State notified them during the signature gathering process that complaints had been received related to address falsification; and (3) denial of additional time for discovery regarding address falsification did not prejudice the proponents because the signature gatherers were contacted, hired, and paid by the proponents, so any information regarding the true addresses was within the exclusive knowledge of the proponents. The due process claim of lack of a meaningful hearing was also denied by the Supreme Court. The record showed that the proponents failed to use the time allocated for discovery or to avail themselves of available procedural remedies. The proponents did not answer the opponents' complaint, request any discovery, move for a continuance, take any depositions, file a pretrial brief, attend depositions conducted by the opponents, file proposed findings of fact or conclusions of law, or object to the District Court's proposed expedited schedule. Thus, any deprivation of a meaningful hearing was more a construct of the proponents' own failure to act than it was a function of the District Court's denial of more time for trial preparation. The proponents' due process claim failed. Montanans for Justice: Vote No on CI-98 v. St., 2006 MT 277, 334 M 237, 146 P3d 759 (2006), distinguishing Wilson v. Dept. of Public Service Regulation, 260 M 167, 858 P2d 368 (1993).

Initiative Amendment Void — Material Language Difference — Improper Publication Procedures: In a decision that resulted in the enactment of this section, the Supreme Court held that the language of an amendment to Art. II, sec. 16, Mont. Const., as filed and certified by the Secretary of State, was not the same language submitted to the voters at the election. Because the difference in language was material and because publication of the proposed initiative prior to election did not follow constitutional mandates, the purported amendment was held to be void. State ex rel. Mont. Citizens for the Preservation of Citizens' Rights v. Waltermire, 227 M 85, 738 P2d 1255, 44 St. Rep. 913 (1987). Petitions for rehearing, reconsideration, and clarification denied, 44 St. Rep. 929A (1987).

Section 8. Limitation on terms of office.

Compiler's Comments

Severability: Section 2, CI No. 64, was a severability clause.

Applicability: Section 3, CI No. 64, provided: "Section 1 applies to terms that begin during or after January 1993."

Effective Date: Section 4, CI No. 64, provided that the measure was effective January 1, 1993.

Case Notes

Challenge to Term Limits Barred by Doctrine of Laches: Constitutional Initiative No. 64, which in 1992 enacted term limits for various elective offices, was challenged in 2002 on several grounds by two state senators whose terms were affected by the limits. The Supreme Court did not address the merits of the claims because it held that they were barred by the doctrine of laches. Laches is a concept of equity that can apply when a person is negligent in asserting a right, and exists when there has been an unexplainable delay of such duration or character as to render the enforcement of an asserted right inequitable. Laches is appropriate when a party is actually or presumptively aware of the party's rights, but fails to act. In order to apply laches, a showing must be made that the passage of time has prejudiced the party asserting laches or has rendered the enforcement of a right inequitable. To allow plaintiffs' challenge 9 years after the enactment of the initiative would prejudice those who relied on its presumptive validity, and raise a question of the inequity of permitting the claim to be enforced. The court noted that

voters still retain the right to repeal the term limits provision, by initiative or through legislative referendum, but that the point had been reached at which a claim asserting that voters failed to follow the proper procedures in enacting the constitutional initiative was simply too late. Cole v. State ex rel. Brown, 2002 MT 32, 308 M 265, 42 P3d 760 (2002), followed in Phillips v. Whitefish, 2014 MT 186, 375 Mont. 456, 330 P.3d 442, in which the Supreme Court concluded that filing a lawsuit challenging a referendum 4 days after the referendum passed did not warrant dismissal based on laches when no demonstration of prejudice or inequity was made, aside from the ordinary cost of the election process.

Congressional Limits Illegal: Article I, sec. 5, clause 1, U.S. Const., prohibits states from imposing congressional qualifications additional to those specifically enumerated in its text. State imposition of term limits for congressional service would effect such a fundamental change in constitutional framework that it must be passed under the procedure set forth in Art. V, U.S. Const. U.S. Term Limits, Inc. v. Thornton, 514 US 779 (1995).

Attorney General's Opinions

Applicability of Constitutional Term Limits to Senate Terms — Initiative Applicability Clause Prevailing: In situations in which application of subsection (2) of this section and the applicability clause of Constitutional Initiative No. 64 could produce conflicting results, the latter prevails. Therefore, for a state Senator serving a term of office beginning in January 1991, the term limit calculation did not apply until that Senator was elected to or otherwise began serving in a term beginning during or after January 1993, as stated in the applicability clause of Constitutional Initiative No. 64. For a state Senator who served continuously since January 1991, this means that the term first counted for purposes of the term limits found in this section is the term that began in January 1995. 47 A.G. Op. 9 (1997).

Applicability of Term Limit Provisions to Appointed Senators — Definitions: Regarding the status of state Senators appointed upon the death or resignation of the incumbent to fill an unexpired term of office that began in 1991, the word "terms" refers to time served in terms beginning or ending before or after January 1993. The word does not refer to a particular date and does not simply exclude or include years prior to the date, but rather includes time by reference to the beginning or ending date of a term of office. Further, the word "year" does not refer strictly to a calendar year of 12 months when used in the context of legislative terms of office because a term does not necessarily begin on the first day of a calendar year. Applying the word "year" in such a strict manner would lead to an unintended, absurd result. A term of office for a state Senator is 4 years beginning on the first Monday in January in the year following the general election. If a Senator accedes to office by appointment or election, that Senator serves to complete the term of the person originally elected. Thus, for a Senator continually serving from the date of appointment or election to fill the unexpired portion of a term that began when the original incumbent took office in 1991, the first term of office counted toward the term limit is the term beginning in January 1995. 47 A.G. Op. 9 (1997).

Officeholder Who Sits Out Two Terms Before Running Again — Bar on Candidate Who Served Eight or More Years: Although one reading of this section could produce the conclusion that the intention is to limit a former officeholder to 8 years of service in any 16-year period and that at the conclusion of the 8-year period the former officeholder would be free to serve in that office again, by its terms, this section does not prevent a person from serving more than 8 years. Rather, it operates to prevent a person from becoming a candidate for an office if, at the conclusion of the term of office in which the person seeks to become a candidate, the person served 8 years in the previous 16-year period, effectively barring the candidate's election for longer than 16 years. 47 A.G. Op. 9 (1997), superseded by 54 A.G. Op. 4 (2012), holding that pursuant to 13-10-201, the phrase "current term" used in Art. IV, sec. 8, Mont. Const., means the term served after regular election to a full term of office. Under this definition, a candidate may file for office if, at the time the candidate begins to serve in, rather than file for, that office, the candidate will have had an 8-year break in service over a 16-year period.

ARTICLE V

THE LEGISLATURE

Article Compiler's Comments

Former Constitutional Provision: This article is similar to Art. V, 1889 Mont. Const.

Article Law Review Articles

Land Use Planning and the Montana Legislature: An Overview for 1973, Lundberg, 35 Mont. L. Rev. 38 (1974).

The Legislative Assembly in a Modern Montana Constitution, Waldron, 33 Mont. L. Rev. 14 (1972).

Section 1. Power and structure.

Convention Notes

No change except in grammar. [Note—see Delayed Effective Date compiler's comment to this section.]

Compiler's Comments

Delayed Effective Date: Section 2 of the Transition Schedule implementing the 1972 Montana Constitution provided: "Section 2. Delayed effective date. The provisions of sections 1, 2, and 3 of Article V, THE LEGISLATURE, shall not become effective until the date the first redistricting and reapportionment plan becomes law."

By letter of December 4, 1974, the Attorney General certified to the Secretary of State that: "The first redistricting and reapportionment plan was filed with the Secretary of State on February 27, 1974, and pursuant to Section 43-117, Revised Codes of Montana 1947, became law as of that date. Therefore, the provisions of Sections 1, 2 and 3, Article V, Constitution of Montana (1972), are now in effect."

The convention note for section 2 of the Transition Schedule provided: "Sections on size of legislature, election and terms of its members would become effective when the reapportionment plan becomes law. If this is in 1974 then elections would be held in November, 1974 for new members of the legislature to take office January 1, 1975."

Former Constitutional Provision: This section contains provisions similar to those in Art. V, sec. 1, 1889 Mont. Const.

Unicameral Legislature Provision Rejected: A separately submitted proposition adopting a unicameral legislature was defeated by the electorate. For the proposed text, see Adoption Schedule compiler's comment in the annotations for the Transition Schedule.

Case Notes

DECISIONS UNDER 1972 CONSTITUTION

24/7 Sobriety and Drug Monitoring Program Testing Fee — Permissible Delegation of Legislative Authority: The District Court held that 44-4-1204 of the Montana 24/7 Sobriety and Drug Monitoring Program Act unconstitutionally delegated legislative power to the executive branch because it lacked any objective criteria to guide the Attorney General in imposing fees, other than requiring that the fees be reasonable. On appeal, the Supreme Court reversed, concluding that 44-4-1204 is a permissible delegation of legislative authority because the section limits fees to reasonable amounts necessary to pay for the administration of the program and does not give the Attorney General unfettered discretion when implementing fees. St. v. Spady, 2015 MT 218, 380 Mont. 179, 354 P.3d 590.

Legislative Employee's Fiscal Assumptions Cannot Trigger Tax Credits — Unlawful Delegation of Power — Invasion of Executive Branch Power Impermissible: Legislative Referendum 123 (LR-123) provided a potential tax credit, tax refund, or payment to individuals when a certain level of surplus revenue was in the state treasury at the close of the fiscal year. As part of the process of determining whether there was surplus revenue, the Legislative Fiscal Analyst (LFA) was required to perform two dozen steps or calculations, including discretionary projections of balances, revenues, transfers, appropriations, and reversions. The Supreme Court held that the delegation of authority to the LFA violated Article V, section 1, of the Montana Constitution as an unlawful delegation of legislative power, similar to the unlawful delegation of authority to a legislative interim committee in State ex rel. Judge v. Legislative Fin. Comm., 168 Mont. 470, 543 P.2d 1317 (1975). Moreover, the requirement that the LFA exercise judgment and interpretations regarding the law violated the separation of powers under Article III, section 1, of the Montana Constitution, since these are Executive Branch functions. MEA-MFT v. McCulloch, 2012 MT 211, 366 Mont. 266, 291 P.3d 1075.

School Territory Transfer Statutes Unconstitutional — Insufficient Guidelines for Delegation of Legislative Authority: In 1994, the respondents, individuals residing in both Rosebud and Big Horn Counties but outside of the Northern Cheyenne Indian Reservation, petitioned their respective County Superintendents of Schools requesting a territory transfer from the Lame Deer High School District (LDHSD—created in 1993) back to the Colstrip and Hardin High

School Districts. The requests were granted. LDHSD appealed the decisions to the State Superintendent of Public Instruction, who reversed the decisions. The respective District Courts reversed the Superintendent of Public Instruction's decision. The Supreme Court reversed the District Courts' decisions on the grounds that the school territory transfer statute is an unconstitutional delegation of legislative power. The broad grant of discretion to a County Superintendent of Schools, unchecked by any standard, policy, or rule of decision, renders the statute unconstitutional. Hayes v. Lame Deer High School District, 2000 MT 342, 303 M 204, 15 P3d 447, 57 St. Rep. 1464 (2000). See also Belgrade Elementary & High School District No. 44 v. Morris, 2000 MT 347, 303 M 245, 15 P3d 482, 57 St. Rep. 1484 (2000), and In re Petitions to Transfer Territory, 2000 MT 348, 303 M 249, 16 P3d 1000, 57 St. Rep. 1486 (2000).

Seed Capital Bond Act Unconstitutional Delegation of Administrative Authority — Adoption of Rules No Cure of Defects: The Science and Technology Development Board Seed Capital Bond Act (Ch. 461, L. 1987, codified in large part as Title 90, ch. 3, part 4, now repealed) was declared unconstitutional under this section on the following grounds: (1) failure to set forth through legislatively defined policy, standard, or rule the law under which the Montana Science and Technology Development Board would function; (2) failure to prescribe with reasonable clarity the limits of Board power; and (3) failure to define terms on which technology investments were to be invested. Adoption of rules by the Board controlling investments did not cure defects. The court focused on the authority delegated by the Legislature and whether limits on that authority are clearly prescribed. Constitutional law does not allow for an administrative board to legislate the limits of its own power, which the Board in this case was required to do in order to give some meaning to the vague terms of the bill. White v. St., 233 M 81, 759 P2d 971, 45 St. Rep. 1310 (1988), distinguished in State ex rel. Dreher v. Fuller, 257 M 445, 849 P2d 1045, 50 St. Rep. 349 (1993), and followed in Hayes v. Lame Deer High School District, 2000 MT 342, 303 M 204, 15 P3d 447, 57 St. Rep. 1464 (2000). See also Belgrade Elementary & High School District No. 44 v. Morris, 2000 MT 347, 303 M 245, 15 P3d 482, 57 St. Rep. 1484 (2000), and In re Petitions to Transfer Territory, 2000 MT 348, 303 M 249, 16 P3d 1000, 57 St. Rep. 1486 (2000).

Delegation of Legislative Authority — Contingent Authorization Allowed: Plaintiff filed a complaint for declaratory judgment in the Supreme Court seeking to determine the validity of several acts of the Legislature allowing the issuance of state revenue bonds. Plaintiff contended that Ch. 705, L. 1983, granted the Board of Natural Resources and Conservation (BNRC) (now abolished) the power and authority to determine the feasibility of various water conservation projects and make recommendations on the projects to the Board of Examiners. Plaintiff contended the delegation was unconstitutional in that it failed to set forth adequate standards or to place limits on the discretion of the BNRC. The court found the standards imposed with reasonable clarity in 85-1-501 and 85-1-502. Under these statutes, the Department of Natural Resources and Conservation (DNRC) is required to study the economic and environmental feasibility of constructing and operating power generating facilities on water projects. Once DNRC has reached its determination, it is the BNRC's duty to determine feasibility and public interest. The court found the legislative enactments complete and sufficiently clear, definite, and certain to enable the agencies to know their respective rights and obligations. The court found that determinations of economic and environmental feasibility are more appropriate in the administrative than the legislative sector. The court found nothing improper in the Legislature's making its authorizations contingent upon administrative decisions properly made in the executive side of state government. Grossman v. St., 209 M 427, 682 P2d 1319, 41 St. Rep. 804 (1984).

Valid Reason for Mandatory Retirement — Legislative, Not Judicial Task: Since compulsory game warden (now game wardens' and peace officers') retirement statute contained no qualifications or justification, it would be in excess of the authority of a court hearing a warden's suit challenging the statute's validity to hold a factfinding hearing to determine whether there was a basis for the age discrimination grounded in the reasonable demands of the position. That is a legislative function; the effort would be great; and the Legislature, not the courts, has the resources for such an undertaking. Taylor v. Dept. of Fish, Wildlife, & Parks, 205 M 85, 666 P2d 1228, 40 St. Rep. 1112 (1983).

Separation of Powers Argument Rejected: The Supreme Court rejected plaintiff's contention that the panel act violates the prohibitions against unlawful delegation of judicial and legislative power and infringes on the doctrine of separation of powers. The decision of the panel is not enforceable, and unlike the panel decisions in most states, it is not even admissible at trial. Consequently, there are no constitutional violations under the Montana act. Linder v. Smith, 193 M 20, 629 P2d 1187, 38 St. Rep. 912 (1981).

Housing Act of 1975: Delegation to the Board of Housing to determine the income level of "persons and families of lower income" does not violate any constitutional prohibitions. It is a clear, definite, and certain direction to the agency that makes clear its rights and obligations. Huber v. Groff, 171 M 442, 558 P2d 1124 (1976).

Budget Information Powers of Legislative Finance Committee: Sections 5-12-302 and 5-12-303 do not impose unconstitutional burden upon state government, since power to approve appropriation bills and budget is in legislative branch, and Committee may require such information from other branches as is reasonably necessary to form rational basis for budget determinations. State ex rel. Judge v. Legislative Fin. Comm., 168 M 470, 543 P2d 1317 (1975).

DECISIONS UNDER 1889 CONSTITUTION

Reservation of Power: The provision of Art. V, sec. 1, 1889 Mont. Const., reserving to the people the right to refer and to approve or reject an act of the Legislature by their ballot and declaring that in the interim the legislation shall be in full force and effect, means that it is in force and effect, subject to the will of the people, and that upon disapproval of a measure it becomes ineffective from the beginning because it lacks the approval of a constitutional branch of the legislative department, namely, the people. State ex rel. Esgar v. District Court, 56 M 464, 185 P 157 (1919).

Attorney General's Opinions

Gathering Initiative Petition Signatures at Primary Election Polling Places: The orderly gathering of initiative petition signatures at primary election polling places that does not interfere with the election process or obstruct voter access to the polling place may not be prohibited. Any interference with the initiative process must be narrowly construed in light of the state constitution's provisions guaranteeing an open initiative process. 39 A.G. Op. 62 (1982).

Section 2. Size.

Convention Notes

New provision for determining size of legislature.

Compiler's Comments

Delayed Effective Date: Section 2 of the Transition Schedule implementing the 1972 Montana Constitution provided: "Section 2. Delayed effective date. The provisions of sections 1, 2, and 3 of Article V, THE LEGISLATURE, shall not become effective until the date the first redistricting and reapportionment plan becomes law."

By letter of December 4, 1974, the Attorney General certified to the Secretary of State that: "The first redistricting and reapportionment plan was filed with the Secretary of State on February 27, 1974, and pursuant to Section 43-117, Revised Codes of Montana 1947, became law as of that date. Therefore, the provisions of Sections 1, 2 and 3, Article V, Constitution of Montana (1972), are now in effect."

The convention note to section 2 of the Transition Schedule provided: "Sections on size of legislature, election and terms of its members would become effective when the reapportionment plan becomes law. If this is in 1974 then elections would be held in November, 1974 for new members of the legislature to take office January 1, 1975."

1974 Reapportionment Plan: In 1974, the apportionment plan, submitted to the Legislature by the Montana Districting and Apportionment Commission, provided for 100 House districts and 50 Senate districts. Maps showing district makeup and boundaries and a certified copy of the apportionment plan are on file with the Secretary of State. After the plan has been submitted to the Legislature for recommendations and upon its filing, it becomes law.

The 1974 apportionment plan will be revised by a new Commission and submitted to the 1981 or 1983 Legislature.

Attorney General's Opinions

Legislative Determination of Size of Legislative Assembly — Not Controlling: The Commission to Redistrict and Reapportion was not bound by a legislative determination of the size of the Legislative Assembly, and sections 43-106.6 and 43-106.7, R.C.M. 1947 (repealed by sec. 1, Ch. 14, L. 1975), enacted prior to the adoption of the 1972 Montana Constitution, are not controlling. 35 A.G. Op. 12 (1973).

Law Review Articles

The State of the Montana Constitution (Turkey Feathers on the Constitutional Eagle), Petesch, 64 Mont. L. Rev. 23 (2003).

Section 3. Election and terms.

Convention Notes

Revises 1889 constitution by adding requirement for staggered terms for senators. [Note—see Delayed Effective Date and Terms of Legislators During Transition compiler's comments to this section.]

Compiler's Comments

Delayed Effective Date: Section 2 of the Transition Schedule implementing the 1972 Montana Constitution provided: "Section 2. Delayed effective date. The provisions of sections 1, 2, and 3 of Article V, THE LEGISLATURE, shall not become effective until the date the first redistricting and reapportionment plan becomes law."

By letter of December 4, 1974, the Attorney General certified to the Secretary of State that: "The first redistricting and reapportionment plan was filed with the Secretary of State on February 27, 1974, and pursuant to Section 43-117, Revised Codes of Montana 1947, became law as of that date. Therefore, the provisions of Sections 1, 2 and 3, Article V, Constitution of Montana (1972), are now in effect."

The convention note to section 2 of the Transition Schedule provided: "Sections on size of legislature, election and terms of its members would become effective when the reapportionment plan becomes law. If this is in 1974 then elections would be held in November, 1974 for new members of the legislature to take office January 1, 1975."

Terms of Legislators During Transition: Section 5 of the Transition Schedule implementing the 1972 Montana Constitution provided: "Section 5. Terms of legislators. (1) The terms of all legislators elected before the effective date of this Constitution shall end on December 31 of the year in which the first redistricting and reapportionment plan becomes law.

(2) The senators first elected under this Constitution shall draw lots to establish a term of two years for one-half of their number."

By letter of March 24, 1977, the Attorney General certified to the Secretary of State that the following provisions of the Transition Schedule have been fully executed: "Section 5. Terms of legislators. Subsection (1) of Section 5 has been fully executed. Under that subsection, the first redistricting and reapportionment plan was filed with the Secretary of State and became effective on February 27, 1974. Therefore, the terms of all legislators elected prior to the effective date of the 1972 Constitution on July 1, 1973, ended on December 31, 1974.

Subsection (2) of Section 5 of the Transition Schedule has been fully executed."

The convention note to section 5 of the Transition Schedule provided: "(1) If the reapportionment and redistricting plan becomes effective after the 1974 legislative session, the terms of legislators serving in that session would end December 31, 1974. (2) Section 3, Article V provides that senators have four year terms but that one-half are elected every two years. This section provides that one-half of the senators first elected will have only two year terms."

Former Constitutional Provision: This section is similar to Art. V, sec. 2, 1889 Mont. Const.

Attorney General's Opinions

Reapportionment — Holdover Senators: Article V, sec. 3, Mont. Const., provides that state Senators be elected to 4-year terms on a staggered basis. The constitution and statutes provide no authority for changing Senators' terms after reapportionment. The reapportionment plan is the responsibility of the Montana Districting and Apportionment Commission. The Commission has the inherent authority under Art. V, sec. 14, Mont. Const., to do what is necessary to implement a plan that complies with the state's laws. How to deal with holdover Senators is the responsibility of the Commission. The terms of office of members of the Montana State Senate who were elected in 1982 may not be shortened as a result of reapportionment and redistricting. 40 A.G. Op. 2 (1983).

Law Review Articles

The State of the Montana Constitution (Turkey Feathers on the Constitutional Eagle), Petesch, 64 Mont. L. Rev. 23 (2003).

Section 4. Qualifications.

Convention Notes

Revises 1889 constitution by reducing district or county residency requirements from one year to six months and eliminating age requirements.

Compiler's Comments

Former Constitutional Provision: This section is similar to Art. V, sec. 3, 1889 Mont. Const.

Attorney General's Opinions

Residency: The apparent intent of this section, based on the debate of the constitutional convention, is that a legislative candidate who resides in a district crossing county boundaries may run in another district in the county of residency which is wholly contained within that county, but may not run in another district in the county of residency which also crosses into another county. A legislative candidate who resides in a district wholly contained within the county of residency may run in another district in the county of residency which is also wholly contained within that county, but may not run in another district in the county of residency which also crosses into another county. 35 A.G. Op. 34 (1973).

Section 5. Compensation.

Convention Notes

No change except in grammar.

Compiler's Comments

Former Constitutional Provision: This section is similar to Art. V, sec. 5, 1889 Mont. Const.

Case Notes

DECISIONS UNDER 1972 CONSTITUTION

Legislature's Appropriating Money Not Fixing Compensation: Gehring argued that the 1993 Legislature had violated the constitution by fixing its own compensation. The Supreme Court held that the 1991 Legislature had fixed the amount of compensation for the 1993 Legislature and that the appropriation of money by the 1993 Legislature to pay itself the compensation set by the previous Legislature did not violate the constitution. Gehring v. Members of 1993 Legislature, 269 M 373, 889 P2d 1164, 52 St. Rep. 34 (1995).

DECISIONS UNDER 1889 CONSTITUTION

Equal Protection — Prohibition Against Salary Change: Prohibition against increase or diminution of salary or emolument of public officer after election or appointment contained in Art. V, sec. 31, 1889 Mont. Const., did not violate Equal Protection Clause of United States Constitution. Shubat v. St., 157 M 143, 484 P2d 278 (1971).

Creation of Legislative Council: Laws which created a "legislative council" under which all of the members of the Council were also members of the Legislature and which act allowed "actual travel and other expenses incurred in the discharge of their duties, including attendance at meetings", did not contravene Art. V, sec. 5, 1889 Mont. Const. State ex rel. James v. Aronson, 132 M 120, 314 P2d 849 (1957), overruling State ex rel. Mitchell v. Holmes, 128 M 275, 274 P2d 611 (1954).

Restriction on Legislative Power: Article V, sec. 8, 1889 Mont. Const., embodied an express restriction upon the powers of the Legislative Assembly. Lloyd v. Silver Bow County, 11 M 408, 28 P 453 (1891).

Appropriation to Fund Second Legislature Constitutional: Article V, sec. 5 and 8, 1889 Mont. Const., fixed the compensation of members of the First Legislative Assembly and conferred upon that body the power to enact laws for the payment of its successors. Such legislation can be amended at any time, subject to the restrictions that no Legislative Assembly can pass a law which defines its own compensation and that members cannot receive an increase of salary or mileage. It was also contemplated that the First Legislative Assembly would provide the statutes that were applicable to these conditions, but it failed to discharge its functions by the passage of any laws. The Second Legislative Assembly having made an appropriation by law for the payment of its members at the same rate established by this section, it was held that the intent of the Constitution being to prevent a Legislative Assembly from securing extravagant compensation by its own votes, the Second Legislative Assembly did not fix its own compensation within the intent, spirit, or scope of these sections, and the appropriation was valid. State ex rel. Harrington v. Kenney, 10 M 410, 25 P 1022 (1891).

Rights of Legislators — Enforceability: Article V, sec. 5 and 15, 1889 Mont. Const., guaranteed to persons occupying the office of Legislator certain rights, privileges, and emoluments, which courts of justice will regard and enforce in proper cases and upon proper showing. State ex rel. Thompson v. Kenney, 9 M 223, 23 P 733 (1890).

Section 6. Sessions.

Convention Notes

New provision. "Continuous body" does not mean the legislature is in continuous session but means the legislature has legal existence even when not actually meeting. It will have regular

annual sessions of 60 days. A legislature cannot pass a law that IT can meet for more than 60 legislative days but can provide that future legislatures may meet longer. Legislature as well as the governor may call a special session. [Note — see Accelerated Effective Date compiler's comment to this section.]

Compiler's Comments

1974 Amendment by Initiative: Constitutional Initiative No. 1, proposed by initiative petition and approved at the general election held November 5, 1974, deleted two sentences at beginning of section that read: "The legislature shall be a continuous body for two-year periods beginning when newly elected members take office. Any business, bill, or resolution pending at adjournment of a session shall carry over with the same status to any other session of the legislature during the biennium", in first sentence after "shall meet" substituted "each odd-numbered year" for "at least once a year", and increased length of session from 60 to 90 days. Amendment effective December 31, 1974. (See text of initiative in final volume of 1975 Laws of Montana where text of initiative is erroneously referred to as Constitutional Amendment No. 3.)

Accelerated Effective Date: Section 1 of the Transition Schedule for implementing the 1972 Montana Constitution provided: "Section 1. Accelerated effective date: Section 6 (SESSIONS) and section 14 (DISTRICTING AND APPORTIONMENT) of Article V, THE LEGISLATURE, shall be effective January 1, 1973."

The convention note for section 1 of the Transition Schedule provided: "Proposed section on annual legislative sessions and reapportionment of the legislature would be effective January 1, 1973. The reapportionment commission could then be appointed by the 1973 legislature and report its plan to the 1974 legislature."

Former Constitutional Provision: This section is similar to Art. V, sec. 5 and 6, 1889 Mont. Const.

Case Notes

DECISIONS UNDER 1889 CONSTITUTION

Interim Committees: Laws creating the legislative interim committees do not extend the limitation of 60 days specified by Art. V, sec. 5, 1889 Mont. Const. State ex rel. James v. Aronson, 132 M 120, 314 P2d 849 (1957), overruling State ex rel. Mitchell v. Holmes, 128 M 275, 274 P2d 611 (1954).

Passage of Bill After Time Limits Expire — Journals Binding on Courts: On collateral attack upon the validity of sections (since repealed) known as a chain store license tax law, based upon the ground that it was passed after the 60-day limit for holding a regular legislative session under Art. V, sec. 5, 1889 Mont. Const., had expired, the legislative journals showing on their face a compliance with such limitation, import absolute verity and are binding upon the courts. It was error to admit parol testimony showing the contrary. Standard Oil Co. v. St. Bd. of Equalization, 110 M 5, 99 P2d 229 (1940).

Biennial Sessions: For ordinary purposes, the Legislature may not convene more often than once in 2 years. State ex rel. Bennett v. St. Bd. of Examiners, 40 M 59, 104 P 1055 (1909).

Attorney General's Opinions

Majority of Members, Not Majority of Each House, Required to Call Special Session: Under this section of the Montana Constitution, a majority of all of the members of the Legislature is required to request that the Legislature be convened in a special session. A majority of each house is not required to request that a special session be convened. 41 A.G. Op. 27 (1985), overruling 35 A.G. Op. 6 (1973).

Recorded Vote — Fulfills Requisites of a "Writing": The Legislative Assembly may reconvene itself in special session by a recorded vote of the majority of each house voting on the proposal. 35 A.G. Op. 7 (1973).

Section 7. Vacancies.

Convention Notes

New provision which would require filling vacancies by election if the present law requiring appointments is ever repealed.

Attorney General's Opinions

Submission to Electorate: For the most part, the provisions of the Montana Constitution encourage officials appointed to vacant offices to submit to the electorate at the next regularly scheduled election. 37 A.G. Op. 115 (1978).

Section 8. Immunity.

Convention Notes

No change except in grammar.

Compiler's Comments

Former Constitutional Provision: This section is similar to Art. V, sec. 15, 1889 Mont. Const.

Case Notes

Representative's Immunity From Litigation for Statements Made in House of Representatives — Defamation Action Properly Dismissed: While giving a speech on the floor of the House of Representatives, Representative Glaser referenced a letter that was sent to the Legislature by Cooper. On a point of personal privilege, Glaser said Cooper had spent time in prison for threatening an officer while in the military, had threatened his neighbors, had spent time in the State Hospital in Warm Springs, was a "kook", and was "not an ordinary member of society". Cooper sued Glaser for defamation. Glaser claimed legislative immunity under Art. V, sec. 8, Mont. Const., but Cooper contended that immunity did not apply because Glaser's statements were personal and not within the sphere of legitimate legislative activity. The District Court granted Glaser's motion to dismiss, and on appeal the Supreme Court affirmed. The question was not whether the statements were legislative in nature, but whether Glaser was engaged in a legislative function when speaking. Thus, regardless of the truth of the statements, Glaser spoke from the floor of the House of Representatives while in session and therefore was immune from the threat of prosecution pursuant to Art. V, sec. 8, Mont. Const. Cooper v. Glaser, 2010 MT 55, 355 Mont. 342, 228 P.3d 443.

Conduct of City Council Meeting Hearing Criticism of City Employee — Not Restricted by Free Speech and Privileged Communication Cases and Statute — Not Legislative Act Shielded by Legislative Immunity: Denke filed complaints with the Human Rights Commission alleging that Thompson Falls and Shoemaker, a City Council member, retaliated against her for previously filing sexual harassment charges with the Commission by holding a City Council meeting at which Shoemaker was allowed, with virtually no limitation, to severely criticize her conduct as city clerk and finance officer. The Commission hearing examiner, the Commission, and the District Court held that Shoemaker's criticism of Denke's actions as city bookkeeper aired during the City Council meeting was a "legislative act" within the meaning of 2-9-111 and the city was therefore immune from a charge of retaliation. The Supreme Court held that 27-1-804(2) and free speech cases such as New York Times Co. v. Sullivan, 376 US 254 (1964), and Skinner v. Pistoria, 194 M 257, 633 P2d 672 (1981), did not limit the City Council's ability to regulate the time, place, and manner of Shoemaker's criticism. The Supreme Court also held that Denke's claim did not involve the calling of the City Council meeting (for which the city would be immune under 2-9-114) so much as the manner in which the meeting was conducted and that the conduct of the meeting did not fall within the definition of a "legislative act", and remanded the case for further proceedings. Denke v. Shoemaker, 2008 MT 418, 347 M 322, 198 P3d 284 (2008).

Absolute Immunity: Plaintiffs claimed that Montana legislators violated single mothers' constitutional rights when the legislators voted to enact legislation deregulating the Montana energy markets. The District Court relied upon Chappell v. Robbins, 73 F3d 918 (9th Cir. 1996), holding that legislators have an absolute common-law immunity against civil suit for their legislative acts. The Ninth Circuit Court upheld the District Court's dismissal of the claims against the legislators. Single Moms, Inc. v. Mont. Power Co., 331 F3d 743 (9th Cir. 2003).

Section 9. Disqualification.

Convention Notes

No change except in grammar.

Compiler's Comments

Former Constitutional Provision: This section is similar to Art. V, sec. 7, 1889 Mont. Const.

Case Notes

DECISIONS UNDER 1972 CONSTITUTION

Law Clerk or Master Not a Public Officer — No Violation of Constitution by Legislator: A law clerk acting as an employee of the court is not exercising the sovereign power of the state since he or she is subject to the supervision of the judge or justice who is the employer. A master, although having duties and obligations of a judicial officer, acts in an advisory capacity and does not sit as a court. Therefore, neither a law clerk nor a master is a public officer. A person who holds these positions while holding office as a state legislator does not violate the constitutional

provision requiring separation of powers. State ex rel. Paugh v. Bradley, 231 M 46, 753 P2d 857, 45 St. Rep. 419 (1988).

Delegation of Powers — Legislative Finance Committee: A committee of the Legislature may not be considered an executive agency for the purpose of delegating powers to it because, under this section, members of the Legislature are disqualified from membership on executive agencies. State ex rel. Judge v. Legislative Fin. Comm., 168 M 470, 543 P2d 1317 (1975).

DECISIONS UNDER 1889 CONSTITUTION

Constitutional Convention Delegates:

Delegates to the 1972 Constitutional Convention were considered representatives who are prohibited by this section from holding any other state office during the term for which elected. Mahoney v. Murray, 159 M 176, 496 P2d 1120 (1972).

Members of the Legislature may not serve as delegates to state Constitutional Convention, since a delegate holds a civil office. Legislative Assembly v. Lennon, 156 M 416, 481 P2d 330 (1971), distinguished in Mahoney v. Murray, 159 M 176, 496 P2d 1120 (1972).

Constitutional Convention Delegates — Term of Office: The term of office of delegates to the 1972 Constitutional Convention extended to June 30, 1973, the date of repeal of the 1972 Constitutional Convention Enabling Act, despite the prior adjournment sine die of the Convention, since the Convention, when it adjourned, constituted a committee to carry on many of the functions of the Convention. Mahoney v. Murray, 159 M 176, 496 P2d 1120 (1972).

Interim Committee Membership Not Civil Office: Membership of Legislators in the legislative interim council serving in interim between sessions was not a civil office within the meaning of Art. V, sec. 7, 1889 Mont. Const. State ex rel. James v. Aronson, 132 M 120, 314 P2d 849 (1957), overruling State ex rel. Mitchell v. Holmes, 128 M 275, 274 P2d 611 (1954).

Member Relief Commission Civil Officer: A member of the Montana Relief Commission (now terminated) was a civil officer and not mere state employee and subject to Art. V, sec. 7, 1889 Mont. Const. State ex rel. Nagle v. Kelsey, 102 M 8, 55 P2d 685 (1936).

Violation by Others Immaterial to Determination of Case: In Quo Warranto proceeding to oust civil officer from office to which he was appointed during term for which he was elected state Senator in contravention of Art. V, sec. 7, 1889 Mont. Const., the fact that others of like disqualification held similar offices is not entitled to consideration. State ex rel. Nagle v. Kelsey, 102 M 8, 55 P2d 685 (1936).

Ousting — Quo Warranto — Complaint: Supreme Court has original jurisdiction of a Quo Warranto proceeding brought by Attorney General to oust state Senator appointed during his term to "civil office under the state". Plaintiff need not set forth in complaint the name of other claimant to office nor that anyone else is entitled to the office. State ex rel. Nagle v. Kelsey, 102 M 8, 55 P2d 685 (1936).

Boiler Inspector Not State Officer: Upon review of the statutes pertaining to the appointment and duties of state boiler inspectors, in a proceeding in Quo Warranto to determine whether an inspector upon his election and qualification as state Senator became disqualified, under Art. V, sec. 7, 1889 Mont. Const., a boiler inspector is not a public or state officer but merely a state employee. Therefore the constitutional provision has no application to him. State ex rel. Nagle v. Page, 98 M 14, 37 P2d 575 (1934).

"Civil Office" Defined:

The words "civil office" as used in Art. V, sec. 7, 1889 Mont. Const., in providing that no Senator or Representative shall, during the term for which elected, be appointed to any civil office, mean any public office not of a military character. State ex rel. Barney v. Hawkins, 79 M 506, 257 P 411 (1927).

To make any position of employment a public office of a civil nature, it must be created by the state Constitution or by the Legislature or created by a municipality pursuant to authority delegated to it; it must possess a delegation of a portion of the sovereign power of government, to be exercised for the benefit of the public; the powers conferred and the duties to be discharged must be defined, directly or impliedly, by the Legislature or through legislative authority. The duties must be performed independently and without control of a superior power, other than the law, unless they be those of an inferior or subordinate office, created or authorized by the Legislature and by it placed under the control of a superior office or body. It must have permanency and continuity, and the incumbent must take and file an oath, hold a commission, and give an official bond, if required by proper authority. State ex rel. Barney v. Hawkins, 79 M 506, 257 P 411 (1927). See also State ex rel. Nagle v. Page, 98 M 14, 37 P2d 575 (1934).

Attorney General's Opinions

Legislator Prohibited From Appointment to Board of Review: Membership on the Board of Review established in 30-16-302 is considered a public office of a civil nature pursuant to the five-part test in State ex rel. Barney v. Hawkins, 79 M 506, 257 P 411 (1927). Therefore, 5-2-104 and this section prohibit the President of the Senate and the Speaker of the House of Representatives from appointing a legislator as a member of the Board of Review, including appointment as a nonvoting member. Because of the prohibition against the appointment of a legislator to a civil office during the legislator's term of office, the President and Speaker may appoint only a nonlegislator as a member of the Board of Review. 49 A.G. Op. 15 (2002).

Mayor Prohibited From Serving as Legislator: An elected Mayor holds a "public office of a civil nature" as defined in State ex rel. Barney v. Hawkins, 79 M 506, 257 P 411 (1927). The office of Mayor is vested with a portion of the sovereign power of government which is executive in character. A Mayor is therefore prohibited by Art. V, sec. 9, Mont. Const., from serving as a member of the Legislature while serving as Mayor. 41 A.G. Op. 79 (1986).

Municipal Officer Holding "Public Office of Civil Nature" Disqualified From Service in Legislature: A municipal officer who holds "public office of a civil nature", as that phrase is defined in State ex rel. Barney v. Hawkins, 79 M 506, 257 P 411 (1927), is prohibited by Art. V, sec. 9, Mont. Const., from serving as a member of the Legislature during his continuance in municipal office. 40 A.G. Op. 46 (1984).

When Legislator May Run — When Terms Not Overlapping: The prohibition contained in this section bars a Legislator from holding two civil offices during the "term" for which he is elected. A Legislator may run for another public office if the terms of the offices do not overlap. However, if the legislative term and the term of another public office are overlapping and conflicting, a Legislator is constitutionally prohibited from being a candidate for that office. 35 A.G. Op. 76 (1974). See 5-2-101, MCA.

Section 10. Organization and procedure.

Convention Notes

(1) and (2) no change except in grammar. (3) Revises 1889 Constitution by preventing the legislature from conducting secret proceedings. (4) New provision specifically allowing the legislature to create committees to work between the annual meetings. (5) No change except in grammar.

Compiler's Comments

Former Constitutional Provision: Subsections (1) and (2) of this section are similar to Art. V, sec. 10, 11, and 12, 1889 Mont. Const. Subsection (3) of this section revises Art. V, sec. 13, 1889 Mont. Const. Subsection (5) of this section is similar to Art. V, sec. 14, 1889 Mont. Const.

Case Notes

DECISIONS UNDER 1972 CONSTITUTION

Budget Information — Legislative Finance Committee: Sections 5-12-302 and 5-12-303 do not impose unconstitutional burden upon state government, since power to approve appropriation bills and budget is in legislative branch, and committee may require such information from other branches as is reasonably necessary to form rational basis for budget determinations. State ex rel. Judge v. Legislative Fin. Comm., 168 M 470, 543 P2d 1317 (1975).

Interim Committees — Approval of Budget Amendments Unconstitutional: Those parts of 5-12-102, 5-12-401, and 5-12-402 (now repealed) empowering finance committee to approve budget amendments are declared invalid as unconstitutional delegations of legislative power, since this power is properly exercisable only by either entire Legislature or executive officer or agency, not by interim committee. State ex rel. Judge v. Legislative Fin. Comm., 168 M 470, 543 P2d 1317 (1975).

DECISIONS UNDER 1889 CONSTITUTION

When Court Does Not Interfere With Jurisdiction Lodged in Senate: When a member of the Senate was seated by that body though illegally appointed to fill a vacancy which did not exist and who by mandamus sought to compel payment of mileage and per diem to him, the Supreme Court in denying relief to relator does not interfere with the jurisdiction lodged in the Senate by Art. V, sec. 9, 1889 Mont. Const., but simply exercises its own jurisdiction, voluntarily invoked by relator in his endeavor to recover emoluments to which he is not entitled under the law. State ex rel. Grant v. Eaton, 114 M 199, 133 P2d 588 (1943).

Recount of Votes for Candidates for Legislature: Sole purpose of recount statutes is to determine whether the official canvass of the vote was correct. The recount is not an election contest, and the result is not binding upon the legislative branch when the proceeding involves candidates for the Legislature. Therefore, the courts may order a recount in such cases without infringing upon the prerogatives of the legislative houses. State ex rel. Ainsworth v. District Court, 107 M 370, 86 P2d 5 (1938).

No Judicial Remedy: Though each house of the Legislative Assembly has plenary power to judge the qualifications, elections, and returns of its membership, the courts are not for that reason required to aid one who was appointed to a vacancy in one of the houses, contrary to a provision of the Constitution, in his endeavor to secure the emoluments attached to the office. State ex rel. Cutts v. Hart, 56 M 571, 185 P 769 (1919).

Continuing Authority to Determine Qualifications: Each house is by the 1889 Montana Constitution clothed with plenary and exclusive authority to determine for itself and in its own way whether a person who presents himself for membership is entitled to a seat. Each member, after seated, holds his office at the will and pleasure of the house to which he belongs, its authority in this respect being a continuing one running throughout the term for which he is elected. State ex rel. Boulware v. Porter, 55 M 471, 178 P 832 (1919).

Quo Warranto — No Jurisdiction: Since each house of the Legislature is the judge of the ultimate right of persons to seats as members thereof, the Supreme Court is without jurisdiction to entertain a proceeding in Quo Warranto to determine such right. State ex rel. Ford v. Cutts, 53 M 300, 163 P 470 (1917).

Grant of Power to Legislature: The state Constitution is a limitation of powers, but the provision contained in Art. V, sec. 9, 1889 Mont. Const., that each house shall judge of the elections, returns, and qualifications of its members is an exception to that rule. This is a distinct grant of power by the people to each branch of the Legislative Assembly, a power necessary to the existence and independence of each house as an instrumentality of government. This power cannot be delegated by either house or both acting together. Likewise, neither house possesses the power to divest itself of the authority conferred upon it. State ex rel. Smith v. District Court, 50 M 134, 145 P 721 (1914).

Contents of Journals Discretionary: Article V, sec. 12, 1889 Mont. Const., required that each house keep a journal of its proceedings; but, except those instances where the Constitution required a specific entry to be made in the journals, the questions what entries were to be made and how full or minute the entries were to be were matters addressed to the legislative discretion. State ex rel. Gregg v. Erickson, 39 M 280, 102 P 336 (1909).

Legislature as Judge of Who Are Members: The power to try the ultimate right of a person claiming to be a member of the Legislative Assembly is in the house where he claims his seat. State ex rel. Thompson v. Kenney, 9 M 223, 23 P 733 (1890).

Attorney General's Opinions

Power of Legislative Standing Committee to Meet During Special Session to Investigate Matter Not Within Call: There is no express or implied constitutional or statutory limitation circumscribing the interim investigative activity of a legislative standing committee, including activity during a special session. Therefore, a standing committee of the Legislature not formally discharged prior to the final adjournment of the preceding session may meet during a special session for the purpose of gathering information and taking testimony on a matter not within the call of the special session. 43 A.G. Op. 60 (1990).

Section 11. Bills.

Convention Notes

(1) No change except in grammar. (2) Changes 1889 constitution by requiring recorded votes on all actions which affect passage of a bill. (3) (4) (5) No change except in grammar. (6) New provision. After it is two years old a law cannot be challenged in court because of technical errors in the way it was passed.

Compiler's Comments

Former Constitutional Provision: Subsection (1) of this section is similar to Art. V, sec. 19, 1889 Mont. Const. Subsection (2) is similar to Art. V, sec. 24, 1889 Mont. Const. Subsections (3), (4), and (5) are similar to Art. V, sec. 23, 33, and 35, 1889 Mont. Const. Subsection (6) is a new provision.

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DECISIONS UNDER 1972 CONSTITUTION

Referendum Title Unnecessarily Redundant but Legally Sufficient — Clarification in Ballot Statement Required: MEA-MFT challenged the title of a legislative referendum that ended same-day voter registration, claiming it was inaccurate and misleading. The title of the referendum "ensur[ed] compliance with the National Voter Registration Act", and a provision was placed in the bill referencing the federal law, although Montana was already compliant with the federal Act. MEA-MFT argued that the title's reference to the National Voter Registration Act (NVRA) misled voters by suggesting that ending same-day voter registration was required by the Act. The Supreme Court found that although the reference to NVRA compliance was unnecessary, the superfluous language did not make it void. Nevertheless, the court found that the stand-alone title could lead to voter confusion and ordered the Attorney General to revise the ballot statement to make it clear that the NVRA did not require elimination of same-day voter registration. MEA-MFT v. St., 2014 MT 33, 374 Mont. 1, 318 P.3d 702.

Failure to Give Notice of Constitutional Challenge to Landowner's Liability Law — Consideration of Constitutional Challenge Precluded: Plaintiff was injured on a sledding hill at a city park. Plaintiff contended that legislation that provided immunity to landowners was defective because the title did not mention that liability was also extended to governmental units, including municipalities. However, plaintiff failed to give notice to the Supreme Court or to the Attorney General, pursuant to former Rule 38, M.R.App.P. (now superseded), that an action in which neither the state nor a state agency or employee was a party was being challenged for constitutionality. The municipality was not a state agency, so the rule applied, and absent plaintiff's compliance with the notice requirements, the Supreme Court declined to address the constitutional issue. Weinert v. Great Falls, 2004 MT 168, 322 M 38, 97 P3d 1079 (2004).

Process for Establishing County Building Code Jurisdictional Area Based on Franchise Limitation Unconstitutional: The 2001 Legislature enacted Senate Bill No. 242 (SB 242), which established a process for designating a county building code jurisdictional area and eliminating municipal jurisdictional areas by an election procedure limited to record owners of real property instead of the general constituency. When questioned regarding the constitutionality of the process, the Supreme Court noted that because voting rights cases involve a fundamental political right, strict scrutiny required the state to demonstrate a compelling governmental interest in restricting the voting franchise. The court concluded that: (1) the application and enforcement of building codes is an issue of public safety that affects all persons living in the area, not just record owners of real property; (2) governmental entities that oversee building codes are not special-purpose units whose functions and actions exclusively or disproportionately affect record owners of real property over other constituents in the area that do not own real property; and (3) elections to determine who may impose and enforce building codes in a given area are general interest elections rather than special interest elections. The state failed to show a compelling interest in limiting the voting franchise to only record owners of real property, and because the valid provisions of SB 242 were not severable from the invalid provisions, the court held that SB 242 was invalid in its entirety. (However, see Ch. 443, L. 2003, wherein the Legislature amended the voting procedure to address the franchise limitation.) Finke v. State ex rel. McGrath, 2003 MT 48, 314 M 314, 65 P3d 576 (2003). See also Kramer v. Union School District, 395 US 621 (1969).

School Territory Transfer Statutes Unconstitutional — Insufficient Guidelines for Delegation of Legislative Authority: In 1994, the respondents, individuals residing in both Rosebud and Big Horn Counties but outside of the Northern Cheyenne Indian Reservation, petitioned their respective County Superintendents of Schools requesting a territory transfer from the Lame Deer High School District (LDHSD—created in 1993) back to the Colstrip and Hardin High School Districts. The requests were granted. LDHSD appealed the decisions to the State Superintendent of Public Instruction, who reversed the decisions. The respective District Courts reversed the Superintendent of Public Instruction's decision. The Supreme Court reversed the District Courts' decisions on the grounds that the school territory transfer statute is an unconstitutional delegation of legislative power. The broad grant of discretion to a County Superintendent of Schools, unchecked by any standard, policy, or rule of decision, renders the

statute unconstitutional. Hayes v. Lame Deer High School District, 2000 MT 342, 303 M 204, 15 P3d 447, 57 St. Rep. 1464 (2000). See also Belgrade Elementary & High School District No. 44 v. Morris, 2000 MT 347, 303 M 245, 15 P3d 482, 57 St. Rep. 1484 (2000), and In re Petitions to Transfer Territory, 2000 MT 348, 303 M 249, 16 P3d 1000, 57 St. Rep. 1486 (2000).

Submission of Constitutional Initiative Amending Three Parts of Constitution Violative of Separate Vote Requirement: Plaintiffs filed an original application for declaration of judgment and injunctive relief, challenging the validity of Constitutional Initiative No. 75 (CI-75), which was passed by the voters and stated that no new tax or tax increase could be enacted unless approved by a majority of the electorate. The initiative amended Art. VIII, Mont. Const., revising state revenue and finance provisions; amended Art. II, sec. 18, Mont. Const., providing that sovereign immunity did not shield public officials or employees from appropriate civil liability for violating CI-75; and provided that notwithstanding the referendum provisions of Art. VI, sec. 10, Mont. Const., before a bill imposing new or increased taxes is referred to the people, the Governor had veto power. The dispositive issue was that CI-75 had two or more constitutional amendments, in violation of Art. XIV, sec. 11, Mont. Const., which is a cogent constitutional recognition of the circumstances under which Montana voters receive constitutional initiatives, namely that a separate vote is required for each proposed constitutional amendment. Citing Armatta v. Kitzhaber, 959 P2d 49 (Oreg. 1998), the Supreme Court held that the separate vote requirement is distinguishable as different and narrower than the single subject requirement in this section, and that to the extent that a constitutional amendment may be valid under the single subject rule but fail under the separate vote rule, holdings to the contrary in State ex rel. Teague v. Bd. of Comm'rs, 34 M 426, 87 P 450 (1906), State ex rel. Hay v. Alderson, 49 M 387, 142 P 210 (1914), and State ex rel. Corry v. Cooney, 70 M 355, 225 P 1007 (1924), were overruled. Because CI-75 expressly amended three parts of the Montana Constitution without allowing a separate vote on each amendment, CI-75 was unconstitutional under Art. XIV, sec. 11, Mont. Const. Marshall v. St., 1999 MT 33, 293 M 274, 975 P2d 325, 56 St. Rep. 142 (1999), following State ex rel. Hinz v. Moody, 71 M 473, 230 P 575 (1924), and Sawyer Stores, Inc. v. Mitchell, 103 M 148, 62 P2d 342 (1936).

Supreme Court Power to Review Legislative Act for Constitutional Conformity Not Violative of Separation of Powers Doctrine: Although the Montana Constitution confers upon the Legislature the exclusive power to set appropriate punishments for criminal acts, the Supreme Court is constitutionally vested with the exclusive power to review whether a particular legislative act conforms to the constitution. Thus, the court's holding that the Montana weapon enhancement statute was violative of state constitutional double jeopardy protections was not a violation of the separation of powers doctrine. St. v. Guillaume, 1999 MT 29, 293 M 224, 975 P2d 312, 56 St. Rep. 117 (1999). See also In re License Revocation of Gildersleeve, 283 M 479, 942 P2d 705, 54 St. Rep. 735 (1997), and St. v. Walker, 2001 MT 170, 306 M 159, 30 P3d 1099 (2001).

Sufficiency of Title of 1988 Welfare Referendum — Applicable Standard: The title of a referendum "allowing the legislature greater discretion to determine the eligibility, duration, and level of economic assistance and social services to those in need" was found by the Supreme Court to be legally sufficient after applying the constitutional requirement of clarity of title set out in Art. V, sec. 11, Mont. Const., and employing the rules of construction developed under State ex rel. Wenzel v. Murray, 178 M 441, 585 P2d 633 (1978), and St. v. McKinney, 29 M 375, 74 P 1095 (1904). The court refused to intervene to remove the referendum from the ballot prior to a vote of the people so as not to violate the constitutional rights of popular sovereignty and self-government. Recognizing important distinctions between the processes of referendum and initiative, the standard applied to the referendum was the same applied to examination of the title of other products of the Legislature. The court affirmed the District Court finding of no statutory authority for preelection nullification of a legislative referendum and noted a strong presumption in favor of the constitutionality of legislative enactments. The ballot language was not purposely misleading and sufficiently identified the measure to provide for an informed vote. Harper v. Greely, 234 M 259, 763 P2d 650, 45 St. Rep. 1889 (1988), distinguishing State ex rel. Steen v. Murray, 144 M 61, 394 P2d 761 (1964), and State ex rel. Harper v. Waltermire, 213 M 425, 691 P2d 826, 41 St. Rep. 2212 (1984). See also State ex rel. Boese v. Waltermire, 224 M 230, 730 P2d 375, 43 St. Rep. 2156 (1986), and T&W Chevrolet v. Darvial, 196 M 287, 641 P2d 1368 (1982).

Unconstitutionality of Seed Capital Bond Act — Private Appropriations — Insufficiency of Title: The Science and Technology Development Board Seed Capital Bond Act (Ch. 461, L. 1987, codified in large part as Title 90, ch. 3, part 4, now repealed) was declared unconstitutional under subsection (5) of this section because the Act empowered the Montana Science and Technology

Development Board to improperly funnel bond proceeds into private business ventures through technology investments. The bill, in effect, unconstitutionally pledges the credit of the state to secure the bonds issued by the Board, the proceeds of which are to be used for the benefit of private businesses. The Act also violated subsection (3) of this section because the title of the enacting legislation, HB 700, failed to mention the fact that the bill pledges the credit of the state to secure the bonds to be issued, a subject of importance to legislators preparing to vote on the bill. White v. St., 233 M 81, 759 P2d 971, 45 St. Rep. 1310 (1988), followed in Hayes v. Lame Deer High School District, 2000 MT 342, 303 M 204, 15 P3d 447, 57 St. Rep. 1464 (2000). See also Belgrade Elementary & High School District No. 44 v. Morris, 2000 MT 347, 303 M 245, 15 P3d 482, 57 St. Rep. 1484 (2000), and In re Petitions to Transfer Territory, 2000 MT 348, 303 M 249, 16 P3d 1000, 57 St. Rep. 1486 (2000).

Law Enforcement Academy Purchase as Ordinary Expense: A 1987 budgetary direction, included as part of the 1987 general appropriations act, directed the Department of Justice to purchase the previously leased modular facilities of the Montana Law Enforcement Academy. The District Court determined that this constitutional provision was offended because the budgetary provision was not for an ordinary expense. The Supreme Court found the budgetary direction to be on the same footing as other state statutes and a further indication of legislative intent. Under the terms of the academy lease, the expense of purchase was certain to occur during the biennium, and the Legislature has power to provide for biennial expenses through appropriation whether incurred through purchase or lease. The budgetary direction was not an unconstitutional appropriation beyond ordinary expense. Cornwall v. St., 231 M 58, 752 P2d 135, 45 St. Rep. 429 (1988).

Challenge of Multiplicitous Initiative Subjects — Procedural Review Requirements to Be Met: An opponent who challenges an initiative on the grounds that the title contains more than one subject, in violation of Art. V, sec. 11, Mont. Const., must meet the procedural review requirements of 13-27-316. State ex rel. Boese v. Waltermire, 224 M 230, 730 P2d 375, 43 St. Rep. 2156 (1986). See also State ex rel. Mont. Citizens for the Preservation of Citizens' Rights v. Waltermire, 224 M 273, 729 P2d 1283, 43 St. Rep. 2192 (1986).

Reasonableness of Time Periods: Under 13-27-316(2), certification by the Secretary of State to the Governor of qualification for the ballot triggers the time in which opponents to the measure may act. The opponents have 10 days following certification to file a challenge in District Court. The opponent has the time from the petition's initiation until its certification to prepare the action but is not required to act until it qualifies for the ballot. The statutes then provide for immediate access to the courts. This is a reasonable procedure for challenging the sufficiency of the title of an initiative. State ex rel. Boese v. Waltermire, 224 M 230, 730 P2d 375, 43 St. Rep. 2156 (1986).

Use of In-State Investment Fund to Guarantee Private Loans or Bonds Unconstitutional: The provisions of 17-6-308, which permit the use of in-state investment fund money derived from taxation to guarantee loans or bonds of private individuals or private entities either directly or through the capital reserve account or through the economic development guaranty fund, are unconstitutional under subsection (5) of this section, which provides that no appropriation shall be made for industrial or benevolent purposes to any private individual or private corporation not under the control of the state. Hollow v. St., 222 M 478, 723 P2d 227, 43 St. Rep. 1435 (1986).

Private Appropriations — Control by State Required: Plaintiff filed a complaint for declaratory judgment in the Supreme Court seeking to determine the validity of several acts of the Legislature allowing the issuance of state revenue bonds. Section 2 of Ch. 705, L. 1983, authorized the creation of state debt for development of hydroelectric power at three state-owned dams. Under Title 85, ch. 1, part 5, the Department of Natural Resources and Conservation and Board of Natural Resources and Conservation (now abolished) are mandated to make the completed projects available for lease to utilities, electric cooperatives, or a state corporation proposing to use a substantial portion of the generated power. Plaintiff contended that this scheme violated Art. V, sec. 11, Mont. Const., by benefiting the public utilities, electric cooperatives, or a private corporation. The court stated that as long as the provisions relating to the expenditure of the funds derived from the proceeds of the bonds are under the control of the State, the constitutional mandate is satisfied. In this case, the proceeds of the coal severance tax bonds will be expended by a state agency under the control of the State for construction of hydroelectric projects. The appropriations therefore are made for an agency of the State. The fact that the State may afterwards lease the projects to a private association or corporation is no more offensive constitutionally than is the power of the State to lease its state-held lands to private parties. Grossman v. St., 209 M 427, 682 P2d 1319, 41 St. Rep. 804 (1984).

Title Indicative of Purpose of Statute: First step in determining the purpose of a statute is an examination of the title of the act through which the statute was introduced. Dept. of Natural Resources and Conservation v. Clark Fork Logging Co., Inc., 198 M 494, 646 P2d 1207, 39 St. Rep. 1146 (1982).

Title Not Embracing a Bill Section as Rendering Section Void: Subsection (5)(d) of 5-7-208, enacted by Initiative 85 (voter information pamphlet version), is not embraced in the title of Initiative 85 and is therefore void. There is insufficient substantive relationship between the title and the section. The lobbyist disclosure laws were not being transformed into a general campaign finances act. Mont. Auto. Ass'n v. Greely, 193 M 378, 632 P2d 300, 38 St. Rep. 1174 (1981). However, see St. v. Morgan, 1998 MT 268, 291 M 347, 968 P2d 1120, 55 St. Rep. 1112 (1998).

Private Appropriation — Use of Bond Money: The use of the bond money authorized by Title 90, ch. 2, for the purpose of lending money to private individuals is not violative of this section as authorizing an appropriation to a private individual not under control of the state. Douglas v. Judge, 174 M 32, 568 P2d 530 (1977).

Montana Housing Board Under State Control: The Montana Board of Housing is a public corporation under the control of the state, and appropriations to it do not violate this section. Huber v. Groff, 171 M 442, 558 P2d 1124 (1976).

Limitation on Challenges to Statutes: When an action to challenge a statute for violation of this section was commenced more than 3 years following the effective date of the enactment challenged, a constitutional challenge was precluded under this section. Reeves v. Ille Elec. Co., 170 M 104, 551 P2d 647 (1976).

Delegation of Power: Those parts of 5-12-102, 5-12-401, and 5-12-402 (now repealed) empowering Legislative Finance Committee to approve budget amendments are declared invalid as unconstitutional delegations of legislative power, since this power is properly exercisable only by either entire Legislature or executive officer or agency, not by interim committee. State ex rel. Judge v. Legislative Fin. Comm., 168 M 470, 543 P2d 1317 (1975).

Separation of Powers: Sections 5-12-302 and 5-12-303 do not impose unconstitutional burden upon state government, since power to approve appropriation bills and budget is in legislative branch, and committee may require such information from other branches as is reasonably necessary to form rational basis for budget determinations. State ex rel. Judge v. Legislative Fin. Comm., 168 M 470, 543 P2d 1317 (1975).

DECISIONS UNDER 1889 CONSTITUTION

AMENDMENT TO CHANGE ORIGINAL PURPOSE

Movie Theater Licensing Laws: Laws providing for the licensing of moving picture theaters were not open to the constitutional objection that as finally passed they were so altered or amended as to change their original purpose. State ex rel. Griffin v. Greene, 104 M 460, 67 P2d 995 (1937).

Operation and Effect: No act of legislation has the force of law, even though unanimously passed and approved by the Governor, unless the requirements of Art. V, sec. 19, 20, and 23, 1889 Mont. Const., that every law shall be passed by bill and that it must have an enacting clause and a title clearly expressing the subject of the enactment, are met. A resolution, in the passing of which neither of these essentials has been observed, is not an authoritative expression of the legislative will upon the subject with which it deals. State ex rel. Payton v. Cunningham, 39 M 197, 103 P 497 (1909).

ENTRY OF LEGISLATIVE VOTE

What Court May Consider: Under the rule that when the constitutionality of an act is questioned on the ground of irregularity in its passage, the only purpose for which courts may go behind the enrolled bill is to ascertain whether the aye and no vote was entered in the journals of the Legislative Assembly, it is not permissible to determine whether an amendment to a bill made by a joint conference committee was considered by either house before passage upon third reading. State ex rel. Woodward v. Moulton, 57 M 414, 189 P 59 (1920).

Role of Court: The courts will not go behind the duly authenticated enrolled bill except to determine whether on its final passage the names of those voting were entered on the journal. Barth v. Pock, 51 M 418, 155 P 282 (1915); State ex rel. Gregg v. Erickson, 39 M 280, 102 P 336 (1909); Palatine Ins. Co. v. N. Pac. Ry., 34 M 268, 85 P 1032 (1906).

Vote on Amendment: After a bill has passed the house in which it originated, the vote being taken by ayes and noes and the names of those voting entered on the journal, as required by Art. V, sec. 24, 1889 Mont. Const., and is amended in the other house of the Legislative Assembly and

then returned to the first for action on the amendments, it is not necessary that the vote on the adoption of the amendments thus made be again taken by ayes and noes and the names entered on the journal. Johnson v. Great Falls, 38 M 369, 99 P 1059 (1909).

Journal — Purpose and Operation: The journal of either house of the Legislature imports verity and may be looked to to determine whether or not a bill, valid on its face, signed by the presiding officer of each house, approved by the Governor, and deposited in the office of the Secretary of State was in fact passed in compliance with the requirements of Art. V., sec. 24, 1889 Mont. Const. Palatine Ins. Co. v. N. Pac. Ry., 34 M 268, 85 P 1032 (1906).

Necessity That Names Be Entered on the Journal: Under Art. V, sec. 24, 1889 Mont. Const., an act relating to the limitation of time within which actions may be brought did not become a law, because it appeared from the journal of the Senate that the names of the members of that branch of the Legislature voting on the measure were not entered on the journal. Palatine Ins. Co. v. N. Pac. Ry., 34 M 268, 85 P 1032 (1906).

ONE SUBJECT CLEARLY EXPRESSED

Exclusion of Bidding Requirements: The 1971 amendment of Title 7, ch. 5, part 43, was void insofar as it appeared to delete a final paragraph excluding certain types of contracts from the bidding requirements of that section, because the title described the amendment as only an "Increase of Dollar Limitations on Bid Requirements". Morrison-Maierle, Inc. v. Forsyth, 160 M 69, 500 P2d 395 (1972).

Minimum Wage Act: The title of the minimum wage act (Title 39, ch. 3, part 4) conforms to Art. V, sec. 23, 1889 Mont. Const. Billings v. Smith, 158 M 197, 490 P2d 221 (1971).

Incomplete Title: Dredge mining regulation and land preservation act (sections 50-1101 through 50-1114, R.C.M. 1947, now repealed) was repugnant to Art. V, sec. 23, 1889 Mont. Const., in that it purported to regulate sluice washing without mentioning sluice washing in its title. Sigety v. St. Bd. of Health, 157 M 48, 482 P2d 574 (1971), distinguished in Billings v. Smith, 158 M 197, 490 P2d 221 (1971).

Deceptive Title: Where title to appropriation bill described an appropriation to carry out provision of specific statutory law and then proceeded to nullify and defeat mandatory and all-inclusive character of that specific statutory law without reference thereto in title, latter provision was deceptive and misleading in violation of Art. V, sec. 23, 1889 Mont. Const., and therefore void. Helena v. Omholt, 155 M 212, 468 P2d 764 (1970).

Penalty Assessment on Bail: Insofar as statute provided for penalty assessment on forfeited bail and on fines, it was void as a violation of Art. V, sec. 23, 1889 Mont. Const., that no bill shall be passed containing more than one subject which shall be clearly expressed in its title. State ex rel. Sanders v. Butte, 151 M 171, 441 P2d 190 (1968).

Initiative Measure Unconstitutional: Proposed Initiative Measure No. 63, which would legalize lotteries and repeal statutes pertaining to lotteries, containing more than one subject, violated Art. V, sec. 23, 1889 Mont. Const. State ex rel. Steen v. Murray, 144 M 61, 394 P2d 761 (1964).

County Water District Act: The title of the county water district act (sections 16-4501 through 16-4534, R.C.M. 1947; now Title 7, ch. 13, parts 22 and 23, MCA) does not violate Art. V, sec. 23, 1889 Mont. Const. Parker v. Yellowstone County, 140 M 538, 374 P2d 328 (1962).

Tax Recovery: Chapter 204, L. 1955, amending 15-1-402 and carrying a title which is practically identical with the heading of this section as stated in the 1947 Codes and properly including additional requirements for bringing actions to recover taxes paid under protest, does not violate Art. V, sec. 23, 1889 Mont. Const. Van Tighem v. Linnane, 136 M 547, 349 P2d 569 (1960).

Effect of Subsequent Codification on Defect:

Section 91-4321, R.C.M. 1947 (now repealed), was enacted in 1943 and was carried forward in the Codes of 1947 without change. The 1947 Codes were regularly adopted by the Legislature with this act incorporated therein without reference to its original title. Any defect in title was cured by its adoption into the 1947 Code. St. v. Rice, 134 M 265, 329 P2d 451 (1958).

Alleged defect in the title to the original act relating to the handling of explosives, of which 45-8-333 and 50-38-106 (now repealed) were a part, and which act was carried forward in three subsequent codifications of the laws, held cured by the adoption of such codes by the Legislature. Cashin v. N. Pac. Ry., 96 M 92, 28 P2d 862 (1934).

Purpose — Guard Against Fraud: The purposes of Art. V, sec. 23, 1889 Mont. Const., are to restrict the Legislature to the enactment of laws, the objects of which legislators and the public as well may be advised, to the end that any who are interested, whether as representatives or

those represented, may be intelligently watchful of the course of the pending bill. The limitation is likewise designed to prevent legislators and the people from being misled by false or deceptive titles and to guard against fraud in legislation by way of incorporating into a law provisions concerning which neither legislators nor the public have any intimation through the title read or published. Johnson v. Meagher County, 116 M 565, 155 P2d 750 (1945); Hale v. Belgrade Co., Ltd., 74 M 308, 240 P 371 (1925); State ex rel. Foot v. Burr, 73 M 586, 238 P 585 (1925); St. v. Hopkins, 54 M 52, 166 P 304 (1917); State ex rel. Holliday v. O'Leary, 43 M 157, 115 P 204 (1911); Russell v. Chicago, Burlington & Quincy Ry., 37 M 1, 94 P 501 (1908); Yegen v. Bd. of County Comm'rs, 34 M 79, 85 P 740 (1906); St. v. Brown, 29 M 179, 74 P 366 (1903); St. v. Anaconda Copper Min. Co., 23 M 498, 59 P 854 (1900).

General Appropriation: House Bill 151, pp. 534 and 547, L. 1943, the general appropriation bill for 1944-45 biennium, which in addition to making the appropriation allegedly amends Ch. 105, L. 1919, creating the Veterans Welfare Commission, requiring claims to be paid by the state Board of Examiners (now Department of Administration) instead of the Commission, held not to violate Art. V, sec. 23, 1889 Mont. Const., as containing more than one subject not clearly expressed in its title. State ex rel. Davidson v. Ford, 115 M 165, 141 P2d 373 (1943).

When Title Would Offend Under Different Interpretation: The term "engaged in", as used in the title of the motor carrier act, meant one who has "embarked in" the business of "transportation by motor vehicles of persons and property for hire". To hold that persons engaged in carrying on other businesses and employing motor vehicles for transporting their own goods included within its meaning, the act would offend against Art. V, sec. 23, 1889 Mont. Const., the title not having given notice to the public or Legislature of intent to regulate such other persons and their use of the highways. Bd. of R.R. Comm'rs v. Gamble-Robinson Co., 111 M 441, 111 P2d 306 (1941).

No Justification for Finding Implied Amendment of Other Statutes: As applied, laws in the enactment of which the Legislature carefully omitted from the title and body all elements of a moratorium in the matter of payment of taxes in violation of Art. V, sec. 23, 1889 Mont. Const., do not justify a finding that an implied amendment of other statutes (prior moratorium acts) must be construed into the body of the chapter simply to fill out the purpose expressed in the act. In construing a new statute, all the applicable laws must be read together, which construction is not equivalent to reading into the new statute something not placed there by the Legislature. State ex rel. Jensen Livestock Co. v. Hyslop, 111 M 122, 107 P2d 1088 (1940).

Apportionment of Trial Costs: Held, that the title of Ch. 21, L. 1937, amending section 94-5610, R.C.M. 1947 (now repealed), authorizing District Courts to apportion costs of prosecution and trial between counties where personal property was stolen in one county and taken into another county where trial was had, is not open to the objection that it violates Art. V, sec. 23, 1889 Mont. Const. Rosebud County v. Flinn, 109 M 537, 98 P2d 330 (1940).

Embracing Incongruous Matters Prohibited: The purpose of Art. V, sec. 23, 1889 Mont. Const., prohibiting more than one subject in a legislative bill and requiring that it be expressed in its title, is to prevent the practice of embracing incongruous matters having no relation to each other or to the subject specified in the title; infraction thereof must be plain and obvious to be recognized as fatal, sound policy and legislative convenience dictating a liberal construction of the title and subject matter of statutes to maintain their validity. Rosebud County v. Flinn, 109 M 537, 98 P2d 330 (1940), followed in St. v. Morgan, 1998 MT 268, 291 M 347, 968 P2d 1120, 55 St. Rep. 1112 (1998).

Methods of Procedure — Not Required: Held, that the title of Ch. 133, L. 1939 (omitted), is sufficient under Art. V, sec. 23, 1889 Mont. Const., as all that is required to meet the provision that the subject of a statute must be clearly expressed in its title is that the act shall be germane to the subject expressed in its title, and where the general object is plainly expressed, it is not necessary that the title should embody the exact methods of application or procedure. Lodge v. Ayers, 108 M 527, 91 P2d 691 (1939).

Debenture Act: Initiative Measure No. 41, the 1938 debenture act (omitted), authorizing issuance of state highway treasury anticipation debentures, held sufficient to meet the requirements of Art. V, sec. 23, 1889 Mont. Const., all the provisions of the act having a natural connection relating directly or indirectly to its one object and purpose. Martin v. St. Highway Comm'n, 107 M 603, 88 P2d 41 (1939).

County Election Recount — Extended to Others: Section 23-2301, et seq., R.C.M. 1947 (now repealed), authorizing a recount of ballots cast at any election by boards of county canvassers, held not so deficient as to be condemned under Art. V, sec. 23, 1889 Mont. Const., if its scope be held to extend to others than county officers. State ex rel. Riley v. District Court, 103 M 576, 64 P2d 115 (1937).

Continuation of Emergency Relief Program: Held, that the title to Ch. 135, L. 1935 (omitted), the purpose of which is to continue in force Ch. 24, L. Extra Session 1933-34, having to do with the public works emergency relief program, is not open to the charge that the matter of the chapter is not clearly expressed therein. State ex rel. Berthot v. Gallatin County High School District, 102 M 356, 58 P2d 264 (1936).

Tax Certificates: The title to Ch. 31, L. 1929, held sufficient as against the contention that it offends against Art. V, sec. 23, 1889 Mont. Const., in that it does not clearly express the legislative intent to deal therein with tax certificates. Martin v. Glacier County, 102 M 213, 56 P2d 742 (1936).

Liquor Control Act: Title to the State Liquor Control Act of Montana, regulating the sale of intoxicating liquor and creating the Liquor Control Board (now Department of Revenue), held not to offend against the provisions of this section that the subjects of the act must be clearly expressed in its title. St. v. Driscoll, 101 M 348, 54 P2d 571 (1936).

Title Misleading: The test is, did the title mislead the public or members of the Legislature as to the subjects expressed in the act? St. v. Driscoll, 101 M 348, 54 P2d 571 (1936); Arps v. St. Highway Comm'n, 90 M 152, 300 P 549 (1931), overruled on other grounds in Burgan & Walker v. St. Highway Comm'n, 114 M 459, 137 P2d 663 (1943).

Natural Connection of Parts of Statute: Title 85, ch. 1, based on three various chapters all pertinent to one general subject of water conservation, held, where all of the different parts of a statute have a natural connection and relate directly or indirectly to one legitimate subject of legislation or are germane thereto, the act is not invalid as containing more than one subject not clearly expressed in its title. State ex rel. Normile v. Cooney, 100 M 391, 47 P2d 637 (1935).

Failure to Include "Witnesses": Chapter 16, L. 1933, purporting to amend 2-18-503, was invalid insofar as it attempted to reduce mileage of witnesses, as its title was misleading in failing to include word "witnesses" and did not direct attention of public and Legislature to this subject. Coolidge v. Meagher, 100 M 172, 46 P2d 684 (1935).

Germaneness: The question as to what is "germane" to a subject is one of fact rather than of law. There can be no clear line of demarcation between those matters which fall within and those which fall without the inhibition of Art. V, sec. 23, 1889 Mont. Const. Durland v. Prickett, 98 M 399, 39 P2d 652 (1935).

Subject of Amendment: Held, as against the contention that Ch. 176, L. 1929, offends against Art. V, sec. 23, 1889 Mont. Const., in that the subject of the amendment is not clearly expressed in its title and that therefore section 32-314, R.C.M. 1947 (now repealed), as it was before the attempted amendment is still the law, is without merit. Durland v. Prickett, 98 M 399, 39 P2d 652 (1935).

Regulation of Motor Carriers: Held, that Ch. 184, L. 1931, the motor carrier act, is not violative of Art. V, sec. 23, 1889 Mont. Const., as against the contentions that, instead of dealing with the regulation of the public highways, as set forth in the title of the act, it regulates the business of the public and private carriers and prevents competition between motor carriers and railroads and that therefore its provisions are not germane to the subject expressed in the title. St. v. Healow, 98 M 177, 38 P2d 285 (1934).

Broad Phraseology: The fact the title of an act in setting forth its subject employs a phrase somewhat broader than that appearing in the act does not affect its constitutionality. State ex rel. Nagle v. The Leader Co., 97 M 586, 37 P2d 561 (1934).

Life of Corporations: Held, on application for Writ of Quo Warranto, that the title to Ch. 7, L. 1931, prescribing the method whereby corporations "whose terms of corporate existence have expired, or may hereafter expire," may in the one case revive and in the other extend their existence, deals with but one subject, the life of corporations, and therefore does not offend against the mandate of Art. V, sec. 23, 1889 Mont. Const., that no bill, other than those excepted, shall contain more than one subject clearly expressed in its title. State ex rel. Nagle v. The Leader Co., 97 M 586, 37 P2d 561 (1934).

Effect of Failure to Argue Defect in Title: When a statute is attacked as unconstitutional on appeal on the grounds that it embraces a subject not expressed in its title but counsel in his brief fails to present argument in support of the contention, the Supreme Court will proceed upon the presumption that the act is constitutional until its invalidity is shown beyond a reasonable doubt. Fulmer v. Bd. of R.R. Comm'rs, 96 M 22, 28 P2d 849 (1934); Fulton Oil Co. v. Toole County, 86 M 367, 283 P 769 (1930).

Fire Insurance — Germane to Operation of Institution: The purpose of Art. V, sec. 23, 1889 Mont. Const., prohibiting the inclusion of more than one subject in a bill, is subserved if its provisions are germane to the general subject expressed in its title; and under that rule, held, that

the title to House Bill No. 222, L. 1931, making appropriations for the operation and maintenance of the state educational institutions and for the payment of fire insurance premiums thereon, does not offend against Art. V, sec. 23, 1889 Mont. Const., fire insurance being essential and germane to the proper operation and maintenance of such institutions, the main subject of the act. Miller Ins. Agency v. Porter, 93 M 567, 20 P2d 643 (1933).

Relation to Subjects: Where all the different parts of a statute have a natural connection and relate directly or indirectly to one legitimate subject of legislation, the act is not invalid as offending against this provision. Merchants' Nat'l Bank v. Dawson County, 93 M 310, 19 P2d 892 (1933).

Taxable Product — Not in Title: Under this case, held, that the assertion that Initiative Measure No. 28 is unconstitutional if the contention that arsenic or arsenious oxide is taxable under Initiative Measure No. 28 be upheld, in that that product is not mentioned in its title, may not be sustained. State ex rel. Snidow v. St. Bd. of Equalization, 93 M 19, 17 P2d 68 (1932).

Complete List Not Required: The title is generally sufficient if the body of the act treats only, directly or indirectly, of the subjects mentioned in the title and of other subjects germane thereto or of matters in furtherance of or necessary to accomplish the general objects of the bill, as mentioned in the title. Details need not be mentioned. The title need not contain a complete list of all matters covered by the act. Barbour v. St. Bd. of Educ., 92 M 321, 13 P2d 225 (1932); Yegen v. Bd. of County Comm'rs, 34 M 79, 85 P 740 (1906); St. v. McKinney, 29 M 375, 74 P 1095 (1904).

Interest and Penalties Germane to Taxation: Held, that Ch. 85, L. 1927, does not offend against the requirements of Art. V, sec. 23, 1889 Mont. Const., relative to the contents of the title to an act, in that the provision for a deposit of taxes, interest, and penalties is germane to the matters expressed in the title and therefore sufficient to meet the constitutional requirement. State ex rel. Souders v. District Court, 92 M 272, 12 P2d 852 (1932).

Gasoline Tax: Under the rules set forth in this case, held that the title to Ch. 95, L. 1931 (omitted), is not fatally defective in declaring, inter alia, the act to be one providing for an excise tax on gasoline, etc., whereas in the body of the act the tax is imposed on distributors and dealers. Arps v. St. Highway Comm'n, 90 M 152, 300 P 549 (1931), overruled on other grounds in Burgan & Walker v. St. Highway Comm'n, 114 M 459, 137 P2d 663 (1943).

Power of Court to Determine Title of Act Limited: The Legislature is the judge, to a great extent, of the title which it will prefix to a bill; and the court has no right to hold a title void because, in its opinion, a better one might have been used. Arps v. St. Highway Comm'n, 90 M 152, 300 P 549 (1931), overruled on other grounds in Burgan & Walker v. St. Highway Comm'n, 114 M 459, 137 P2d 663 (1943); St. v. McKinney, 29 M 375, 74 P 1095 (1904).

Ceding Jurisdiction Over Park Land: An act of the Montana Legislature passed Feb. 14, 1891 (L. 1891, p. 262), entitled "An act ceding to the United States jurisdiction over certain lands", held to state subject of act to cede exclusive jurisdiction to United States over all lands within state which were or might be embraced within Yellowstone National Park and certain other lands sufficiently within requirement of Art. V, sec. 23, 1889 Mont. Const. Yellowstone Park Transp. Co. v. Gallatin County, 31 F2d 644 (9th Cir. 1929).

Abolition of Appeal: Held, that Ch. 225, L. 1921, abolishing the appeal from an order denying a new trial, does not offend against the provision of Art. V, sec. 23, 1889 Mont. Const., that an act containing a subject not embraced in the title shall be void as to that subject. Kline v. Murray, 79 M 530, 257 P 465 (1927).

Purpose to Amend: Setting forth a purpose to amend the section relating to the given subject is sufficient, stating the nature of the proposed amendment. St. v. Silver Bow Ref. Co., 78 M 1, 252 P 301 (1926).

State Assumption of Liability: Held, that House Bill 398, p. 416, L. 1925, assuming, on behalf of the state, liability for injuries sustained by a student in the University of Montana (now University of Montana-Missoula) through the negligence of one of the state's agents and making an appropriation to discharge that liability, is not open to the objection that it contains a plurality of subjects in violation of Art. V, sec. 23, 1889 Mont. Const. Mills v. Stewart, 76 M 429, 247 P 332 (1926).

Parts of Single Plan: When two or more propositions are contained in the title of an act that may be logically viewed as parts or aspects of a single plan, the constitutional requirement of unity of subject is met. State ex rel. Jones v. Erickson, 75 M 429, 244 P 287 (1926).

Increase of Punishment Not Indicated: Chapter 116, L. 1923, amending sections 11071, 11075, and 11079, R.C.M. 1921 (since repealed), and increasing the punishment for the unlawful transportation or possession of intoxicating liquor, held not open to the attack that it contravenes

the provisions of Art. V, sec. 23, 1889 Mont. Const., in that the purpose to increase the punishment is not indicated in its title. St. v. Duncan, 74 M 428, 240 P 978 (1925).

Section of Code: When the title of an amendatory act refers to the number of the section of the Code to be amended and indicates its subject matter with sufficient particularity to identify it to a reasonable degree of certainty, it is sufficient to withstand constitutional attack. St. v. Duncan, 74 M 428, 240 P 978 (1925).

Change of Supreme Court Rules: Held, that so much of sec. 1, Ch. 19, L. 1925, as assumes to amend section 9746, R.C.M. 1921 (section 93-8018, R.C.M. 1947, now repealed), by the addition of a provision declaring within what time transcripts on appeal shall be filed in the Supreme Court and repealing by implication section 9732 (93-8004, R.C.M. 1947, now repealed), prescribing the time within which an appeal from a judgment may be taken, is void as in contravention of Art. V, sec. 23, 1889 Mont. Const., in that the title of the chapter does not disclose the purpose of the Legislature to effectuate a change in the time within which transcripts must be filed as fixed by subdivision 2 of Rule V of the Supreme Court rules. Hale v. Belgrade Co., Ltd., 74 M 308, 240 P 371 (1925).

Boundary Change — Abolition of County: Held, that the title to Ch. 93, L. 1925: "An act to amend sections 4318 and 4327 of the Revised Codes of 1921, relating to changing the boundaries of Fergus and Judith Basin counties", the effect of section 1 of which act (omitted) was to include within the boundaries of Fergus County the entire county of Petroleum created in February, 1925, thus abolishing the latter county, is insufficient to meet the requirements of Art. V, sec. 23, 1889 Mont. Const., rendering the section invalid. State ex rel. Foot v. Burr, 73 M 586, 238 P 585 (1925).

Habeas Corpus Attack: Held, on habeas corpus, that the bank act (Ch. 89, L. 1915), as amended by Ch. 90, L. 1923 (section 6081, R.C.M. 1921, since repealed), under which complainant was convicted of accepting deposits when his bank was insolvent, is not open to the charge of unconstitutionality on the ground that the titles of both the original and the amendatory acts are insufficient to meet the requirements of Art. V, sec. 23, 1889 Mont. Const. Held, further, that by the enactment of Ch. 90, L. 1923 (section 6078, R.C.M. 1921, since repealed), providing the method of determining the insolvency of a bank, was not repealed by implication. State ex rel. Boone v. Tullock, 72 M 482, 234 P 277 (1925).

Provisions Germane to Subject: Chapter 75, L. 1917, is not invalid so far as it assumes to impose a license fee upon owners of motor vehicles, for failure to indicate in its title a purpose to impose a charge of any kind, the unity of title to an act required by Art. V, sec. 23, 1889 Mont. Const., being observed if the various provisions of the act are germane to the general subjects expressed in the title. St. v. Pepper, 70 M 596, 226 P 1108 (1924).

Tax Collection: Held, that the title to Ch. 96, L. 1923 (Title 15, ch. 16), "An act to fix the time and method of collecting taxes and interest thereon", sufficiently expresses the subject of the act, authorizing the semiannual payment of taxes, to meet the requirements of Art. V, sec. 23, 1889 Mont. Const. Thomas v. Missoula, 70 M 478, 226 P 213 (1924).

Initiatives: Held, that Initiative Measure No. 19 does not contravene the 1889 constitutional provision (Art. V, sec. 23), forbidding the enactment of any law containing more than one subject which shall be clearly expressed in its title. State ex rel. Bonner v. Dixon, 59 M 58, 195 P 841 (1921), overruled on other grounds in Bd. of Regents v. Judge, 168 M 433, 543 P2d 1323 (1975). See also St. v. Pippi, 59 M 116, 195 P 556 (1921).

War Defense Act: Chapter 21, Ex. L. 1918 (omitted), known as the war defense act, has to do with but one subject, which is clearly expressed in its title, namely, "to assist the United States in carrying on and prosecuting the war now existing between the United States and the German and Austrian empires" and does not contravene the provisions of Art. V, sec. 23, 1889 Mont. Const. State ex rel. Campbell v. Stewart, 54 M 504, 171 P 755 (1918).

Chiropractic Within Definition of Osteopathy: The act regulating the practice of osteopathy, approved March 1, 1905 (Title 37, ch. 5), and the act amendatory thereof, approved March 6, 1907, are not repugnant to Art. V, sec. 23, 1889 Mont. Const., on the ground that there is nothing in the titles of the acts indicating an intention to include "chiropractic"; the latter, like the former, having to do with the art of healing by the use of the hands, falls within the definition of "osteopathy" and must be held to have been intended as included within it. St. v. Hopkins, 54 M 52, 166 P 304 (1917).

Workmen's Compensation Act: The title of Ch. 96, L. 1915 (Title 39, ch. 71), known as the Workmen's Compensation Act (now Workers' Compensation Act), fairly indicates the general subject of the act, is comprehensive enough in its scope reasonably to cover all the provisions thereof, and is not calculated to mislead either the Legislature or the public and is therefore

sufficient to meet the requirements of Art. V, sec. 23, 1889 Mont. Const. Lewis & Clark County v. Indus. Accident Bd., 52 M 6, 155 P 268 (1916).

Reason for Excepting Appropriation Bills and Bills for Codification: The obvious reason for the exception of appropriation bills and bills for the codification and general revision of the laws is that the first are necessary for the maintenance of the government and hence their validity ought not to be open to question for informality. The latter are so extraordinary in their character that both the members of the legislative body and the public are presumed to know what is being done. It would be impracticable to formulate a title that would cover every subject embraced in such a bill, and a bill of either class does not fall within the prohibition of Art. V, sec. 23, 1889 Mont. Const. State ex rel. Cotter v. District Court, 49 M 146, 140 P 732 (1914).

Nonpartisan Judiciary — Prohibition of Nomination by Political Party: The so-called "non-partisan judiciary act", Ch. 113, L. 1909, is not in harmony with the constitutional requirement that the purpose of a statute shall be clearly expressed in the title. The title of the enactment was "An act to provide for non-partisan nominations for judicial offices", whereas the body of it disclosed the purpose of the legislation was not to provide for nonpartisan nominations, for which provision was already made, but to prohibit judicial nominations by partisan political organizations. State ex rel. Holliday v. O'Leary, 43 M 157, 115 P 204 (1911).

Natural Connection: The object of Art. V, sec. 23, 1889 Mont. Const., is not to embarrass honest legislation but to prevent the vicious practice, which prevailed in states which did not have such inhibitions, of joining in one act incongruous and unrelated matters. The rule of interpretation now quite generally adopted is that if all parts of the statutes have a natural connection and can reasonably be said to relate, directly or indirectly, to one general and legitimate subject of legislation the act is not open to the charge that it violates Art. V, sec. 23, 1889 Mont. Const. This is true no matter how extensively or minutely it deals with the details looking to the accomplishment of the main legislative purpose; or stating the converse of the proposition, it may be said that if, after giving the act the benefit of all reasonable doubts, it is apparent that two or more independent and incongruous subjects are embraced in its provisions, the act will be held to transgress the constitutional provision and to be void by reason thereof. St. v. Ross, 38 M 319, 99 P 1056 (1909); Evers v. Hudson, 36 M 135, 92 P 462 (1907).

Prohibition of Forms of Gambling: Page 287, Ch. 115, L. 1907, prohibiting certain forms of gambling, is not open to the constitutional objection that it contains more than one subject. St. v. Ross, 38 M 319, 99 P 1056 (1909).

Bonds of Officers — Appeal Bonds: The act of March 7, 1899 (L. 1899, p. 79), "relating to bonds of officers and other bonds", insofar as it applies to undertakings on appeal, runs counter to the provisions of Art. V, sec. 23, 1889 Mont. Const., and is, to that extent, invalid. Russell v. Chicago, Burlington & Quincy Ry., 37 M 10, 94 P 501 (1908).

Exact Limitations Not Required: By Art. V, sec. 23, 1889 Mont. Const., it is only intended that the subject of the bill shall be fairly expressed in the title. It is not necessary, for the Constitution has not so declared, that a title shall embody the exact limitations or qualifications contained in the bill itself which are germane to the purpose of the Legislature, if the general subject of the measure is clearly expressed in the title. Upon the highest authority it is held that, under constitutional provisions substantially like that referred to in Montana, where the degree of particularity necessary to be expressed in the title of a bill is not indicated by the Constitution itself, the courts ought not to "embarrass legislation by technical interpretations based upon mere form of phraseology. The objections should be grave, and the conflict between the statute and the constitution palpable before the judiciary should disregard a legislative enactment upon the sole ground that it embraced more than one object, or, if but one object, that it was not sufficiently expressed by that title". Evers v. Hudson, 36 M 135, 92 P 462 (1907); Yegen v. Bd. of County Comm'rs, 34 M 79, 85 P 740 (1906); St. v. Anaconda Copper Min. Co., 23 M 498, 59 P 854 (1900).

Meaningless Words: Meaningless words or phrases in the title of an act may be discarded by construction, and if, after such elimination, the title clearly expresses the subject embraced in the act, it is not objectionable to Art. V, sec. 23, 1889 Mont. Const. Evers v. Hudson, 36 M 135, 92 P 462 (1907).

Object: In determining the question whether an act offends against this constitutional inhibition, the object sought to be accomplished by the legislation is a proper subject of inquiry. Evers v. Hudson, 36 M 135, 92 P 462 (1907).

Validation of Prior Acts: Page 50, Ch. 29, L. 1907, relating to the establishment and maintenance of county free high schools, does not contain more than one subject, namely provision for the establishment and maintenance of such schools, and for validating all acts done under

enactments of the Legislature passed on the subject at prior sessions. Evers v. Hudson, 36 M 135, 92 P 462 (1907).

Direction to Subject: If the title of an act is single and directs the mind to the subject of the law in a way calculated to direct the attention truly to the matter which is proposed to be legislated upon, the object of the provision is satisfied. It is not satisfied unless the object of the legislation is clearly so expressed. St. v. Cunningham, 35 M 547, 90 P 755 (1907); St. v. Brown, 29 M 179, 74 P 366 (1903); W. Ranches v. Custer County, 28 M 278, 72 P 659 (1903).

Estray Law — Public Domain Not Synonymous With Range: The "estray law", p. 30 of L. 1903, entitled: "An act to define the word 'estray' and to provide a penalty for the taking up, using, or disposing of estrays upon the 'public domain'", section 1 of which defines an estray as an animal "which is away from its accustomed range", section 2 of which makes it a misdemeanor to take from the range any estray animal, and section 3 of which provides that one who, with intent to steal, disposes of or attempts to dispose of any estray shall be guilty of grand larceny, is void as violative of Art. V, sec. 23, 1889 Mont. Const., in that it embraces a subject not expressed in its title, the terms "public domain" and "range" not being synonymous. St. v. Cunningham, 35 M 547, 90 P 755 (1907).

Penalty Clause — Need Not Be Designated in the Title: A penalty clause may be incorporated in an act without being designated in its title. In re Terrett, 34 M 325, 86 P 266 (1906).

Creation of Board of Health — County Quarantine Power: Sections 11, 25, and 26 of the act approved March 15, 1901, the purpose of which was to create a State Board of Health (now abolished), define its powers and duties, and provide for the compensation of its officers and for the enforcement of its rules, while the body of the statute, among other things, confers upon County Boards of Health power to declare quarantine against contagious diseases and confine persons affected with such diseases in suitable detention hospitals, for which power is also granted, is unconstitutional as in contravention of Art. V, sec. 23, 1889 Mont. Const. Yegen v. Bd. of County Comm'rs, 34 M 79, 85 P 740 (1906).

License on Sellers — Omitted: Section 15, Ch. 120, L. 1903, entitled: "An act to create the office of meat and milk inspector for the state of Montana, and prescribing his powers and duties and compensation therefor", imposing a license on persons selling milk, is not in violation of Art. V, sec. 23, 1889 Mont. Const. St. v. McKinney, 29 M 375, 74 P 1095 (1904).

Intent Not Inferable: Chapter 58, L. 1903, approved March 4, 1903, amending the game laws, is in conflict with Art. V, sec. 23, 1889 Mont. Const., and void. The subject of the act is not clearly expressed in the title, and the intent of the Legislature cannot be inferred therefrom. St. v. Brown, 29 M 179, 74 P 366 (1903).

"Unlawful Levy" Construed: The act approved March 18, 1895, entitled: "An act providing for unlawful levy and collection of public revenue", is not in violation of the provisions of Art. V, sec. 23, 1889 Mont. Const., requiring the subject matter of acts to be clearly expressed in their titles, the words "providing for unlawful levy", etc., being construed as meaning "providing a remedy for unlawful levy", etc. W. Ranches v. Custer County, 28 M 278, 72 P 659 (1903).

Act Void Only to Nonexpressed Subject: The subject was clearly expressed in the title. If any subject is embraced in an act, which is not expressed in its title, such act is void only as to so much as is not so expressed, as Art. V, sec. 23, 1889 Mont. Const., should receive a liberal construction. St. v. Courtney, 27 M 378, 71 P 308 (1903).

Casing of Mining Cages: Laws of 1897, p. 245, entitled: "An act to amend section 705 of Title X, of the Penal Code of the state of Montana, to have the cages in all mines cased in", making it unlawful for any corporation to sink or work through any vertical shaft where mining cages are used to a greater depth than 300 feet unless such shaft shall be provided with an iron-bonneted safety cage, sufficiently expresses the subject matter of the act in the title within the meaning of Art. V, sec. 23, 1889 Mont. Const. St. v. Anaconda Copper Min. Co., 23 M 498, 59 P 854 (1900).

Reference to Statutes: The title of the act of March 7, 1895, entitled: "An act to amend sections 364 and 365 of the Fifth Division of the Compiled Statutes of Montana and the amendments thereto, approved September 14, 1887", relating to the qualifications of Mayors and Aldermen, does not conflict with Art. V, sec. 23, 1889 Mont. Const. Dowty v. Pittwood, 23 M 113, 57 P 727 (1899).

Exemption of Existing Institutions: The act of March 4, 1897, entitled: "An act to provide for the organization . . . of building and loan associations . . ." is a general revision of the laws relating to one subject embraced therein and provides that corporations then existing should not be affected by the law unless they elected to come within its provisions. The omission in the title of this proviso did not nullify the act. Home Bldg. & Loan Ass'n v. Nolan, 21 M 205, 53 P 738 (1898).

Compensation of County Officers: The act of March 9, 1893, amending the act of 1891, concerning the compensation of county officers and providing for the payment of Sheriffs by salary and that the Commissioners shall fix the number of Deputy Sheriffs, is not repugnant to Art. V, sec. 23, 1889 Mont. Const. Jobb v. Meagher County, 20 M 424, 51 P 1034 (1898).

Use of "Repeal" — Meaning "Amend": An act approved March 4, 1897, was entitled: "An act repealing sections 470 and 472, Article IX, chapter III, part III, of the Political Code, relating to the appointment of the state land agent and his annual salary." These sections were amended and not repealed. The misuse of the word "repealing" instead of "amending" in the title of such act does not violate Art. V, sec. 23, 1889 Mont. Const., since the other words of the title clearly point out the sections, chapter, title, and code and subject to be affected by the provisions of the bill. State ex rel. Neill v. Page, 20 M 238, 50 P 719 (1897).

Damage to Livestock: The act approved March 2, 1891, entitled: "An act requiring railroad companies to pay for damages to stock", which provides that railroad companies must fence their track or respond in damages, is not void because the title does not refer to fences or penalties. Snook v. Clark, 20 M 230, 50 P 718 (1897). See St. v. McKinney, 29 M 375, 74 P 1095 (1904); In re Terrett, 34 M 325, 86 P 266 (1906).

Effect on Bills to Revise or Harmonize Sections of Law: When the purpose of a bill is manifestly to harmonize and revise generally sections of the law referring to the same subject, it is not necessary to mention specifically in the title of the bill the several sections proposed to be amended or repealed. In re Ryan, 20 M 64, 50 P 129 (1897). See State ex rel. Cotter v. District Court, 49 M 146, 140 P 732 (1914).

Penalty as Incidental: The act entitled: "An act to regulate the sale and redemption of transportation tickets of common carriers", passed in 1893, provides for the appointment of agents to sell tickets and the issuance of a license and prescribes penalties for the violation of parts of the act. The subject of the act is clearly expressed in the title, since the penalty imposed is merely an incident to the regulation of the sale and redemption of transportation tickets, which is the subject of the law. St. v. Bernheim, 19 M 512, 49 P 441 (1897). See Snook v. Clark, 20 M 230, 50 P 718 (1897); St. v. McKinney, 29 M 375, 74 P 1095 (1904); In re Terrett, 34 M 325, 86 P 266 (1906); St. v. Ross, 38 M 319, 99 P 1056 (1909).

Amendment of Nonexisting Chapter: Chapter IX of the proposed Penal Code of 1895, entitled: "Gaming", and prohibiting the same, having been stricken out by the Legislature, and prior laws authorizing certain gambling games reenacted in lieu thereof, which were annexed to chapter VIII of the Penal Code, entitled "Lotteries", the act of February 28, 1895, entitled: "An act to amend chapter IX of the Penal Code of the state of Montana", and prohibiting all gambling, is in conflict with Art. V, sec. 23, 1889 Mont. Const., since, at the time of the passage of said act of February 28 there was no chapter IX concerning gaming in the Penal Code to be amended, and as the other chapters numbered IX in said Code pertained to other subjects, there was nothing in the title of the bill to indicate to which one, if any, of the three existing chapters it was an amendment. St. v. Mitchell, 17 M 67, 42 P 100 (1895).

Amendment: The act of March 4, 1891, p. 225, L. 1891, entitled: "An act to amend sections 790, 795, 796, and 808, Fifth Division of the Compiled Statutes of Montana", relates to one general subject and is not obnoxious to Art. V, sec. 23, 1889 Mont. Const., prohibiting the passage of a law containing more than one subject, which shall be expressed in its title. Hotchkiss v. Marion, 12 M 218, 29 P 821 (1892).

APPROPRIATION BY SEPARATE BILL

Single Subject: Upon the assumption that chapter contained an appropriation, it is but an incident to the single subject of the legislation and therefore is not violative of Art. V, sec. 33, 1889 Mont. Const. State ex rel. Hawkins v. Bd. of Examiners, 97 M 441, 35 P2d 116 (1934); State ex rel. Veeder v. Bd. of Educ., 97 M 121, 33 P2d 516 (1934).

Emergency Act: An emergency act, authorizing the erection of buildings, providing for the issuance of bonds, the pledging of the earnings of a school as well as of one-half of the income derived from the federal land grant, and empowering the State Board of Education to contract with the federal government under the National Recovery Act for repayment of the money borrowed, did not violate the provisions of Art. V, sec. 33, 1889 Mont. Const. State ex rel. Blume v. St. Bd. of Educ., 97 M 371, 34 P2d 515 (1934).

"Ordinary Expense": Any expense which recurs from time to time and is reasonably to be anticipated as likely to recur in the proper operation and maintenance of the departments of the state government is an "ordinary expense". Miller Ins. Agency v. Porter, 93 M 567, 20 P2d 643 (1933).

War Defense Act: The war defense act, Ch. 21, Ex. L. 1918 (omitted), was not subject to the constitutional objection that while it appropriates money, such appropriation is not made by a separate bill embracing one subject, as required by Art. V, sec. 33, 1889 Mont. Const. State ex rel. Campbell v. Stewart, 54 M 504, 171 P 755 (1918).

Appropriation Incidental: When an appropriation is a mere incident to a larger but single subject of legislation, it need not be made by separate bill as otherwise required by Art. V, sec. 33, 1889 Mont. Const. Hill v. Rae, 52 M 378, 158 P 826 (1916).

"Public Debt": The term "public debt" includes warrants as well as bonds. State ex rel. Palmer v. Hickman, 11 M 541, 29 P 92 (1892).

PURPOSE OF APPROPRIATION

Voter Education: Any power and authority a constitutional convention may possess to receive and expend public funds for voter education purposes must be exercised by the convention itself and may not be delegated to a committee. State ex rel. Kvaalen v. Graybill, 159 M 190, 496 P2d 1127 (1972).

Funds for Indigent Mothers: Payment of public funds to persons providing medical, hospitalization, and foster home care to indigent mothers who have sought or received assistance from private rather than public adoptive agencies does not violate Art. V, sec. 35, 1889 Mont. Const. Welfare Bd. v. Lutheran Social Serv., 156 M 381, 480 P2d 181 (1971).

Veterans' Organizations: An appropriation made to pay for secretarial services of two private veterans' organizations maintaining service offices in Montana, which were not under the control of the state, was prohibited by Art. V, sec. 35, 1889 Mont. Const., although the legislation was for a public purpose. Veterans' Welfare Comm'n v. VFW, 141 M 500, 379 P2d 107 (1963).

Appropriation for Water Conservation Board: Appropriations of state money made relative to the creation of the Montana Water Conservation Board (now Division of Water Resources), being for a public use, are not governed by provision that no appropriations shall be made for charitable, industrial, educational, or benevolent purposes to any person or corporation. State ex rel. Normile v. Cooney, 100 M 391, 47 P2d 637 (1935).

War Defense Act: Law known as the war defense act, Ch. 21, Ex. L. 1918 (omitted), was not objectionable as appropriating money for charitable, industrial, or benevolent purposes within the meaning of Art. V, sec. 35, 1889 Mont. Const. State ex rel. Campbell v. Stewart, 54 M 504, 171 P 755 (1918).

Seed-Grain Law: Article V, sec. 35, 1889 Mont. Const., was not offended by the seed-grain law (now repealed), designed to furnish aid to persons engaged in agriculture who, because they are so reduced in circumstances by natural or other conditions beyond their control, have no means wherewith to purchase seed, since the Legislature made no appropriation for the purpose sought to be served by the act. State ex rel. Cryderman v. Wienrich, 54 M 390, 170 P 942 (1918).

Guaranty Fund: The provision (since repealed), appropriating $20,000 to serve as a guaranty fund to assure prompt payment of interest on farm loan bonds, was void under Art. V, sec. 35, 1889 Mont. Const., because the funds thus appropriated are "not under the absolute control of the state". Hill v. Rae, 52 M 378, 158 P 826 (1916).

Attorney General's Opinions

County Authorized to Appropriate Money for Museum — City Authorized to Appropriate Money for Public Purpose — Constitutionality Analyzed: Pursuant to 7-16-2202 (now repealed), a county, but not a city, is authorized to create a program to provide grants to private, nonprofit museums. However, pursuant to 7-1-4124, a city is allowed to grant money to public or private entities as long as the grant is for a public purpose, such as a museum that would enhance the education and enjoyment of the general public, but that would not be merely for the gain of a private entity. The Attorney General declined to opine regarding the constitutionality of 7-1-4124 or 7-16-2202 (now repealed), in light of the prohibition in subsection (5) of this section, against the appropriation of public funds for any private individual, private association, or private corporation not under control of the state, but did analyze that constitutional provision as it related to the question of county or city expenditures for grants to private museum programs, concluding that the constitutional prohibition applies only to the appropriation of public funds by the Legislature, not by local governmental entities. 48 A.G. Op. 12 (2000), overruling prior opinions to the contrary in 37 A.G. Op. 25 (1977), 37 A.G. Op. 105 (1978), and 39 A.G. Op. 25 (1981).

Three-Fourths Vote Required to Appropriate Severance Tax Trust Fund Income: Income deposited in the coal severance tax permanent fund under 17-5-704 becomes part of the principal of the trust. As such, the Legislature may not appropriate by a simple majority the income and

interest earned on the trust fund since July 1, 1983; rather, a three-fourths vote of each house is required. 42 A.G. Op. 110 (1988).

Statement of Intent Not Part of Bill or Law: Laws must be enacted by bills. A Statement of Intent is not part of the bill to which it is attached. Therefore, the Statement of Intent cannot be used in the interpretation of a clearly written statute. 39 A.G. Op. 68 (1982).

Restrictions in Appropriation Bill Subservient to Statutory Power to Provide Assistance to Counties: Section 7-6-2352 (now repealed) reflects legislative intent to make financial assistance grants for the purpose of offsetting virtually all excess costs associated with the operation of a District Court except those for building, capital, and library maintenance, replacement, and acquisition. Restrictive language in the general appropriation bill of the 1981 legislative session limited the appropriation to emergency funding and only when extraordinary expenses are incurred, expressly conflicting with 7-6-2352 (now repealed). The Attorney General noted that the courts have considered such restrictions with disfavor, that the appropriation bill title did not refer to restrictions on the appropriation, and that the language of Art. V, sec. 11, Mont. Const., limits a general appropriation bill to appropriations. Rejecting the repeal by implication of 7-6-2352 (now repealed) by the restrictions in the appropriation bill, it was concluded that the Department of Administration should follow the provisions of 7-6-2352 (now repealed) in providing financial assistance to counties for District Court expenses. 39 A.G. Op. 25 (1981).

Role of Montana Wheat Research and Marketing Committee in Political Action and Legal Action: "Marketing" is to be interpreted in its broadest sense to include the transportation of goods, including transportation rates. The Committee may take action to assure reasonable transportation rates if it is in the best interest of the wheat and barley growers of Montana as a whole. Political action, not legal action, is prohibited. Although in some situations, lawsuits against purchasers or growers of wheat or barley for violation of the wheat research and marketing statutes must be brought by the Department of Agriculture, that requirement did not govern a situation when the litigation in question was brought not merely to enforce the procedural requirements of the wheat research and marketing statutes but also to assure reasonable transportation rates. Actual use of Committee funds for permissible legal action is impermissible if the use of the funds is not under state control. The Committee also is prohibited from contributing to a legal fund over which it has no control; however, the Committee is not prohibited from engaging indirectly in litigation by funding research if it controls the expenditure of the funds for the studies by way of contract or agreement. 39 A.G. Op. 8 (1981).

Federal Revenue Sharing Funds — Allocation by Board of County Commissioners: The Board of County Commissioners of a county which had not adopted a self-government form of local government may not make a grant of federal revenue sharing funds to individual county residents for the purpose of creating a water district under Title 7, ch. 13, parts 22 and 23, because there is no express or necessarily implied authority under which such a grant could be made and because the statutes provide a different mechanism for the creation and funding of a water district. 39 A.G. Op. 6 (1981).

Appropriations — Legislative Control Over Marketing Assessment Funds: Although the control of the Legislature over appropriations to state agencies is based upon broad constitutional provisions, certain money may either be exempt from the appropriation process or the purposes for which that money may be appropriated may be limited by statute. Thus, the Legislature may control appropriations from the wheat marketing and research account but those appropriations are subject to the statutorily stated purposes of the account. Any attempt by the Legislature in an appropriation bill to alter the purposes for which appropriations from the account are made is subject to the constitutional restriction that the purpose of legislation must be clearly stated in the title of the bill. 39 A.G. Op. 3 (1981).

Gift to Private Nonprofit Corporation: Under 20-8-111, the Board of Public Education, in its discretion, may give money that has been donated for the use and benefit of the Montana School for the Deaf and Blind to a private nonprofit corporation created and controlled by the Board and operated for the benefit of that school. However, the Board remains accountable for the money until it is used directly for the general support, maintenance, or improvement of the Montana School for the Deaf and Blind. 38 A.G. Op. 111 (1980).

Attendance Unit on Hutterite Colony Premises — Establishment — Closure — Finance: A school district board of trustees may establish a separate attendance unit on the premises of a Hutterite colony located in the district. Closure of an attendance unit on the premises of a Hutterite colony is a matter within the discretion of the board of trustees of the school district involved, and the trustees have no authority to make an agreement to the contrary. The colony may effectively close an attendance unit by failing to renew the lease agreement if no similar

space is available for its continued operation. Operational costs of an attendance unit must be budgeted and financed in the manner provided by law. Any agreement between the school district and the colony for private financing would be unenforceable. 38 A.G. Op. 26 (1979).

State Grants to Regional Mental Health Centers — Conditions: State grants to regional mental health centers are properly conditioned upon each recipient center accounting for all of its funds through the state treasury and the Statewide Budget and Accounting System (SBAS). 37 A.G. Op. 127 (1978).

County Powers — Revenue Funds: Unless a specific mode or manner of action is mandated by statute, counties may contract with individuals or private organizations, including nonprofit service organizations, for the purchase of services or materials the counties are authorized by statute to provide their constituents if the contracts are reasonable and appropriate methods of furnishing services or materials. Counties may use federal revenue sharing funds to purchase any services or materials they could use county tax revenues to purchase. 37 A.G. Op. 105 (1978).

Entire Student Body of Hutterite Faith: An elementary school district composed entirely of property belonging to North Harlem Hutterite Colony would be eligible to receive public money for school purposes without violating any provision of the Montana Constitution provided the school remains under the authority, control, and operation of the public school system by public school personnel and open to all persons eligible to attend this public school. 36 A.G. Op. 5 (1975).

Bill Title Held Sufficient to Identify Subject Matter: Senate Bill 254 of the 1973 Legislative Session, as codified in 23-2-616, sufficiently identifies the subject matter embraced within sections 2 and 3 of the bill, as codified in 23-2-617 and 23-2-619 (now repealed), respectively, because the codified sections have a natural and logical connection and can reasonably be said to relate, directly or indirectly, to one general subject of legislation (i.e., snowmobile decals). Thus, the title to Senate Bill 254, as codified, meets the requirements of Art. V, sec. 11(3), Mont. Const., requiring each bill contain only one subject. 35 A.G. Op. 64 (1974).

Law Review Articles

Lost Legislative Intent: What Will Montanans Do When The Meaning Isn't Plain, Gordon & Jazayeri, 70 Mont. L. Rev. 1 (2009).

Section 12. Local and special legislation.

Convention Notes

No change except in grammar.

Compiler's Comments

Former Constitutional Provision: This section is similar to Art. V, sec. 26, 1889 Mont. Const.

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DECISIONS UNDER 1972 CONSTITUTION

No Demonstration Beyond a Reasonable Doubt That the Statute is Unconstitutional: Plaintiffs argued that 39-71-413 of the Workers' Compensation Act violated various Montana constitutional provisions including the right to equal protection, the prohibition against legislation conferring any irrevocable grant of special privileges, franchises, or immunities, and the prohibition against special legislation. Statutes are presumed to be constitutional, and the court concluded that the plaintiffs failed to meet their burden of demonstrating beyond a reasonable doubt that 39-71-413 is unconstitutional. Alexander v. Bozeman Motors, Inc., 2010 MT 135, 356 Mont. 439, 234 P.3d 880.

Constitutionality of Notice Requirement of Dram Shop Law — Not Violative of Equal Protection — Not Considered Unlawful Special Legislation: A little over 1 year after being injured in an accident involving an intoxicated bar patron, plaintiffs brought an action against the bar to recover damages incurred as a result of the accident. The bar moved to dismiss the action under 27-1-710, which requires that a person who wishes to commence a dram shop action must notify the person who furnished alcohol by certified mail within 180 days from the date of sale or service. Plaintiffs admitted that they did not meet the notice requirement but argued that the notice provision was unenforceable because it was unconstitutional special legislation and violated plaintiffs' right to equal protection. The District Court dismissed the action as untimely and plaintiffs appealed the constitutional issues, but the Supreme Court affirmed. The notice requirement is rationally related to a legitimate government purpose, and while those who make a claim under the dram shop law must take an additional step before bringing suit, they are still in a situation similar to that of others who allege injury by the wrongful act or omission of another, so the notice requirement does not create an unreasonable classification in violation of equal protection. Additionally, the notice requirement does not constitute special legislation because it operates in the same manner upon all persons in like circumstances without conferring particular privileges or disabilities upon a class of persons arbitrarily selected from a larger group of persons, all of whom stand in the same relation to the privileges or disabilities. Rohlfs v. Klemenhagen, LLC, 2009 MT 440, 354 M 133, 227 P3d 42 (2009). See also State ex rel. Fisher v. School District, 97 M 358, 34 P2d 522 (1934), Lowery v. Garfield County, 122 M 571, 208 P2d 478 (1949), and Linder v. Smith, 193 M 20, 629 P2d 1187, 38 St. Rep. 912 (1981).

County Allowed Choice Whether to Issue Bonds Secured by Revolving Fund — County Not Relieved of Obligation to Make Loans to Deficient Rural Special Improvement Districts: The plain meaning of statutes regarding revolving funds, as well as the legislative history, supports the legislative intent to allow counties to choose whether to finance a rural special improvement district by issuing bonds secured by the revolving fund. Nothing in the statutes voids the commitment to loan from the revolving fund if the district becomes deficient. In this case, County Commissioners agreed to a revolving fund obligation and issued bonds secured by the revolving fund. The District Court reasoned that this was a violation of the constitutional prohibition against indebtedness beyond a certain percent, holding that the county was thus relieved of its obligation to make such loans. However, special improvement bond obligations are limited to the district funds and, if necessary, receive loans from the revolving fund. If both funds are insufficient to meet bond payments, there is no other source to pay the bonds. Under 7-12-2182, revolving fund levies are limited to an amount that would increase the balance in the fund to no more than 5% of the principal amount of the outstanding bonds. The District Court erred in its decision that the county was not obligated to make loans to the special improvement districts. Having exercised the discretion to institute a revolving fund and freely enter into an agreement with the bondholders and the underwriters, under both the terms of the agreement and applicable statutes, a county is obliged to carry out that contractual obligation. Loans from the revolving fund and subsequent tax levies are within the constitutional mandates of Art. VIII, sec. 1, Mont. Const., which requires that state funds be used for public purposes. Further, a county's obligation to make such loans and levy taxes to fund the revolving fund is mandatory, rather than discretionary, and is not an unconstitutional pledge of credit. Carbon County v. Dain Bosworth, Inc., 265 M 75, 874 P2d 718, 51 St. Rep. 436 (1994), distinguishing Stanley v. Jeffries, 86 M 114, 284 P 134 (1929), and Hansen v. Havre, 112 M 207, 114 P2d 1053 (1941).

Law Enforcement Academy Purchase Not Special or Local Act: A 1987 budgetary direction, included as part of the 1987 general appropriations act, directed the Department of Justice to purchase the previously leased modular facilities of the Montana Law Enforcement Academy. The District Court determined that this constitutional provision was offended because the budgetary direction was a special or local act. The Supreme Court found that the direction to purchase was regarded by the Legislature as an expense to be incurred in the coming biennium. The Legislature could have set out the budgetary direction in a separate statute or law instead of including it in the general law; however, the method used was not a violation of the constitutional prohibition against special or local acts. Cornwall v. St. 231 M 58, 752 P2d 135, 45 St. Rep. 429 (1988).

Annexation — Preservation of Existing Garbage Service — Constitutionality: The city of Billings contended that 7-2-4736 was a special or local act which violated Art. V, sec. 12, Mont. Const. The Supreme Court in State ex rel. Redman v. Meyers, 65 M 124, 210 P 1064 (1922), set out the test for a special law: "Does it operate equally upon all of a group of objects which, having regard to the purpose of the legislature, are distinguished by characteristics sufficiently

marked and important to make them a class by themselves?" In the present case, the court determined that the legislative purpose to encourage private garbage service to unannexed areas was a sufficiently important governmental interest to justify the classification; hence, 7-2-4736 was held to be a general law which does not violate Art. V, sec. 12, Mont. Const. D & F Sanitation Serv. v. Billings, 219 M 437, 713 P2d 977, 43 St. Rep. 74 (1986).

Special Legislation — Permissible When General Act Cannot Be Provided: Plaintiff filed a complaint for declaratory judgment in the Supreme Court seeking to determine the validity of several acts of the Legislature allowing the issuance of state revenue bonds. The bonds would be financed by coal severance taxes to provide proceeds for development of state water resources. Plaintiff contended that the appropriation of funds for favorable loans to a score of small municipalities, water districts, and portions of counties constituted special legislation and was unconstitutional. The court noted that Art. V, sec. 12, Mont. Const., is not absolutely prohibitory. The court noted that the Legislature cannot draft a general act of statewide application providing for the issuance and sale of revenue bonds and at the same time keep a handle on the way the proceeds are to be spent or loaned except through its direct authorization of projects. The court held that the passage of Ch. 705, L. 1983, was an implementation of Title 85, ch. 1, part 6, and excluded no class of governmental entity. Therefore, those enactments were "general" legislation within the meaning of Art. V, sec. 12, Mont. Const. The court also held sections 5 and 6 of Ch. 705, L. 1983, were valid in any event because even though local in effect, these were provisions for which a general act could not be provided. Grossman v. St., 209 M 427, 682 P2d 1319, 41 St. Rep. 804 (1984).

Panel Act Not Special Legislation: The panel act does not constitute special legislation violative of equal protection guarantees because the medical profession as a group of potential tort defendants is getting special treatment not accorded to other tort defendants and medically injured plaintiffs are being subjected to barriers to the judicial system not put in the way of other tort plaintiffs. A law which operates in the same manner upon all persons in like circumstances is not "special" in the constitutional sense. The classifications rest on distinctions between the groups of tort plaintiffs and tort defendants involved that have a fair and rational relationship to the object of the legislation. Linder v. Smith, 193 M 20, 629 P2d 1187, 38 St. Rep. 912 (1981).

Card Games — Statute Constitutional: A declaratory judgment action yielded a District Court order declaring 23-5-311 constitutional. That order was appealed. The Supreme Court on review held the statute did not deny equal protection, was not special legislation, and was not void for vagueness. A criminal statute need not apply to all areas that may be injurious to public health to comply with equal protection requirements. Mere classification of the subjects of legislation does not deny equal protection. If all persons in the same class are treated alike, there is no violation of equal protection requirements. The statute was general and operated uniformly and equally on all persons in Montana and thus was a general law, not local or special legislation in the constitutional sense. The claim the term "poker" was vague was rejected because the appellant lacked standing to challenge the constitutionality of the statute because he was not injured or jeopardized by the alleged vagueness of the word "poker". Palmer v. St., 191 M 534, 625 P2d 550, 38 St. Rep. 447 (1981).

DECISIONS UNDER 1889 CONSTITUTION

GENERAL

Livestock Liens — Notice Required: Section 81-8-301 (now repealed), relating to the requirement that mortgage lienholders of livestock file their lien with the recorder of marks and brands in order to give notice to livestock markets, does not constitute a special law in violation of Art. V, sec. 26, 1889 Mont. Const. The classification is legitimate and reasonable and operates equally upon every person or thing in the class. Mont. Meat Co. v. Missoula Livestock Auction Co., 125 M 66, 230 P2d 955 (1951).

Low-Income Housing: The state housing law, Title 7, ch. 15, part 44, held not invalid as special or class legislation in violation of Art. V, sec. 26, 1889 Mont. Const., as singling out persons of low income for special treatment. Rutherford v. Great Falls, 107 M 512, 86 P2d 656 (1939).

Regulation of Trade — Special or Class Legislation: An act regulating a trade or profession that permits those engaged therein on the effective date of the act to continue without passing an examination as prescribed therein is not "special" or class legislation prohibited by Art. V, sec. 26, 1889 Mont. Const. St. v. Bays, 100 M 125, 47 P2d 50 (1935).

Classification Based on Natural Distinction: A law is general and uniform in its operation when it applies equally to all persons embraced within the class to which it is addressed, provided

such classification is made upon some natural intrinsic or constitutional distinction between the persons within the class and others not embraced within it. It is not "general" and makes an improper discrimination if it confers particular privileges or imposes peculiar disabilities upon a class of persons arbitrarily selected from a large number of persons all of whom stand in the same relation to the privileges conferred or the disabilities imposed. The difference on which the classification is based must be such as, in some reasonable degree, will account for and justify the particular legislation. Leuthold v. Brandjord, 100 M 96, 47 P2d 41 (1935).

Motor Carrier Act — Grandfather Clause: The motor carrier act (Title 69, ch. 12) is not rendered unconstitutional as special legislation (Art. V, sec. 26, 1889 Mont. Const.) by the fact that under it holders of certificates of convenience and necessity, issued under prior acts of like tenor, are entitled to operate thereunder and are relieved of the burden of making new applications and submitting evidence to establish their right to such certificates. St. v. Healow, 98 M 177, 38 P2d 285 (1934).

Limitation to Included Group at Passage: A statute that limits its operation to those who are within its provisions at the time of its passage or within a limited time thereafter is special legislation, forbidden by Art. V, sec. 26, 1889 Mont. Const. Roberts v. Hosking, 95 M 562, 28 P2d 199 (1933).

"Special Law" — Defined: A special statute within the meaning of Art. V, sec. 26, 1889 Mont. Const., forbidding such legislation, is one which relates to particular persons or things of a class or one made for individual cases and for less than a class or one which relates and applies to particular members of a class either particularized by the express terms of the act or separated by any method of selection from the whole class to which the law might, but for such limitation, be applicable. State ex rel. Powell v. St. Bank of Moore, 90 M 539, 4 P2d 717 (1931); State ex rel. Redman v. Meyers, 65 M 124, 210 P 1064 (1922).

Purpose of Provision: The object of Art. V, sec. 26, 1889 Mont. Const., against special or local laws is to prevent a diversity of laws relating to the same subject. Arps v. St. Highway Comm'n, 90 M 152, 300 P 549 (1931), overruled on other grounds in Burgan & Walker v. St. Highway Comm'n, 114 M 459, 137 P2d 663 (1943).

Curative Act: A curative act that is made applicable to all places within the state or all things or subjects affected by the conditions which are to be remedied is not a special act within the meaning of the Art. V, sec. 26, 1889 Mont. Const., prohibition against the enactment of special statutes. Weber v. Helena, 89 M 128, 297 P 464 (1931).

Special Statute — How Determined: Determination of the question whether a statute is special depends not upon what it includes but upon what it excludes. State ex rel. Redman v. Meyers, 65 M 124, 210 P 1064 (1922). See also State ex rel. Roundup Coal Min. Co v. Indus. Accident Bd., 94 M 386, 23 P2d 253 (1933).

When Special Laws Are Permissible: The concluding sentence of Art. V, sec. 26, 1889 Mont. Const., does not prohibit special legislation altogether but does seek to curtail it. It forbids special laws where general laws can be made applicable. State ex rel. Ford v. Schofield, 53 M 502, 165 P 594 (1917).

Person Charged — Cannot Challenge: One charged with having aided and abetted in recording, reporting, and registering a bet on a horserace held without the state, contrary to the provisions of Ch. 92, L. 1909, may not call the constitutionality of the act in question on the ground that its provisions having to do with speed contests within the state are a denial of the equal protection of the laws guaranteed by the federal Constitution and local or special in their character. St. v. Rose, 40 M 66, 105 P 82 (1909).

Persons Who May Complain Under This Provision: A person who is not one of a class whose rights are said to have been discriminated against by an alleged special act of the Legislature, contrary to the provisions of Art. V, sec. 26, 1889 Mont. Const., will not be heard to complain of its unconstitutionality on that account. Spratt v. Helena Power Transmission Co., 37 M 60, 94 P 631 (1908).

LOCAL GOVERNMENT

When City Ordinance Violates Section: A city ordinance that prohibits the installation of plumbing called "Durham work", made of certain material, in one- or two-story buildings and permits its installation in all others over two stories high is arbitrary and unreasonable class legislation and therefore invalid as in conflict with Art. V, sec. 26, 1889 Mont. Const., in the absence of evidence showing that the prohibited kind of material is detrimental to the health and safety of the people of the municipality. Practically the same rules apply to the validity of an

ordinance as to enactment of a binding statute. Missoula v. Swanberg, 116 M 232, 149 P2d 248 (1944).

Special Improvement District — Revolving Funds: Contention that 7-12-4221 through 7-12-4228, referring to the matter of special improvement district revolving funds, contravene Art. V, sec. 26, 1889 Mont. Const., as being special laws, held groundless under authority of the case of Stanley v. Jeffries, 86 M 114, 284 P 134 (1929). Hansen v. Havre, 112 M 207, 114 P2d 1053 (1941).

Constitutional Amendment Allowing Consolidation of Cities and Counties Not in Conflict With This Provision: Amendment to Art. XVI, 1889 Mont. Const., by adding thereto section 7, providing for the consolidation of county and city governments, held not open to the objection that it violates Art. V, sec. 26, of that instrument prohibiting the Legislature from passing a local or special act regulating county affairs, creating offices or prescribing the powers and duties of officers in counties and cities, or of section 31 thereof prohibiting the extension of terms of public officers or the increasing or diminishing of their salaries. State ex rel. Corry v. Cooney, 70 M 355, 225 P 1007 (1924), overruled, to the extent that a constitutional amendment may be valid under the single subject rule but fail under the separate vote rule, in Marshall v. St., 1999 MT 33, 293 M 274, 975 P2d 325, 56 St. Rep. 142 (1999).

County Printing: On the authority of Hersey v. Neilson, 47 M 132, 131 P 30 (1913), and Stange v. Esval, 67 M 301, 215 P 807 (1923), held that section 4482, R.C.M. 1921 (since repealed), requiring the contract for county printing to be let to a newspaper published in the particular county continuously for a period of 1 year immediately preceding its letting, is not void as in violation of the 5th and 14th amendments to the federal Constitution, as depriving the county of the right to contract and granting a person a privilege or immunity not granted to another or of Art. V, sec. 26, 1889 Mont. Const., prohibiting the enactment of special or class legislation, or of Art. III, sec. 2 and 27 thereof, as denying the county the right to contract and depriving it of property without due process of law. State ex rel. Woare v. Bd. of Comm'rs, 70 M 252, 225 P 389 (1924).

Creation of County — Legislative Determination: Chapter 56, L. 1917 (omitted), creating Carter County, is not invalid as violative of Art. V, sec. 26, 1889 Mont. Const., forbidding special legislation where a general law can be made applicable. The act creating the county is an implied legislative determination that the general law providing for the creation of new counties is no longer applicable under present conditions. State ex rel. Ford v. Schofield, 53 M 502, 165 P 594 (1917).

"Changing" and "Removing" Defined: The words "changing" and "removing" found in the 1889 Constitution and the statute laws refer to the act of changing or removing a county seat that has been definitely located and have no reference to a so-called temporary or provisional county seat. State ex rel. Geiger v. Long, 43 M 401, 117 P 104 (1911).

Changing the Names of Persons or Places: The provision of Art. V, sec. 26, 1889 Mont. Const., prohibiting the Legislature from passing local or special laws changing the names of persons or "places", applies to the names of counties, notwithstanding Art. VI, sec. 4, and Art. XVI, sec. 1 and 3, 1889 Mont. Const., recognizing the power of the Legislature to create new counties and to change those already established. State ex rel. Sackett v. Thomas, 25 M 226, 64 P 503 (1901).

Counties — Not to Be Disturbed: Under the Constitution, the Legislature has the power to create counties and give them names or to destroy them, but after they are created, they may not be disturbed by special or local legislation, except incidentally in the exercise of the creative power or in cases where a general law cannot be made applicable. State ex rel. Sackett v. Thomas, 25 M 226, 64 P 503 (1901).

Creation of a New County by Special Act Not Forbidden by This Provision: The creation of a new county by special act is not forbidden by Art. V, sec. 26, 1889 Mont. Const., and matters necessarily incidental to the creation of a new county which are provided for in the act creating it, solely for the purpose of organizing the new county and setting it in motion as one of the governmental subdivisions of the state, do not come within either the letter or the spirit of its inhibitions. Holliday v. Sweet Grass County, 19 M 364, 48 P 553 (1897).

Regulating County Affairs: The proviso to section 794, Fifth Division, of the Compiled Statutes of 1887, enacted by the Territorial Legislature, which excepts the county of Missoula from the provisions of the law fixing the rate of interest on county warrants, is in conflict with the provisions of Art. V, sec. 26, 1889 Mont. Const., prohibiting the passage of local or special laws regulating county affairs and the rate of interest on money. Hotchkiss v. Marion, 12 M 218, 29 P 821 (1892).

SCHOOLS

Classification — Reasonable in Light of Purpose: Section 75-4601, R.C.M. 1947 (now repealed), was not violative of Art. V, sec. 26, 1889 Mont. Const. It was general in its application and the classification made by it was reasonable in the light of the purpose, which was limited to the construction, repair, improvement, and equipment of school buildings. Lorang v. High School District "C" of Cascade County, 126 M 204, 247 P2d 477 (1952).

Workmen Employed by School Districts: Chapter 79, L. 1939, amending 39-71-602 (unconstitutional portion omitted), excepting workmen employed by school districts from the prescribed limitation of time within which claims for injuries must be presented to the party liable or from the filing of claims with the Industrial Accident Board (now Division of Workers' Compensation) under the Workmen's Compensation Act (now Workers' Compensation Act), held unconstitutional as being a special act in the nature of class legislation in contravention of Art. V, sec. 26, 1889 Mont. Const. Kerruish v. Indus. Accident Bd., 112 M 556, 118 P2d 1049 (1941).

Application Based on Population: Held, that sections 75-4601 through 75-4606, R.C.M. 1947 (now repealed), not a "special law" within the meaning of Art. V, sec. 26, 1889 Mont. Const., on contention that by providing that said sections shall not apply to any high school district in a county having a population of 45,000 or over, based on the 1930 federal census, thereby not reaching all counties falling within that class. State ex rel. Berthot v. Gallatin County High School District, 102 M 356, 58 P2d 264 (1936).

County Bonds for High Schools: Held, that Ch. 29, L. 1929 (since repealed), authorizing the issuance of county bonds for high school purposes is not violative of the provisions of Art. XIII, sec. 3, 1889 Mont. Const., prohibiting the use of borrowed funds for any purpose other than that specified in the law authorizing the loan, or of Art. XII, sec. 11, 1889 Mont. Const., declaring that taxes shall be levied and collected by general laws and for public purposes only, or Art. V, sec. 26, 1889 Mont. Const., providing that local or special laws regulating county affairs for the management of common schools and the assessment and collection of taxes shall not be passed; held, further, that the act is not open to the objection that it fails to provide a workable plan. State ex rel. Henderson v. Dawson County, 87 M 122, 286 P 125 (1930).

Creation of Joint School Districts: Section 1038, R.C.M. 1921 (omitted), relating to the creation of joint school districts, is invalid as special legislation upon a subject covered by a general statute (section 75-1814, R.C.M. 1947, now repealed), in that it operates only upon existing districts divided by the creation of new counties under the new counties act and excludes from its operation all existing districts which may have been or may be divided by the creation of new counties by direct legislative acts. State ex rel. Redman v. Meyers, 65 M 124, 210 P 1064 (1922).

Classification on Population: A law which classifies school districts according to population and provides a system for the election of trustees which is uniform for all districts within the same class is not a local or special law within the meaning of Art. V, sec. 26, 1889 Mont. Const., although the law provides that the elections in the different classes shall be held under different supervision. State ex rel. Bray v. Long, 21 M 26, 52 P 645 (1898), overruled on other grounds in Palatine Ins. Co. v. N. Pac. Ry. Co., 34 M 268, 85 P 1032 (1906).

REAL PROPERTY

Small Tract Financing Act: Small Tract Financing Act of Montana's 3-acre classification was not special legislation favoring rural landowners; it was reasonable in that it fostered development of state, added to its prosperity, and treated all those within class equally. Great Falls Nat'l Bank v. McCormick, 152 M 319, 448 P2d 991 (1968).

Grazing Districts: Title 76, ch. 16, relating to grazing districts, does not constitute a local or special law in violation of Art. V, sec. 26, 1889 Mont. Const. Thompson v. Tobacco Root Co-op St. Grazing District, 121 M 445, 193 P2d 811 (1948).

Repurchase of Tax Delinquent Property — Conditions: Section 2235, R.C.M. 1935 (since repealed), authorizing the former owner of real property held by a county under tax deed to repurchase it under certain conditions, held not in violation of Art. V, sec. 26, 1889 Mont. Const., relating, as it does, to all instances coming within a general class of situations, i.e., those in which real estate has been taken by tax deed and is held by the county after the effective date of the act. Blackford v. Judith Basin County, 109 M 578, 98 P2d 872 (1940).

Lease Extension: Chapter 61, L. 1935 (omitted), directing the State Board of Land Commissioners to extend for 3 years all grazing leases previously issued for 2 years or less under earlier statute, without requiring open bidding, was "general" and not "special" in that it related

to all members in the class of short-term leasers. Leuthold v. Brandjord, 100 M 96, 47 P2d 41 (1935).

Application to All Persons in Like Circumstances: Article V, sec. 26, 1889 Mont. Const., prohibiting the enactment of a special statute, does not extend to a reasonable classification of persons, and one which operates in the same manner upon all persons in like circumstances is not "special" in the constitutional sense. Chapter 88, L. 1935 (omitted), granting the privilege of redemption of property sold for taxes without the exaction of penalty and interest to all persons in the same situation is a general and not a special act. State ex rel. Sparling v. Hitsman, 99 M 521, 44 P2d 747 (1935).

CORPORATIONS

Public Corporation — Agency of State: Chapter 95, L. 1935, found under Title 85, ch. 1, is not a special or local law granting to a corporation special or exclusive privileges, immunities, or franchises prescribed in Art. V, sec. 26, 1889 Mont. Const. The board, being a public corporation, is an agency of the state and as such not included in the prohibition of Art. V, sec. 26, 1889 Mont. Const. State ex rel. Normile v. Cooney, 100 M 391, 47 P2d 637 (1935).

Bank Reports: Chapter 64, L. 1929 (Title 15, ch. 8, part 1), and Ch. 64, L. 1927 (15-24-505, now repealed), so far as they relate to taxation of moneyed capital and shares of stock of state banks, in requiring reports for purposes of assessment by a banking corporation, though none is required from owners of competing capital, are not special laws in contravention of Art. V, sec. 26, 1889 Mont. Const. The taxing officers under other provisions of law have authority to call for such reports. Bank of Miles City v. Custer County, 93 M 291, 19 P2d 885 (1933).

Confidential Financial Information: Section 108, Ch. 89, L. 1927 (32-1-339), which, by denying to a stockholder in a state bank the right to inspect certain of its books, in effect prohibits bank officials from divulging semiconfidential information they receive as to the financial standing of the bank's customers, is not a special law (Art. V, sec. 26, 1889 Mont. Const.) or one making an unreasonable classification in making the act applicable only to state banks. State ex rel. Powell v. St. Bank of Moore, 90 M 539, 4 P2d 717 (1931).

Creating a Private Corporation: The 1889 Constitution makes it impossible for a private corporation to be created in this state by a special act of the Legislature. In re Beck's Estate, 44 M 561, 121 P 784 (1912).

Incorporation for Guaranteeing Bonds: The act of March 9, 1893, which by sections 1 and 2 (33-26-101 and 33-26-102) authorizes any corporation incorporated in the state for guaranteeing or becoming a surety on bonds to become a sole surety, without an affidavit showing qualifications, is not a special law regulating the practice in courts of justice or granting to a corporation a special or exclusive privilege. King v. Pony Gold Min. Co., 24 M 470, 62 P 783 (1900).

Exemption of Existing Institutions: A proviso that an act, approved March 4, 1897, shall not affect any building and loan association heretofore organized under the laws of Montana, unless such association elects to come under its provisions, operates alike on all corporations and is valid. The proviso is neither local nor special and does not purport to charter an association. Home Bldg. & Loan Ass'n v. Nolan, 21 M 205, 53 P 738 (1898).

PUBLIC EMPLOYEES

Retirement Pay — Deduction of Workers' Compensation Benefits: The provision in section 68-901(h), R.C.M. 1947 (since repealed), requiring the deduction of workmen's compensation benefits in determining the retirement pay of a public employee who is receiving workmen's compensation for a total disability is unconstitutionally discriminatory in treating totally disabled employees less favorably than those only partially disabled. State ex rel. Morgan v. White, 136 M 470, 348 P2d 991 (1960).

County Attorneys — Salary Increase: Chapter 87, L. 1943, amending 7-4-2505, relating to and increasing salaries of deputy and assistant county officials by permitting a 12 1/2% increase in their maximum salaries, held not to offend against Art. V, sec. 26, 1889 Mont. Const., since it is not a special law but a law of general operation. Adami v. Lewis & Clark County, 114 M 557, 138 P2d 969 (1943).

"Public Officers": The term "public officers" as used in Art. V, sec. 26, 1889 Mont. Const., in prohibiting the enactment of special laws increasing "allowances of public officers", was held to mean officers having a fixed and definite term and not appointive officers who hold at the pleasure of the appointing power. Adami v. Lewis & Clark County, 114 M 557, 138 P2d 969 (1943).

Exemption of Certain State Employees From Necessity of Taking Examination: Subsection (3) of sec. 2, Ch. 46, L. 1933 (sections 66-1801 through 66-1812, R.C.M. 1947, now repealed), which chapter regulates the practice of the profession of public accounting, exempting certain state

employees who shall have been continuously engaged in their several employments for at least 4 years prior to making application for a certificate entitling them to engage in the profession of public accounting from examination as to their qualifications to which others not so employed must submit, is unconstitutional as special legislation. Roberts v. Hosking, 95 M 562, 28 P2d 199 (1933).

Teachers' Pensions: Chapter 95, L. 1915 (sections 1113 through 1132, R.C.M. 1935, since repealed), providing for teachers' pensions, is not invalid as in contravention of Art. V, sec. 26, 1889 Mont. Const. Trumper v. School District, 55 M 90, 173 P 946 (1918).

LEGISLATURE

Creation of Legislative Council: Chapter 34, L. 1957 (Title 5, ch. 11, part 1), creating the Legislative Council, did not violate Art. V, sec. 26, 1889 Mont. Const. State ex rel. James v. Aronson, 132 M 120, 314 P2d 849 (1957), overruling State ex rel. Mitchell v. Holmes, 128 M 275, 274 P2d 611 (1954).

Legislature to Decide Whether General Law Would Be Applicable: Where the Legislature passes a special act, the question whether or not a general law on the subject could have been made applicable is one, broadly speaking, for that body alone. Arps v. St. Highway Comm'n, 90 M 152, 300 P 549 (1931), overruled on other grounds in Burgan & Walker v. St. Highway Comm'n, 114 M 459, 137 P2d 663 (1943).

Determination by Legislature — General Statute Inadequate: Courts will not generally interfere with the determination of the Legislature evinced by enacting a special statute, that the general law covering the subject is inapplicable because of extrinsic facts and circumstances or that the general statute has spent its force with the passing of time and has become inadequate. They will hold the special act invalid under Art. V, sec. 26, 1889 Mont. Const., where there are not and cannot be such facts or circumstances which can militate against the operation of the general law. State ex rel. Redman v. Meyers, 65 M 124, 210 P 1064 (1922).

Express Restriction: Article V, sec. 26, 1889 Mont. Const., embodies an express restriction upon the powers of the Legislative Assembly. Lloyd v. Silver Bow County, 11 M 408, 28 P 453 (1891).

COURTS

Divorce Proceedings: Proceedings for divorce undoubtedly are statutory, but jurisdiction in matters of divorce is constitutional and may not be abridged. Trudgen v. Trudgen, 134 M 174, 329 P2d 225 (1958).

Shortening Period of Limitation: Section 84-4159, R.C.M. 1947 (now repealed), was a special law shortening the period of the Statute of Limitations with respect to certain persons and individuals and was invalid. Mitchell v. Garfield County, 123 M 115, 208 P2d 497 (1949); Ross v. First Trust & Sav. Bank, 123 M 81, 208 P2d 490 (1949); Lowery v. Garfield County, 122 M 571, 208 P2d 478 (1949).

Reopening of Claim for Workmen's Compensation: Chapter 85, L. 1933 (omitted), in effect authorizing the reopening of a claim for compensation under the Workmen's Compensation Act (now Workers' Compensation Act) of one designated by name, after denial thereof by the board for failure to follow the statutory directions with reference to filing notice of accident and after the matter had become res judicata, and directing the board to investigate the claim as though all necessary steps had been taken by the claimant, is a special statute and as such invalid. State ex rel. Roundup Coal Min. Co. v. Indus. Accident Bd., 94 M 386, 23 P2d 253 (1933).

INTEREST RATES

Retail Installment Sales Act: The Montana Retail Installment Sales Act is constitutional both before and after the 1971 amendments, making it applicable to revolving charge accounts. The act was not a special or local law regulating the rate of interest on money in violation of Art. V, sec. 26, 1889 Mont. Const., since the finance charges imposed pursuant to the act are time price differentials rather than interest and since there is a reasonable basis for the classification and different treatment of those involved in revolving charge transactions. The act did not grant special or exclusive privileges as prohibited by Art. V, sec. 26, 1889 Mont. Const., since the legislative classifications in the act are constitutionally permissible. Cecil v. Allied Stores Corp., 162 M 491, 513 P2d 704 (1973).

Interest on Retail Installment Sales Contracts: In a diversity action to recover the balance due on a note and conditional sales contract executed and delivered by defendants to a North Dakota corporation and assigned by it to plaintiff, where defendants contended that the rate of interest charged them pursuant to the Montana Retail Installment Sales Act, 31-1-241 (prior

to amendment), was 16.3%, which exceeded the maximum rate of 10% permitted by 31-1-107 and constituted a special law regulating the rate of interest on money, proscribed by Art. V, sec. 26, 1889 Mont. Const., the federal court applied the abstention doctrine and postponed further action until the issue was determined by the Supreme Court of Montana. B-W Acceptance Corp. v. Torgerson, 234 F. Supp. 214 (D.C. Mont. 1964).

ELECTIONS

Shortening of Registration Time: Chapter 95, L. 1931 (omitted), was not obnoxious to the provision of Art. V, sec. 26, 1889 Mont. Const., that the Legislative Assembly shall not pass local or special laws for the opening or conducting of any election or designating the place of voting. The act provided that the election at which the proposition was to be submitted to the people should be held under the general election laws, with certain provisions relative to the shortening of time of registration and notice, made necessary by the exigencies of the case, neither of which had anything to do with the opening or conducting of the election. Arps v. St. Highway Comm'n, 90 M 152, 300 P 549 (1931), overruled on other grounds in Burgan & Walker v. St. Highway Comm'n, 114 M 459, 137 P2d 663 (1943).

Election Contests — Attorney Fees: Sections 94-1467 and 94-1468, R.C.M. 1947 (now repealed), awarding the successful party in an election contest attorney's fees, etc., are not open to constitutional objections that they deny to the unsuccessful one the equal protection of the laws, grant to the former a special privilege not enjoyed by successful litigants in other cases, violate the provision that justice shall be administered without sale, denial, or delay, and constitute an attempt to delegate legislative power to the courts. Doty v. Reece, 53 M 404, 164 P 542 (1917).

TAXATION

Revolving Fund: Held, in a taxpayer's suit, that Ch. 24, L. 1929 (7-12-4221 through 7-12-4228), creating a revolving fund to be raised by transfers from the general fund of the city or town which shall be deemed loans, and in addition to or in lieu of such transfers, from a tax levy, to secure prompt payment of special improvement district bonds or warrants, is not invalid as violative of either sec. 1 of the 14th amendment to the federal Constitution, guaranteeing the equal protection of the laws, or Art. V, sec. 26, 1889 Mont. Const., prohibiting the passage of special laws. Stanley v. Jeffries, 86 M 114, 284 P 134 (1929).

License Tax on Gas Distributors: Chapter 186, L. 1925 (since repealed), imposing a license tax upon dealers and distributors of gasoline (superseded by Initiative Measure No. 31, p. 604, L. 1927, since repealed), under which a dealer sought to recover a tax paid under protest on the grounds that the act was unconstitutional as offending against the Equal Protection of the Law Clause of the federal Constitution, as well as against the provisions of Art. XII, sec. 11; Art. XV, sec. 11; and Art. V, sec. 26, 1889 Mont. Const., to the effect that taxes shall be uniform upon the same class of subjects, that foreign corporations engaged in business in the state shall not have any greater rights or privileges than domestic corporations, and that the Legislative Assembly shall not pass local or special laws where a general law can be made to apply, is not open to the attacks made upon it. Hart Refineries v. Harmon, 81 M 423, 263 P 687 (1928).

ROADS AND HIGHWAYS

Toll Bridges: Chapter 51, L. 1949 (section 32-1621, R.C.M. 1947, now repealed), which authorized the expenditure of state highway funds on "All toll bridges crossing any river in the state of Montana", was a local and special law since the only bridge crossing any river in the state where tolls are collected for its use is the Great Northern Railway bridge at Snowden. Sjostrum v. St. Highway Comm'n, 124 M 562, 228 P2d 238 (1951).

Parking Meters: The installation and use of parking meters by a city is not in violation of Art. V, sec. 26, 1889 Mont. Const., prohibiting local or special laws chartering or licensing toll roads. Glodt v. Missoula, 121 M 178, 190 P2d 545 (1948).

Law Review Articles

Constitutionality of Statute Delaying Commencement of Adverse Possession by Tenant Against Landlord Is Questioned by Court, Corontzos, 22 Mont. L. Rev. 189 (1961).

Section 13. Impeachment.

Convention Notes

Minor revision. Two-thirds rather than a majority vote necessary to impeach. The legislature may choose the senate or another body to hear the charges.

Compiler's Comments

Former Constitutional Provision: This section is similar to Art. V, sec. 16, 17, and 18, 1889 Mont. Const.

Case Notes

DECISIONS UNDER 1972 CONSTITUTION

Necessity of Verified Complaint: The Judicial Standards Commission initiated an investigation upon receipt of a letter from a retired District Judge, contrary to its own rules and the statute requiring that such investigations be initiated by a verified complaint. It argued that because the Constitution prescribed its investigative authority and granted rulemaking power to implement its authority, the Legislature was without power to specify the procedure by which it exercised such authority. The court disagreed, finding that under Art. V, sec. 13(1), Mont. Const., the Legislature has broad powers relating to removal of public officers and that there can be no inhibition of the legislative power, irrespective of rulemaking authority granted to the Commission, to make suitable provision not in conflict with the constitutionally granted powers of the Commission, including the requirement that the Commission may act only upon a verified complaint. State ex rel. Shea v. Judicial Standards Comm'n, 198 M 15, 643 P2d 210, 39 St. Rep. 521 (1982).

Judicial Nomination Procedure: The established procedures for filling judicial vacancies in Montana are constitutional and not repugnant to applicable provisions of the Montana Constitution. Jones v. Judge, 176 M 251, 577 P2d 846 (1978).

DECISIONS UNDER 1889 CONSTITUTION

Removal of State Officer: The provisions of 2-16-213(1), that when the term of office is not fixed by law the office is held at the pleasure of the appointing power, did not violate Art. V, sec. 18, 1889 Mont. Const. State ex rel. MacGilvra v. District Court, 148 M 182, 418 P2d 874 (1966).

Police Judge — Not Judicial Officer: A police judge is not a "judicial officer" as that term is used in Art. V, sec. 18, 1889 Mont. Const. State ex rel. Ryan v. Norby, 118 M 283, 165 P2d 302 (1946).

Resignation of Office to Run for Another: Chapter 116, L. 1937 (since repealed), providing that the holder of a public office must tender his resignation upon becoming a candidate for another office, etc., held not open to the contention that it adds causes of removal of public officers to those provided for by Art. V, sec. 17, 1889 Mont. Const., it simply providing a method whereby a public officer may voluntarily abandon his office; nor may the act be held arbitrary or capricious. Mulholland v. Ayers, 109 M 558, 99 P2d 234 (1940).

Governor Not Disqualified by Estoppel or Res Judicata in Hearing Removal Charges: Proceeding under Art. V, sec. 18, 1889 Mont. Const., to remove members of Highway Commission (now Transportation Commission) for collection of illegal fees and per diem, Governor not barred from passing upon accusation by doctrines of estoppel or res judicata because he had passed upon and approved the alleged illegal claims as a member of the State Board of Examiners (now Department of Administration). State ex rel. Matson v. O'Hern, 104 M 126, 65 P2d 619 (1937).

Misconduct — Need Not Be Willful: The word "misconduct" as used in Art. V, sec. 18, 1889 Mont. Const., includes any act involving moral turpitude or which is contrary to justice, honesty, principle, or good morals; it need not be willful, nor does it necessarily imply corruption or criminal neglect. State ex rel. Matson v. O'Hern, 104 M 126, 65 P2d 619 (1937).

Corrupt Practices: Held, that section 94-1450, R.C.M. 1947 (now repealed), known as corrupt practices act, does not contravene the provisions of Art. V, sec. 17, 1889 Mont. Const., and District Court has jurisdiction to entertain a proceeding for removal of state officer for violation thereof and to test the validity of his election. Tipton v. Sands, 103 M 1, 60 P2d 662 (1936).

Enactment of Removal Statutes — Legislative Power: Article V, sec. 17, 1889 Mont. Const., provides for the removal of certain officers by impeachment, and sec. 18 of the same article declares that officers not liable to impeachment are subject to removal for misconduct or malfeasance in office, in such manner as may be provided by law. Recalling that our Constitution is a limitation and not a grant of power, it will be seen at once that the provisions of sec. 18 added nothing to the power which the Legislature would have had in the absence of such provisions. In other words, the Legislature was left entirely free to enact such statutes as it might see fit providing for the removal of officers other than those enumerated in sec. 17. State ex rel. Bullock v. District Court, 62 M 600, 205 P 955 (1922).

Legislative Power: Article V, sec. 18, 1889 Mont. Const., added nothing to the power which the Legislature would have had in the absence of the provisions therein contained. In other

words, the Legislature was left entirely free to enact such statutes as it might see fit providing for the removal of officers other than those enumerated in Art. V, sec. 17, 1889 Mont. Const. State ex rel. Bullock v. District Court, 62 M 600, 205 P 955 (1922); State ex rel. Payne v. District Court, 53 M 350, 165 P 294 (1917).

"Misconduct in Office": Any act involving moral turpitude, or any act which is contrary to justice, honesty, principle, or good morals, if performed by virtue of office or by authority of office, is included in the term "misconduct in office". State ex rel. Ryan v. Bd. of Aldermen, 45 M 188, 122 P 569 (1912); State ex rel. Wynne v. Examining & Trial Bd., 43 M 389, 117 P 77 (1911).

Official Misconduct: In pursuance of Art. V, sec. 18, 1889 Mont. Const., the Legislature enacted 45-7-401. It appears that the section was intended to apply to those cases in which the accused has been guilty of willful or corrupt misconduct or malfeasance, and to those derelictions which are the result of incompetency or inattention to official duties. State ex rel. Rowe v. District Court, 44 M 318, 119 P 1103 (1911).

Constitutional Officers Only: Article V, sec. 17, 1889 Mont. Const., is only applicable to constitutional officers and does not cover a city police judge, whose office is statutory only. State ex rel. Working v. Mayor, 43 M 61, 114 P 777 (1911).

Removal of City Officers: Section 7-4-4113, authorizing the City Council to remove any officer on written charges after notice by a two-thirds vote of all the members elect, is in consonance with Art. V, sec. 18, 1889 Mont. Const.; the statute is a proper exercise of the legislative authority granted, and a police judge of a city may be removed in a proper case by the City Council. State ex rel. Working v. Mayor, 43 M 61, 114 P 777 (1911).

Constitution Exclusive: The framers of the Constitution did not regard a Senator as either a state or judicial officer, within the meaning of those terms as employed in Art. V, sec. 17, 1889 Mont. Const. He cannot be a judicial officer because the Constitution expressly provides that a judicial officer may be removed by impeachment, and a Senator cannot be so removed. The Governor and other state and judicial officers can be removed only by impeachment. The constitutional provision is exclusive. State ex rel. Haviland v. Beadle, 42 M 174, 111 P 720 (1910).

Impeachment Power — Vested in Legislature: Article V, sec. 16, 1889 Mont. Const., provided that the sole power of impeachment is vested in the House of Representatives and that impeachment shall be tried by the Senate sitting for that purpose. The Senate cannot initiate the proceedings; the House must perform that function, whereupon the Senate tries the impeachment. It will thus be seen that it is the Legislative Assembly, constituting the legislative department of the state government, to which is delegated by the Constitution the sole power of impeachment from its initiatory step to the final judgment. In other words, the jurisdiction to conduct and determine impeachments is by the Constitution lodged solely in the legislative department. A Senator or Representative, by virtue of the fact that he may act in impeachment proceedings, does not thereby lose his character or status as a member of the Legislative Assembly. It is only because of the fact that he is such Senator or Representative that he may act in such proceedings. State ex rel. Haviland v. Beadle, 42 M 174, 111 P 720 (1910).

Judicial Officers: "Judicial officers", as used in Art. V, sec. 17, 1889 Mont. Const., was adopted by the Legislative Assembly in passing 5-5-401, both provisions using the phrase in the same sense. State ex rel. Haviland v. Beadle, 42 M 174, 111 P 720 (1910).

Legislators Not State Officers: The words "state officers", as employed in Art. V, sec. 17, 1889 Mont. Const., do not include members of the Legislative Assembly. Members of the Legislative Assembly are not liable to impeachment. State ex rel. Haviland v. Beadle, 42 M 174, 111 P 720 (1910).

State and Judicial Officers — Who Are: A policeman is not a state officer subject to removal by impeachment in accordance with the provisions of Art. V, sec. 17, 1889 Mont. Const. He is a public officer in the sense that he has certain duties to perform other than those strictly pertaining to the government of the municipality for which he is acting. State ex rel. Quintin v. Edwards, 38 M 250, 99 P 940 (1908).

Section 14. Districting and apportionment.

Convention Notes

(1) New provision for single-member house districts. Two house districts constitute a senatorial district. (2) and (3) new provision which establishes a five member commission to recommend a reapportionment plan after each U.S. census. [Note—see Accelerated Effective Date compiler's comment to this section.]

Compiler's Comments

1984 Amendment by Referendum: Constitutional Amendment No. 14, proposed by Ch. 421, L. 1983, and approved at the general election held November 6, 1984, in (2) near end of first sentence after "legislative" substituted "districts and a plan for redistricting the state into congressional districts" for "and congressional districts"; inserted (3) relating to deadline for congressional districts; in (4) in first sentence and last sentence after "plan" inserted "for legislative districts"; and in (5) substituted existing text relating to dissolution of commission upon filing of both plans for "The commission is then dissolved." Amendment effective October 1, 1985. (See text of referendum in final volume of 1985 Laws of Montana.)

Accelerated Effective Date: Section 1 of the Transition Schedule for implementing the 1972 Montana Constitution provided: "Section 1. Accelerated effective date. Section 6 (SESSIONS) and section 14 (DISTRICTING AND APPORTIONMENT) of Article V, THE LEGISLATURE, shall be effective January 1, 1973."

The convention note for section 1 of the Transition Schedule provided: "Proposed section on annual legislative sessions and reapportionment of the legislature would be effective January 1, 1973. The reapportionment commission could then be appointed by the 1973 legislature and report its plan to the 1974 legislature."

Former Constitutional Provision: This section is similar to Art. V, sec. 4, and Art. VI, 1889 Mont. Const.

Case Notes

DECISIONS UNDER 1972 CONSTITUTION

Districting and Apportionment Commission Part of Legislative Branch: The Districting and Apportionment Commission is exempt from the public participation requirements of Art. II, sec. 8, Mont. Const., and statutes regarding participation in government because the Commission is attached to the Legislative Branch and is not an agency and thus not a part of the Executive Branch. Willems v. St., 2014 MT 82, 374 Mont. 343, 325 P.3d 1204.

No Authority of Legislature to Assign Holdover Senators Following Redistricting: The 2003 Districting and Apportionment Commission plan for redistricting House and Senate districts assigned holdover Senators who were elected under the old districting system to redrawn districts under the new system, and the Commission submitted the plan to the 2003 Legislature for recommendations. In response, the Legislature passed 5-1-116, granting to itself the power to assign holdover Senators to districts for the remainder of their terms and prohibiting the Commission from making those assignments. The Legislature then passed further legislation implementing its recommendations. Three of the holdover Senators challenged the legislative assignments. The District Court declared 5-1-116 and the implementing legislation unconstitutional, and the Supreme Court affirmed. Under this section, the mandate that the Districting and Apportionment Commission effect redistricting is self-executing, and the power to assign districts for holdover Senators is historically an inherent part of the redistricting process. The constitutional grant of redistricting power to the Commission constitutes a denial of any latitude to the Legislature to invoke its plenary powers. Thus, the 2003 legislation designed to transfer the power to assign holdover Senators from the Commission to the Legislature was unconstitutional and of no force and effect. Wheat v. Brown, 2004 MT 33, 320 M 15, 85 P3d 765 (2004). See also Cargo v. Paulus, 635 P2d 367 (Oreg. 1981).

Dilution of Voting Strength: Plaintiffs contended that the 1992 redistricting plan for the Montana House of Representatives and Senate diluted the voting strength of American Indians in violation of section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973. The plaintiffs also alleged that the redistricting plan was adopted with a discriminatory purpose in violation of section 2 of the Voting Rights Act. The federal District Court rejected both claims. The Ninth Circuit Court of Appeals determined that the District Court's finding that the plan did not dilute the voting strength of American Indians was based upon two errors. The errors were that white bloc voting in majority-white House districts was not legally significant and that American Indians were proportionally represented under the 1992 redistricting plan. The Ninth Circuit Court of Appeals reversed and remanded with instruction to determine whether, in light of the totality of the circumstances, vote dilution had occurred. Old Person v. Cooney, 230 F3d 1113 (2000). On remand, the District Court held that the plaintiffs had limited standing and to prevail had to show, but did not show, vote dilution in the specific legislative districts where they resided. Also, the District Court held that even if the plaintiffs had shown vote dilution, their claim failed because of the unavailability of an adequate remedy. The District Court reasoned that the state would be redistricting in 2003, and the 2002 elections (the last elections to be conducted under

the 1992 plan) were fast approaching. The plaintiffs appealed. The Ninth Circuit Court held that under the totality of the circumstances, it was not clearly erroneous for the District Court to determine that there was no vote dilution. The District Court's ruling dismissing the Voting Rights Act of 1965 claim based on the conclusion that there was no vote dilution was affirmed. Old Person v. Brown, 312 F3d 1036 (2002).

Application of 1983 Reapportionment Commission Criteria — Balancing of Criteria: The 1983 Reapportionment Commission established five criteria to follow in redistricting that addressed governmental boundaries, geographic boundaries, communities of interest, consideration of existing district boundaries, and an attempt to stay within a 5% plus or minus deviation from the ideal district population. The court held that these criteria were considerations and that conflicts between them as they existed within a district or between districts must be balanced in arriving at a plan embracing the entire state. The Commission interprets its own criteria, such as what constitutes a community of interest and the possible ripple effects of any particular change; thus when the Commission made a good faith effort to balance the criteria, the reapportionment plan could not be struck down on the contention that it failed to exactly follow its own criteria. McBride v. Mahoney, 573 F. Supp. 913, 40 St. Rep. 1907 (D.C. Mont. 1983).

1983 Reapportionment Plan — Total Population Deviation Over Ten Percent Upheld — Legitimate State Interests: In the 1983 reapportionment plan, the population deviation between the largest and smallest House districts was 10.94% and between the largest and smallest Senate districts was 10.18%, which created a prima facie case of discrimination because the totals exceeded 10%. To be upheld, the deviations must be justified by legitimate state objectives. The court determined that legitimate state objectives were stated in criteria established by the Reapportionment Commission. The criteria addressed governmental boundaries, geographic boundaries, communities of interest, consideration of existing district boundaries, and an attempt to stay within a 5% plus or minus deviation from the ideal population. McBride v. Mahoney, 573 F. Supp. 913, 40 St. Rep. 1907 (D.C. Mont. 1983).

Projected Population as Basis for Reapportionment: A reapportionment plan will not be struck down for failure to consider projected population growth when the Reapportionment Commission did not consider population projections and it was not presented with data that would have enabled it to apply population projections in a systematic manner. McBride v. Mahoney, 573 F. Supp. 913, 40 St. Rep. 1907 (D.C. Mont. 1983).

Timing of Plan Submission: After the 1980 census, the Attorney General sought a writ of mandamus to compel the Districting and Apportionment Commission to submit its plan to the 1981 Legislature. The District Court determined that the Commission must submit its plan to the first regular session of the Legislature following the Commission's appointment or to the first regular session of the Legislature following the availability of census figure, whichever came later. In this case, the Commission was required to submit its plan to the 1983 Legislature meeting in regular session. State ex rel. Greely v. Mont. Districting & Apportionment Comm'n, First Judicial District, No. 46873 (Aug. 12, 1981).

DECISIONS UNDER 1889 CONSTITUTION

Constitutional Convention: The 1972 Constitutional Convention had to be apportioned on basis of 1970 census applicable to apportionment of House of Representatives to be elected in November 1972. Legislative Assembly v. Lennon, 156 M 416, 481 P2d 330 (1971).

Constitutionality of 1889 Provision Under United States Constitution: The portion of Art. V, sec. 4, 1889 Mont. Const., which stated that "there shall be no more than one senator from each county" was void and unconstitutional in that it violated the Equal Protection Clause of the 14th amendment to the Constitution of the United States. Herweg v. Thirty Ninth Legislative Assembly of Mont., 246 F. Supp. 454 (D.C. Mont. 1965).

Failure to Reapportion: When Legislature failed to reapportion congressional districts in three successive sessions following the 1960 census in conformity with Art. VI, sec. 2, 1889 Mont. Const., and districts had a disparity in population of 126,332, Governor and Secretary of State were enjoined from proclaiming, certifying, or conducting election of members of the House of Representatives, and court established new districts for future elections. Roberts v. Babcock, 246 F. Supp. 396 (D.C. Mont. 1965).

One Senator From Each County: Contention that it is competent for the Legislative Assembly to provide for a proxy or substitute to perform the duties of a duly elected member in the event of temporary disability, such as is created by absence in the military service under 10-2-221 through 10-2-228 (all now repealed), may not be sustained since to act, vote, and participate in the proceedings of the Assembly, the Legislator must function in person and not by proxy. A

county may not, at one time, have one duly elected, qualified living Senator and one duly acting Senator. The duties are purely personal in nature, and during a legislative session his presence is required at the seat of government. State ex rel. Grant v. Eaton, 114 M 199, 133 P2d 588 (1943).

Attorney General's Opinions

Reapportionment — Holdover Senators: Article V, sec. 3, Mont. Const., provides that state Senators be elected to 4-year terms on a staggered basis. The constitution and statutes provide no authority for changing Senators' terms after reapportionment. The reapportionment plan is the responsibility of the Montana Districting and Apportionment Commission. The Commission has the inherent authority under Art. V, sec. 14, Mont. Const., to do what is necessary to implement a plan that complies with the state's laws. How to deal with holdover Senators is the responsibility of the Commission. The terms of office of members of the Montana State Senate who were elected in 1982 may not be shortened as a result of reapportionment and redistricting. 40 A.G. Op. 2 (1983).

When Plan to Be Submitted — Recess and Reconvening: The Commission to Redistrict and Reapportion is required under 5-1-109 to submit its plan to the 47th Legislature if census data is available in December 1980. The Legislature may recess and reconvene at a later date and still be within its regular session to receive and make recommendations, according to 5-1-110, on the Commission's plan. 38 A.G. Op. 99 (1980).

Procedure for Submitting Reapportionment Plan: The reapportionment plan should be submitted, with a cover letter signed by each commission member, to each house of the Legislature by the 10th day of the legislative session; and within 30 days of the return of the reapportionment plan from the Legislature, the final plan should be submitted, with a cover letter signed by each commission member, to the Secretary of State for filing. 35 A.G. Op. 50 (1973).

Constitutional Grant of Power to Apportion — Historical and Current: Prior to the adoption of the 1972 Montana Constitution, the apportionment power was granted to the Legislature. (See Art. VI, 1889 Mont. Const.) However, with the adoption of the new Constitution, the people of this state divested the Legislature of all power concerning apportionment of the Legislature, except for the power of recommendation in Art. V, sec. 14, 1972 Mont. Const. 35 A.G. Op. 12 (1973).

Legislative Determination of Size of Legislative Assembly — Not Controlling: The Commission to Redistrict and Reapportion was not bound by a legislative determination of the size of the Legislative Assembly, and sections 43-106.6 and 43-106.7, R.C.M. 1947 (repealed by sec. 1, Ch. 14, L. 1975), enacted prior to the adoption of the 1972 Montana Constitution, are not controlling. 35 A.G. Op. 12 (1973).

Reapportionment Commission — Exclusive Power to Apportion Legislative and Congressional Districts: The Commission to Redistrict and Reapportion has the exclusive power to determine the size of the legislative houses and the geographical makeup of the legislative and congressional districts, subject only to the restrictions of Art. V, Mont. Const. 35 A.G. Op. 12 (1973).

Reapportionment Plan Becomes Law: Upon submission of the apportionment plan, proposed by the Commission to Redistrict and Reapportion, to the Secretary of State, the plan becomes law and all previous statutory provisions in conflict with that plan are, in effect, repealed. 35 A.G. Op. 12 (1973).

Law Review Articles

The State of the Montana Constitution (Turkey Feathers on the Constitutional Eagle), Petesch, 64 Mont. L. Rev. 23 (2003).

Constitutional Apportionment of Local Government in Montana, Simmons, 30 Mont. L. Rev. 35 (1968).

Home Rule in Montana—Present and Proposed, Mason, 19 Mont. L. Rev. 79 (1957).

ARTICLE VI

THE EXECUTIVE

Article Compiler's Comments

Former Constitutional Provisions: This article is similar to Art. VII, 1889 Mont. Const.

Section 1. Officers.

Convention Notes

Revises 1889 constitution. Removes constitutional status of state treasurer, board of examiners, and state examiner. The offices still appear in the law. All officers mentioned must reside at capital. 1889 constitution exempts lieutenant governor from this requirement.

Compiler's Comments

Former Constitutional Provision: This section is similar to Art. VII, sec. 1, 8, and 20, 1889 Mont. Const.

Case Notes

DECISIONS UNDER 1889 CONSTITUTION

Effect of Joint Resolutions: A joint legislative resolution is not a general law and cannot be used to control the discretion of the Governor. Gildroy v. Anderson, 162 M 26, 507 P2d 1069 (1973).

Attorney General — Employment of Outside Counsel by Agency: Resolution adopted by Highway Commission (now Transportation Commission) authorizing chief counsel thereof "to employ and engage such outside fee counsel as he, in his discretion shall deem reasonable and necessary, to represent the Highway Commission (now Transportation Commission) in whatever type of case arises" was proper and did not infringe on any powers, duties, or responsibilities of Attorney General. Woodahl v. Highway Comm'n, 155 M 32, 465 P2d 818 (1970).

Attorney General — Common-Law Powers and Duties:

The Attorney General has common-law powers and duties. State ex rel. Olsen v. P.S.C., 129 M 106, 283 P2d 594 (1955).

The office of the Attorney General, as it existed in England under the common law, was adopted as a part of the governmental machinery of this state, and in the absence of express restrictions, the common-law duties of that officer attach themselves to the office insofar as they are applicable and in harmony with our system of government. State ex rel. Ford v. Young, 54 M 401, 170 P 947 (1918).

Residence of Temporary Appointee During Military Service of Elected Officer: Since, by law, the temporary appointee became the Attorney General for all purposes during the leave of absence, relief from duty, or suspension granted the duly elected officer during active military service, it is the temporary appointee's residence under Art. VII, sec. 1, 1889 Mont. Const., that must be at the seat of government. That of the temporarily supplanted Attorney General thereafter becomes immaterial. Gullickson v. Mitchell, 113 M 359, 126 P2d 1106 (1942).

Auditor — Duties and Powers:

The State Auditor and ex officio Commissioner of Insurance has general jurisdiction, under Art. VII, sec. 1, 1889 Mont. Const., and by law, of matters relating to insurance and has the power, under certain circumstances enumerated in the statutes, to revoke certificates of authority of insurance companies to do business in the state. State ex rel. Pearl Assurance Co. v. Holmes, 113 M 144, 124 P2d 700 (1942).

The fact that the State Auditor is a member of the Industrial Accident Board (now Division of Workers' Compensation) did not render the Workers' Compensation Act unconstitutional on the ground that he thus holds two offices. The only limitation upon the Legislature in imposing duties upon that officer, under the Constitution, prohibits the imposition of duties appertaining to the legislative or judiciary, not the executive, departments of government. Shea v. N. Butte Min. Co., 55 M 522, 179 P 499 (1919).

"Term" Refers to Office: The word "term", referring to the terms of office of Governor and Lieutenant Governor fixed at 4 years by Art. VII, sec. 1, 1889 Mont. Const., applied to the office and not to the person holding it. State ex rel. Lamey v. Mitchell, 97 M 252, 34 P2d 369 (1934).

Limitation on Term of Office: Article VII, sec. 1, 1889 Mont. Const., regulated the terms of state executive officers. State ex rel. Jones v. Foster, 39 M 583, 104 P 860 (1909).

Attorney General — Duties and Powers: The Attorney General is required to perform such duties as are prescribed in the Constitution and laws of the state. Inasmuch, however, as there appear to be by the Constitution no powers or duties specifically delegated to that officer whereby he is clothed with supervisory powers over other or inferior legal officers of the state or any subordinate government therein or directing him to assist other and inferior officers in the performance of their duties, the laws must be consulted to ascertain what, if any, such duties are prescribed and what are the extent and limitations of his official authority. State ex rel. Nolan v. District Court, 22 M 25, 55 P 916 (1899).

Attorney General's Opinions

Collective Bargaining — Representation of Executive Agencies: The Governor or his designee has the statutory authority to represent all agencies of the executive branch for purposes of collective bargaining with public employee unions. 37 A.G. Op. 168 (1978).

Section 2. Election.

Convention Notes

Only change is subsection (2) which is new requirement that governor and lieutenant governor must run as a team.

Compiler's Comments

Former Constitutional Provision: This section is similar to Art. VII, sec. 2, 1889 Mont. Const.

Attorney General's Opinions

Collective Bargaining — Representation of Executive Agencies: The Governor or his designee has the statutory authority to represent all agencies of the executive branch for purposes of collective bargaining with public employee unions. 37 A.G. Op. 168 (1978).

Section 3. Qualifications.

Convention Notes

Revises 1889 constitution. Sets 25 as age requirement for governor, lieutenant governor, superintendent of public instruction and attorney general. Age requirement for secretary of state unchanged. New requirements that candidate for attorney general be admitted to practice law for five years and superintendent of public instruction have educational qualifications set by law.

Compiler's Comments

Former Constitutional Provision: This section revises Art. VII, sec. 3, 1889 Mont. Const.

Section 4. Duties.

Convention Notes

Only change is subsection (2) which is new provision allowing legislature to make lieutenant governor full time. Deletes provision that lieutenant governor be president of senate.

Compiler's Comments

Former Constitutional Provision: This section is similar to Art. VII, sec. 1, 5, 15, and 17, 1889 Mont. Const.

Case Notes

DECISIONS UNDER 1972 CONSTITUTION

Legislative Employee's Fiscal Assumptions Cannot Trigger Tax Credits — Unlawful Delegation of Power — Invasion of Executive Branch Power Impermissible: Legislative Referendum 123 (LR-123) provided a potential tax credit, tax refund, or payment to individuals when a certain level of surplus revenue was in the state treasury at the close of the fiscal year. As part of the process of determining whether there was surplus revenue, the Legislative Fiscal Analyst (LFA) was required to perform two dozen steps or calculations, including discretionary projections of balances, revenues, transfers, appropriations, and reversions. The Supreme Court held that the delegation of authority to the LFA violated Article V, section 1, of the Montana Constitution as an unlawful delegation of legislative power, similar to the unlawful delegation of authority to a legislative interim committee in State ex rel. Judge v. Legislative Fin. Comm., 168 Mont. 470, 543 P.2d 1317 (1975). Moreover, the requirement that the LFA exercise judgment and interpretations regarding the law violated the separation of powers under Article III, section 1, of the Montana Constitution, since these are Executive Branch functions. MEA-MFT v. McCulloch, 2012 MT 211, 366 Mont. 266, 291 P.3d 1075.

Standing of Attorney General to Appeal P.S.C. Order — P.S.C. Appeal Untimely: The Montana Power Company (M.P.C.) applied to the Public Service Commission (P.S.C.) for a rate increase of over $96.3 million. The P.S.C. granted only $4.1 million and denied in toto M.P.C.'s request to recover costs associated with Colstrip Unit 3. The M.P.C. appealed to District Court for review under 2-4-701. The judge reversed the P.S.C. order. The Attorney General filed notice of appeal. More than 60 days after the judge's order was entered, the P.S.C. also filed notice of appeal. The M.P.C. filed a motion to dismiss the appeal of the Attorney General for lack of standing and the appeal of the P.S.C. as untimely. The Supreme Court granted the motion, holding that the Attorney General had no standing to represent the state on appeal since it was not an aggrieved party or a party to the proceedings before the District Court and because, in his official capacity, the Attorney General may not appeal a decision that is within the discretion of the P.S.C. as a

party to the action. The appeal of the P.S.C. was untimely, although within 7 days of the notice of appeal filed by the Attorney General. The latter appeal being invalid, the P.S.C. appeal would have to fall within the 60-day rule. Mont. Power Co. v. Dept. of Pub. Serv. Regulation, 218 M 471, 709 P2d 995, 42 St. Rep. 1750 (1985).

State Auditor as Member of Hail Board — Not Dual Office Holding: The State Auditor is a constitutional office with "such duties as are provided by law" (Art. VI, sec. 4, Mont. Const.). One of these prescribed duties is being a member of the Board of Hail Insurance established under 2-15-3003. The State Auditor does not hold dual offices by carrying out legislatively imposed duties. The only limitation on the Legislature in prescribing such duties is that the duties may not pertain to the legislative or judicial department of government. Mtn. States Ins. Co. v. St., 218 M 365, 708 P2d 564, 42 St. Rep. 1657 (1985).

DECISIONS UNDER 1889 CONSTITUTION

Casting Deciding Vote: The Lieutenant Governor of Montana, while presiding as President of the Senate, possessed the requisite power to enable or entitle him to cast the deciding vote on third reading of House Bill No. 342, as amended (1961 amendment, 61-5-111), at a time when the Senators then present and voting were equally divided. State ex rel. Easbey v. Highway Patrol Bd., 140 M 383, 372 P2d 930 (1962).

Common-Law Powers and Duties:

The Attorney General has common-law powers and duties. State ex rel. Olsen v. P.S.C., 129 M 106, 283 P2d 594 (1955).

The office of the Attorney General, as it existed in England under the common law, was adopted as a part of the governmental machinery of this state, and in the absence of express restrictions, the common-law duties of that officer attach themselves to the office insofar as they are applicable and in harmony with our system of government. State ex rel. Ford v. Young, 54 M 401, 170 P 947 (1918).

Governor — Authority Over Judiciary Restricted: The Governor is not empowered to exclude or remove from office the duly elected, qualified, and acting judge of a judicial district or to order the judge of another district into his district. State ex rel. Bennett v. Bonner, 123 M 414, 214 P2d 747 (1950).

Auditor — Duties and Powers:

The State Auditor and ex officio Commissioner of Insurance has general jurisdiction, under Art. VII, sec. 1, 1889 Mont. Const., and by law, of matters relating to insurance and has the power, under certain circumstances enumerated in the statutes, to revoke certificates of authority of insurance companies to do business in the state. State ex rel. Pearl Assurance Co. v. Holmes, 113 M 144, 124 P2d 700 (1942).

The fact that the State Auditor is a member of the Industrial Accident Board (now Division of Workers' Compensation) did not render the Workers' Compensation Act unconstitutional on the ground that he thus holds two offices. The only limitation upon the Legislature in imposing duties upon that officer, under the Constitution, prohibits the imposition of duties appertaining to the legislative or judiciary, not the executive, departments of government. Shea v. N. Butte Min. Co., 55 M 522, 179 P 499 (1919).

Governor — Power to Remove Commission Members: The powers reposed in the Governor by constitutional and statutory provisions to remove the members of a commission for cause are discretionary in character. His action is reviewable by the courts only when it appears that he acted without facts to move his discretion and, therefore, in an arbitrary and capricious manner. State ex rel. Matson v. O'Hern, 104 M 126, 65 P2d 619 (1937).

Governor — Veto Power: The power of the Governor over legislation by the exercise of the veto can only be exercised when clearly authorized by specific provision of the Constitution. Mills v. Porter, 69 M 325, 222 P 428 (1924).

Attorney General — Duties and Powers: The Attorney General is required to perform such duties as are prescribed in the Constitution and laws of the state. Inasmuch, however, as there appear to be no powers or duties specifically delegated by the Constitution to that officer whereby he is clothed with supervisory powers over other or inferior legal officers of the state or any subordinate government therein or directing him to assist other and inferior officers in the performance of their duties, the laws must be consulted to ascertain what, if any, such duties are prescribed and what are the extent and limitations of his official authority. State ex rel. Nolan v. District Court, 22 M 25, 55 P 916 (1899).

Attorney General's Opinions

Authority of Auditor to Recover Unauthorized Compensation: The State Auditor has the authority to compel an elected member of the Public Service Commission to repay unauthorized compensation received from the state for service in the Montana Army National Guard. 43 A.G. Op. 43 (1989).

Collective Bargaining — Representation of Executive Agencies: The Governor or his designee has the statutory authority to represent all agencies of the executive branch for purposes of collective bargaining with public employee unions. 37 A.G. Op. 168 (1978).

Authority to Issue Legal Opinions and Weight to Be Given: Only the Attorney General has specific authority to issue legal opinions to County Attorneys or other agencies of state and county government. Opinions issued by state officers or agencies that conflict with the Attorney General's opinion on the same question must yield to the Attorney General's opinion. 35 A.G. Op. 68 (1974).

Section 5. Compensation.

Convention Notes

Revises 1889 constitution. Salaries may be increased or decreased. Public official may not receive more than one salary or hold more than one office but may be candidate for another office without resigning.

Compiler's Comments

Former Constitutional Provision: This section revises Art. VII, sec. 4, 1889 Mont. Const.

Case Notes

DECISIONS UNDER 1972 CONSTITUTION

State Auditor as Member of Hail Board — Not Dual Office Holding: The State Auditor is a constitutional office with "such duties as are provided by law" (Art. VI, sec. 4, Mont. Const.). One of these prescribed duties is being a member of the Board of Hail Insurance established under 2-15-3003. The State Auditor does not hold dual offices by carrying out legislatively imposed duties. The only limitation on the Legislature in prescribing such duties is that the duties may not pertain to the legislative or judicial department of government. Mtn. States Ins. Co. v. St., 218 M 365, 708 P2d 564, 42 St. Rep. 1657 (1985).

DECISIONS UNDER 1889 CONSTITUTION

Constitutional Convention Delegates: State officers named in Art. VII, sec. 5, 1889 Mont. Const., could not serve as delegates to state Constitutional Convention. A delegate holds public office. Legislative Assembly v. Lennon, 156 M 416, 481 P2d 330 (1971), distinguished in Mahoney v. Murray, 159 M 176, 496 P2d 1120 (1972).

Effect of Induction Into Military: Against the contention that induction of the Attorney General into the military service of the United States vacated the office, while it is doubtful that a military officer holds a public office, if he does, the constitutional provisions would only serve to negate his right to hold the federal office and not to vacate that of Attorney General. Gullickson v. Mitchell, 113 M 359, 126 P2d 1106 (1942).

Salary — Claimed on Basis of Title: The language of Art. VII, sec. 4, 1889 Mont. Const., appeared to indicate that the officer may claim his salary whether he serves or not, provided he has title to the office. Peterson v. Butte, 44 M 401, 120 P 483 (1912).

Restriction of Legislative Power: Article VII, sec. 4, 1889 Mont. Const., embodied an express restriction upon the powers of the Legislative Assembly. Lloyd v. Silver Bow County, 11 M 408, 28 P 453 (1891).

Attorney General's Opinions

Sheriff Authorized to Accept Compensation From Federal Agency for Performance of Services Outside Official Duties: A Sheriff may receive compensation from a federal agency under the terms of a cooperative law enforcement agreement without violating any Montana statutory or constitutional provision, so long as the services rendered by the Sheriff fall outside the scope of the Sheriff's official duties. 49 A.G. Op. 12 (2001).

Absence of Public Service Commissioner From State on Military Duty — Vacancy in Office Not Created — No Additional Compensation:

When asked to clarify his opinion in 43 A.G. Op. 32 (1989), the Attorney General looked to the nature of service and the source of payment as affecting the right of a state officer to receive additional compensation, noting that a National Guard member engaged in federal service and thus compensated by the federal government is subject to the duties and may receive the benefits

of federal law, while a member engaged in purely state-oriented service and thus compensated by the state is subject to state regulation. Therefore, this section prohibits an elected member of the Executive Branch from accepting compensation from the state for service in the Montana Army National Guard, beginning with the first instance of dual compensation. Further, a public officer has a duty to repay unauthorized compensation and the state, through the State Auditor, has a corresponding right to compel repayment of the unauthorized compensation. 43 A.G. Op. 43 (1989).

Absence from the state attributable to active military duty does not result in a vacancy in the office of Public Service Commissioner. However, elected members of the Public Service Commission may not receive additional compensation for simultaneous service in the Montana Army National Guard. 43 A.G. Op. 32 (1989).

Section 6. Vacancy in office.

Convention Notes

Revises 1889 constitution by changing method of filling vacancy in office of lieutenant governor. Senate confirmation no longer required for appointments to fill vacancies in offices listed.

Compiler's Comments

Former Constitutional Provision: This section is similar to Art. VII, sec. 7, 15, and 16, 1889 Mont. Const.

Case Notes

DECISIONS UNDER 1889 CONSTITUTION

Military Service: Held, as against the contention that induction of the Attorney General into the military service of the United States vacated the office according to the provisions of Art. VII, sec. 1, 1889 Mont. Const., that, while it is doubtful that a military officer holds a public office, if he does, the constitutional provisions would only serve to negate his right to hold the federal office and not to vacate that of Attorney General. Gullickson v. Mitchell, 113 M 359, 126 P2d 1106 (1942).

Attorney General's Opinions

Appointment of Judges: The Senate confirmation of an individual appointed by the Governor to the office of District Judge is required before that office may be placed on the ballot for election. 37 A.G. Op. 115 (1978).

Submission to Electorate: For the most part, the provisions of the Montana Constitution encourage officials appointed to vacant offices to submit to the electorate at the next regularly scheduled election. 37 A.G. Op. 115 (1978).

Section 7. 20 departments.

Convention Notes

Only grammar change in 20 department reorganization amendment adopted by the people in November, 1970.

Compiler's Comments

Former Constitutional Provision: This section is similar to Art. VII, sec. 21, 1889 Mont. Const.

Attorney General's Opinions

Collective Bargaining — Representation of Executive Agencies: The Governor or his designee has the statutory authority to represent all agencies of the executive branch for purposes of collective bargaining with public employee unions. 37 A.G. Op. 168 (1978).

Collateral References

Executive Reorganization, Interim Report No. 38, Montana Legislative Council (1971-72).

Section 8. Appointing power.

Convention Notes

Subsection (1) new provision. Unless law provides otherwise governor appoints heads of the 20 departments, subject to senate confirmation. No change except in grammar in subsections (2) and (3). Subsection (4) is new provision prohibiting nomination or appointment of persons previously rejected by senate.

Compiler's Comments

Former Constitutional Provision: Subsections (2) and (3) of this section are similar to Art. VII, sec. 7, 1889 Mont. Const.

Case Notes

DECISIONS UNDER 1889 CONSTITUTION

Recess Appointments: Article VII, sec. 7, 1889 Mont. Const., authorizing recess appointments, has reference only to such vacancies which leave the office without anyone to discharge the duties and does not apply to a case where the incumbent holds until his successor is elected or appointed and qualified and is discharging the duties of his office. Hence an appointment to the Industrial Accident Board (now Division of Workers' Compensation) on May 1, 1955, which was during a time when the Senate was not in session, was not effective since it was not "by and with the consent of the senate" as required by section 92-104, R.C.M. 1947 (now repealed). The incumbent, whose term expired May 1, 1955, would continue to hold the office and discharge its duties. State ex rel. Olsen v. Swanberg, 130 M 202, 299 P2d 466 (1956).

Meaning of "Or Otherwise": Under the doctrine of ejusdem generis, held, that the words "or otherwise" contained in Art. VII, sec. 7, 1889 Mont. Const., imported circumstances of the same permanent nature as "death" and "resignation" modifying the word "vacated" which itself imports finality or permanency and therefore do not relate to situations in the nature of leave of absence, suspension, or relief from duty resulting in temporary vacancies, such as contemplated by laws providing for appointments of "acting officers" during military service of elected incumbents and their restoration to office upon their return before expiration of their term. Gullickson v. Mitchell, 113 M 359, 126 P2d 1106 (1942).

Vacancy — Term of Appointees: As soon as a vacancy occurs, the appointing power may act, but since the Constitution does not distinguish vacancies into different classes on account of the exigencies which occasion them, the term for which the appointment holds good is governed by the limitations upon the appointing power therein prescribed. State ex rel. Patterson v. Lentz, 50 M 322, 146 P 932 (1915).

Term of Officers: There is no limit to the term of officers whose offices are established by the Constitution or which may be created by law, except as provided in the various portions of the Constitution which deal with particular officers. State ex rel. Quintin v. Edwards, 38 M 250, 99 P 940 (1908).

Appointment Power Reserved to People — Bounty Inspectors: The power to appoint or delegate the appointing power is reserved to the people, acting through the Legislature, in every instance, excepting those enumerated in the Constitution. Bounty inspectors were not officers whose appointment is "otherwise provided for" in Art. VII, sec. 7, 1889 Mont. Const., and the Legislature had the power to delegate the selection of three stockgrowers in each county to appoint bounty inspectors to the District Judges. In re Terrett, 34 M 325, 86 P 266 (1906).

Attorney General's Opinions

Collective Bargaining — Representation of Executive Agencies: The Governor or his designee has the statutory authority to represent all agencies of the executive branch for purposes of collective bargaining with public employee unions. 37 A.G. Op. 168 (1978).

Section 9. Budget and messages.

Convention Notes

Makes it mandatory that Governor send budget to legislature. Otherwise no change except in grammar.

Compiler's Comments

Former Constitutional Provision: This section is similar to Art. VII, sec. 10, 1889 Mont. Const.

Case Notes

DECISIONS UNDER 1972 CONSTITUTION

Department of Revenue's Activity in Proposing Tax Legislation Not Violation of Separation of Powers: In 1994 and 1995, the Department of Revenue engaged in a project to build a consensus between various parties on how best to achieve a simplification of oil and natural gas taxes. The Department proposed legislation to the 1995 Legislature, and it was passed as the Montana Oil and Natural Gas Production Tax Act. Certain counties and taxpayers challenged the law on the basis that neither the Legislature nor the Governor had granted the Department any power to conduct the project and that the Department's actions violated the doctrine of separation of powers. The Supreme Court upheld the tax law on the basis that the constitution requires the Governor to provide the Legislature with information and to recommend measures that the Governor considers necessary and further that 15-1-203 is an enabling statute allowing the

Department to formulate and recommend legislation. Powder River County v. St., 2002 MT 259, 312 M 198, 60 P3d 357 (2002).

Legislative Mandate of Budget Inclusion: The mandatory language in the Housing Act of 1975 that the Governor include the Board of Housing's appropriation request in his budget creates no constitutionally prohibited invasion of the executive's power. Huber v. Groff, 171 M 442, 558 P2d 1124 (1976).

Separation of Powers — Budget a Legislative Function: Notwithstanding Art. VI, sec. 9, Mont. Const., the Montana budget is a legislative budget, not an executive budget. Article V, sec. 1 and 11, and Art. VIII, sec. 9, 12, and 14, Mont. Const., vest the power not only to approve appropriation bills and a budget in the legislative branch but to create an interim committee to gather information from other branches of government necessary to form a rational basis for its budget determinations. State ex rel. Judge v. Legislative Fin. Comm., 168 M 470, 543 P2d 1317, (1975).

DECISIONS UNDER 1889 CONSTITUTION

Extent of Governor's Authority: Under Art. VII, sec. 10, 1889 Mont. Const., the utmost extent of the Governor's authority, so far as constructive legislative work was concerned, was to recommend such measures as he considered expedient. State ex rel. Anaconda Copper Min. Co. v. Clancy, 30 M 529, 77 P 312 (1904).

Section 10. Veto power.

Convention Notes

Subsection (1) revises 1889 constitution. Amendments to U.S. and Montana constitutions and legislative resolutions may be passed without governor's signature. Pocket veto after adjournment eliminated. Subsection (2) new provision. "Amendatory veto" enables governor to return bills with suggestions for changes. No change in subsection (3) except for grammar. Provision in subsection (4) for reconvening to consider vetoed bills is new.

Compiler's Comments

1994 Amendment by Referendum: Constitutional Amendment No. 26, proposed by Ch. 94, L. 1993, and approved at the general election held November 8, 1994, in (1) in second sentence increased time from 5 days to 10 days and after "delivery to him" deleted "if the legislature is in session or within 25 days if the legislature is adjourned". Amendment effective July 1, 1995. (See text of referendum in final volume of 1995 Laws of Montana.)

1982 Amendment by Referendum: Constitutional Amendment No. 12, proposed by Ch. 611, L. 1981, and approved at the general election held November 2, 1982, in (3) after "the members" inserted "of each house"; in (4)(a) after "vetoes a bill" inserted "approved by two-thirds of the members present" and after "reasons therefor to the" substituted language relating to polling by the secretary of state for "legislature as provided by law"; in (4)(b) after "reconvene" inserted "as provided by law" and after "any bill" substituted "vetoed by the governor when the legislature is not in session" for "so vetoed"; and made minor changes in style. Amendment effective November 2, 1982. (See text of referendum in final volume of 1983 Laws of Montana.)

Former Constitutional Provision: Subsections (1) and (3) of this section revise Art. VII, sec. 12, 1889 Mont. Const. Subsection (5) of this section is similar to Art. VII, sec. 13, 1889 Mont. Const. See also Art. V, sec. 40, 1889 Mont. Const.

Case Notes

DECISIONS UNDER 1972 CONSTITUTION

Submission of Constitutional Initiative Amending Three Parts of Constitution Violative of Separate Vote Requirement: Plaintiffs filed an original application for declaration of judgment and injunctive relief, challenging the validity of Constitutional Initiative No. 75 (CI-75), which was passed by the voters and stated that no new tax or tax increase could be enacted unless approved by a majority of the electorate. The initiative amended Art. VIII, Mont. Const., revising state revenue and finance provisions; amended Art. II, sec. 18, Mont. Const., providing that sovereign immunity did not shield public officials or employees from appropriate civil liability for violating CI-75; and provided that notwithstanding the referendum provisions of this section, before a bill imposing new or increased taxes is referred to the people, the Governor had veto power. The dispositive issue was that CI-75 had two or more constitutional amendments, in violation of Art. XIV, sec. 11, Mont. Const., which is a cogent constitutional recognition of the circumstances under which Montana voters receive constitutional initiatives, namely that a separate vote is required for each proposed constitutional amendment. Citing Armatta v. Kitzhaber, 959 P2d 49

(Oreg. 1998), the Supreme Court held that the separate vote requirement is distinguishable as different and narrower than the single subject requirement in Art. V, sec. 11, Mont. Const., and that to the extent that a constitutional amendment may be valid under the single subject rule but fail under the separate vote rule, holdings to the contrary in State ex rel. Teague v. Bd. of Comm'rs, 34 M 426, 87 P 450 (1906), State ex rel. Hay v. Alderson, 49 M 387, 142 P 210 (1914), and State ex rel. Corry v. Cooney, 70 M 355, 225 P 1007 (1924), were overruled. Because CI-75 expressly amended three parts of the Montana Constitution without allowing a separate vote on each amendment, CI-75 was unconstitutional under Art. XIV, sec. 11, Mont. Const. Marshall v. St., 1999 MT 33, 293 M 274, 975 P2d 325, 56 St. Rep. 142 (1999), following State ex rel. Hinz v. Moody, 71 M 473, 230 P 575 (1924), and Sawyer Stores, Inc. v. Mitchell, 103 M 148, 62 P2d 342 (1936).

Governor's Signature Not Required on Legislative Referendum: As used in the Montana Constitution, the term "referendum measures" means both legislative and initiative referendums. The plain language of Art. III, sec. 5, Mont. Const., and this section makes it clear that legislation calling for a referendum measure is not required to be signed by the Governor. State ex rel. Gould v. Cooney, 253 M 90, 831 P2d 593, 49 St. Rep. 410 (1992).

DECISIONS UNDER 1889 CONSTITUTION

Failure to Submit Constitutional Amendments: It was a fatal defect for the Legislature to ignore the Governor, in neglecting and refusing to present proposed constitutional amendments to the Governor in full as passed by the House and Senate for the Governor's approval or disapproval. State ex rel. Livingstone v. Murray, 137 M 557, 354 P2d 552 (1960).

Legislature Alone — Cannot Enact a Law: The Legislature alone cannot enact a law; it has the power to pass bills that may become laws when signed by the presiding officers of both houses and when approved and signed by the Governor, these officers being an indispensable part of the machinery set up by the Constitution to make laws. Vaughn & Ragsdale Co., Inc. v. St. Bd. of Equalization, 109 M 52, 96 P2d 420 (1939).

Governor's Approval: Since the Governor in the approval of laws is a component part of the Legislature and no bill can become a law (with certain exceptions) without his approval, his approval fixes the time when it becomes a law, the order in which bills are passed in the two houses being immaterial. State ex rel. Toomey v. St. Bd. of Examiners, 74 M 1, 238 P 316 (1925).

Appropriation Bill — Scaling of Items: Since under Art. VII, sec. 12, 1889 Mont. Const., no bill shall become a law after adjournment of the Legislative Assembly unless approved by the Governor, where, instead of approving or disapproving a general appropriation bill as a whole or approving some of the items therein and disapproving others, he scaled certain items and approved them as scaled, which he was without power to do, his action was neither an approval nor a disapproval, resulting in no appropriations as to such items. Mills v. Porter, 69 M 325, 222 P 428 (1924).

Veto Power — Reduction of Appropriation by Governor: Under Art. VII, sec. 13, 1889 Mont. Const., empowering the Governor "to disapprove of any item or items of any bill making appropriations of money, embracing distinct items", he may not scale any particular item or items by deducting a certain percent of the amount appropriated by the Legislature in a bill which because of adjournment could not be returned to it for further action, since by so doing he would be exercising creative legislative power and usurping the function of the Legislative Assembly. Mills v. Porter, 69 M 325, 222 P 428 (1924).

Creation of County: Chapter 56, L. 1917 (omitted), creating Carter County, became a law without the approval of the Governor, pursuant to Art. VII, sec. 12, 1889 Mont. Const. State ex rel. Ford v. Schofield, 53 M 502, 165 P 594 (1917).

Passage on Last Day of Session: A measure having been passed on the last day of a legislative session and not acted upon by the executive until after final adjournment would require the Governor's signature to make it operative. State ex rel. Hay v. Hindson, 40 M 353, 106 P 362 (1910).

Passage and Approval Effective Date — Failure of Governor to Sign: Law (now repealed) relating to the establishment of county free high schools provides that it "shall take effect and be in full force from and after its passage and approval by the governor". It was never expressly approved by the Governor but became a law pursuant to Art. VII, sec. 12, 1889 Mont. Const. The provision that if any bill be not returned by the Governor within 5 days after presentment to him, it shall be a law, in like manner as if he had signed it, being binding upon the Legislature, the act in question became a law notwithstanding the above provision therein contained. Evers v. Hudson, 36 M 135, 92 P 462 (1907).

Attorney General's Opinions

Vote to Override Gubernatorial Veto: A gubernatorial veto may be overridden only upon a vote of two-thirds of the members present in each house of the Legislature, not merely two-thirds of the members present of the whole Legislature. 36 A.G. Op. 8 (1975).

Section 11. Special session.

Convention Notes

Revises 1889 constitution. Continues power of governor to call special sessions of the legislature but removes his power to limit subjects to be considered.

Compiler's Comments

Former Constitutional Provision: This section revises Art. VII, sec. 11, 1889 Mont. Const.

Case Notes

DECISIONS UNDER 1889 CONSTITUTION

Repurchase of Tax Lien Property: Chapter 33, Ex. L. 1933-34, amending section 2235, R.C.M. 1935 (since repealed), so as to authorize the former owner of real property held by a county under tax deed to repurchase it under certain conditions, held constitutional under the rules that courts must uphold a statute unless its invalidity is made manifest beyond a reasonable doubt, and any enactment which will meet the ends sought to be accomplished by the Governor's call must be deemed embraced within the limits of the subjects under consideration. Blackford v. Judith Basin County, 109 M 578, 98 P2d 872 (1940).

Aiding Federal Works Program: Chapter 47, Ex. L. 1933-34 (sections 75-4601 through 75-4606, R.C.M. 1947, now repealed), an act to provide emergency relief by the creation of high school districts, authorizing the borrowing of money for the construction of buildings, etc., held not invalid as not authorized by the Governor's proclamation calling the Legislature into special session, where by special message he recommended consideration of the general subject of consolidating school districts, since the effect of such consolidation would be the creation of new districts, with resultant accomplishment of the main purpose of the call: aiding in the federal public works program and thus to a certain extent reducing unemployment and relieving distress. Pierson v. Hendricksen, 98 M 244, 38 P2d 991 (1934).

Liberal Construction: Legislation incidental or germane to the subjects expressed in the Governor's proclamation calling the Legislature into special session must be upheld as within his call, and the proclamation must be liberally construed, to the end that the legislation enacted pursuant thereto becomes operative. Pierson v. Hendricksen, 98 M 244, 38 P2d 991 (1934).

Special Message: Under the rule that a subject submitted to the Legislative Assembly by special message while in extraordinary session is before it for consideration to the same extent as if specifically mentioned in the Governor's proclamation calling it, held that Ch. 9, Ex. L. 1921 (repealed), relating to the suppression of illegal traffic in intoxicating liquor, is not invalid as in contravention of Art. VII, sec. 11, 1889 Mont. Const. St. v. Dishman, 64 M 530, 210 P 604 (1922).

Police Salaries: Held, that Ch. 11, Ex. L. 1919 (7-32-4121), providing that actions by police officers for the recovery of salaries must be commenced within 6 months after the cause of action shall have accrued, etc., is not open to the objection that it did not come within the purview of the Governor's proclamation calling the session, his reference therein to certain conditions prevailing in the "department of police" in a named city covering the subject of the legislation. Sweeney v. Butte, 64 M 230, 208 P 943 (1922).

Extraordinary Purposes: Although, for ordinary purposes, the Legislature may convene only once in every 2 years, the Governor may call it into extra session at other times for extraordinary purposes. State ex rel. Bennett v. St. Bd. of Examiners, 40 M 59, 104 P 1055 (1909).

Extraordinary Sessions — Powers of Legislature: When convened in extraordinary session, the power of the Legislature is as absolute as when convened in regular session, except that it is then limited to enacting laws affecting those subjects only that are enumerated in the Governor's call or in his message. In order to determine whether legislation passed at an extraordinary session of the Legislature is germane to the subject specified in the proclamation, it is incumbent on the court to examine the proclamation as a whole, giving to the language used its ordinary meaning, and a rule of liberal interpretation should be applied, to the end that the legislation be operative. State ex rel. Anaconda Copper Min. Co. v. Clancy, 30 M 529, 77 P 312 (1904).

Legislation Germane to Governor's Call: Where a proclamation of the Governor convened the Legislature in extra session for the purpose of enacting general legislation by which the bias and prejudice of District Judges should be made a disqualification of such Judges to try any case that may come before them, as well as legislation making suitable provision for the trial of

such case or cases in such event, and the Legislature met and passed the act of December 10, 1903, amending section 180 of the Code of Civil Procedure of 1895 (section 93-901, R.C.M. 1947, now repealed) so as to provide that, on the filing of an affidavit of prejudice against a District Judge, he should no longer act, and also amending section 615 of the same Code (25-2-201) so as to provide that in such case, if a qualified Judge should be called to try the cause within 30 days after such disqualification, no change of venue therefor should be had, such legislation was germane to the Governor's call, as required by Art. VII, sec. 11, 1889 Mont. Const. State ex rel. Anaconda Copper Min. Co. v. Clancy, 30 M 529, 77 P 312 (1904).

Section 12. Pardons.

Convention Notes

Revises 1889 constitution. Deletes reference to board of pardons (which is provided for by law) and to the board of prison commissioners (which is defunct).

Compiler's Comments

Former Constitutional Provision: This section is similar to Art. VII, sec. 9, 1889 Mont. Const.

Case Notes

DECISIONS UNDER 1889 CONSTITUTION

Parole Not a Pardon or Commutation of Sentence: The state Board of Pardons (now Board of Pardons and Parole) has no power to pardon or commute a sentence, and when it grants a parole, the effect is not to extinguish the sentence but merely to change the conditions of custody. State ex rel. Herman v. Powell, 139 M 583, 367 P2d 553 (1961).

Conditional Suspension of Sentence Void: Provision in judgment of a Justice of the Peace that jail sentence would be suspended if defendant leave and remain out of the county is in the nature of a conditional pardon and therefore void as an attempted exercise of the pardoning powers reposed in the Governor. Ex parte Sheehan, 100 M 244, 49 P2d 438 (1935).

Court — May Suspend Sentence: The suspended sentence law as construed in this case to the effect that the court may order a sentence suspended after entry of judgment does not infringe the pardoning power of the Governor. State ex rel. Bottomly v. District Court, 73 M 541, 237 P 525 (1925).

District Court — May Not Reduce Sentence After Judgment: The power given the District Court to reduce the extent of punishment fixed by the jury in a criminal prosecution must be exercised prior to or at the time judgment is pronounced, and therefore an order reducing a fine and jail sentence after the judgment had been in process of execution for a number of days was void as in excess of jurisdiction and an encroachment upon the pardoning power reposed by the Constitution in the Governor and the state Board of Pardons (now Board of Pardons and Parole). State ex rel. Reid v. District Court, 68 M 309, 218 P 558 (1923).

Governor — May Impose Restrictions on Pardon: In the exercise of the pardoning power, the Governor is authorized to impose conditions without restriction so long as they are not illegal, immoral, or impossible of performance. In re Sutton, 50 M 88, 145 P 6 (1914).

Attorney General's Opinions

Consecutive Sentences Commuted: Consecutive sentences may be commuted either individually or aggregately. 37 A.G. Op. 43 (1977).

Executive Clemency — Exhaustion of Other Remedies: Under its present rules, the Board of Pardons (now Board of Pardons and Parole) may not postpone consideration of an application for executive clemency until the applicant has exhausted the appeal and sentence review processes. 37 A.G. Op. 43 (1977).

Section 13. Militia.

Convention Notes

Last phrase of subsection (1) regarding protection of life and property is new. Subsection (2) removes sex and age qualifications for militia.

Compiler's Comments

Former Constitutional Provisions: Subsection (1) of this section is similar to Art. VII, sec. 6, 1889 Mont. Const. Subsection (2) of this section is similar to Art. XIV, sec. 1, 1889 Mont. Const.

Case Notes

DECISIONS UNDER 1972 CONSTITUTION

Nature of National Guard Service — State Court Jurisdiction: Members of the National Guard serve a dual responsibility, both to the State of Montana and to the United States of

America. While Guard units consist of members enlisted in the United States Army, they are also a Montana military unit consisting of Montana citizens. The District Court improperly dismissed a suit brought by members of the Montana Army National Guard on grounds that the court did not have jurisdiction, absent proof that the members were on federal active duty as opposed to state active duty. The case was remanded for further findings. Grove v. Mont. Army Nat'l Guard, 264 M 498, 872 P2d 791, 51 St. Rep. 366 (1994), distinguishing Evans v. Mont. Nat'l Guard, 223 M 482, 726 P2d 1160 (1986).

National Guardsman Injured on Weekend Drill, Not During State of Emergency — No Remedy: A National Guardsman alleged that 10-1-504 (repealed 1983) provided a remedy for an injury he received while on routine weekend drill since the section allowed the same benefits to a member of the organized militia "who is wounded, disabled, or dies while on duty in the service of this state" that would have been received if the member had been in federal service. The Supreme Court held that within the context of Title 10, ch. 1, part 5, the words "in the service of this state" clearly referred to active duty during times of state emergency declared by the Governor pursuant to Art. VI, sec. 13, Mont. Const. Since the Guard was not called to emergency service in this case, summary judgment against the guardsman was proper. Evans v. Mont. Nat'l Guard, 223 M 482, 726 P2d 1160, 43 St. Rep. 1930 (1986), distinguished in Grove v. Mont. Army Nat'l Guard, 264 M 498, 872 P2d 791, 51 St. Rep. 366 (1994), overruled in Trankel v. St., 282 M 348, 938 P2d 614, 54 St. Rep. 380 (1997). Trankel was followed in Lake v. St., 282 M 484, 938 P2d 698, 54 St. Rep. 442 (1997).

DECISIONS UNDER 1889 CONSTITUTION

Source of Governor's Powers: The Constitution and laws of the state are the charters of the Governor's powers, and in them he must find the authority for his official acts. Herlihy v. Donohue, 52 M 601, 161 P 164 (1916).

Section 14. Succession.

Convention Notes

New provision based on 25th amendment to U.S. Constitution. If governor dies, is disqualified, or resigns, the lieutenant governor takes his place. If governor is gone from the state more than 45 days or is temporarily disabled the lieutenant governor becomes acting governor. If the lieutenant governor and the attorney general think the governor is unable to perform his duties they may send notice to the legislature. By a two-thirds vote the legislature can decide that the lieutenant governor shall serve as acting governor because the governor is unable to act.

Compiler's Comments

Former Constitutional Provision: Article VII, sec. 14, 15, and 16, 1889 Mont. Const., dealt with succession.

Case Notes

DECISIONS UNDER 1889 CONSTITUTION

Resignation of Governor — Immediate Transfer of Power: There can be no vacancy in an office when there is a person clothed with authority to perform its duties. When the Governor resigns, there is no vacancy in the office in the sense that there is no one left with power to discharge the duties imposed upon the Governor. The powers, duties, and emoluments of the office are immediately transferred to the Lieutenant Governor, who must discharge the duties of the office for the residue of the term for which the Governor was elected. He, as Lieutenant Governor, then acts as Governor. State ex rel. Lamey v. Mitchell, 97 M 252, 34 P2d 369 (1934).

Nature of Right of Lieutenant Governor: The only instance in the 1889 Montana Constitution in which authority was given to one called upon to fill vacancy to hold for the residue of the term was in case of a vacancy in the office of Governor, and in that instance the Lieutenant Governor became Governor by right of succession and not of appointment. State ex rel. McGowan v. Sedgwick, 46 M 187, 127 P 94 (1912).

Section 15. Information for governor.

Convention Notes

No change except in grammar.

Compiler's Comments

Former Constitutional Provision: This section is similar to Art. VII, sec. 10 (part), 1889 Mont. Const.

ARTICLE VII

THE JUDICIARY

Article Compiler's Comments

Former Constitutional Provision: This article is similar to Art. VIII, 1889 Mont. Const.

Article Case Notes

Prima Facie Constitutionality of Legislative Enactments — Limit on Court Contravention of Legislative Power: The constitutionality of a legislative enactment is prima facie presumed, and every intendment in its favor will be presumed unless its unconstitutionality appears beyond reasonable doubt. When the Legislature acts within its constitutional power, courts are unable to contravene such power on any court-presumed grounds of fairness, absent equal protection consequences. Fallon County v. St., 231 M 443, 753 P2d 338, 45 St. Rep. 748 (1988), followed in Stratemeyer v. Lincoln County, 259 M 147, 855 P2d 506, 50 St. Rep. 731 (1993). See also St. v. Clark, 1998 MT 221, 290 M 479, 964 P2d 766, 55 St. Rep. 919 (1998).

Article Law Review Articles

State Constitutional Design and State Constitutional Interpretation, Tarr, 72 Mont. L. Rev. 7 (2011).

The Judicial Article: What Went Wrong?, Bowman, 51 Mont. L. Rev. 492 (1990).

The Montana Supreme Court in Politics, Lopach, 48 Mont. L. Rev. 267 (1987).

The Increasing Use of the Power of Contempt, Hilts, 32 Mont. L. Rev. 183 (1971).

The History and Role of a Supreme Court in a Federal System, Wagner, 20 Mont. L. Rev. 171 (1959).

Section 1. Judicial power.

Convention Notes

Revises 1889 constitution by allowing the legislature to establish "inferior" courts, such as a small claims court, as well as intermediate courts of appeal. Reference in 1889 constitution to senate as court of impeachment is deleted.

Compiler's Comments

Former Constitutional Provision: This section revises Art. VIII, sec. 1, 1889 Mont. Const.

Case Notes

DECISIONS UNDER 1972 CONSTITUTION

Case Rendered Moot by Board's Removal of Position Statement — Specific Relief Achieved: The plaintiff, a nonprofit that opposes assisted suicide and euthanasia, filed a petition seeking to have the board of medical examiners remove a position statement related to Baxter v. State, 2009 MT 449, 354 Mont. 234, 224 P.3d 1211, concerning aid in dying. During the proceeding, the board rescinded its position statements and moved for dismissal. The District Court granted summary judgment because the issue was rendered moot. On appeal, the Supreme Court agreed, holding that the issue was not a justiciable controversy, the specific remedy sought by the plaintiff had been achieved, and there was no evidence to suspect that the same wrong would occur. Montanans Against Assisted Suicide v. Bd. of Medical Examiners, 2015 MT 112, 379 Mont. 11, 347 P.3d 1244.

Public Service Commission Not Vested With Judicial Powers — No Authority in Negligence Action: An electric service customer filed an action in District Court alleging property damage based on a power company's negligence and negligence per se in terminating the customer's electric service. The District Court dismissed the action, reasoning that the customer did not exhaust administrative remedies before the Public Service Commission (PSC). On appeal, the Supreme Court reversed the dismissal on the grounds that the PSC is not vested with judicial powers and does not have the authority to adjudicate a negligence action seeking damages. Schuster v. NW. Energy Co., 2013 MT 364, 373 Mont. 54, 314 P.3d 650.

Challenge to Protest Provision Mooted by County Inaction: Individuals residing within the boundary of a proposed zoning district sought an injunction against Gallatin County, claiming the protest provision of 76-2-205 was unconstitutional. While the parties awaited the injunction hearing, the 30-day postprotest deadline passed without the county taking action. An intervening party moved for summary judgment, which the District Court granted on the basis of mootness because the county had not acted within the statutory deadlines. The Supreme Court affirmed and declined to consider the constitutional challenge under the "capable of repetition" exception.

The challenge never ripened because the zoning district did not fail due to the protest provision, but failed because of county inaction. Gateway Opencut Min. Action Group v. Bd. of County Comm'rs, 2011 MT 198, 361 Mont. 398, 260 P.3d 133.

No Constitutional Prohibition Against Justices' Courts of Record: Hernandez asserted that 3-10-101, allowing the creation of Justices' Courts of Record, violated the provisions of Art. VII, sec. 1, Mont. Const., by abolishing constitutionally created Justices' Courts. The Supreme Court disagreed. Under 3-10-101, counties are given the option but are not required to create Justices' Courts of Record, so constitutionally created Justices' Courts are not abolished. Article VII, sec. 1, Mont. Const., allows the Legislature to create inferior courts by law, and the Legislature properly exercised that authority in adopting 3-10-101 and provided operating rules for Justices' Courts of Record in 3-10-115 to govern operation of the inferior courts of record. Nothing in the constitutional provision prohibits the creation of Justices' Courts of Record, and 3-10-101 is not unconstitutional. Hernandez v. Yellowstone County Comm'rs, 2008 MT 251, 345 M 1, 189 P3d 638 (2008).

Statutes Granting Child Support Enforcement Division Judicial Power to Make and Enforce Child Support Orders Violative of Constitutional Separation of Powers: As part of a marriage dissolution, the District Court ordered that the husband pay monthly child support in a specific amount. The Child Support Enforcement Division (CSED) subsequently notified the court that it intended to modify the order pursuant to its authority in 40-5-272 and 40-5-273. The court, sua sponte, then enjoined CSED from modifying any child support orders issued by a Montana District Court, asserting that CSED's actions in modifying a court order violated the constitutional separation of powers clause. On appeal, CSED maintained that the statutes did not violate the separation of powers clause because: (1) the statutory scheme was merely a quasi-judicial function that did not threaten the institutional integrity of the Judicial Branch; (2) the statutes in question were a reasonable response to both the federal legal requirements for expedited child support modification and the sheer magnitude of child support collection in Montana; (3) CSED was empowered to modify a support order only if the facts changed; (4) every contested modification was subject to a hearing before an administrative law judge; (5) all modifications were subject to judicial review; and (6) the Legislature's grant of jurisdictional authority to CSED was not exclusive. The District Court responded that the statutes were an unconstitutional violation of separation of powers because: (1) they gave CSED judicial power that is exclusively reserved to the judiciary; (2) they gave CSED statutory authority to modify a child support order, file it with the District Court, and then enforce the order as a District Court judgment; and (3) the procedure for judicial review of a CSED modification was not automatic and was limited by the scope of the Montana Administrative Procedure Act. The Supreme Court concluded that 40-5-272 and 40-5-273 are an unconstitutional violation of the separation of powers clause to the extent that they grant CSED the judicial power to make and enforce child support orders without automatic and mandatory judicial review. Although appreciative of the magnitude of the agency's modification and enforcement tasks, the court found that that fact did not justify unbridled departure from constitutional norms respecting the autonomy of the individual branches of government. Seubert v. Seubert, 2000 MT 241, 301 M 382, 13 P3d 365, 57 St. Rep. 1006 (2000), distinguishing Chastain v. Chastain, 932 SW 2d 396 (Mo. 1996), and State of Iowa ex rel. Sara Allee v. Gocha, 555 NW 2d 683 (Iowa 1996).

Appeal From Extension of Temporary Investigative Authority Held Moot — Permanent Custody Transferred to Father: When A.E.'s mother, Teresa, filed a pro se appeal from the District Court's extension of temporary custody and temporary investigative authority of the Department of Public Health and Human Services (Department), Teresa's ex-husband, who was the natural father of A.E., sought and received an amendment to the previous dissolution decree by which his marriage to Teresa was dissolved. The amendment transferred permanent custody of A.E. from Teresa to A.E.'s father. Upon the transfer of custody, the Department sought and received dismissal of its petition for extension of temporary custody and to vacate the District Court's order awarding it temporary legal custody for the purposes of the investigation. On appeal of the award of the extension of temporary investigative authority, the Supreme Court held that the appeal had been rendered moot because the Department no longer had temporary custody of A.E. and because the Department no longer possessed the authority to investigate. For this reason, the Supreme Court dismissed the appeal. In re A.E., 1998 MT 159, 289 M 340, 961 P2d 1265, 55 St. Rep. 638 (1998).

Taxpayer Properly Held in Contempt for Refusal to File Income Tax Returns — Privilege Against Self-Incrimination No Defense: Gillispie failed to file an income tax return for 4 years. The District Court ordered her to file the returns or to show cause why she should not be required

to file them. At the hearing, the Department of Revenue introduced Gillispie's W-2 forms, which showed that she had made the minimum income necessary to require her to file returns. The District Court ordered her to file the returns or be found in contempt. When Gillispie failed to file the returns, the District Court held her in contempt, and Gillispie filed a petition for a writ of habeas corpus with the Supreme Court. The Supreme Court held that the District Court had jurisdiction to order Gillispie to file the returns and jurisdiction to hold Gillispie in contempt and that the District Court also had sufficient evidence to do so. The Supreme Court also held that Gillispie's privilege against self-incrimination does not justify the outright refusal to file a return and cannot be used as a method of evading payment of lawful taxes. The Supreme Court held that she must demonstrate the specific parts of the returns that would result in self-incrimination. Gillispie v. Sherlock, 279 M 21, 929 P2d 199, 53 St. Rep. 507 (1996).

Power of State to Enact and Courts to Enforce Laws Regulating Motor Vehicles: Appellant, appearing pro se, challenged as unconstitutional laws requiring driver's license, mandatory insurance, and vehicle registration. The Supreme Court held that the issues raised by the appellant were frivolous, unreasonable, and groundless in that the court had previously recognized the state's power to regulate motor vehicles in the interests of public safety at the expense of individual rights. Whitefish v. Hansen, 237 M 105, 771 P2d 976, 46 St. Rep. 657 (1989).

Mandatory Transfer of Prosecution of Older Youth to District Court — Not Violation of Doctrine of Separation of Powers: The automatic transfer provisions of 41-5-206(3), providing for the prosecution of older youth for certain offenses in District Court rather than Youth Court, are not a usurpation of the judiciary's power to hear and decide motions and is not in violation of the Montana Constitution's requirement for separation of powers. The transfer provision is within the Legislature's inherent power to create other courts under this section. The 1987 amendment providing for transfer without hearing on mitigating factors was merely a revision of protection afforded youth under earlier legislative action and not a violation of the separation of powers doctrine. In re Wood, 236 M 118, 768 P2d 1370, 46 St. Rep. 228 (1989).

Court Decisions as Binding Authority: Supreme Court decisions are binding authority even when the majority opinion is signed by only three justices, with one justice specially concurring and three justices dissenting. Kaiser v. Whitehall, 221 M 322, 718 P2d 1341, 43 St. Rep. 846 (1986).

Dismissal of Appeal for Mootness: Under the former version of this section before its amendment in 1985, a petition of 60% of the freeholders affected was required for the establishment of a rural special improvement district (RSID). Appellants filed an application for a Writ of Prohibition under the former law to prohibit the County Commissioners from building a swimming pool pursuant to creation of an RSID, alleging that the petition to create the RSID was not in compliance with the law. The District Court denied their application. The Supreme Court affirmed the denial, ruling the question moot because of the 1985 amendment. Porch v. Powder River Bd. of County Comm'rs, 219 M 179, 710 P2d 1364, 42 St. Rep. 1936 (1985).

District Court's Power to Order Payment of Expenditures Beyond Budget: District Court's fiscal year budget was overrun, and this stopped or threatened to stop the efficient and orderly administration of justice and court business, creating an emergency. As a court of competent jurisdiction, the District Court may issue orders for the payment of out-of-budget expenditures that are reasonable and necessary. Compliance with the orders by the members of the Board of County Commissioners or by any other officer in the exercise of his official duties is within the exception to personal liability of the officers provided in 7-6-2323 (now repealed). The officers may pass on the propriety of the claims but may not deny them on the basis that they are outside the budget if the court has duly ordered them paid. State ex rel. District Court v. Whitaker, 210 M 363, 681 P2d 1097, 41 St. Rep. 1104 (1984).

Criminal Contempt and Contempt of Court Distinguished — District Court Without Jurisdiction to Try Criminal Contempt: Criminal contempt, a misdemeanor crime defined in 45-7-309, is an offense against society prosecuted by the state, whereas contempt of court is a judicial power arising out of Art. VII, sec. 1, Mont. Const., and Title 3 that allows a court to enforce its own judgments and maintain decorum in its proceedings. Thus, while only the District Court could have found the defendant in contempt of court for failure to pay a fine from a criminal proceeding of that court, it lacked jurisdiction to try a misdemeanor criminal contempt action for failure to pay the fine because criminal contempt, like most other misdemeanors, must be brought in Justice's Court. St. v. Abrams, 209 M 508, 680 P2d 585, 41 St. Rep. 871 (1984).

Valid Reason for Mandatory Retirement — Legislative, Not Judicial Task: Since compulsory game warden (now game wardens' and peace officers') retirement statute contained no qualifications or justification, it would be in excess of the authority of a court hearing a warden's

suit challenging the statute's validity to hold a factfinding hearing to determine whether there was a basis for the age discrimination grounded in the reasonable demands of the position. That is a legislative function; the effort would be great; and the Legislature, not the courts, has the resources for such an undertaking. Taylor v. Dept. of Fish, Wildlife, & Parks, 202 M 85, 666 P2d 1228, 40 St. Rep. 1112 (1983).

Separation of Powers Argument Rejected: The Supreme Court rejected plaintiff's contention that the panel act violates the prohibitions against unlawful delegation of judicial and legislative power and infringes on the doctrine of separation of powers. The decision of the panel is not enforceable, and unlike the panel decisions in most states, it is not even admissible at trial. Consequently, there are no constitutional violations under the Montana act. Linder v. Smith, 193 M 20, 629 P2d 1187, 38 St. Rep. 912 (1981).

Standing to Challenge Constitutionality of Statute — Death Penalty: One who is neither injured nor jeopardized by the operation of a statute cannot challenge its constitutionality. Since the prosecutor did not ask for the death penalty, the defendant had no standing to contend that the statute is unconstitutional. St. v. Booke, 178 M 225, 583 P2d 405 (1978).

Standing of Environmental Groups: Unlawful environmental degradation is within the judicial cognizance of the state, and environmental groups alleging injury to their members have standing to seek injunctive relief. Mont. Wilderness Ass'n v. Bd. of Health & Environmental Sciences, 171 M 477, 559 P2d 1157 (1976).

Justice of the Peace — Authority to Issue Search Warrants Relating to Illegal Possession of Dangerous Drugs: Justices' Courts are constitutionally created, and where the Legislature has had the opportunity to limit their jurisdiction and has not seen fit to do so, a legislative intent to authorize the practice of Justices' Courts issuing search warrants is presumed, as a Justice of the Peace meets the standard of "a neutral and detached magistrate" to examine the application for a search warrant and determine whether reasonable cause exists for its issuance. St. v. Snider, 168 M 220, 541 P2d 1204 (1975).

DECISIONS UNDER 1889 CONSTITUTION

Judicial Power: "Judicial power", within the meaning of Art. VIII, sec. 1, 1889 Mont. Const., was the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision. Shea v. North-Butte Min. Co., 55 M 522, 179 P 499 (1919).

Senator Not Judicial Officer During Impeachment: A state Senator is a member of the legislative department, though the Senate, when sitting as a Court of Impeachment, is a court exercising judicial functions, with power to judge the law and the evidence. The term "judicial officers" does not include a Senator. The term is limited to Judges of the Supreme and District Courts, Justices of the Peace, and judges of other inferior courts. State ex rel. Haviland v. Beadle, 42 M 174, 111 P 720 (1910).

Distinction Between Court and Judge — Justices' Courts: There is a well-defined distinction between a particular court and the judges of that court, but the authority of the Justice of the Peace and of the Justice's Court, so far as judicial matters are concerned, is identical. State ex rel. Grissom v. Justice Court, 31 M 258, 78 P 498 (1904).

Transfer of Causes Between District Courts: The courts of this state are distinct entities, and the transfer of a cause from one district to another would amount to a change of venue. State ex rel. Boston & Mont. Consol. Copper & Silver Min. Co. v. Clancy, 30 M 193, 76 P 10 (1904).

Authority of Clerk — Letters of Guardianship: The act conferring on clerks of the courts the power in vacation to grant letters of guardianship when no protests or objections are filed thereto cannot be construed to clothe the clerk of a court with authority to hear evidence and adjudicate a person mentally incompetent to care for himself or to manage his property. Such authority would involve the exercise of judicial power, which under the Constitution and law of the state is vested in the judge of the court. In re Kane's Estate, 12 M 197, 29 P 424 (1892).

Law Review Articles

State Constitutional Design and State Constitutional Interpretation, Tarr, 72 Mont. L. Rev. 7 (2011).

Montana's Judicial System—A Blueprint for Modernization, Mason & Crowley, 29 Mont. L. Rev. 1 (1967).

Section 2. Supreme court jurisdiction.

Convention Notes

(1) No change except in grammar. (2) No change except in grammar. (3) Allows Supreme Court to make rules governing itself, other courts and lawyers. Legislature may veto the rules. (4) No change except in grammar.

Compiler's Comments

Former Constitutional Provisions: Subsections (1), (2), and (4) of this section are similar to Art. VIII, sec. 2 and 3, 1889 Mont. Const.

Case Notes

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DECISIONS UNDER 1972 CONSTITUTION

APPELLATE AND ORIGINAL JURISDICTION

Appeal From District Court's Denial of Petition for Writ of Habeas Corpus Prohibited: After the District Court denied a criminal defendant's petition for a writ of habeas corpus, the defendant appealed to the Supreme Court. The Supreme Court held it will no longer consider as an original petition a party's appeal from a District Court's denial of a petition for a writ of habeas corpus. A petitioner must file an original petition for a writ of habeas corpus in the Supreme Court in order for the court to consider it. Thomas v. Doe, 2011 MT 283, 362 Mont. 454, 266 P.3d 1255.

No District Court Subject Matter Jurisdiction Over Attorney Disciplinary Matters: The Supreme Court suspended a Yellowstone County Deputy City Attorney, publicly censured her, and placed her on probation for 2 years. Plaintiff newspaper requested that the District Court provide the documents related to the attorney's disciplinary proceedings, but the District Court declined to release the documents on grounds that it lacked subject matter jurisdiction. On appeal, the Supreme Court affirmed. The Supreme Court, not the District Court, possesses original and exclusive jurisdiction and responsibility in all matters involving the conduct and disciplining of Montana attorneys, and court disciplinary rules provide for the confidentiality of disciplinary procedures. Billings Gazette v. St., 2008 MT 287, 345 M 385, 190 P3d 1126 (2008). See also Boe v. Court Administrator, 2007 MT 7, 335 M 228, 150 P3d 927 (2007).

Statutory Time Period for Filing Appeal of Petition for Adding Lands to Irrigation District Superseded by Rules of Appellate Procedure: The District Court dismissed a petition to extend the boundaries of an irrigation district. One of the parties appealed, but the other party contended that the appeal should be dismissed because it was not filed within the 10-day statutory period set out in 85-7-1810. The Supreme Court disagreed. Under Art. VII, sec. 2, Mont. Const., the Supreme Court has rulemaking authority to govern the appellate process. The court established a 30-day period for filing civil appeals in Rule 4, M.R.App.P. (Title 25, ch. 21), so the statutory timeframe in 85-7-1810 has been superseded. Because the appeal in this case was filed within the 30-day period, the appeal was timely. In re Formation of E. Bench Irrigation District, 2008 MT 210, 344 M 184, 186 P3d 1266 (2008).

Nonjusticiable Ballot Measure Controversy Dismissed: Proponents for a 2006 ballot measure petitioned the Supreme Court to reverse the District Court's invalidation of the legal sufficiency of the ballot measure to allow the measure to be placed on the ballot. However, the Supreme Court previously held in Montanans for Justice: Vote No on CI-98 v. St., 2006 MT 277, 334 M 237, 146 P3d 759 (2006), that the ballot measure was invalid and that no votes for the measure would be counted. Lacking jurisdiction over nonjusticiable matters, the Supreme Court may raise questions of justiciability sua sponte, but moot questions and advisory opinions are among matters that exceed the court's jurisdiction. A question becomes moot when effective relief can no longer be granted, and a justiciable controversy is one upon which the judgment of the court

may effectively operate. In this case, even if the Supreme Court determined that the District Court erred when it overruled the Attorney General's determination of legal sufficiency, votes for the initiative could not be counted because the Secretary of State's certification of the ballot measure was invalidated in Montanans for Justice. Additionally, the decision in Montanans for Justice ensured that any judgment in the present case would have no effect on the rights of the parties, so this appeal was reduced to a request for an advisory opinion that exceeded the court's jurisdiction. Thus, this nonjusticiable appeal was dismissed. Not in Montana: Citizens Against CI-97 v. St., 2006 MT 278, 334 M 265, 147 P3d 174 (2006).

Interpretation of Wyoming Arbitration Law by Montana Supreme Court: Plaintiff brought a case in Montana against a limited liability company, of which plaintiff was a member, and against six other members. The District Court ordered the parties to arbitrate the disagreement pursuant to the company's operating agreement, which stipulated that Wyoming law would govern the arbitration. The arbitrator ordered a transfer of units to plaintiff and found that plaintiff was liable for $2.5 million in nominal and exemplary damages for defaulting on his obligations. Plaintiff moved to vacate the arbitration award, but the motion was denied, and defendants' motion to confirm the award was granted. On appeal, the Montana Supreme Court decided to interpret Wyoming arbitration laws, including several issues of first impression. The Supreme Court held that: (1) issues on appeal should be addressed under Wyoming law; (2) plaintiff's motion to vacate was timely filed; (3) sufficient findings supported the arbitrator's award under Wyoming law; (4) the District Court did not abuse its discretion in finding that, under Wyoming law, plaintiff had defaulted and was liable for damages; (5) the amended judgment correctly reflected relative ownership interests in the company following the transfer of shares to plaintiff; and (6) the District Court did not abuse its discretion in confirming the arbitrator's awards pursuant to Wyoming law. Wallace v. Hayes, 2005 MT 253, 329 M 23, 124 P3d 110 (2005).

Out-of-Time Appeal in Criminal Matters — Exclusive Jurisdiction With Supreme Court: Under 46-20-101, the only method for review in criminal cases is by notice of appeal. Time limits for filing an appeal are mandatory and jurisdictional. If a defendant takes no action to perfect an appeal within 90 days of judgment, the District Court loses its jurisdiction and the appeal is out-of-time. However, an out-of-time appeal is a remedy that may be available to a criminal defendant who, through no fault of the defendant, misses a deadline for filing an appeal. Although former Rule 21(b), M.R.App.P. (now superseded), precludes an out-of-time appeal in a civil case, the Supreme Court is not precluded from addressing a motion for an out-of-time appeal in a criminal case. Further, a District Court lacks jurisdiction to grant an out-of-time appeal. The Supreme Court has exclusive jurisdiction to grant a motion for an out-of-time appeal, and the motion is considered an original proceeding subject to the provisions of former Rule 17, M.R.App.P. (now superseded). Upon a showing that the failure to timely notice a criminal appeal was excusable under the circumstances, the Supreme Court may conclude that an out-of-time appeal is the appropriate remedy pursuant to former Rule 21(b), M.R.App.P. (now superseded). In that event, the matter will be remanded to the District Court with instructions to vacate and reenter judgment to afford the defendant a second opportunity to act within the statutory timeframes for filing notice of appeal. St. v. Tweed, 2002 MT 286, 312 M 482, 59 P3d 1105 (2002).

Exercise of Original Supreme Court Jurisdiction Based on Statewide Importance of Tribal Water Rights: The Confederated Salish and Kootenai Tribes petitioned the Supreme Court to exercise original jurisdiction in a case involving the use of ground water on the Flathead Indian Reservation. The Supreme Court found this to be an appropriate case in which to exercise original jurisdiction because: (1) the petition implicated constitutional water rights issues under Art. IX, sec. 3, Mont. Const.; (2) tribal water rights are of statewide importance; (3) the decisive issue was purely legal or constitutional; and (4) the normal litigation process was inadequate. Confederated Salish & Kootenai Tribes v. Stults, 2002 MT 280, 312 M 420, 59 P3d 1093 (2002), following In re Application for Beneficial Water Use Permit, 278 M 50, 923 P2d 1073 (1996), and Confederated Salish & Kootenai Tribes v. Clinch, 1999 MT 342, 297 M 448, 992 P2d 244 (1999).

Acceptance of Original Jurisdiction to Address Insurer-Imposed Billing Rules and Procedures: Several attorneys petitioned the Supreme Court for a determination whether insurer-imposed billing and practice rules conflicted with the Rules of Professional Conduct for Montana attorneys. The court accepted original jurisdiction but denied a request from the respondent insurers for an evidentiary hearing. Insurers contended that the court erred in doing so, on grounds that there was no justiciable case, the petitioners lacked standing, and there was no issue of statewide importance. The court found the insurers' arguments to be wholly without merit. The Supreme Court has a constitutional mandate to fashion and interpret rules for the professional conduct

of attorneys. Whether the insurer-imposed billing and practice rules conflicted with the Rules of Professional Conduct was a question of law that required no evidentiary hearing. The tension between the two rules created an appearance of impropriety that formed a sufficient basis for the court to exercise its inherent powers and constitutional mandate to address the issue. Petitioners clearly had a personal stake in the issue and thus did not lack standing. Insurers' contention that the issue was not of statewide importance and that they did not have notice and opportunity to respond was belied by the more than 1,000 pages of affidavits, expert opinions, billing and practice rules, and amici briefs submitted by the insurers. In re Rules of Professional Conduct & Insurer Imposed Billing Rules & Procedures, 2000 MT 110, 299 M 321, 2 P3d 806, 57 St. Rep. 433 (2000).

Question of Issuance of Water Use Permits on Reservation Appropriate for Exercise of Supreme Court Original Jurisdiction: The Confederated Salish and Kootenai Tribes petitioned the Supreme Court to accept original jurisdiction and enjoin the state from issuing water use permits on the Flathead Indian Reservation until such time as the tribes' water rights were quantified. The state contended that this was not an appropriate case for the exercise of original jurisdiction because a factual record was necessary in order to determine whether the tribes' rights had been affected and that the appeal process was adequate for development of the factual and legal issues presented by the tribes' petition. The Supreme Court concluded that this was an appropriate case in which to exercise original jurisdiction and entertain the tribes' petition because: (1) the petition implicated Art. IX, sec. 3, Mont. Const.; (2) tribal water rights are of statewide importance; (3) the decisive issue was purely legal or constitutional; and (4) the normal litigation process was inadequate because in the time that it might take for the case to proceed through the courts, any number of water use permits could be issued and water appropriated unlawfully pursuant to those permits. Confederated Salish & Kootenai Tribes v. Clinch, 1999 MT 342, 297 M 448, 992 P2d 244, 56 St. Rep. 1356 (1999). See also Grossman v. St., 209 M 427, 682 P2d 1319, 41 St. Rep. 804 (1984), and Stuart v. Dept. of Social and Rehabilitation Services, 247 M 433, 807 P2d 710, 48 St. Rep. 238 (1991).

Supreme Court Power to Review Legislative Act for Constitutional Conformity Not Violative of Separation of Powers Doctrine: Although the Montana Constitution confers upon the Legislature the exclusive power to set appropriate punishments for criminal acts, the Supreme Court is constitutionally vested with the exclusive power to review whether a particular legislative act conforms to the constitution. Thus, the court's holding that the Montana weapon enhancement statute was violative of state constitutional double jeopardy protections was not a violation of the separation of powers doctrine. St. v. Guillaume, 1999 MT 29, 293 M 224, 975 P2d 312, 56 St. Rep. 117 (1999). See also In re License Revocation of Gildersleeve, 283 M 479, 942 P2d 705, 54 St. Rep. 735 (1997), and St. v. Walker, 2001 MT 170, 306 M 159, 30 P3d 1099 (2001).

Denial of Bond Pending Appeal — Method of Supreme Court Review — Jurisdiction: After conviction for negligent homicide and on related charges, Ingraham moved the District Court to continue bond pending appeal. The District Court denied the motion, finding that Ingraham was a danger to the community and therefore did not meet the requirements of 46-9-107. Ingraham then moved the Supreme Court, pursuant to former Rule 22, M.R.App.P. (now superseded), to continue bond pending appeal or, in the alternative, to accept appeal of the District Court's order denying bond, pursuant to former Rule 1, M.R.App.P. (now superseded), and 46-20-104.

The Attorney General moved to dismiss, contending that there was no provision in law for appeal from a District Court order denying bond pending appeal and that Ingraham should have brought an original habeas corpus proceeding. The Supreme Court agreed with the Attorney General and dismissed Ingraham's motion or appeal, holding that Ingraham should have brought a petition for a writ of habeas corpus pursuant to 46-22-103. Ingraham then filed a petition for a writ of habeas corpus, which was filed with Justice Trieweiler pursuant to 3-2-212. Justice Trieweiler granted the petition to the extent necessary for the District Court to hold an evidentiary hearing as provided by statute, under the theory that the District Court was the more appropriate court for the hearing than was the Supreme Court. The Attorney General opposed the order by applying to the full Supreme Court for a writ of supervisory control, arguing, contrary to the state's previous position, that 46-22-103 does not really apply to persons convicted in a criminal case and that the more appropriate procedure was an original proceeding "in the nature of habeas corpus" before the full Supreme Court. The application for a writ of supervisory control was denied, was treated by the Supreme Court as a late-filed response to Ingraham's petition for a writ of habeas corpus, and was referred to Justice Trieweiler. Justice Trieweiler determined that it was inappropriate for him alone to determine the form of review of the District Court's denial of bond. Justice Trieweiler also determined that: (1) Ingraham

had no constitutional right to bond pending appeal; (2) Ingraham did have a right to the proper exercise of the District Court's discretion in the application of 46-9-107; and (3) that right was a substantial right for the purposes of 46-20-104. For these reasons, Justice Trieweiler vacated his previous order granting Ingraham's petition for a writ of habeas corpus and referred the matter to the full Supreme Court for review of the District Court's order denying bond pending appeal. St. v. Ingraham, 284 M 77, 945 P2d 16, 54 St. Rep. 614 (1997).

Section 1983 Action — Denial of Summary Judgment on Qualified Immunity Held Not Appealable — Lack of Supreme Court Jurisdiction — Sanctions Awarded: After a riot at the Montana State Prison (MSP) in which several prison inmates were killed or injured, inmates brought a negligence and section 1983 action against MSP officials. The MSP officials moved for summary judgment on the issue of qualified immunity from the Section 1983 action. The District Court denied the motion, and the MSP officials appealed the denial. The Supreme Court held that the Supreme Court had no jurisdiction over the appeal from the District Court's denial of the summary judgment motion because the District Court order is not a final judgment within the meaning of former Rule 1(b)(1), M.R.App.P. (now superseded), and that the appeal was likewise not authorized by former Rule 1(b)(2) or (3), M.R.App.P. (now superseded). The Supreme Court noted that this result is not changed by the state's allegation that the record in "ripe for appeal" and is "easily reviewable". The Supreme Court also held that the case law of the federal courts interpreting 28 U.S.C. 1291, especially Mitchell v. Forsyth, 472 US 511 (1985), and Johnson v. Jones, 515 US 304, 132 L Ed 2d 238 (1995), 115 S Ct 2151 (1995), was not relevant because the Montana Supreme Court derives its authority over appeals from the state constitution and the Montana Rules of Appellate Procedure and not from 28 U.S.C. 1291. Because the appellants had not made any arguments in favor of their appeal, the Supreme Court determined that it was frivolous and, pursuant to former Rule 32, M.R.App.P. (now superseded), awarded the respondents their attorney fees on appeal. In re Litigation Relating to Riot, 283 M 277, 939 P2d 1013, 54 St. Rep. 598 (1997).

Factors Necessary for Acceptance of Original Jurisdiction:

Although it is correct that prior to the decision in State ex rel. Racicot v. District Court, 244 M 521, 798 P2d 1004 (1990), the Supreme Court had exercised supervisory control under all three circumstances set forth in the Racicot test, subsequent decisions interpreted Racicot to mean that all three circumstances must be present before supervisory control will be accepted. However, the Supreme Court recognizes that there will be circumstances that are appropriate for the exercise of supervisory control that do not satisfy the three-part test. To the extent that Racicot suggests that all three elements must be established and to the extent that subsequent decisions have applied the test in that fashion, they are reversed. Plumb v. District Court, 279 M 363, 927 P2d 1011, 53 St. Rep. 1187 (1996).

Once standing to bring an action is established, the question shifts to whether the action meets the necessary factors for the Supreme Court to accept original jurisdiction. Assumption of original jurisdiction is proper when: (1) constitutional issues of major statewide importance are involved; (2) the case involves purely legal questions of statutory and constitutional construction; and (3) urgency and emergency factors exist, making the normal appeal process inadequate. Butte-Silver Bow Local Gov't v. St., 235 M 398, 768 P2d 327, 46 St. Rep. 87 (1989), followed in State ex rel. Racicot v. District Court, 244 M 521, 798 P2d 1004, 47 St. Rep. 1785 (1990). See also State ex rel. Greely v. Water Court, 214 M 143, 691 P2d 833 (1984), State ex rel. Nelson v. District Court, 262 M 70, 863 P2d 1027, 50 St. Rep. 1447 (1993), and Craig v. District Court, 262 M 201, 864 P2d 791, 50 St. Rep. 1515 (1993).

Dismissal of "Friendly Suit" as Nonjusticiable Controversy: Relator applied to the Supreme Court to commence an original proceeding for declaratory judgment, writ of mandate, and other appropriate relief. He sought a court requirement of the Secretary of State to commence the administrative process for inclusion of two constitutional initiatives in the next regular statewide election. The court found no justiciable controversy existed because the Secretary of State had already advised county election officials that he intended to place the initiatives on the ballot, which was essentially the same relief relator sought through the court by his "friendly suit". A declaratory judgment and writ of mandate are inappropriate in the absence of a justiciable controversy; therefore, relator's application for an original proceeding was dismissed. Marbut v. Secretary of St., 231 M 131, 752 P2d 148, 45 St. Rep. 487 (1988).

Declaratory Judgment on Requiring Prepayment of Jury Fees by Party Demanding Jury: The Supreme Court took original jurisdiction of, and heard, a petition for a declaratory judgment that it was unconstitutional to require prepayment, by a party requesting a civil jury trial, of each day's jury fees at or before the end of the prior day. The requirement was contained in Rule 14F,

M.J.C.R.Civ.P. (Title 25, ch. 22, superseded 1990). There was a justiciable controversy of statewide impact in that the rule applied to all justice courts; delay could abridge vital constitutional rights of litigants; the purpose of the declaratory judgment would serve the office of a writ, and the court has jurisdiction to issue, hear, and determine writs; and it would promote judicial economy to accept jurisdiction rather than force piecemeal litigation on the constitutionality of the rule. The court said that the prepayment requirement was contained in the rule and 3-15-203, which provided that "In civil actions, the jurors' fees must be paid by the party demanding the jury and taxed as costs against the losing party", and declared both the statute and rule unconstitutional. Hammer v. Justice Court, 222 M 35, 720 P2d 281, 43 St. Rep. 1040 (1986).

Supreme Court Original Jurisdiction Over Declaratory Action Concerning Statewide Water Adjudication: The Supreme Court had power to determine an action for declaratory judgment involving the constitutionality of the requirement in 85-2-234 that final water decrees state "the amount of water, rate, and volume, included in the right". The issue affects all rights in the statewide adjudication process. Determination of the issue by the Supreme Court: (1) will provide guidance to the water court; (2) is in the interests of judicial economy; and (3) would serve the public policy of the state by expediting the determination of existing water rights. McDonald v. St., 220 M 519, 722 P2d 598, 43 St. Rep. 576 (1986), rehearing denied, 220 M 519, 722 P2d 598, 43 St. Rep. 1397 (1986).

Original Jurisdiction — Declaratory Judgments: Plaintiff filed a complaint for declaratory judgment in the Supreme Court seeking to determine the validity of several acts of the Legislature allowing the issuance of state revenue bonds. The bonds would be financed by coal severance taxes to provide proceeds for development of state water resources. The Supreme Court accepted original jurisdiction of the declaratory judgment action. The court relied on Forty-Second Legislative Assembly v. Lennon, 156 M 416, 481 P2d 330 (1971), and the transcripts of the 1972 Constitutional Convention proceedings to determine that the original jurisdiction of the court as contained in the 1889 Montana Constitution was intended to be continued in the 1972 Montana Constitution. The court held that it does have original jurisdiction to accept declaratory judgment proceedings when the issues have impact of major importance on a statewide basis or upon a major segment of the state and when the purpose of the declaratory judgment proceedings will serve the office of a writ provided by law in accordance with Art. VII, sec. 2(1), Mont. Const. Grossman v. St., 209 M 427, 682 P2d 1319, 41 St. Rep. 804 (1984).

Starting Point for Running of Period for Filing Appeal — Workers' Compensation: For an appeal from a final decision of the Workers' Compensation Judge to be filed in the manner provided by law for appeals from the District Court in civil cases, there must be a date that is the starting point for the running of the period for filing notice of appeal under former Rule 5, M.R.App.Civ.P. (now Montana Rules of Appellate Procedure, now superseded). In that there is no judgment book in the Workers' Compensation Court in which to enter the judgment and therefore there can be no notice of entry of judgment, the court established, under the powers granted by Art. VII, sec. 2, Mont. Const., that the date on which a decision becomes final under ARM 2.52.222 (now repealed) shall be the starting point for the running of the period for filing the notice of appeal. McMahon v. The Anaconda Co., 194 M 546, 828 P2d 374, 38 St. Rep. 1233 (1981).

Closure of Voir Dire Examination to Public and Press Vacated: At the commencement of Gene Austad's trial, the District Court directed that the individual voir dire examination of prospective jurors be closed to the press and public. The Great Falls Tribune filed an original proceeding in the Supreme Court seeking a Writ of Supervisory Control. The Supreme Court directed the District Court to allow the press and public to attend the voir dire examination. The court found that there is nothing in subjecting the prospective jurors to an open and public voir dire examination that would deny or impair Austad's right to a speedy trial. The Montana Constitution imposes a stricter standard in order to authorize closure of a trial than does the United States Constitution. Great Falls Tribune v. District Court, 186 M 433, 608 P2d 116 (1980).

Habeas Corpus — Exhaustion of Remedies — Procedures — Interstate Corrections: Petition for a Writ of Habeas Corpus was denied prisoner convicted in Montana but imprisoned in Nevada because state remedies had not been exhausted. Evans v. Wolff, 427 F. Supp. 400 (D.C. Mont. 1977).

Original Jurisdiction — Malicious Prosecution: Appeal by Attorney General from denial of motion to dismiss suit based upon malicious prosecution is a proper case for Supreme Court to exercise its original jurisdiction. State ex rel. Dept. of Justice v. District Court, 172 M 88, 560 P2d 1328 (1976).

Habeas Corpus — Absence of New Facts: Where petition for Writ of Habeas Corpus shows no new facts not previously considered by Supreme Court, the Writ will be denied. Gallagher v. Crist, 172 M 51, 560 P2d 538 (1976).

Habeas Corpus — Exhaustion of Remedies in Neglect Proceeding: In child neglect proceeding a writ will not be granted if adequate remedies have not been exhausted notwithstanding petitioner's loss of remedy by not making timely appeal. Stubben v. Flathead County Dept. of Public Welfare, 171 M 111, 556 P2d 904 (1976).

Writ of Certiorari Will Not Lie — Police Commission Hearing in Progress: A Writ of Certiorari is not proper where the proceedings to be reviewed are pending or undetermined because before a Writ of Certiorari will lie there must be an absence of the right of appeal, which cannot arise while proceeding is in progress but only after a decision or judgment is rendered. In re DeWar, 169 M 437, 548 P2d 149 (1976).

SUPERVISORY CONTROL

Supervisory Control Granted — Appeal Cannot Undo Damage to Privacy Right for Unwarranted Psychological Evaluation: After being hit by a vehicle that left the scene, the plaintiff sought compensation from her insurer under her uninsured motorist coverage for past and future medical expenses and for physical and emotional pain, suffering, and anxiety associated with the physical injuries. The District Court issued an order for an independent psychological examination for the purpose of determining whether the plaintiff's chronic pain was caused or exacerbated by preexisting mental health issues. Subsequently, the Supreme Court granted the plaintiff's request for supervisory control based on the factors in Rule 14(3), M.R.App.P. (Title 25, ch. 21), reasoning that an appeal of a final judgment could not undo the damage to the plaintiff's privacy right caused by an unwarranted psychological evaluation. Lewis v. District Court, 2012 MT 200, 366 Mont. 217, 286 P.3d 577.

Writ of Supervisory Control Appropriate — Remedy by Appeal Inadequate: In a proceeding regarding the interpretation of the Securities Act of Montana in which the District Court ruled that certain tenants-in-common investments were not securities, supervisory control was appropriate because the ruling would cause a significant injustice that could not be remedied by appeal. Redding v. District Court, 2012 MT 144, 365 Mont. 316, 281 P.3d 189.

Letter Written by Insurer's Counsel and Disclosed to Employer in Workers' Compensation Claim — No Application of Attorney-Client Privilege — Protection of Work-Product Doctrine Waived by Disclosure — Supervisory Control Granted: An employee was injured at Roscoe Steel and filed a workers' compensation claim. Zurich, which insured Roscoe Steel, accepted liability for the claim and contracted with a third party to adjust the claim. Over time, the employee and Zurich disagreed about the employee's level of impairment. Eventually, Zurich had an attorney prepare an opinion and evaluation letter regarding the employee's case. The letter was given to Zurich as well as to the claims adjuster, who, without the knowledge of Zurich or the attorney, gave a copy of it to Roscoe Steel. Ultimately, the employee filed an action for unfair claims settlement practices against Zurich and the claims adjuster. As a part of discovery, the employee served a subpoena duces tecum on Roscoe Steel requesting all correspondence with Zurich, the adjuster, and the attorney's law firm. Counsel for Roscoe Steel filed an action to quash the subpoena, citing the attorney-client privilege and the attorney work-product doctrine. After the District Court denied the motion, Zurich petitioned the Supreme Court for a writ of supervisory control, which was granted. The Supreme Court agreed that the attorney-client privilege did not apply because Roscoe Steel and Zurich did not share a common legal interest in the adjustment of the employee's claim and that Roscoe Steel was not protected by Zurich's privilege with its counsel. Similarly, because Roscoe Steel and Zurich did not share common litigation interests, there was no reasonable expectation that Roscoe Steel would keep Zurich's work product confidential, and the privilege had been waived by the letter's disclosure to Roscoe Steel. American Zurich Ins. Co. v. 13th Judicial District Court, 2012 MT 61, 364 Mont. 299, 280 P.3d 240.

Supervisory Control Exercised to Clarify Standard of Review of Sentences by Sentence Review Division: Several defendants who intended to have their sentences reviewed moved that the Sentence Review Division clarify the standard applied to sentences submitted for review. The Division had applied the "clearly inadequate or excessive" standard in Rule 17 of the Division's rules, but defendants asked that the Division instead review cases for equity. Defendants petitioned for supervisory control by the Supreme Court, and the petition was granted pursuant to the court's authority to ensure that the Division complies with applicable constitutional and statutory rules. The court noted that the Legislature did not articulate a specific standard of review, but instead granted the Division authority to adopt rules to expedite sentence review.

The court concluded that the Division's rules provide for an appropriately broad review of the totality of the facts and circumstances of each case, including review for equity, disparity, or considerations of justice. Under 46-18-904, the sentence imposed by the District Court is presumed correct, and after a hearing, the Division then decides if this presumption has been overcome and whether a new sentence should be imposed, after determining whether the original sentence was clearly inadequate or excessive. This standard is a valid application of the Division's statutory duty and is the standard to be applied to sentence review. Driver v. Sentence Review Div., 2010 MT 43, 355 Mont. 273, 227 P.3d 1018, clarifying In re Jones, 176 Mont. 412, 578 P.2d 1150 (1978).

Supervisory Control Appropriate to Address Constitutionality of Statute Requiring Person to Remain at Site of Fatal Accident: Steglich was charged with failure to remain at the scene of a fatal accident pursuant to 61-7-103. Steglich moved to dismiss on grounds that the statute was unconstitutionally vague. The District Court held that the statute was vague both facially and as applied to Steglich and granted the dismissal motion. The state filed a petition for supervisory control. The Supreme Court held that urgency or emergency factors existed that made the normal appeal process inadequate and that because the case involved purely legal questions as well as constitutional issues of statewide importance and because the District Court was proceeding under a mistake of law causing a gross injustice, supervisory control was appropriate. St. v. District Court, 2009 MT 163, 350 M 465, 208 P3d 408 (2009).

Mistake of Law — Aunt and Uncle Lack Standing to Petition for Termination of Parental Rights: J.C. is the sole surviving parent of 8-year-old J.R. J.R.'s birth father was killed in 1999 when J.C. crashed the vehicle in which she, J.R.'s father, and another of J.C.'s children were riding. J.C. was pregnant with J.R. at the time. The wreck killed all but J.C. and her unborn child, J.R. J.C. married M.W. M.W. and J.C. have lived together since J.R. was 1 month old. In 2005, J.C. drove the getaway car in a botched armed robbery. J.R. and his half-brother were unrestrained in the back seat of the vehicle when J.C. crashed the car into a tree. J.C. was taken to jail and the children were placed in foster care by the Department of Public Health and Human Services. J.C. pleaded guilty to felony criminal endangerment for her role in the armed robbery and received a 10-year suspended sentence. The sentencing court warned J.C. that if she violated her probation, she would serve the entire 10 years. J.C. ultimately agreed to allow J.R.'s half-brother to move with his father to South Dakota, but J.C. declined to relinquish J.R. to his aunt and uncle despite their offers to assist her. Less than a year after J.C. received her suspended sentence, she admitted to violating her probation by drinking and driving. Her suspended sentence was revoked and she was transported to the women's prison to serve her full sentence. Before she went to prison, J.C. executed a durable power of attorney enabling M.W. to handle her financial affairs. Although J.C. made no provision for J.R. in the power of attorney, she left J.R. in M.W.'s care. M.W. is on probation for failing to register in Montana as a violent offender. On November 21, 2007, G.R. and P.R. filed a petition for termination of parental rights requesting that the court permanently terminate J.C.'s parental rights to J.R. and order the adoption of J.R. by G.R. and P.R. G.R. and P.R. also filed a motion for temporary care pending the disposition of their petition. That same day, the judge issued an order removing J.R. from M.W.'s care and placing him in the temporary care of G.R. and P.R., who reside in Idaho. On December 11, 2007, J.C. filed a motion to dismiss the petition to terminate her parental rights alleging that G.R. and P.R. do not qualify as persons entitled by the adoption statutes to file such a petition as they do not meet any of the standing requirements. However, the following day, J.C. signed an agreement wherein she voluntarily and unequivocally relinquished her parental rights to J.R. and consented to both the permanent transfer of legal and physical custody to and the adoption of J.R. by G.R. and P.R. J.C. was represented by counsel at the time she entered into this agreement. Eight days later, on December 20, 2007, J.C. revoked her consent and moved to dismiss the order for temporary care. She also requested that the court impose sanctions against G.R., P.R., and their counsel on the grounds that the motion for temporary care was not warranted by existing law and was filed for the improper purpose of depriving a parent of her constitutionally protected right to parent her child. That same day, M.W. filed a cross-petition for stepparent adoption. A hearing on the issue of temporary care took place on March 25, 2008. J.C. testified from prison via videoconference. G.R., P.R., and M.W. testified as well. At the time of the hearing, G.R. and P.R. filed a motion to amend their petition for termination of parental rights to add a reference to 40-6-233, giving relatives within the third degree the right to bring an action alleging abuse of parental authority. The court allowed the filing of the amended petition. On May 5, 2008, J.C. filed a motion to dismiss the amended petition, arguing that a parental abuse action is a distinct and separate action that does not confer standing under the adoption statutes. The District Court issued its findings of fact, conclusions of law, and an order on June

11, 2008, in which the court determined that G.R. and P.R. had standing to bring the petition. The court ordered that J.R. remain in the temporary care of G.R. and P.R. pending a hearing on the termination of J.C.'s parental rights. The court also denied J.C.'s motion for sanctions. Thereafter, J.C. filed her petition for writ of supervisory control with the Supreme Court. A hearing on the termination of J.C.'s parental rights was to be conducted by the District Court on September 10, 2008, but that action was stayed pending the outcome of J.C.'s petition. The Supreme Court assumed supervisory control to determine whether G.R. and P.R. had standing to bring the amended petition to terminate parental rights and for adoption. A child's aunt and uncle are not parties authorized by 42-1-107 to place a child for adoption. A child may not be placed for adoption until the parental rights of the birth parents have been terminated by a court as provided in Title 41, chapter 3, or Title 42. G.R. and P.R. did not have standing to file a petition for termination of parental rights under 42-2-603(2). Under Title 41, chapter 3, a petition for the termination of parental right based upon abuse or neglect of a child may only be brought by the County Attorney, the Attorney General, or an attorney hired by the county. Section 40-6-233 refers to the abuse of parental authority for making decisions regarding the support and education of a child and is not the basis for terminating parental rights. Therefore, G.R. and P.R. do not have standing to petition for the termination of parental rights based upon abuse or neglect. J.C. v. Eleventh Judicial District Court, 2008 MT 358, 346 M 357, 197 P3d 907 (2008).

No Mistake of Law in City Court's Failure to Appoint Counsel Given Defendant's Prior Refusal of Appointed Counsel or Appropriate Request: Compton was arrested in Flathead County and charged with first offense DUI. At both Compton's initial appearance in City Court and at the subsequent arraignment hearing, Compton refused appointed counsel. However, a few days later, Compton submitted a whimsical, handwritten document to the Office of State Public Defender (OSPD) in Whitefish requesting appointment of counsel. The OSPD then appeared in court and requested permission to file a notice of appearance on behalf of Compton, but the judge refused to enter the OSPD's appearance because of the absence of documents demonstrating an attorney-client relationship. The OSPD then faxed the handwritten document to the court, but the judge declined to appoint counsel absent a request from Compton, either in person or by an appropriate written request. The OSPD then filed a petition for supervisory control with the Supreme Court requesting that the court order the City Judge to appoint the OSPD to represent counsel. The Supreme Court noted that a writ of supervisory control is appropriate only in extraordinary circumstances when a court is proceeding under a mistake of law that will result in significant injustice if not corrected. Here, the OSPD was unable to demonstrate a mistake of law. Under 47-1-111, it is assumed that a court's initial order for appointment of counsel will follow an appropriate request by a defendant. Compton had twice refused appointed counsel, and the handwritten request lacked credibility and was inappropriate, so refusal to appoint counsel absent a request from Compton, either in person or by an appropriate written request, was not a mistake of law. The Supreme Court denied the petition for supervisory control, noting that if Compton desired appointed counsel, he could submit an appropriate request and that his eligibility could then be determined in accordance with statute. Office of St. Pub. Defender v. Whitefish City Court, 2008 MT 79, 342 M 141, 188 P3d 43 (2008), distinguishing Rios v. Justice's Court, 2006 MT 256, 334 M 111, 148 P3d 602 (2006).

No Exception to Sixty-Day Rule for Prosecutor's Filing of Notice to Seek Death Penalty — Lack of Prejudice to Defendants Irrelevant: The defendants petitioned the Supreme Court to take supervisory control and reverse the trial court's decision that the prosecutor's failure to file the notice to seek the death penalty within the 60 days required by rule was acceptable because the late filing did not prejudice the defendants. The defendants argued that the late filing was a violation of their rights to due process under the federal and state constitutions. The Supreme Court held that it did not have to resort to a due process analysis but that the issue could be decided on the basis of subsection (3) of this section granting the Supreme Court its rulemaking authority. The Supreme Court noted that it had amended Standard 1.1.a. in 2002 to include the 60-day notice rule and that the Legislature had not exercised its right to disapprove the rule in the two following legislative sessions. The state argued that the 60-day rule was subject to exceptions, stating that in the present case, the defendants and their counsel were well aware that the death penalty was a potential punishment and that the notice was filed sufficiently in advance of the trial to afford the defendants ample opportunity to defend against a capital case. The Supreme Court stated that the state's reliance on St. v. Sol, 282 M 69, 936 P2d 307 (1997), for the proposition that the defendants were entitled only to adequate notice was misplaced. The Supreme Court held that even if the defendants' rights to due process were met by adequate notice, that did not nullify their argument that the 60-day notice rule is a mandate.

The defendants argued that the plain language of the 60-day rule was clear and left no room for the trial court to inject the concept of allowing a late notice if a defendant is not prejudiced by the delay. The Supreme Court agreed and held that the court rules were subject to the same rules of interpretation as statutory law and the notice rule was clear on its face that a prosecutor has only 60 days after arraignment to file the notice of intent to seek the death penalty. The Supreme Court pointed out that the rule states that the prosecutor "shall" not "should" or "may" file the notice within 60 days and that the use of shall creates a mandate for when the notice must be filed. Miller v. District Court., 2007 MT 149, 337 M 488, 162 P3d 121 (2007).

Writ of Supervisory Control Proper in Case of Late Filing of Notice to Seek Death Penalty: The defendants petitioned the Supreme Court to take supervisory control and reverse the trial court's decision that the prosecutor's late filing of the notice to seek the death penalty was acceptable because the late filing did not prejudice the defendants. The Supreme Court ruled that it was proper to exercise supervisory control because appealing the ruling was not an adequate remedy because if the prosecutor should have been barred from seeking the death penalty, then the defendants would be subjected to defending themselves from that penalty when they would not have been subject to the penalty in the first place. The Supreme Court stated that if the trial court's ruling was incorrect, then the defendants would be subjected to a gross injustice for which appeal was not an adequate remedy. Miller v. District Court, 2007 MT 149, 337 M 488, 162 P3d 121 (2007).

Probability of Mootness — Writ of Supervisory Control Appropriate When Issue Likely to Arise Again — Appeal Inadequate Remedy: Defendant Courville was charged in Justice's Court with speeding, DUI, and possession of an open container. Courville requested a waiver of a jury trial, and the state objected. The Justice's Court granted the waiver, finding that the statute violated Art. II, sec. 24, Mont. Const. The state filed an application for a writ of supervisory control and a motion for stay of proceedings pending the Supreme Court's review of the application. Courville argued that the case was likely to be dismissed under 46-13-401(2), which requires dismissal of misdemeanor prosecutions if not brought to trial within a certain time period, thus making the issue of waiver of a jury trial moot. The Supreme Court found that there was a justiciable controversy because the issue would very likely arise in future proceedings. The court further concluded that the case was appropriate for the exercise of supervisory control, an extraordinary remedy exercised when a court is proceeding under a mistake of law that, if uncorrected, would cause significant injustice and the remedy of appeal is inadequate. The appeal process in this matter would have provided an inadequate remedy for the state because, upon appeal, the state would have already lost its right to consent or object to waiver of a jury trial. The Supreme Court vacated the waiver of a jury trial, holding that Art. II, sec. 26, Mont. Const., provides a right of a jury trial to the state and that both parties in a criminal trial must consent to waiver. State ex rel. Long v. Justice's Court, 2007 MT 3, 335 M 219, 156 P3d 5 (2007).

Discovery of Corporate Communications Conducted During Former Director's Tenure — No Violation of Attorney-Client Privilege: Plaintiff corporation sought a writ of supervisory control on grounds that the District Court was proceeding under a mistake of law by controlling a discovery attempt by the former director of a corporation to discover communications between the corporation's current directors and corporate counsel that occurred while the former director was a director. Plaintiff contended that allowing discovery violated the attorney-client privilege. The Supreme Court concluded that although the corporation was the client, the directors were jointly responsible for the management of the corporation and that, consistent with this responsibility, the directors must be treated as joint clients with the corporation when legal advice is rendered to the corporation through its officers or directors. When the former director was a corporate officer, he was entitled to access attorney-client communications, and the fact that he was no longer a director was not sufficient cause to render those communications privileged against him. The confidentiality of the attorney-client privilege is not violated when a former director of a closely held corporation who brings claims against the corporation is allowed to discover communication between corporate counsel and other directors that occurred during the former director's tenure as a director. Thus, the Supreme Court declined to accept supervisory control. Inter-Fluve v. District Court, 2005 MT 103, 327 M 14, 112 P3d 258 (2005).

Punishment for Contempt by Judge Who Issues Order Not Erroneous Absent Showing of Impartiality — No Due Process Violation: Drew was appointed to represent a criminal defendant but failed to file an amended petition for postconviction relief as ordered. Following several months of missed deadlines, the District Court held that Drew had failed to provide any plausible explanation for the failure to comply with the court's orders. Drew was then removed from the case, charged with contempt, and sentenced to jail time and a fine. The day before the jail term

was to begin, Drew filed a writ of certiorari and a motion for an emergency stay order, contending that the District Court's action constituted a deprivation of Drew's due process right, including the right to allocution, a hearing before a neutral magistrate, and the opportunity to present testimony through witnesses by way of defense or explanation. The stay was issued, but in an original proceeding, the Supreme Court disagreed, denied the writ, and lifted the stay. Under 3-1-518, the judge who issues a contempt order is authorized to punish the contempt, and the only proviso against the court's punishment authority is if it is shown that the judge would not be impartial. The statute itself provides that the charged person is entitled to a hearing and to examine witnesses and also takes into account the issue of partiality by allowing the charged person to demonstrate that the sitting judge could not be impartial, in which case the neutral magistrate requirement will be imposed. Section 3-1-518 contains its own due process safeguards. Thus, due process is not offended by allowing a District Court Judge to preside over a contempt hearing when the contempt arose from violation of an order of that court issued after a hearing on the merits on the subject of the order. In these situations, the judge who conducted the hearing and issued the order retains the authority to punish that violation by contempt proceedings, as long as the other due process protections in the statute and enunciated by the Montana and U.S. Supreme Courts are met and honored, unless it is shown that the judge could not be impartial. Drew v. District Court, 2004 MT 154, 321 M 520, 92 P3d 1195 (2004).

Supervisory Control Accepted When District Court Proceeding Under Mistake of Law Regarding Time Period for Substitution of Judge: The exercise of supervisory control was appropriate when the District Court was proceeding under a mistake of law regarding the period of time within which a motion must be filed for substitution of a judge pursuant to 3-1-804. State ex rel. Dusek v. District Court, 2003 MT 303, 318 M 166, 79 P3d 292 (2003).

Supervisory Control Denied to Address Discovery Issues: Petitioner sought a writ of supervisory control to address a District Court order directing petitioner to submit to discovery through an independent medical examination in an automobile accident negligence case. The Supreme Court declined to exercise supervisory control. Typically, orders pertaining to discovery are interlocutory in nature and are not generally reviewable in an original proceeding. Original jurisdiction will be exercised when an order places a party at a significant disadvantage in litigating a case. Supervisory control should issue when a District Court proceeds under a mistake of law, causing a gross injustice for which an appeal is not an adequate remedy, but supervisory control is an extraordinary remedy exercised only in extraordinary circumstances. Absent a showing that procedural protections were inadequate to control discovery in an independent medical examination, supervisory control was inappropriate. Hegwood v. District Court, 2003 MT 200, 317 M 30, 75 P3d 308 (2003).

Supervisory Control Appropriate to Address Res Judicata Claim: Following a dispute over the sale of irrigation equipment, H-D Irrigating and Lane sued Kimble Properties and Kimble for false representation of the irrigation equipment and damages. Kimble Properties and Kimble counterclaimed for the balance due on the equipment, alleging that H-D Irrigating was a sham and the alter ego of Lane. The alter ego claim was never pursued. The Supreme Court eventually decided the case in H-D Irrigating, Inc. v. Kimble Properties, Inc., 2000 MT 212, 301 M 34, 8 P3d 95 (2000), and remanded for judgment in favor of Kimble. In an effort to collect, Kimble sought to compel Lane to testify regarding the assets of H-D Irrigating, but rather than appear, Lane filed bankruptcy and received a stay on further proceedings. Kimble then filed an action to collect from Lane personally, again raising the alter ego issue. Lane asserted that the issue had been already decided in the prior litigation and sought supervisory control on res judicata grounds. The Supreme Court held that the case was appropriate for supervisory control because if the res judicata claim was correct, Lane was entitled to summary judgment, but if denial of the summary judgment motion was in error, Lane would be required to defend against the same claim a second time and incur the attendant delay and expense, resulting in a gross injustice. The case was remanded for further proceedings on the alter ego claim. Lane v. District Court, 2003 MT 130, 316 M 55, 68 P3d 819 (2003), following Plumb v. District Court, 279 M 363, 927 P2d 1011 (1996).

Dual Insurance Claims — Supervisory Control Proper to Facilitate Convenience and Judicial Economy: Following a vehicle accident, a couple sought recovery for injuries and loss of consortium and also alleged that the damages exceeded the limits of defendants' coverage, entitling them to recover from their own policy. The District Court bifurcated the claims, and the couple sought relief from the order on grounds that they would be prejudiced by having to prosecute two separate trials. The Supreme Court concurred with the couple and, in the interests of the convenience of the parties and judicial economy, agreed to exercise supervisory control.

State ex rel. Gadbaw v. District Court, 2003 MT 127, 316 M 25, 75 P3d 1238 (2003), following Malta Pub. School District A & 14 v. District Court, 283 M 46, 938 P2d 1238 (1997).

Supervisory Control Proper to Determine Whether Admission of Evidence of Subsequent Accidents With Nonparties Admissible to Disprove Liability for Damages: Following Truman's injury in an automobile accident, she was involved in a second automobile accident and in an accident involving an ultralight aircraft. The District Court held that evidence of Truman's injuries in the second automobile accident and the aircraft accident would be admissible in a trial related to the first automobile accident to disprove causation. Truman requested that the Supreme Court exercise supervisory control because the District Court made a mistake of law that would place Truman at a significant disadvantage in litigating the case. If the District Court's conclusion, that evidence of subsequent accidents with nonparties was admissible, proved incorrect, that conclusion would impact all aspects of the trial, render the trial results unreliable, and substantially increase the cost to Truman in both time and finances. Therefore, the Supreme Court acceded to the request and exercised supervisory control to determine whether the District Court was proceeding based upon a mistake of law. Truman v. District Court, 2003 MT 91, 315 M 165, 68 P3d 654 (2003), following Plumb v. District Court, 279 M 363, 927 P2d 1011 (1996).

Supervisory Control Proper to Determine Scope of Court-Ordered Medical Examination: Pursuant to former Rule 35, M.R.Civ.P. (now superseded), the District Court ordered plaintiff to undergo an extensive independent medical examination by an expert 750 miles away. The examination would have subjected plaintiff to burdensome, painful, invasive, elective, and potentially harmful procedures. Plaintiff requested that the Supreme Court assume supervisory control, asserting that the District Court was proceeding on a mistake of law that posed a risk of gross injustice to plaintiff. The Supreme Court agreed. The extent to which former Rule 35 permits an individual to be subjected to extensive and potentially harmful procedures is an issue of statewide importance, and an appeal from a mistake of law compelled by the rule would be an inadequate remedy. Therefore, the Supreme Court determined that supervisory control was appropriate to determine whether the District Court was proceeding under a mistake of law in ordering the examination. Simms v. District Court, 2003 MT 89, 315 M 135, 68 P3d 678 (2003). See also Winslow v. Mont. Rail Link, Inc., 2001 MT 269, 307 M 269, 38 P3d 148 (2001).

Supervisory Control of Issue Related to Wrongful Death and Survival Action and Evidence of Economic Consumption: Plaintiff sought supervisory control of an action related to evidence of economic consumption as it pertained to a survival action and wrongful death. The Supreme Court found that allowing the District Court to permit the jury to consider evidence of economic consumption in this case would be a mistake of law constituting a deviation from well-established jurisprudence that would alter the cost of and preparation for trial, affect settlement negotiations, and call into question the value of any potential verdict, resulting in additional time and expense for appellate resolution and subsequent litigation. Any remedy available to plaintiff on direct appeal would thus prove inadequate, resulting in a gross injustice. Therefore, the Supreme Court held that this was an appropriate case in which to exercise supervisory control. Payne v. District Court, 2002 MT 313, 313 M 118, 60 P3d 469 (2002).

Exercise of Supervisory Control of Legal Issues Regarding Water Rights: The Water Court accepted a master's report concerning the adjudication of certain Missouri River basin water rights without objection from the Department of Fish, Wildlife, and Parks, ruling that five pre-1973 water rights claims based on diversions for fish, wildlife, or recreation were potentially invalid based on the holding in In re Water Rights in Dearborn Drainage, 234 M 331, 766 P2d 228 (1988) , commonly known as the Bean Lake decision. The state appealed, but the Water Court asserted that the appeal should be dismissed or converted to a petition for declaratory relief or supervisory control. The Supreme Court agreed that compliance with claim examination rules is critical to effective appellate review, but determined that because the Bean Lake decision was the genesis of the alleged confusion over the present matter, the issue should be treated as a continuation of the Bean Lake decision in which the Supreme Court accepted supervisory control. Therefore, the court accepted supervisory control here as well in order to resolve the confusion, promote judicial economy, expedite determination of existing water rights, and assist in avoiding protracted litigation. In re Adjudication of Existing Water Rights of Basin 41I, 2002 MT 216, 311 M 327, 55 P3d 396 (2002).

Right of Substitution in Cases Involving Multiple Parties — Supervisory Control Appropriate: The question of whether a District Court properly interpreted 3-1-804, to require a defendant to demonstrate its adversity to another defendant that had already exercised its right of substitution in order to invoke an independent right of substitution, was an issue of both first impression and statewide importance. Based on these extraordinary circumstances and a particular need to keep

an injustice from occurring, the Supreme Court accepted supervisory control to address the issue. The District Court's interpretation was held to be proper. Goldman Sachs Group, Inc. v. District Court, 2002 MT 83, 309 M 287, 46 P3d 606 (2002).

Denial of Motion to Intervene — Supreme Court Use of Supervisory Control for Immediate Review of Interlocutory Order: Two sporting groups sought to intervene in an action challenging the enforcement of a ballot initiative that prohibited the shooting of alternative livestock for a fee. The District Court denied the motion, so the groups sought a writ of supervisory control, claiming that a direct appeal after a final judgment would be a wholly inadequate remedy. The Supreme Court noted that although an order denying a motion to intervene is not separately appealable under former Rule 1, M.R.App.P. (now superseded), the proper appeal from such an interlocutory order lies after entry of final judgment. However, supervisory control may be used to immediately review an interlocutory order when: (1) there is no remedy by appeal or other remedial procedure and extraordinary circumstances are present; (2) an appeal from a final judgment would impose undue hardship on an applicant and be wholly inadequate as a remedy; and (3) necessary to prevent extended and needless litigation. This case presented the purely legal issue of whether the primary proponents of a ballot issue have a legally protectable interest sufficient to allow intervention in a case challenging the resulting statute. The Supreme Court considered this case to be extraordinary and of statewide importance, noting that appeal following a final judgment would come too late and would not allow the groups to participate in the defense of the initiative that they actively supported, and that if the groups successfully appealed the denial of their motion to intervene after final judgment, extended and needless litigation would result. Thus, the Supreme Court accepted supervisory control because appeal from a final judgment would be a wholly inadequate remedy. Sportsmen for I-143 v. District Court, 2002 MT 18, 308 M 189, 40 P3d 400 (2002).

Order Signed During Judge's Term of Office, but Not Filed Until After Expiration of Judge's Term, Considered Binding: One day before the expiration of her legal term of office, a District Court Judge signed an order affirming an administrative decision in a labor dispute, but the order was not filed until 3 days after the judge's term of office expired. The judge's successor struck the order and directed further proceedings. The union then petitioned the Supreme Court for supervisory control, contending that striking the original order was a mistake of law. The Supreme Court agreed, applying Plumb v. District Court, 279 M 363, 927 P2d 1011 (1996), and accepted supervisory control because of the absence of a plain, speedy, or adequate remedy at law. The court noted that states generally recognize that judgments undergo three phases of final development, including rendition, reduction to writing, and entry, but that states vary in their determination of the stage at which a judgment binds the parties before the court. The court determined that the case most directly on point to the facts in the present case was Cirro Wrecking Co. v. Roppolo, 605 NE 2d 544 (Ill. 1992). The filing of the District Court's order was merely a ministerial function performed by the Clerk of the District Court. The judgment was otherwise properly rendered during the pendency of the judge's term and was binding on the parties at that point, even though it was entered by the clerk after the judge's vacation of office. Further, for purposes of commencing time periods, judgments continue to take effect from the date on which they are filed with the clerk, so that a fixed date is established and known to the parties. Int'l Ass'n of Firefighters, Local No. 8 v. District Court, 2002 MT 17, 308 M 183, 40 P3d 396 (2002).

District Court Proceeding Under Mistake of Law in Determining Whether Implied Consent Statute Applicable to Blood Drawn for Medical Reasons — Supervisory Control Accepted: The District Court suppressed the results of a blood test taken for medical reasons after a DUI suspect declined to give consent for a blood test following a car accident in which the use of alcohol was suspected. The Supreme Court concluded that the District Court was proceeding under a mistake of law, and that if the mistake was left uncorrected, the state would be without an adequate remedy on appeal. Given the state's limited ability to appeal an evidentiary ruling, the Supreme Court accepted original jurisdiction in the matter to prevent the introduction of evidence when correction of the ruling by a later court decision would be ineffective. State ex rel. McGrath v. District Court, 2001 MT 305, 307 M 491, 38 P3d 820 (2001), following State ex rel. Mazurek v. District Court, 277 M 349, 922 P2d 474 (1996), and Park v. District Court, 1998 MT 164, 289 M 367, 961 P2d 1267 (1998).

Time Bar on Writ of Certiorari to Review Contempt Proceedings: In a case of first impression, the Supreme Court was asked to establish a timeframe within which a petition for review of a contempt order must be filed. The issue was whether the time limitation should come from Title 25, which includes the Montana Rules of Civil Procedure and the Montana Rules of

Appellate Procedure, or from Title 27, which prescribes the various statutes of limitation for the commencement of actions. The court noted that there is no appeal, as such, from an order of contempt in a civil proceeding and that the exclusive method of review of civil contempt orders (with certain exceptions) is through a writ of certiorari or writ of review. That review is generally limited to jurisdictional questions and whether evidence supports the contempt. Therefore, the issue of timeliness for filing a petition for a writ of certiorari or review is not a statute of limitations issue, and to mechanically characterize those writs for the review of contempt proceedings as original proceedings governed by the 5-year statute of limitations in 27-2-231 would be to deny the basic nature of appellate review. Further, petitions for writs of certiorari to review contempt proceedings are fundamentally different from other original proceedings commenced in the Supreme Court and from petitions for writs of supervisory control, which do not so much involve appellate review of and a decision on the underlying proceedings as they involve the court dealing with discreet questions of law during the pendency of the underlying proceedings. Because the timeframe in which to file petitions for writs of certiorari to review contempt proceedings is a procedural issue analogous to the procedure for filing a notice of appeal, the Supreme Court held that former Rule 72, M.R.Civ.P. (now superseded), former Rule 1, M.R.App.P. (now superseded), former Rule 17, M.R.App.P. (now superseded), and 27-25-103 require that the timeframe for those petitions be determined by the Montana Rules of Appellate Procedure. Specifically, pursuant to former Rule 5, M.R.App.P. (now superseded), a petition for a writ of certiorari to review contempt proceedings must be filed with the Clerk of the District Court within 30 days of the date on which the District Court enters the contempt finding, unless the state is a party, in which case the petition must be filed within 60 days of the date on which the District Court enters the contempt finding. This may not be construed to limit the Supreme Court's power to grant writs of supervisory control or to consider applications for other types of original proceedings. The Supreme Court chose not to establish a precedent that allows contempt proceedings to be delayed until the underlying cause is resolved. Jones v. District Court, 2001 MT 276, 307 M 305, 37 P3d 682 (2001), overruling Shaffroth v. Lamere, 104 M 175, 65 P2d 610 (1937), to the extent that Shaffroth holds that the general 5-year statute of limitations in 27-2-231 applies to all writs of review authorized in 27-25-102.

Writ of Supervisory Control Inappropriate in Appealing Department of Corrections' Decision Regarding Good Time Allowance — Writ of Habeas Corpus Granted: Inmate Eisenman applied to the Supreme Court for a writ of supervisory control and moved to proceed in forma pauperis, requesting that the court order the Department of Corrections to direct the reduction of his sentence for good time served. Supervisory control is an extraordinary remedy that is appropriate only when a District Court is proceeding upon a mistake of law that, if not corrected, would cause significant injustice and when the remedy by appeal is inadequate. The Supreme Court held that a writ of supervisory control was inappropriate in this case because the court's power to issue that writ extends only to inferior courts, not to other governmental agencies. Eisenman's claims were more appropriately asserted by a writ of habeas corpus because habeas corpus relief is available to every imprisoned person. The state claimed that a writ of habeas corpus was not appropriate either because Eisenman failed to plead that he would be entitled to release if he received the good time credits as requested. However, under Peyton v. Rowe, 391 US 54 (1968), and Garlotte v. Fordice, 515 US 39 (1995), immediate physical release is not the only remedy available under a writ of habeas corpus, so it was not premature to consider a habeas corpus petition prior to Eisenman's release. The Supreme Court thus considered Eisenman's application for writ of supervisory control to be a petition for writ of habeas corpus and proceeded to consider the good time issue on that basis. Eisenman v. St., 2000 MT 170, 300 M 322, 5 P3d 542, 57 St. Rep. 704 (2000).

Supervisory Control Granted to Address Stay of Declaratory Judgment Until Settlement Reached or Judgment Entered: Hill was injured in a vehicle accident caused by the negligence of Bennett, an insured of Safeco Insurance Company of Illinois (Safeco). Although Safeco apparently paid some of Hill's initial medical bills, Safeco eventually disputed the causal relationship between the accident and the injuries, refusing to pay any further medical bills after a specific date. Hill sued Bennett for negligence and Safeco for nonpayment of medical expenses, seeking a declaratory judgment that he was entitled to advance payment of medical costs prior to settlement or final judgment and claiming that a declaratory judgment was proper under the Unfair Trade Practices Act and Ridley v. Guar. Nat'l Ins. Co., 286 M 325, 951 P2d 987 (1997). The District Court granted the declaratory judgment, and Safeco sought a writ of supervisory control because a direct appeal would be an inadequate remedy. The Supreme Court agreed and granted the writ. Safeco's application presented an appropriate legal issue for supervisory control because if the

ordered payment of medical expenses was a mistake of law or incorrect, the delay in awaiting the outcome of the corollary litigation could create an unfair prejudice for Safeco, while any unnecessary delay in the payment of the medical costs would certainly prejudice Hill. Ultimately, the Supreme Court affirmed on grounds that the declaratory judgment did not constitute a money judgment for damages in the ordinary sense, but merely removed all uncertainty and controversy over the issue of when the inevitable policy proceeds were due. Safeco Ins. Co. of Ill. v. District Court, 2000 MT 153, 300 M 123, 2 P3d 834, 57 St. Rep. 604 (2000).

Youth Considered in Custody — Supervisory Control Appropriate When Lower Court Proceeding Under Mistake of Law: Fourteen-year-old Evans was taken by his mother to the Flathead County Sheriff's office, upon request of the Deputy Sheriff, because he had been observed talking to a child on the day of her disappearance. Evans and his mother were separated upon arrival at the office, and Evans was taken to a 9-by-9-foot windowless interrogation room with a shut door where he was questioned for 2 1/2 hours by two officers wearing badges and weapons. Evans waived his Miranda rights outside the presence and without the consent of his mother and without an opportunity to discuss his rights or the waiver with counsel. The officers did not tell Evans that he could leave the interrogation room or consult with his mother, and during the course of the interview, Evans' mother was denied contact with Evans. Although initially adamantly denying involvement, the officers repeatedly suggested that Evans had "more to tell them" and misled him into believing that the police had fingerprints from the girl's body that could be matched to his. Toward the end of the interrogation, Evans confessed that he drowned the child and was charged with her death, arrested, handcuffed, and escorted to juvenile detention without an opportunity to speak to his mother. Evans filed a motion to suppress the confession on grounds that his waiver of rights while in custody was invalid under 41-5-331. The District Court denied the motion, concluding that Evans was not in custody during the interview and that the confession was voluntary. Accepting supervisory control because the District Court was proceeding under a mistake of law, the Supreme Court, finding it difficult to imagine a more "custodial" setting, applied the factors in St. v. Staat, 251 M 1, 822 P2d 643, 48 St. Rep. 1041 (1991), and concluded that Evans was in custody during the interview, that his waiver of rights without the consent of a parent or advice of counsel was invalid under 41-5-331, and that the confession was not voluntary under the totality of the circumstances. Although the record on appeal was not sufficient to determine whether the state had other evidence sufficient to charge Evans, the case was nevertheless remanded for consideration of the evidence without the confession. Evans v. District Court, 2000 MT 38, 298 M 279, 995 P2d 455, 57 St. Rep. 175 (2000), followed, with regard to applicability of the totality of circumstances test for determining voluntariness of a juvenile's waiver and consent, in In re C.T.P., 2004 MT 63, 320 M 279, 87 P3d 399 (2004). See also State ex rel. D.M.B. v. District Court, 2004 MT 335, 324 M 190, 103 P3d 514 (2004).

Negligent Homicide Charges After DUI Guilty Plea — Supervisory Control to Avoid Double Jeopardy Trial: If the District Court's conclusion that the Justice's Court plea of guilty to DUI did not bar subsequent prosecution of two negligent homicide charges arising out of the same auto accident as the DUI charge is proved, on appeal, to be incorrect, the defendant will have been subjected to prosecution even though double jeopardy entitled him to avoid prosecution altogether. Thus, it is clear that an appeal would not be an adequate remedy, and the defendant's application to the Supreme Court for a writ of supervisory control presented legal issues appropriate for the Supreme Court's consideration and would be accepted and decided. State ex rel. Booth v. District Court, 1998 MT 344, 292 M 371, 972 P2d 325, 55 St. Rep. 1395 (1998).

Examination of Defendant by State Psychiatrist — Supervisory Control Granted to Prevent Denial of Defendant's Fifth Amendment Right Against Self-Incrimination: Park, who was charged with forgery and deliberate homicide, filed notice of his intent to use the affirmative defense that extreme mental and emotional stress caused him to commit the offenses and gave notice of his intent to use expert psychological testimony in the course of his defense. The state requested an examination of Park by its own psychological expert, but Park objected to the oral part of the requested examination on the grounds that, first, his defense was not reliance upon a mental disease or defect and the state therefore had no right to a psychological examination, and, second, he did not want to discuss his offenses with the psychological expert for fear of waiving his constitutional right against self-incrimination. The Supreme Court, citing Mapes v. District Court, 250 M 524, 822 P2d 91 (1991), held that the case was appropriate for supervisory control because Park was faced with the loss of a constitutional right as part of the psychological interview and appeal could not prevent the loss of that right. Park v. District Court, 1998 MT 164, 289 M 367, 961 P2d 1267, 55 St. Rep. 657 (1998).

Denial of Bond Pending Appeal — Method of Supreme Court Review — Jurisdiction: After conviction for negligent homicide and on related charges, Ingraham moved the District Court to continue bond pending appeal. The District Court denied the motion, finding that Ingraham was a danger to the community and therefore did not meet the requirements of 46-9-107. Ingraham then moved the Supreme Court, pursuant to former Rule 22, M.R.App.P. (now superseded), to continue bond pending appeal or, in the alternative, to accept appeal of the District Court's order denying bond, pursuant to former Rule 1, M.R.App.P. (now superseded), and 46-20-104. The Attorney General moved to dismiss, contending that there was no provision in law for appeal from a District Court order denying bond pending appeal and that Ingraham should have brought an original habeas corpus proceeding. The Supreme Court agreed with the Attorney General and dismissed Ingraham's motion or appeal, holding that Ingraham should have brought a petition for a writ of habeas corpus pursuant to 46-22-103. Ingraham then filed a petition for a writ of habeas corpus, which was filed with Justice Trieweiler pursuant to 3-2-212. Justice Trieweiler granted the petition to the extent necessary for the District Court to hold an evidentiary hearing as provided by statute, under the theory that the District Court was the more appropriate court for the hearing than was the Supreme Court. The Attorney General opposed the order by applying to the full Supreme Court for a writ of supervisory control, arguing, contrary to the state's previous position, that 46-22-103 does not really apply to persons convicted in a criminal case and that the more appropriate procedure was an original proceeding "in the nature of habeas corpus" before the full Supreme Court. The application for a writ of supervisory control was denied, was treated by the Supreme Court as a late-filed response to Ingraham's petition for a writ of habeas corpus, and was referred to Justice Trieweiler. Justice Trieweiler determined that it was inappropriate for him alone to determine the form of review of the District Court's denial of bond. Justice Trieweiler also determined that: (1) Ingraham had no constitutional right to bond pending appeal; (2) Ingraham did have a right to the proper exercise of the District Court's discretion in the application of 46-9-107; and (3) that right was a substantial right for the purposes of 46-20-104. For these reasons, Justice Trieweiler vacated his previous order granting Ingraham's petition for a writ of habeas corpus and referred the matter to the full Supreme Court for review of the District Court's order denying bond pending appeal. St. v. Ingraham, 284 M 77, 945 P2d 16, 54 St. Rep. 614 (1997).

Bifurcation of Breach of Insurance Contract and Bad Faith Claims — Use of Supervisory Control to Require That Both Claims Be Tried to Same Jury: After the District Court bifurcated the Malta school district's insurance contract and bad faith claims, the school district requested by motion that both claims be tried to the same jury, one claim immediately following the other. The District Court denied the motion, and the school district sought a writ of supervisory control. The Supreme Court granted the writ and directed the District Court to try the contract claim and the bad faith claim to the same jury. Because 33-18-242 contains no standards governing whether a bifurcated case should be tried to the same jury, the Supreme Court looked to cases decided under former Rule 42(b), M.R.Civ.P. (now superseded), for guidance and, after finding the state and federal versions of the same rule sufficiently similar, relied upon Martin v. Bell Helicopter Co., 85 FRD 654 (1980). The Supreme Court held that a two-step process should be used; it should first be determined whether bifurcation is appropriate and then whether the interests of judicial economy, fairness to the parties, clarity of the issues, and convenience require trial of the issues to the same or a different jury. In determining whether to grant the writ of supervisory control, the Supreme Court weighed the same or similar considerations also weighed by the Supreme Court pursuant to Martin v. Bell Helicopter Co. to determine whether separate juries should be used. The Supreme Court reviewed the circumstances of the case and found that the writ of supervisory control should be granted and that the District Court abused its discretion in refusing to try the two claims to the same jury. Malta Pub. School District A & 14 v. District Court, 283 M 46, 938 P2d 1335, 54 St. Rep. 486 (1997), followed in State ex rel. Gadbaw v. District Court, 2003 MT 127, 316 M 25, 75 P3d 1238 (2003).

Exercise of Supervisory Control in Cases Involving Media Challenge to Court-Imposed Restrictions on Access to Information: The District Court issued a restrictive order requiring that any filings referencing evidence in a criminal case be submitted under seal. A newspaper filed for writ of supervisory control, asking the Supreme Court to assume original jurisdiction to correct the District Court's mistake of law in issuing the order. In determining to exercise supervisory control, the Supreme Court cited State ex rel. Mazurek v. District Court, 277 M 349, 922 P2d 474 (1996), holding that legal issues existed that were appropriate for resolution through the writ in order to address a gross injustice resulting from the District Court's mistake of law. State ex rel. The Missoulian v. District Court, 281 M 285, 933 P2d 829, 54 St. Rep. 175 (1997).

Court Order for Suitable Jury Room — Supervisory Control Properly Used — Inherent Powers Not Implicated — Findings Not Clearly Erroneous: Judge Moran issued an order pursuant to 3-5-404 (now repealed) for the Gallatin County Sheriff to provide a specific space in the Gallatin County courthouse for use as a jury room and to have the room remodeled and for the expenses to be paid from the Gallatin County general fund. Gallatin County requested the Supreme Court to take supervisory control to prevent protracted litigation, a request with which Judge Moran joined. However, Judge Moran asked that a District Court Judge be appointed to make findings and conclusions. The Supreme Court accepted jurisdiction in order to prevent protracted litigation of the issues and appointed a neutral District Court Judge, Judge Wilson, to hold a hearing and make findings and conclusions. The Supreme Court held that Judge Moran had the authority under 3-5-404 (now repealed) to issue an order to the Sheriff to provide a suitable jury room; that the space provided by the Sheriff pursuant to the order was "suitable", within the dictionary definition of that word; that because the Legislature provided the authority under which Judge Moran acted, the implied powers of the District Court and the separation of powers doctrine were not implicated by Judge Moran's action; and that the findings of fact concerning the suitability of the room provided by the Sheriff and the suitability of another alternative jury room designated by the County Commissioners were not clearly erroneous. Gallatin County v. District Court, 281 M 33, 930 P2d 680, 54 St. Rep. 46 (1997).

Consideration of Moot Issue of Right to Reasonable Bail: Although a petition to the Supreme Court for a writ of habeas corpus was moot because petitioner was no longer in custody, the issue was the petitioner's right to reasonable bail, and the court accepted jurisdiction to address the substantive issues by writ of supervisory control in order to address a constitutional issue capable of repetition. Wier v. Lincoln County Sheriff's Dept., 278 M 473, 925 P2d 1172, 53 St. Rep. 1013 (1996).

Constitutionality of Statute Regarding Multiple Defendants Proper Issue for Supervisory Control: Although all three circumstances for the exercise of supervisory control in State ex rel. Racicot v. District Court, 244 M 521, 798 P2d 1004 (1990), were not present, the Supreme Court nevertheless concluded that the constitutionality of 27-1-703(6) was an appropriate issue to decide by supervisory control after finding that any remedy available to plaintiffs by appeal was inadequate and that denial of a speedy remedy by supervisory control would be a denial of justice. Plumb v. District Court, 279 M 363, 927 P2d 1011, 53 St. Rep. 1187 (1996), following State ex rel. Deere & Co. v. District Court, 224 M 384, 730 P2d 396 (1986), and followed in Preston v. District Court, 282 M 200, 936 P2d 814, 54 St. Rep. 312 (1997), and Park v. District Court, 1998 MT 164, 289 M 367, 961 P2d 1267, 55 St. Rep. 657 (1998).

Admission of Evidence Under Rape Shield Law — Proper Use of Supervisory Control: The Attorney General petitioned the Supreme Court for a writ of supervisory control in a case in which the District Court had ruled that certain evidence of prior sexual conduct by the victim was admissible in a case charging sexual intercourse without consent. The Supreme Court accepted original jurisdiction of the case, holding that it was a proper case for supervisory control because: (1) once the testimony on prior sexual conduct is given in open court, the injury that the rape shield law was intended to prevent has already occurred; and (2) under 46-20-103, evidentiary rulings under the rape shield law may not be appealed. State ex rel. Mazurek v. District Court, 277 M 349, 922 P2d 474, 53 St. Rep. 678 (1996), cited in Park v. District Court, 1998 MT 164, 289 M 367, 961 P2d 1267, 55 St. Rep. 657 (1998).

Search Warrant Issued by Unqualified Substitute Judge Invalid — Supervisory Control Necessary to Preclude Further Proceedings: In a case in which a search warrant issued by a previously qualified but legally unauthorized substitute judge was held to be void ab initio, the Supreme Court accepted supervisory control and assumed jurisdiction in order to forestall further needless and expensive litigation. The court determined that it would be fundamentally unfair and prejudicial, not to mention a waste of time and a waste of the limited resources of the court and counsel, to proceed further. Potter v. District Court, 266 M 384, 880 P2d 1319, 51 St. Rep. 853 (1994).

Disqualification Unwarranted but Writ of Supervisory Control Granted Because of Aura of Possible Bias: Defendant mining company sought a writ of supervisory control disqualifying a presiding judge based on the fact that: (1) the judge's son was employed by plaintiff's counsel of record as a legal intern; and (2) the judge knew and associated with the partners of that counsel's law firm on a social basis, in particular at a university football game where he was invited to the firm's stadium box for a drink and conversed only about football. The Supreme Court found these facts insufficient to disqualify the judge under the criteria of 3-1-803. However, the court exercised its power of supervisory control under this section to disqualify the judge because the

facts when viewed in light of other circumstances, including the appearance of another attorney from the law firm as a witness and a newspaper article describing the meeting at the football game, rendered the realization of the standard that a judge's conduct should be free from the appearance of impropriety a virtual impossibility. Washington v. Mont. Min. Properties, Inc., 243 M 509, 795 P2d 460, 47 St. Rep. 1366 (1990).

Writ Proper to Clarify Law and Provide Judicial Economy: In a negligence action against a school district and its employees, the District Court granted summary judgment dismissing the school district defendant pursuant to the immunity provisions of 2-9-111 and allowed plaintiffs to amend their complaint to name particular school district employees, namely school janitors, as defendants. This is a proper case for a writ of supervisory control to clarify the law and promote judicial economy. The lack of any issue of material fact renders the case appropriate for disposition upon summary judgment. The problem confronting the District Court is whether 2-9-111 provides immunity to school district employees, thereby entitling them to summary judgment. State ex rel. Eccleston v. District Court, 240 M 44, 783 P2d 363, 46 St. Rep. 1929 (1989).

Criminal Trial Pending — No Emergency Shown — Writ Denied: In 1980, defendant was convicted of the deliberate homicide of his wife. The conviction was reversed in 1982 (St. v. Forsyth, 197 M 248, 642 P2d 1035). Upon his retrial, the jury was deadlocked and a mistrial was declared. Upon the scheduling of the third trial, defendant moved to dismiss: first, for double jeopardy and lack of due process predicated upon a claim of jury tampering and prosecutorial misconduct in the second trial; and second, for lack of a speedy trial. Defendant also moved for a change of venue. The motions were denied by the District Court. Defendant then petitioned the Supreme Court for a Writ of Supervisory Control. The Supreme Court refused to issue the Writ, ruling that, with respect to all four issues, defendant had failed to demonstrate that any emergency exists which renders appeal an inadequate remedy. State ex rel. Forsyth v. District Court, 216 M 480, 701 P2d 1346, 42 St. Rep. 65 (1985).

Supervisory Control of Water Court Accepted — Federal Reserved Water Rights: Following the U.S. Supreme Court decision in Ariz. v. San Carlos Apache Tribe, 463 US 545, 77 L Ed 2d 837, 103 S Ct 3201 (1983), that to the extent state courts have taken jurisdiction over Indian water rights, such jurisdiction is proper, the State requested that the Montana Supreme Court exercise its powers of supervisory control over the state Water Court concerning the adjudication of federal reserved water rights. In assuming jurisdiction, the Supreme Court concluded that factors of urgency and emergency argued for acceptance of original jurisdiction. The request is not barred by the suspension provisions of 85-2-217, as the proceeding will not generally adjudicate an Indian reserved water right or any federal reserved water right. The issues before the court are limited to a determination of the effect of the so-called disclaimer clause of Art. I of the Montana Constitution on subject matter jurisdiction by the Water Court, and whether the Water Use Act is adequate to adjudicate Indian reserved water rights. State ex rel. Greely v. Water Court, 214 M 143, 691 P2d 833, 41 St. Rep. 2373 (1984).

Abuse of Discretion by Denial of Venue: If, upon presentation of a matter to the Montana Supreme Court by means of a writ, it is apparent from the record that a relator will be deprived of a fundamental right, both justice and judicial economy require the court to then resolve the issue in favor of relator. Court's assumption of jurisdiction upon a petition for a Writ of Supervisory Control in which the issue was whether District Court abused its discretion in denying motion for a change of venue was not premature, and the Writ was granted. State ex rel. Coburn v. Bennett, 202 M 20, 655 P2d 502, 39 St. Rep. 2300 (1982), followed, as to the grant of a writ to preserve a fundamental right, in Woirhaye v. District Court, 1998 MT 320, 292 M 185, 972 P2d 800, 55 St. Rep. 1298 (1998).

No Supervisory Control Power in District Court: Relator was arrested for driving while intoxicated. He refused to take a blood alcohol test and subsequently applied to the District Court for a Writ of Supervisory Control on the issue of the admissibility of evidence of the refusal, arguing that the nonlawyer Justice of the Peace was ill equipped to handle the constitutional aspects of his case. Relator appealed from the District Court's ruling against him after hearing the Writ on the merits. The Supreme Court found no power in the District Courts to exercise supervisory control and stated that a Writ of Supervisory Control was not to be used as a means to circumvent the appeal process. Only in the most extenuating circumstances will a Writ be granted. State ex rel. Ward v. Schmall, 190 M 1, 617 P2d 140, 37 St. Rep. 1720 (1980).

Writ of Certiorari Not Proper — Writ of Supervisory Control Proper: Because the Supreme Court did not have a fully certified transcript of the record and proceedings pursuant to 27-25-202, a Writ of Certiorari was not a proper remedy to review a contempt order. But under Art. VII, sec. 2, Mont. Const., the Supreme Court may exercise supervisory power since the relator is

barred from using a Writ of Certiorari. State ex rel. Anderson v. District Court, 188 M 77, 610 P2d 1183 (1980). See also Jones v. District Court, 2001 MT 276, 307 M 305, 37 P3d 682 (2001).

Immediate Appeal From Partial Judgment: This is a proper case for a Writ of Supervisory Control because relator wife has no plain, speedy, and adequate remedy at law by appeal. Neither 40-4-108 nor former Rule 1, M.R.App.Civ.P. (now Montana Rules of Appellate Procedure, now superseded), provide for immediate appeal from a partial judgment. Instead, the right of immediate appeal from a judgment on part but not all of the claims for relief in a single action is governed by former Rule 54(b), M.R.Civ.P. (now superseded). State ex rel. Marlenee v. District Court, 181 M 59, 592 P2d 153 (1979).

Constitutionality of Statute: Because the Supreme Court wished to reexamine the constitutionality of 45-9-101, it exercised its discretion to do so by supervisory control prior to trial rather than limiting defendant to his remedy by appeal in the event of his conviction. State ex rel. Zander v. District Court, 180 M 548, 591 P2d 656 (1979).

Speedy Criminal Trials: Under an application for supervisory control to insure prompt and speedy trials in criminal cases and seeking specific remedial action in various particulars relating thereto, the Supreme Court directed the appointment of a chief District Judge in each multiple judge judicial district. The Supreme Court declined to eliminate peremptory disqualification of District Judges or to limit disqualification of District Judges for cause. Each District Court was directed to establish by rule an omnibus hearing in all criminal cases and to provide a formalized practice and procedure relating thereto. St. v. District Court, 180 M 317, 590 P2d 1104 (1979).

Order by Lower Court to Seek Writ: The Writ of Supervisory Control was denied even though petitioner was ordered by the lower court to seek the Writ to determine jurisdiction in a child custody case. State ex rel. Jennings v. District Court, 178 M 187, 582 P2d 1260 (1978).

Review in Criminal Cases: The Supreme Court, under the constitutionally granted power of general supervisory control over all other courts, suspended rules relating to review in criminal cases which would allow review only by appeal or by postconviction relief and ordered a Justice's Court to grant a stay of proceedings with respect to a charge filed against defendant, conditioned upon a filing by either party in a court of record of an action to promptly terminate the litigation. State ex rel. Turk v. District Court, 177 M 245, 581 P2d 433 (1978).

Standard of Proof Improperly Applied in Pretrial Hearing: It was error for the court in a pretrial evidentiary hearing to acquit defendant by reason of mental disease or defect excluding responsibility when the judge failed to apply the proper standard for measuring the proof required to satisfy the court; thus, review by Writ of Supervisory Control was appropriate. St. v. Hagerud, 174 M 361, 570 P2d 1131 (1977).

Supervisory Control — Remedy for Procedural Morass: Appeal is not an adequate remedy for a case mired in procedural entanglements, and the Supreme Court will accept a Writ of Supervisory Control. State ex rel. Leavitt v. District Court, 172 M 12, 560 P2d 517 (1977). See also State ex rel. Eccleston v. District Court, 240 M 44, 783 P2d 363, 46 St. Rep. 1929 (1989).

Supervisory Writ Not Equivalent to Appeal: An original proceeding under subsections (1) and (2) of this section for a Writ of Supervisory Control is not equivalent to an appeal. Fisher v. District Court, 424 US 382, 47 L Ed 2d 106, 96 S Ct 943 (1976).

Lack of Remedy — Abuse of Discretion: While there is no statutory means provided for an appeal from an order denying a request by the Attorney General to impanel a grand jury, when the facts clearly show that a party has no plain, speedy, or adequate remedy at law and when there is no right of appeal from the order, a Writ of Supervisory Control may issue so that the decision may be reviewed by the Supreme Court. However, when a court abuses its discretionary functions, the Supreme Court may review the abuse by means of supervisory control. State ex rel. Woodahl v. District Court, 166 M 31, 530 P2d 780 (1975).

SUPERVISION OF THE BAR

Dual Representation During Federal Criminal Investigation Violative of Rules of Professional Conduct: The Office of Disciplinary Counsel (ODC) filed a formal disciplinary complaint against an attorney for the attorney's representation of both a husband and wife, without obtaining an informed waiver of any actual or potential conflict, during a federal criminal investigation of the husband and, after the attorney no longer represented the husband, for the attorney's continued representation of the wife in the federal investigation and in divorce proceedings initiated against the husband. The Supreme Court upheld the Commission on Practice's decision to strike an ODC witness's testimony on the basis that the ODC improperly withheld new information from the attorney's counsel. The attorney violated Rule 1.7, Montana Rules of Professional Conduct, by concurrently representing the husband and wife during the federal investigation, regardless of

whether the husband's defense was actually prejudiced, and violated Rule 1.9, Montana Rules of Professional Conduct, by subsequently representing the wife, whose position was materially adverse to her husband, the attorney's former client. In re Neuhardt, 2014 MT 88, 374 Mont. 379, 321 P.3d 833.

Motion to Disqualify Properly Denied — No Violation of Rules of Professional Conduct: The wife in a dissolution proceeding moved to disqualify and enjoin the husband's attorney on the basis that the wife had consulted the same attorney years before the dissolution was filed about representing the wife in a dissolution proceeding against the husband. The District Court denied the motion. On appeal, the Supreme Court affirmed, concluding that disqualification was improper under Rule 1.20 of the Rules of Professional Conduct because the wife did not establish that any of the information she divulged to the attorney could have any impact on the current dissolution proceeding and that it was permissible for the attorney to testify at the disqualification hearing pursuant to Rule 3.7 of the Rules of Professional Conduct and, pursuant to Rules 1.6 and 1.9 of the Rules of Professional Conduct, to use information about her previous contact with the wife to respond to the wife's allegations. In re Marriage of Perry, 2013 MT 6, 368 Mont. 211, 293 P.3d 170.

Former or Current Client — Plaintiffs' Attorney Joins Law Firm Representing Defendants — Motion to Disqualify Firm — Denial of Motion Reversed: The plaintiffs sued a lender for breach of contract, breach of the covenants of good faith and fair dealing, and fraud. Early in the case, the plaintiffs' attorney hired a tax attorney to advise them on certain issues related to their case. The plaintiffs and both attorneys met to discuss the case against the lender. Following the meeting, the plaintiffs received from the tax attorney an engagement letter and a bill, which the plaintiffs paid. A few weeks before the trial date, the plaintiffs received a letter from the tax attorney notifying them that he had taken a position with the law firm representing the lender. This was the plaintiffs' first notice that the tax attorney intended to join the opposing law firm. The plaintiffs moved to disqualify the firm from representing the lender. The lender claimed that the plaintiffs were former clients of the tax attorney and therefore, under the Rules of Professional Conduct, the firm could continue to represent the lender as long as there was a screen in place. The District Court agreed that the plaintiffs were former clients and denied the motion to disqualify. The plaintiffs appealed to the Supreme Court, which reversed the District Court. The Supreme Court concluded that the plaintiffs reasonably believed they were current clients of the tax attorney based on the engagement letter, the fact the bill did not indicate it was a final bill, and the lack of notice. Because the plaintiffs were current clients at the time the tax attorney joined the other law firm, the Supreme Court held that the firm was disqualified from representing the lender. Krutzfeldt Ranch, LLC v. Pinnacle Bank, 2012 MT 15, 363 Mont. 366, 272 P.3d 635.

Commission on Unauthorized Practice of Law Dissolved: Following extensive public comment, the Supreme Court concluded that a petition by the Commission on the Unauthorized Practice of Law to dissolve the Commission should be granted. The court will continue to address cases of unauthorized practice that are properly before the court and will continue to regulate the practice of law by Montana attorneys, but the Attorney General's Office of Consumer Protection will receive, process, evaluate, and address complaints of unauthorized practice of law by nonattorneys. In re Dissolving Comm'n on Unauthorized Practice of Law, 2010 MT 82, 356 Mont. 109, 242 P.3d 1282.

Failure of Commission on Practice to Notify Attorney of Charge — Due Process Violation: The Commission on Practice attempted to discipline attorney Best with a private admonition without notifying Best of the rule that was allegedly violated. The Supreme Court, following In re Ruffalo, 390 US 544 (1968), held that punishing Best for a violation of that rule without giving Best an opportunity to respond to the charge would be a violation of Best's right to fair and due process. The disciplinary proceeding was dismissed with prejudice. In re Best, 2010 MT 59, 355 Mont. 365, 229 P.3d 1201.

Defense Attorney's Retention of Physical Evidence in Ongoing Case — No Violation of Professional Conduct: Olson acted as defense counsel in a child pornography case. While investigating, Olson recovered 13 photographs of children in suggestive poses but came to a good faith belief that the photos were not child pornography or contraband. Olson also believed he was under no compulsion to turn the photos over to authorities absent a court order or applicable discovery statute. Olson then received a protective order from the District Court authorizing him to retain the items. Olson eventually left the case when it was pursued by federal authorities, and the Office of Disciplinary Counsel (ODC) subsequently filed a complaint against Olson for misconduct and obstructing access to evidence. The Commission on Practice determined that

Olson did not violate the rules of professional conduct, and on appeal the Supreme Court affirmed. The ODC failed to demonstrate by clear and convincing evidence that Olson violated the rules by unlawfully concealing or obstructing another's access to evidence, tampering with or fabricating evidence, or engaging in dishonest or deceitful misconduct. In re Olson, 2009 MT 455, 354 M 358, 222 P3d 632 (2009).

Transfer to Disability/Inactive Status Upon Request of Lawyer Facing Disciplinary Proceedings: Pursuant to Rule 28A, Montana Rules for Lawyer Disciplinary Enforcement, upon request by a lawyer who is facing disciplinary proceedings in Montana, the lawyer must be transferred to disability/inactive status. In re Shontz, 2009 MT 298, 352 M 300, 224 P3d 603 (2009).

Costs in Attorney Disciplinary Action Governed by Montana Rules for Lawyer Disciplinary Enforcement: Attorney Potts objected to the statement of costs filed by the Office of Disciplinary Counsel stemming from disciplinary proceedings against Potts before the Commission on Practice, asserted that the Office violated several statutes and former Rule 33, M.R.App.P. (now superseded), in assigning costs as directed in In re Potts, 2007 MT 81, 336 M 517, 158 P3d 418 (2007), and requested a hearing before an adjudicatory panel regarding reasonableness of the costs. The Supreme Court held that, in accord with the court's authority to regulate and discipline attorneys, the Montana Rules for Lawyer Disciplinary Enforcement (MRLDE), not the statutes and rules applicable to civil actions generally, govern costs imposed by the Office as discipline or sanctions against attorneys. Under Rule 9(A)(8), MRLDE, the attorney must pay reasonable costs of any professional services employed by the Commission, and the case was remanded for a hearing before an adjudicatory panel for consideration of the reasonableness of the amount requested by the Office for each category of costs. In re Potts, 2007 MT 236, 339 M 186, 171 P3d 286 (2007).

Charging Unreasonable Fee and Improper Handling of Client's Trust Funds Grounds for Attorney's Sanction: Although the Commission on Practice found that attorney Engel violated no rules of practice and recommended no sanctions, the Supreme Court weighed the Commission's findings and disagreed. Engel violated Rule 1.5 of the Rules of Professional Conduct by charging an unreasonable fee of $121,545 for handling an uncontested trust termination proceeding for which an attorney customarily would have received between $1,500 and $2,500. Engel also improperly commingled hundreds of thousands of dollars of trust funds with his personal operating account rather than depositing the client funds into a trust account, in violation of Rules 1.15 and 1.18 of the Rules of Professional Conduct. The court remanded the case to the Commission for recommendation of an appropriate sanction for the rules violations. In re Engel, 2007 MT 172, 338 M 179, 169 P3d 345 (2007). Following the 2007 Engel decision (Engel II), Engel filed an objection, alleging that the process by which the Supreme Court reviewed the disciplinary proceeding deprived the court of jurisdiction over the formal complaint filed by the Office of Disciplinary Counsel against Engel. The Supreme Court vacated the public censure and accepted briefs on the jurisdiction issue. After a review of the proceedings in Engel I and Engel II, the court concluded that nothing in the process by which the court came to review Engel's disciplinary proceeding deprived the court of its constitutionally endowed authority to regulate lawyer conduct, so the court maintained subject matter jurisdiction throughout. Engel enjoyed the full panoply of rights afforded to lawyers facing disciplinary proceedings, and no procedural due process rights were violated. Engel's public censure was reinstated, and he was assessed with costs of the proceedings and suspended from practice for 60 days. In re Engel, 2008 MT 215, 344 M 219, 194 P3d 613 (2008).

Following remand, the Commission on Practice, citing several mitigating factors, recommended that Engel be subjected to public censure and be required to pay the costs of the disciplinary proceedings, but that no harsher sanctions be imposed. The Supreme Court examined each cited mitigating factor, but failed to find any of the factors persuasive. Engel was therefore not only publicly censured and required to pay the costs of the disciplinary proceedings, but was also suspended from the practice of law for 60 days. In re Engel, 2008 MT 42, 341 M 360, 177 P3d 502 (2008).

Supreme Court Jurisdiction and Standard of Review of Decisions of Commission on Practice: The Supreme Court possesses original and exclusive jurisdiction and responsibility in all matters involving the disciplining of lawyers in Montana. Thus, the court reviews de novo the findings of fact, conclusions of law, and recommendations of the court's Commission on Practice and weighs the evidence upon which the Commission's findings rest. In re Engel, 2007 MT 172, 338 M 179, 169 P3d 345 (2007). See also In re Potts, 2007 MT 81, 336 M 517, 158 P3d 418 (2007).

Petition for Postconviction Relief Alleging Ineffective Assistance of Counsel Filed in District Court — Immunity of Attorney Assisting in Proceedings — Gillham Clarified: At the time of the decision in In re Gillham, 218 M 187, 707 P2d 1100 (1985), petitions for postconviction relief were addressed to the Supreme Court. Because the postconviction procedure has changed, pursuant to 46-21-105, petitions for postconviction relief are now initially filed in District Court. Thus, the Supreme Court clarified that petitions for postconviction relief alleging ineffective assistance of counsel may now be filed in the District Court where the postconviction proceeding is pending. The court affirmed that an attorney ordered to respond to a Gillham order issued by a District Court is not subject to a disciplinary proceeding before the Commission on Practice or subject to charges of malpractice. The immunity extends to all information, testimony, or documents necessarily provided in response to the allegations of ineffective assistance of counsel. Marble v. St., 2007 MT 98, 337 M 99, 169 P3d 1148 (2007).

Fraud Substantiated in Attorney's Handling of Probate Case — Violation of Attorney's Duty of Truthfulness — Public Censure Warranted: Attorney Potts represented parties in a will contest. Two of the parties knew that some joint tenancy accounts were not included in the value of the estate and, in an attempt to secure the funds in the accounts, directed Potts to remain silent as to whether the settlement agreement prepared by Potts included the accounts. Potts failed to notify the court and counsel for the estate that one of his clients intended to obtain the jointly held property regardless of the outcome of any settlement. The Supreme Court subsequently determined in In re Estate of Stukey, 2004, MT 279, 323 M 241, 100 P3d 114 (2004), that the parties intended that the total estate value, including the joint tenancy accounts, be included in the settlement. A professional misconduct complaint was later filed against Potts, alleging that Potts engaged in or assisted in client fraud by failing to disclose material information to opposing counsel and that Potts breached the duty of candor to the tribunal by failing to disclose material information to the court. The Commission on Practice found that Potts knew that his clients were using Potts' services to perpetuate fraud in violation of Rules 1.2(d) and 3.3(a)(2) of the Montana Rules of Professional Conduct (MRPC), that Potts failed to fulfill his ethical obligation to inform the clients that he would not participate in the fraudulent conduct, a violation of Rule 1.2(d), MRPC, and that Potts violated the duty of candor to the tribunal in violation of Rule 3.3(a)(2), MRPC. The Commission recommended that Potts be publicly censured and suspended from the practice of law for 30 days. Potts appealed, raising issues of client confidentiality, asserting that his clients did not engage in fraud because the accounts passed to his client as a matter of law and thus could not have been included as part of the settlement basis, contending that he had no duty to correct opposing counsel's erroneous understanding of the settlement, and arguing that the Commission's proposed sanctions were inappropriate. The Supreme Court held that, by definition, Potts' clients were engaged in fraudulent conduct, that Potts assisted in the conduct by not disclosing the conduct to the court and to opposing counsel in violation of the duty of truthfulness and by drafting a stipulation stating that all disputes had been settled when he knew that the parties relied on a misrepresentation in drafting a settlement, and that Potts could have avoided the situation by withdrawing from representation. Potts' conduct resulted in considerable injury to the parties, requiring one District Court proceeding and two appeals to determine the meaning and scope of the stipulation. The Commission's findings were affirmed. However, the court reversed the suspension of Potts' practice in light of mitigating factors of Potts' history of compliance with the rules of professional conduct and his good character and reputation to this point and held that public censure sufficed to apprise Potts of the gravity of the misconduct. In re Potts, 2007 MT 81, 336 M 517, 158 P3d 418 (2007).

Dual Representation of Two Adverse Clients Violative of Rules of Professional Conduct — Censure and Costs Appropriate: Johnson's firm agreed to represent a woman in a wrongful death action and, a few months later, determined that a second client was a potentially responsible party and filed a complaint against the second client while still representing that client on other matters. The Commission on Practice concluded that Johnson violated the Rules of Professional Conduct by undertaking dual representation of two directly adverse clients and recommended Johnson's public censure and required Johnson to pay a pro rata share of costs. Johnson appealed, asserting: (1) a reasonable belief that dual representation would not adversely affect the relationship with the second client; (2) no intentional or negligent violation of the Rules of Professional Conduct; (3) an absence of selfish or dishonest motive; (4) that both clients actively sought representation from Johnson's firm; (5) the desire to serve the needs of both clients; (6) a reputation for good character and high competence as an attorney, including practicing law for over 30 years without any prior Commission disciplinary record; and (7) a delay in bringing and processing disciplinary proceedings. The Supreme Court affirmed. It was untenable for Johnson

to contend that no conflict of interest existed in asserting on the woman's behalf that the second client negligently caused the death of the woman's husband. Johnson also failed to obtain the informed consent of the second client regarding representation of the woman. The court also noted that nothing in the Rules of Professional Conduct implies that a lawyer has to knowingly violate the rules to be subject to discipline. After considering the mitigating factors, the court agreed that censure and payment of costs were appropriate. In re Johnson, 2004 MT 6, 319 M 188, 84 P3d 637 (2004), followed in In re Wenz, 2004 MT 7, 319 M 200, 87 P3d 376 (2004), and In re Marra, 2004 MT 8, 319 M 213, 87 P3d 384 (2004).

Implied Attorney-Client Relationship — Motion for Disqualification of Attorney — Client's Burden of Showing Reasonable Belief That Attorney-Client Relationship Exists: Defendant telephoned attorney Penwell's office and spoke to the legal secretary regarding possible representation in this action, but never spoke personally to Penwell. Defendant was informed that Penwell was accepting no new cases and was referred to another attorney. Penwell ultimately appeared as counsel for plaintiff, and defendant moved to disqualify Penwell, asserting that confidential information was disclosed during the telephone conversation with the secretary and that the information was imputed to Penwell, creating an attorney-client relationship. At the hearing on the motion, defendant did not disclose what type of information was allegedly disclosed, relying on the conclusory statement that what was disclosed was confidential. The District Court denied the motion, holding that defendant had failed to meet the burden of conclusively establishing the existence of an attorney-client relationship. Defendant appealed, but the Supreme Court affirmed. Although an alleged client should not be required to reveal actual confidences at a disqualification hearing, the alleged client must at least inform the court of the nature of the information disclosed so that the court can make a reasoned judgment. Under the circumstances, defendant could not have reasonably believed that an attorney-client relationship was formed with Penwell, based upon two telephone conversations with the secretary, when defendant never spoke or met with Penwell, and was advised that Penwell would not take the case. Pro-Hand Serv. Trust v. Monthei, 2002 MT 134, 310 M 165, 49 P3d 56 (2002). See also Krutzfeldt Ranch, LLC v. Pinnacle Bank, 2012 MT 15, 363 Mont. 366, 272 P.3d 635.

Creation of Office of Discipline Counsel: By an order dated December 11, 2001, the Supreme Court created the Office of Discipline Counsel, adopted structural changes to the Commission on Practice, and adopted changes to Montana's system of disciplining lawyers. In re Creation of Office of Discipline Counsel, 2001 MT 257, 307 M 210, 53 P3d 861 (2001).

Annual State Bar Membership Dues to Be Set by Supreme Court: In its 1974 order creating a unified State Bar of Montana, the Supreme Court provided that membership dues would be as approved by the court in order to protect the State Bar membership's right to register its say as to the dues structure. The court reiterated its intention to retain the authority to approve or disapprove annual dues increases in Douglas v. St. Bar of Mont., 183 M 155, 598 P2d 1080 (1979). In the years after 1974, the State Bar adopted and amended its bylaws to provide that all changes in dues and fees could be amended or repealed only through a referendum procedure by a majority vote of the voting active members, subject to approval of the court. However, this structure of shared control over dues revenue did not comport with this section, which places the governance and control of the practice of law solely with the Supreme Court. Putting the State Bar membership effectively in control of the dues structure hampered the court's ability to govern and control the practice of law. When presented with a petition by the State Bar for a dues increase, following disapproval by the membership of a dues increase referendum by a 2-to-1 margin, the court noted that under the 1974 order, it could not unilaterally approve an increase in dues that was not first adopted pursuant to the referendum process set out in the bylaws, nor did the 1974 order grant the court leeway to unilaterally amend the bylaws. Therefore, the petition was denied. Instead, the court held its own 1974 order to be unworkable and possibly even unconstitutional and exercised its authority under Douglas and this section to amend the 1974 order to provide that annual membership dues will henceforth be set at the sole discretion of the Supreme Court. The court then increased the annual dues by 50% and directed the State Bar to amend the bylaws to conform to these amendments. In re Petition of St. Bar of Mont. for a Dues Increase, 2001 MT 108, 305 M 279, 53 P3d 854 (2001).

Applicability to Attorney of Ordinance Requiring Safety Inspection Certificate: A city ordinance requiring a business to obtain an annual safety inspection certificate to ensure that the place of business is safe for the public did not carry a penalty that would prohibit an attorney from practicing law. The penalty for a violation is a fine or jail time. In addition, the Supreme Court's exclusive authority to regulate the practice of law does not prohibit certain limited legislative actions in the area. The amount of the certificate fee, which is determined

by the square footage of the business, is reasonable in relation to the safety inspection services. The certificate requirement is a minimal and inoffensive intrusion on the Supreme Court's constitutional authority to regulate attorneys, and the defendant attorney could be convicted for nonpayment. St. v. Radford, 2001 MT 36, 304 M 198, 19 P3d 809 (2001).

Negotiating Settlement With Party Without Consent of Party's Attorney: Settlement between two parties is not voided merely by the fact that an attorney for one party negotiates the settlement with the other party without the consent of the other party's attorney. A client has an absolute right to settle a case without the consent of counsel. In re Estate of Netzorg, 2000 MT 358, 303 M 327, 15 P3d 926, 57 St. Rep. 1525 (2000).

Attorney Failure to Consult Client on Possible Conflict of Interest — Opposing Attorney Failure to Further Pursue Motion to Disqualify: In February 1992, Klemens was served with an amended complaint bringing Klemens into a case. In September 1993, Klemens' motion to disqualify the law firm representing plaintiffs, on grounds of conflict of interest, because the firm had represented Klemens in another matter was denied. Judgment in the case was issued in January 1999, and Klemens appealed denial of the motion to disqualify. Klemens never renewed its conflict of interest objection and did not request from the trial court the relief that Klemens requested on appeal—a new trial. Klemens could have requested an injunction under irreparable harm theory, sought a writ of supervisory control, sought certification of the order denying its motion to disqualify, or reported the alleged conflict of interest to the Commission on Practice. Instead, Klemens did nothing for 6 years. A party may not request relief on appeal that was not requested of the trial court. Denial of the motion to disqualify is affirmed. However, conduct of counsel for both sides must be referred by the Supreme Court to the Commission on Practice, which can pursue appropriate proceedings and any appropriate discipline. Plaintiffs' counsel did not consult with Klemens and obtain Klemens' consent to represent plaintiffs, as required by a professional conduct rule. Klemens' counsel failed to follow up on its disqualification motion. Schuff v. A.T. Klemens & Son, 2000 MT 357, 303 M 274, 16 P3d 1002, 57 St. Rep. 1499 (2000). The decision in Schuff to refer the attorneys involved to the Commission on Practice was held to constitute sufficient notice to preclude claims of delay in disciplinary proceedings in In re Wenz, 2004 MT 7, 319 M 200, 87 P3d 376 (2004), and In re Marra, 2004 MT 8, 319 M 213, 87 P3d 384 (2004). See also Krutzfeldt Ranch, LLC v. Pinnacle Bank, 2012 MT 15, 363 Mont. 366, 272 P.3d 635.

Jurisdiction Over and Authority to Sanction Conduct of Attorney — Motion to Disqualify: It is beyond argument that the Supreme Court has original and exclusive jurisdiction in all matters involving the conduct of attorneys practicing law in Montana. Accordingly, the court and the agency to which the court has delegated disciplinary authority have the exclusive authority to discipline or sanction unprofessional conduct of an attorney, and a lower court cannot give a party relief for misconduct of an attorney or a firm. Violation of a professional conduct rule should not give rise to a cause of action or create a presumption that a legal duty has been breached. The professional conduct rules do not establish substantive legal duties. However, a lower court may consider an attorney's violation of a rule if the violation results in prejudice or adversely affects the rights of another party, as when an attorney is disqualified because of a conflict of interest, because the lower court has inherent authority to control trial administration in the interest of fairness and justice. The essence of a motion to disqualify is that the continued representation of one party by the attorney will prejudice or adversely impact the rights of another party, not that the attorney violated a professional conduct rule, and evidence of violation of a professional conduct rule merely adds additional weight that may tip the scales in favor of disqualification. The rule violation is not prima facie grounds for disqualification or for any other relief. Prejudice must be proved. Schuff v. A.T. Klemens & Son, 2000 MT 357, 303 M 274, 16 P3d 1002, 57 St. Rep. 1499 (2000), followed in In re Wenz, 2004 MT 7, 319 M 200, 87 P3d 376 (2004), In re Marra, 2004 MT 8, 319 M 213, 87 P3d 384 (2004), and Byers v. Cummings, 2004 MT 69, 320 M 339, 87 P3d 465 (2004). See also Krutzfeldt Ranch, LLC v. Pinnacle Bank, 2012 MT 15, 363 Mont. 366, 272 P.3d 635.

In-House Counsel Not Precluded From Bringing Wrongful Discharge From Employment Claim Even if Proof of Claim Requires Disclosure of Confidential Information: Burkhart was hired as in-house counsel for Semitool, Inc. (Semitool). Following his discharge from employment, Burkhart sued Semitool for wrongful discharge. The District Court concluded that even though Burkhart had a right to protection against wrongful discharge, Semitool also had a right to protection of its trade secrets and that because the rights conflicted, the attorney-client privilege must prevail. The court dismissed Burkhart's claim on grounds that he was precluded from bringing an employment claim because, as staff counsel hired to provide legal advice or services, proof

of the claim would require disclosure of confidential matters. Burkhart maintained on appeal that the Wrongful Discharge From Employment Act applied to any employee and that there was no exclusion for attorneys. Semitool argued that because this section gives the Supreme Court sole authority to regulate the conduct of lawyers, the Act is unconstitutional to the extent that it interferes with that authority. Semitool also cited Campbell v. Bozeman Investors of Duluth, 1998 MT 204, 290 M 374, 964 P2d 41 (1998), for the "universal rule" that clients may fire lawyers at any time, for any reason, with or without cause and that for that reason, application of the Act to the employment relationship of staff attorneys and the client employer was not proper. In a case of first impression, the Supreme Court examined two lines of cases from other jurisdictions that appeared to support either conclusion. The court then concluded that the reasoning and analysis in Gen. Dynamics Corp. v. Superior Court, 876 P2d 487 (Calif. 1994), and its progeny were the more sound and realistic approach. The holding in Campbell does not create an absolute right to discharge an attorney with complete impunity no matter the form of the attorney-client relationship. The universal rule does not apply in an attorney-client relationship in which the attorney is the employee of the client because in that context, the client has avoided the traditional relationship and granted the attorney protections that do not apply to independent contractors, but do apply to employees, including the Wrongful Discharge From Employment Act. Further, although this section gives the Supreme Court sole authority to regulate the conduct of lawyers, the court does not have sole authority to regulate employer conduct. The Act pertains solely to employer conduct and does not implicate the conduct of lawyers in the practice of law, and thus, it is not an unconstitutional encroachment on the court's authority for the Act to apply to lawyers as employees or employers. Further, Rule 1.6 of the Montana Rules of Professional Conduct contemplates that a lawyer may reveal confidential attorney-client information to the extent that the lawyer reasonably believes necessary to establish an employment-related claim against an employer who is also a client. Thus, the plain language of the Wrongful Discharge From Employment Act requires courts to recognize an in-house counsel's right to pursue and maintain an action for wrongful discharge, and those claims are within the contemplation of the rules of professional conduct for attorneys. A lawyer does not forfeit rights simply because confidential information must be used to prove them, nor may a client gain the right to cheat the lawyer by imparting confidences. Burkhart v. Semitool, Inc., 2000 MT 201, 300 M 480, 5 P3d 1031, 57 St. Rep. 785 (2000). See also Doe v. A Corp., 709 F2d 1043 (5th Cir. 1983).

Insurer-Imposed Billing Rules and Procedures Violative of Rules of Professional Conduct: When presented with the question of whether an attorney licensed to practice in Montana or admitted pro hac vice may agree to abide by an insurer's billing and practice rules that impose conditions limiting or directing the scope and extent of representation of the attorney's client, the insured, the Supreme Court considered the requirement imposed by some insurers that defense counsel secure the consent of the insurer's claim professional before proceeding with the case, in order to ensure adequate consultation. Insurers cited Jessen v. O'Daniel, 210 F. Supp. 317 (D.C. Mont. 1962), for the proposition that under Montana law, in the absence of a real conflict, the insurer and the insured are dual clients of defense counsel, arguing that as co-client of defense counsel, the insurer may require preapproval of attorney activities. The Supreme Court noted that although decisions subsequent to Jessen recognized the conclusion that an insurance contract may place absolute control of litigation in the hands of the insurer, the dual representation doctrine is not recognized under the Rules of Professional Conduct, but applies only in determining whether the communications between an insurer and its attorneys are subject to the attorney-client privilege. The contractual relationship between insurer and insured does not supersede or waive defense counsels' obligations under the Rules of Professional Conduct. Rather, the Rules of Professional Conduct have application in all cases involving attorneys and clients, and under the rules, the insured is the sole client of defense counsel. The court concluded that defense counsel in Montana who submit to the requirement of prior approval from the insurer violate the Rules of Professional Conduct by fundamentally interfering with their duties to exercise independent judgment and to give their undivided loyalty to insureds. The court noted that the prior approval requirement also creates a substantial appearance of impropriety by suggesting that the insurer, rather than defense counsel, controls the day-to-day details of the defense. In re Rules of Professional Conduct & Insurer Imposed Billing Rules & Procedures, 2000 MT 110, 299 M 321, 2 P3d 806, 57 St. Rep. 433 (2000).

Requirement That Attorney Submit Detailed Descriptions of Services Violative of Client Confidentiality: When presented with the question of whether an attorney licensed to practice in Montana or admitted pro hac vice may be required by an insurer's billing and practice rules to submit detailed descriptions of professional services to outside persons or entities, such

as third-party insurance auditors, without first obtaining the informed consent of the client, insurers cited U.S. v. Mass. Institute of Technology, 129 F3d 681 (1st Cir. 1997), in claiming that as agents of insurers, third-party auditors are part of a privileged community or magic circle within which confidential information may be shared without waiver of attorney-client privilege or work product doctrine. The insurers also cited Indian Law Resource Center v. Dept. of Interior, 477 F. Supp. 144 (D. D.C. 1979), for the proposition that an auditor is a confidential agent of a privileged party, so disclosure of attorney fee information did not waive any privilege. The Supreme Court found neither case persuasive, concluding that third-party auditors are not confidential agents of insureds, but function rather as agents of insurers, and thus are not within the magic circle of confidentiality. Rather, disclosure of detailed billing statements to third-party auditors constitutes disclosure to a potential adversary because there is always the possibility of disputes between auditors and defense counsel and their clients that could result in litigation. As possible adversaries, auditors stand in potential conflict with the interests of insureds in competent representation by defense counsel who exercise their independent professional judgment. The court looked to Rule 1.6 of the Rules of Professional Conduct, which extends to all communications between insureds and defense counsel, making it broader in both scope and protection than the attorney-client privilege and the work product doctrine. Although disclosures of billing information to insurers are permissible because insurers are impliedly authorized to carry out representation, disclosure to third-party auditors is not impliedly authorized. The court also rejected the insurers' argument that insureds' consent by contract to disclosure of billing statements comports with Rule 1.6. An insured executing a liability policy with an insurer cannot know at that time what kind of claim will be brought against that insured, what the issues will be, what kind of services will be undertaken by defense counsel, or the legal consequences that might result from the disclosure of billing information to a third-party auditor. Under Rule 1.6, for an insured to make a fully informed consent to disclosure of detailed billing statements, the consent must be contemporaneous with the facts and circumstances of which the insured should be aware. Thus, disclosure by defense counsel of detailed descriptions of professional services to third-party auditors without first obtaining the informed consent of the insured violates confidentiality under the Rules of Professional Conduct. In re Rules of Professional Conduct & Insurer Imposed Billing Rules & Procedures, 2000 MT 110, 299 M 321, 2 P3d 806, 57 St. Rep. 433 (2000), distinguishing U.S. v. Schwimmer, 892 F2d 237 (2nd Cir. 1989).

Constitutional Due Process and Equal Protection Rights Not Violated by Procedure in Rule 9 Regulating Practice of Attorneys: Formal complaints against two attorneys were filed with the State Bar Commission on Practice, which recommended disciplinary actions against the attorneys. In their appeal, the attorneys contended that Rule 9 of the Rules on Lawyer Disciplinary Enforcement, which sets forth the procedure relied on by the Commission, unconstitutionally violated their rights to due process, to an impartial tribunal, and to equal protection, because the procedure improperly vested both investigatory and adjudicatory functions in one body—the Commission. The Supreme Court disagreed. Applying Withrow v. Larkin, 421 US 35, 43 L Ed 2d 712, 95 S Ct 1456 (1975), the court noted that bias in a decisionmaker is not presumed and must be proved and that state and federal case law generally rejects the idea that the combination of judging and investigation functions is a denial of due process. Although attorneys who are confronted with proceedings that may result in the loss of their licenses to practice law are entitled to the same due process considerations as any other professionals faced with such proceedings, the attorneys in this case cited no authority stating that either equal protection or due process requires that identical procedures must be followed in all types of disciplinary proceedings, nor did they establish that the procedure for handling disciplinary complaints under Rule 9 denied them their constitutional rights. In re Goldstein & Albers v. Comm'n on Practice, 2000 MT 8, 297 M 493, 995 P2d 923, 57 St. Rep. 31 (2000), following In re Wyse, 212 M 339, 688 P2d 758, 41 St. Rep. 1780 (1984).

Constitutional Right to Due Process Not Violated by Confidentiality Provisions in Rule 13 Regulating Complaints Against Attorneys: Formal complaints against two attorneys were filed with the State Bar Commission on Practice, which recommended disciplinary actions against the attorneys. In their appeal, the attorneys contended that Rule 13 of the Rules on Lawyer Disciplinary Enforcement violated their rights to due process, based on their alleged inability to prepare for their cases before the Commission because of the prohibition against reviewing documents in the Commission's files that were filed prior to the filing of the formal complaints against them. Although agreeing that any exculpatory evidence obtained by the Commission prior to filing of the formal complaints that is related to the matters eventually included in the formal complaints must be disclosed to the respondent attorneys, the Supreme Court's

examination of the files and records in the present case revealed no such exculpatory evidence. Thus, the attorneys failed to demonstrate any due process violation. In re Goldstein & Albers v. Comm'n on Practice, 2000 MT 8, 297 M 493, 995 P2d 923, 57 St. Rep. 31 (2000), following In re Wyse, 212 M 339, 688 P2d 758, 41 St. Rep. 1780 (1984).

Constitutional Right to Equal Protection Not Violated by Confidentiality Provisions in Rule 13 Regulating Complaints Against Attorneys: Formal complaints against two attorneys were filed with the State Bar Commission on Practice, which recommended disciplinary actions against the attorneys. In their appeal, the attorneys contended that Rule 13 of the Rules on Lawyer Disciplinary Enforcement violated their rights to equal protection under the law, making a comparison with the constitutional provision in section 11 of this article and statutes concerning the Judicial Standards Commission under which a judge responding to a disciplinary complaint may waive confidentiality. The Supreme Court found the argument inscrutable and unworthy of consideration. The attorneys failed to establish that they were treated differently under the Rules on Lawyer Disciplinary Enforcement from than any other attorney facing disciplinary charges. In re Goldstein & Albers v. Comm'n on Practice, 2000 MT 8, 297 M 493, 995 P2d 923, 57 St. Rep. 31 (2000), following In re Wyse, 212 M 339, 688 P2d 758, 41 St. Rep. 1780 (1984).

Constitutional Right to Free Speech Not Violated by Confidentiality Provisions in Rule 13 Regulating Complaints Against Attorneys: Formal complaints against two attorneys were filed with the State Bar Commission on Practice, which recommended disciplinary actions against the attorneys. In their appeal, the attorneys contended that Rule 13 of the Rules on Lawyer Disciplinary Enforcement violated their rights to free speech by placing a blanket gag order on all freedom of expression relating to ethical charges against an attorney, citing Doe v. Supreme Court of Fla., 734 F. Supp. 981 (S.D. Fla. 1990). The Supreme Court distinguished Doe based on totally different facts and circumstances. The attorneys failed to establish that their free speech rights were violated. In re Goldstein & Albers v. Comm'n on Practice, 2000 MT 8, 297 M 493, 995 P2d 923, 57 St. Rep. 31 (2000), following In re Wyse, 212 M 339, 688 P2d 758, 41 St. Rep. 1780 (1984).

Disqualification of Attorney's Firm Upon Disqualification of Attorney: Once an attorney is found to be disqualified, such as for previous representation of an adverse party, the attorney's firm is also disqualified. In re Guardianship of Mowrer, 1999 MT 73, 294 M 35, 979 P2d 156, 56 St. Rep. 300 (1999), following Trone v. Smith, 621 F2d 994 (9th Cir. 1980).

Attorney's Disclosure of Information Without Client's Consent — Presumption of Prejudice: Prior to defendant's trial for felony assault (now assault with a weapon), a court-appointed attorney moved to withdraw as counsel based on Rule 1.16, Montana Rules of Professional Conduct, which requires an attorney to withdraw when continued representation would result in a violation of the rules of professional conduct. The attorney informed the court that the defendant, against the advice of counsel, had communicated an intent to testify falsely at trial. The District Court denied the attorney's motion to withdraw, and the defendant was subsequently convicted of assault. On appeal, the Supreme Court reversed and remanded, ruling that the attorney's disclosure of confidential information implicated the attorney's duty of loyalty and the defendant's constitutional right to effective assistance of counsel. St. v. Jones, 278 M 121, 923 P2d 560, 53 St. Rep. 864 (1996).

Failure to File Tax Returns — Committee's Refusal to Certify Bar Admission Upheld: Petitioner, a law student and certified public accountant licensed in Montana, applied for admission to the State Bar of Montana. After reviewing the application, the Committee on Character and Fitness (Committee) refused to certify the petitioner to take the bar examination, citing concern over the petitioner's driving under the influence convictions and tax liens for unpaid back taxes. At an informal hearing, the petitioner submitted documents demonstrating petitioner's membership in the Golden Means Society, which advocated violation of tax laws, but failed to inform the Committee of criminal investigations of his activities by the Internal Revenue Service. On appeal, the Supreme Court affirmed the Committee's decision, ruling that the petitioner's lack of candor with the Committee concerning civil and criminal investigations for failure to file tax returns constituted neglect of financial and professional responsibilities and rendered the petitioner unfit to practice law. Petition of Steele, 262 M 481, 865 P2d 285, 50 St. Rep. 1649 (1993).

Committee Error in Initially Placing Burden on Applicant to Prove Good Moral Character: Pedersen argued that the State Bar of Montana's Committee on Character and Fitness had erred in initially placing the burden on him to prove that he was of good moral character. The Supreme Court held that the Committee was in error in not presuming good character but that Pedersen's past questionable conduct justified the Committee's determination that he was unfit to be a

member of the State Bar of Montana. In re Petition of Pedersen, 250 M 325, 820 P2d 1288, 48 St. Rep. 988 (1991), distinguished in In re Matt, 252 M 345, 829 P2d 625, 49 St. Rep. 279 (1992).

Independent Review of Entire Record: The Supreme Court held that while the State Bar of Montana's Committee on Character and Fitness had the opportunity to observe the demeanor and credibility of witnesses, the Supreme Court was ultimately responsible for determining fitness to practice law in the state and therefore it could conduct an independent review of the entire record of any proceeding before the Committee. In re Petition of Pedersen, 250 M 325, 820 P2d 1288, 48 St. Rep. 988 (1991), followed in In re Matt, 252 M 345, 829 P2d 625, 49 St. Rep. 279 (1992).

Rules to Provide Due Process: On the basis that he had been denied his right to due process, Pedersen appealed the finding of the State Bar of Montana's Committee on Character and Fitness that he was unfit for admission to the State Bar of Montana. The Supreme Court held that the Committee's rules included due process safeguards. The petitioner: (1) had been granted three hearings; (2) from the beginning, knew of the Committee's concerns; and (3) had an opportunity to present his case. In re Petition of Pedersen, 250 M 325, 820 P2d 1288, 48 St. Rep. 988 (1991), followed in In re Matt, 252 M 345, 829 P2d 625, 49 St. Rep. 279 (1992).

Commission Findings Adopted — Disbarment Ordered: Adopting the findings of the Commission on Practice, the Supreme Court ordered disbarment based on facts that the attorney: (1) had been temporarily suspended from practice in 1990 for conviction of the crime of issuing bad checks and for nonpayment of State Bar of Montana membership dues; (2) failed to respond orally or in writing to a complaint filed by the Commission; (3) failed to perfect an appeal in the Ninth Circuit Court of Appeals on behalf of a client who paid him to do so; (4) was convicted of criminal contempt for failure to appear at the sentencing of his client before the U.S. District Court of Western Michigan and misrepresented to the District Court Judge the nature of the Montana bad check charge; (5) was suspended by the State Bar in 1986 for noncompliance with court rules for mandatory continuing legal education and for failure to pay State Bar dues; (6) represented a client in federal court in California while suspended from practice of law in Montana; and (7) was admonished by the Third Circuit Court of Appeals in 1988 for failure to diligently prosecute his client's cause. In re Shrom, 246 M 333, 806 P2d 23, 47 St. Rep. 2086 (1990).

Material Misrepresentation and Failure to Provide Adequate Representation — Public Censure: Public censure by the Supreme Court was the result of an attorney's violation of five Rules of Professional Conduct that occurred when he: (1) made a material misrepresentation to a third party and the party's attorney, promising payment if an insurance draft would be endorsed by that party and finally making payment 2 years later; and (2) failed to adequately represent a client in a child custody matter, causing great emotional and financial distress, including deprivation of child support for 1 year. In re Graveley, 246 M 58, 805 P2d 1263, 47 St. Rep. 1897 (1990).

Validity of Attorney License Tax: A $25 license tax on attorneys, along with the attendant penalty provision for nonpayment, has the effect of regulating the practice of law in that an attorney may not practice law in Montana without paying the tax. The tax is a minimal and inoffensive intrusion on the Supreme Court's constitutional prerogatives and is valid as a legislative enactment in aid of the power of the court to regulate the practice of law. In re Application of Kradolfer v. Smith, 246 M 210, 805 P2d 1266, 47 St. Rep. 1861 (1990).

Misconduct Warranting Disbarment Rather Than Suspension: Disbarment, rather than temporary suspension, was appropriate for an attorney charged with seven counts of misconduct in the practice of law, including the use of methods that serve only to embarrass and burden a third party, failure to provide competent representation, failure to exercise the degree of competency required of an attorney in prosecuting an action without a good faith basis, and the promotion of prostitution. In re Bechhold, 235 M 383, 771 P2d 563, 46 St. Rep. 74 (1989).

Indefinite Suspension Proper — Violation of Ethics Rules: The Supreme Court adopted the recommendations of the Commission on Practice that an attorney be indefinitely suspended from practice, be required to remit client fees, and pay Commission costs. The Commission found that Rules 1.16(d) and 8.4(c) of the Rules of Professional Conduct were violated by the attorney's failure to remit client fees and return his work product to the clients when he knew or should have known that he was going to leave the state and could not represent the clients. Also, Rules 8.4(c), 8.4(d), and 3.3(a)(1) were violated when the attorney set forth as one continuous quotation statements actually taken from two entirely different portions of a deposition, resulting in a misleading representation of testimony. In re Ziskind, 233 M 510, 766 P2d 218, 45 St. Rep. 1691 (1988).

Suspension and Censure Appropriate — Ethics Violations: The Supreme Court affirmed the recommendations of the Commission on Practice to censure and suspend an attorney after substantiating counts of filing frivolous and unfounded ethics violations claims against opposing counsel; disobedience of a judge's order; attempting to obstruct justice; physical assault; outrageous, undignified, and discourteous conduct; intimidation and threats to a public official; contacting a prospective client for private representation on a matter investigated by the County Attorney's office; conflict of interest; contacting an adverse party represented by counsel; and a continued pattern of misconduct. In re Belue, 232 M 365, 766 P2d 206, 45 St. Rep. 1119 (1988).

Practicing Law Without License: The court properly dismissed appellants' complaint on the Daly Ditch decision because appellants' spokesman, Bernie Swift, was practicing law without a license. He is not licensed to practice law in Montana and therefore cannot act as spokesman for others before the court. Swift v. St., 226 M 439, 736 P2d 117, 44 St. Rep. 786 (1987).

Censured Suspension — Violation of Rules of Professional Conduct: An attorney in an insurance claim served the local agent rather than the Commissioner of Insurance as required by 33-1-602. He then misrepresented to the District Court Clerk that he had obtained a default judgment. When given the opportunity by opposing counsel, he refused to stipulate to setting aside the void default judgment. The Commission on Practice and the Supreme Court found that the attorney had violated Canons 1 and 7 of the Canons of Professional Ethics and paralleling Rules of Professional Conduct. Public censure and suspension from the practice of law were the discipline imposed. In re LaFountain, 226 M 296, 738 P2d 472, 44 St. Rep. 668 (1987).

Serious Crime — Disbarment: Attorney was convicted in federal District Court of a felony for receiving federal Social Security disability benefits during the time that he was engaged in the practice of law. The Commission on Practice determined that the conviction was a "serious" crime within the meaning of Rule 16(B) of the Rules Governing the Commission on Practice. The Supreme Court agreed with the findings of the Commission on Practice concerning the seriousness of the crime and found that to be the overwhelming factor requiring disbarment. In re Gilbert, 226 M 279, 738 P2d 476, 44 St. Rep. 654 (1987).

Multistate Bar Examination: In response to a petition of students of the 1986 graduating class of the University of Montana (now University of Montana-Missoula) School of Law, the Supreme Court held that the petitioners did not establish compelling reasons for elimination of the multistate bar examination. The examination provides a practical and useful means of testing applicants' qualifications. In re Revision of Mont. Bar Exam., 222 M 25, 720 P2d 285, 43 St. Rep. 1158 (1986).

Attorney Fees in Divorce Actions — Contingency Fees Impermissible — Findings Required: The District Court order entered in a proceeding to enforce a decree of dissolution of marriage awarded attorney fees to the respondent. The court made findings as to the reasonableness of the amount of the award of attorney fees, but made no findings as to the wife's need for the award. The court awarded the respondent $6,506 for maintenance arrearages and then found that one-third of the recovery, or $2,146, was a reasonable attorney fee. Noting that the Rules of Professional Conduct prohibit contingency fees in domestic relations actions, the Supreme Court vacated the award for attorney fees and remanded the case for reconsideration and entry of findings by the District Court on the fee issue. In re Marriage of Jones, 218 M 441, 709 P2d 158, 42 St. Rep. 1722 (1985).

Filling In Preprinted Forms Not Practice of Law: When the bank filled in blanks on preprinted forms for a mortgage and deed of trust as a service to the buyer and the sellers and incident to a real estate transaction in which the bank was involved, this did not constitute the unauthorized practice of law. The Supreme Court listed three factors as most important in resolving the question of whether filling in preprinted real estate forms is the practice of law: (1) the real estate instruments must be prepared only incident to transactions in which the maker is interested; (2) the instruments must be prepared without a separate charge; and (3) the preparation must not go beyond the filling in of blank forms. Pulse v. N. Am. Land Title Co. of Mont., 218 M 275, 707 P2d 1105, 42 St. Rep. 1578 (1985).

No Conflict of Interest: There was no conflict of interest for an attorney appointed to represent the child in a proceeding for modification of custody when the attorney occupied an office that had formerly been shared by the attorney representing the father and the judge presiding over the case (before he became a judge). In re Marriage of Stout, 216 M 342, 701 P2d 729, 42 St. Rep. 856 (1985).

Ineffective Assistance of Counsel Claim — Effect on Attorney-Client Privilege: When a convicted person files a petition for relief based on grounds of ineffective assistance of counsel, the petitioner's comprehension of waiver of privilege or his knowledge and consent to waiver are

irrelevant. The attorney in question has a duty to respond by affidavit or other sworn testimony to admit, deny, or qualify the allegations of fact made in the petition. In future cases, if a response from a defense attorney so charged is necessary, the Attorney General shall first apply to the Supreme Court for an order preserving the responding attorney from charges of discipline or malpractice for revealing necessary confidential information from such convicted person. Petition of Gillham, 216 M 279, 704 P2d 1019, 42 St. Rep. 806 (1985). Gillham was clarified in Marble v. St., 2007 MT 98, 337 M 99, 169 P3d 1148 (2007). See also Bone v. St., 284 M 293, 944 P2d 734, 54 St. Rep. 890 (1997), wherein it was held that failure to secure an order from the Supreme Court pursuant to Petition of Gillham did not constitute prejudice to defendant because the District Court that ruled on the petition did not rely on preliminary findings on the issue.

Censure of Attorney Disseminating Confidential Information Protected by Statute: A lawyer was publicly censured by the Montana Supreme Court for obtaining confidential information from his law firm's files and from the files of the County Attorney and for disseminating the information to parties not entitled to it, notwithstanding the confidentiality requirements of this section. Censure was changed from oral censure in the Supreme Court's courtroom to censure in writing by that court and placed in the court's records, because it would be a financial burden for him to appear in court as he lived out of state. In re Wyse, 215 M 82, 697 P2d 94, 42 St. Rep. 198 (1985).

Prosecutorial Discretion — Deputy's Prior Representation: The Lemmons were divorced after 20 years of marriage. Leroy was seeing Donna Myers, and Koralyn was seeing John Sweeting. Myers and Sweeting had just ended a personal and business relationship. Sweeting asked Koralyn to get a briefcase out of Leroy's truck. The briefcase actually belonged to Myers. Leroy and Myers returned to the truck and found the briefcase missing. They concluded Koralyn had taken it since the truck was not broken into. Leroy and Myers went to Koralyn's home. She heard them drive up and put a gun in the waistband of her pants. Leroy and Koralyn fought, and Leroy struck her in the head with the gun. Leroy and Myers put Koralyn on the floor of the truck and went to the Sheriff's department. The Sheriff was not immediately available, so Leroy and Myers left, with Koralyn still on the floor of the truck, to find Sweeting. A high speed chase ensued in which the cars rammed together and gunshots were exchanged. The chase ended when Leroy's transmission caught fire. The charges arising from the pursuit were dropped. Leroy was charged with aggravated assault and kidnapping. He was convicted of assault and unlawful restraint. Leroy contended the County Attorney abused his discretion in not acting on his complaints against Koralyn and for not disqualifying the office since a deputy had represented Koralyn in the divorce. On appeal, the Supreme Court held that the abuse of discretion issue had not been raised at trial and could not be raised on appeal. The court also stated that selectivity in enforcement is not a violation of the U. S. Constitution if the selection is not based on an unjustifiable or arbitrary classification. The court construed DR 5-105(D) to concern conflicts in representation, not prosecution. Also, the court stated that it was not established that the County Attorney would have been disqualified from the prosecution for representing Koralyn, let alone a deputy. St. v. Lemmon, 214 M 121, 692 P2d 455, 41 St. Rep. 2359 (1984), followed, with regard to the broad applicability of prosecutorial discretion, in St. v. Harris, 1999 MT 115, 294 M 397, 983 P2d 881, 56 St. Rep. 481 (1999). See also Helena Parents Comm'n v. Lewis & Clark County Comm'rs, 277 M 367, 922 P2d 1140, 53 St. Rep. 687 (1996).

Disciplinary Rules for Attorneys in Remarks on Criminal Cases — Violation of Attorney's Freedom of Speech: Disciplinary Rules 7-107(B) and (H) of the Canons of Professional Ethics, adopted in Montana to govern the conduct of attorneys, restrict the use of extrajudicial statements in criminal actions on various subjects to protect the accused's right to a fair trial. The Supreme Court voided the Rules because, read literally, the Rules invaded an attorney's right of free speech; thus, a standard for interpretation of the Rules would be necessary to balance an attorney's right to free speech and the accused's right to a fair trial. The court declined to adopt such a standard and instead provided that new disciplinary rules be drafted incorporating such a standard. In re Keller, 213 M 196, 693 P2d 1211, 41 St. Rep. 2045 (1984).

Commission on Practice and Disciplinary Proceedings — Not Violative of Due Process: The Commission on Practice, a body appointed by the Supreme Court, undertakes proceedings relating to the discipline of members of the bar. The proceedings are designed to establish a record upon which the Supreme Court may act, the Supreme Court having retained exclusive jurisdiction over disciplinary matters. The accused member of the bar retains full rights of representation, confrontation, production of evidence, and argument before the Commission. The report of the Commission is not binding on the Supreme Court, and the accused may again make denials and argue defenses before the Supreme Court. This process does not constitute any deprivation of

due process rights but rather provides an orderly process preserving in the accused the widest latitude of due process. In re Wyse, 212 M 339, 688 P2d 758, 41 St. Rep. 1780 (1984), followed in In re Goldstein & Albers v. Comm'n on Practice, 2000 MT 8, 297 M 493, 995 P2d 923, 57 St. Rep. 31 (2000).

Preservation of Confidences and Secrets of Client — Disciplinary Rule 4-101: Disciplinary Rule 4-101 relates to the preservation of confidences and secrets of a client. As the term "secret" is used in the rule, the rule prohibits the unconsented-to disclosure of information that would be embarrassing or detrimental to the client even though the information related to the client's child rather than to the client herself. In re Wyse, 212 M 339, 688 P2d 758, 41 St. Rep. 1780 (1984).

Regulatory Municipal Business License Applicable to Attorneys — Unconstitutional: A business license ordinance enacted by a self-governing municipality requiring municipal licensure of attorneys and that provided for regulation was an unconstitutional encroachment on the Supreme Court's authority to regulate the bar as provided in Art. VII, sec. 2, Mont. Const., because the ordinance conditions attorneys' access to the practice of law. The ordinance included police provisions that could conceivably cover standards of practice, prohibited attorneys from carrying on their occupation without procuring a municipal license, required municipal licensure of nonresident attorneys practicing in the municipality, and provided for fines and incarceration for failing to comply with the ordinance. Harlen v. Helena, 208 M 45, 676 P2d 191, 41 St. Rep. 162 (1984).

Lobbying by State Bar: The State Bar of Montana may not use funds derived from compulsory dues for lobbying purposes unless the State Bar makes provision to refund to members dissenting to such lobbying an aliquot portion of compulsory dues paid by said members. Reynolds v. St. Bar of Mont., 660 P2d 581, 40 St. Rep. 415 (1983) (apparently not reported in Montana Reports).

Permanent Disbarment Not Mandated for Felony: Permanent disbarment is not mandated upon conviction of a felony. In re McKeon, 201 M 515, 656 P2d 179, 39 St. Rep. 2270 (1982).

Reinstatement Following Disbarment for Multiple Felonies: On the record, petitioner showed by clear and convincing evidence that he was entitled to reinstatement to the State Bar of Montana. Petitioner had pleaded guilty to the felonies of offering false evidence, obtaining money by false pretenses, grand larceny by bailee, and forgery. Eight years had passed, and he had served his prison time and was making restitution on schedule. He had lived an exemplary life during the 8 years and had a record of immense service to the public prior to the commission of the felonies. The evidence against reinstatement consisted of a letter stating that felons should be denied reinstatement and a statement from a businessman that reinstatement should be denied in view of the severity of the crimes. Reinstatement was supported by 20 letters and by petitions with approximately 250 signatures, 48 of them those of lawyers. No person requested an opportunity to appear at a hearing in opposition to the application for reinstatement. An investigation into the application had been made. The evidence uniformly showed that applicant had reformed and that the public believed he had reformed. In re McKeon, 201 M 515, 656 P2d 179, 39 St. Rep. 2270 (1982).

Lobbying — Initiative 85 — Attorneys — Constitutionality: Initiative 85, as emended in Mont. Auto. Ass'n v. Greely, 193 M 378, 632 P2d 300, 38 St. Rep. 1174 (1981), is not so vague as to be unconstitutionally uncertain, nor does it intrude on the power of the Supreme Court to regulate the conduct of attorneys. The act applies equally to attorneys and nonattorneys acting in the nonlegislative lobbying field. The right of the court to supervise the conduct of the members of the bar is undiminished by any provision of the Initiative. St. Bar of Mont. v. Krivec, 193 M 477, 632 P2d 707, 38 St. Rep. 1322 (1981).

Duty of State Agency to Compensate Lead Counsel in Consolidated Cases Upheld: In an action against the defendant for damages caused by a range fire in which numerous cases were consolidated and lead counsel appointed for all consolidated cases, the District Court did not err in requiring the plaintiff state agency to compensate lead counsel. There is no basis either in Disciplinary Rule 2-107 of the Canons of Ethics or elsewhere for treating the plaintiff differently from any other beneficiary of the litigation because payment for the litigation is founded upon principles of equity and equity demands that all parties receiving a benefit contribute to payment of the expenses. Disciplinary Rule 2-107, regarding the splitting of fees between two lawyers, has no application to court-appointed lead counsel who is paid under the supervision of the court. Means v. Mont. Power Co., 191 M 395, 625 P2d 32, 38 St. Rep. 351 (1981).

Lawyer Advertising — Categorical Listing in Telephone Directory: The proposal of Mountain Bell to publish in the yellow pages a lawyers' guide containing 33 categories of practice under which lawyers, for a fee, could be listed under one or more fields of law has significant potential for misrepresentation and overreaching by lawyers and resulting harm to the public. The court

would hope that Mountain Bell, in the spirit of cooperation, would withdraw its proposal in Montana. In re Mtn. Bell Directory Advertising, 185 M 68, 604 P2d 760 (1979).

Increase in Annual Dues of State Bar of Montana: The Supreme Court denied any relief from an increase because its order of January 23, 1975, gave control over Bar dues to the State Bar of Montana. It stated that the failure of the Bar to publish its financial statement prior to the annual meeting, as required by the Bar's bylaws, was not cause to nullify the action by the majority at the meeting increasing dues. The court stated its intention to issue an order to reinstate its authority to approve or disapprove of future dues increases. Douglas v. St. Bar of Mont., 183 M 155, 598 P2d 1080 (1979).

Public Censure of Attorney in Open Court: The attorney in this case was charged with several violations of the Canons of Professional Ethics and Disciplinary Rules adopted by the Supreme Court. Since he failed to carry the burden of showing the Supreme Court that the findings of the Commission on Practice were not supported by the evidence or that the recommendations were erroneous or unlawful, the Commission's recommendation of public censure in open court was concurred in. In re Johnson, 182 M 486, 597 P2d 740 (1979).

Disciplinary Action Against Attorney: The Supreme Court relied on the findings of fact of the Commission on Practice and concluded that the attorney who was the subject of the disciplinary action failed to shift the burden of demonstrating that the findings were not supported by the evidence or that the recommendations were erroneous or unlawful. However, the court rejected the Commission's recommendation that the attorney be disbarred. In re Goldman, 179 M 526, 588 P2d 964 (1978).

State Jurisdiction Over Indian Contract: One licensed to practice law in this state cannot make a contract as an attorney to be performed both on and off the reservation and then use his status as an Indian to defeat state jurisdiction when he is sued on the contract involved. Crawford v. Roy, 176 M 227, 577 P2d 392 (1978).

Petition Attacking Bar Unification: A petition to test the efficacy, constitutional legality, and beneficial application of the Supreme Court order and opinion of January 29, 1974, unifying the Montana bar was dismissed for failure to state a claim on which relief could be granted. In re Petition of Morris, 175 M 456, 575 P2d 37 (1978).

Authority to Impose Orders Restricting Public Statements by Counsel: The Supreme Court has the jurisdiction and authority to issue orders restricting counsel from making public statements regarding pending criminal cases. State ex rel. Angel v. Woodahl, 171 M 13, 555 P2d 501 (1976).

Legislative Veto Power — Not Extended to Admission to the Bar: Rules of appellate and civil procedure are subject to disapproval by the Legislature; however, as to rules promulgated by the court relative to practice, admission to the bar, and conduct of members of the bar, the Legislature has no such veto authority, as under the principle of separation of powers the Supreme Court was given exclusive authority to promulgate such rules. In re the Petitions of McCabe & Zeman, 168 M 334, 544 P2d 825 (1975).

Unification of Bar: Supreme Court has power under this section to order unification of the bar of the State of Montana. Application of President of Mont. Bar Ass'n, 163 M 523, 518 P2d 32 (1974).

MISCELLANEOUS

Legislative Referendum to Restructure Supreme Court Elections — Recusal of Nonretiring Judges Not Warranted — Potential for Bias Too Speculative: The Legislature passed a bill to put a referendum on the ballot to change elections for Supreme Court justices from statewide to regional. Prior to the election, citizens from each of the seven proposed regions filed an action against the Secretary of State, seeking a declaratory judgment that the proposed referendum was unconstitutional as well as an injunction to bar the Secretary of State from putting the measure on the ballot. The District Court granted the plaintiffs summary judgment and the state appealed. Seven legislators in favor of the bill, appearing as amici curiae, argued that those Supreme Court justices who were not retiring should recuse themselves from the case. The Supreme Court concluded that recusal was not warranted under Montana statutes, including the Montana Code of Judicial Conduct. Specifically, the Supreme Court ruled that the law presumes honesty and integrity of a justice and that in this case, the mere possibility of a justice running for reelection and being prevented from doing so by passage of the referendum did not constitute a "direct, personal, substantial, and pecuniary" interest that would obligate the justice to recuse himself. Reichert v. St., 2012 MT 111, 365 Mont. 92, 278 P.3d 455.

Disqualification of Chief Justice Who Was Formerly Attorney General From Certain Cases: Ellis moved to disqualify the Chief Justice from presiding over and participating in Ellis's appeal

because the appeal was initiated while the Chief Justice was serving as Attorney General. The Supreme Court held that under Rule 2.12(A)(5)(b) of the Code of Judicial Conduct, a Chief Justice who previously served as Attorney General must be disqualified from cases in which the Chief Justice personally and substantially participated as Attorney General or expressed an opinion concerning the merits of the matter in controversy. However, the fact that the former Attorney General's name appeared on the state's answer brief did not, by itself, trigger a disqualification. In Ellis's case, as Attorney General, the Chief Justice oversaw and approved the filing of the criminal appeal by the state, which constituted personal and substantial participation under the Rule, so disqualification was appropriate. St. v. Ellis, 2009 MT 58, 349 M 317, 206 P3d 564 (2009).

Withdrawal of Counsel — No Requirement That Party Provide Written Notice of Hearing Until Notice of Withdrawal of Counsel Filed: Defendant moved for sanctions and dismissal based on discovery abuses. Notice was sent to plaintiffs' counsel regarding a hearing on the motion, but plaintiffs' counsel had decided to withdraw. Although counsel mentioned the hearing to plaintiffs, plaintiffs failed to appear at the hearing, so defendant's motion was granted. No notice was filed with the court formalizing withdrawal of counsel until after the hearing. Plaintiffs' new counsel moved to set aside the judgment on grounds of mistake, surprise, and excusable neglect, asserting that defendant was required to notify plaintiffs in writing before the hearing, but the motion was denied, and plaintiffs appealed. The Supreme Court affirmed. Defendant was not required to provide written notice to plaintiffs until their former counsel filed a notice of withdrawal, and the rules of professional conduct prohibited defendant from contacting plaintiffs in person. Until the notice of withdrawal was filed, defendant was entitled to presume that plaintiffs' former counsel continued to provide representation and that plaintiffs had been properly notified of the hearing by counsel. Under these circumstances, denial of the motion to set aside the judgment was not an abuse of discretion. Flesch v. McDonald's Restaurant, 2005 MT 235, 328 M 407, 121 P3d 527 (2005).

Failure to Show Excessiveness of Sanctions — Reasonableness of Fees and Costs: Defendant was awarded fees and costs from plaintiff's attorney Palmer, who complained that the sanctions were excessive, citing Rule 1.5 of the Rules of Professional Conduct for the proposition that fees customarily charged in a locality be considered in determining the reasonableness of fees. However, under Rule 1.5, fees customarily charged in a locale are not the sole factor that may be considered. Palmer did not assert specific objections to either the necessity of or the time spent on the work billed by defendant's counsel and thus failed to show that the sanctions were excessive. Dambrowski v. Champion Int'l Corp., 2000 MT 149, 300 M 76, 3 P3d 617, 57 St. Rep. 581 (2000).

Rebuttal of Testimony of Plaintiffs' Witness by Defendants' Attorney — Error Requiring Reversal: In a suit involving a complex three-way property exchange between defendants (developer and builders) and plaintiff purchasers, purchasers called as a witness the attorney for a person who had sued some of the defendants in another suit. The attorney testified that prior to the closing on the other deal, he advised his client not to pay defendants anything. Defendants' attorney in this appeal rebutted the testimony. The rebuttal testimony was an error requiring reversal. Defendants knew that the plaintiff's attorney in the other suit would testify for plaintiffs in this case but did not seek discovery from him, so they could not complain that they did not know what he would say. Rule 3.7 of the Rules of Professional Conduct prohibited the rebuttal testimony of a lawyer in this case. Vestre v. Lambert, 249 M 455, 817 P2d 219, 48 St. Rep. 769 (1991).

Rulemaking Power — Lower Court Procedure: The Supreme Court is authorized to promulgate rules of practice and procedure for all other courts. Uniform Rule II is binding on the practice before all District Courts in the state. McLaughlin v. Hart, 213 M 216, 690 P2d 431, 41 St. Rep. 2059 (1984).

Role of Branches Construed: In interpreting the role of the courts and the Legislature under Art. VII, sec. 2(3), Mont. Const., the Supreme Court stated that the provision vests in the Supreme Court the authority to adopt rules for appellate procedure and trial and appellate procedures for all other courts. Just as clearly, the Legislature is empowered to veto any such rules. However, once a legislative veto is exercised, the Legislature is not empowered to fill the vacuum by enacting its own legislation governing appellate procedure or lower court procedure; that is a sphere reserved expressly to the Supreme Court. Coate v. Omholt, 203 M 488, 662 P2d 591, 40 St. Rep. 586 (1983).

Supreme Court Finding of Improper Pretrial Prosecutorial Comment: In a well publicized and controversial case, defendant charged with rape had bail set at $100,000 by a Justice of the Peace and lowered to $15,000 by the District Court. The County Attorney and a Deputy County

Attorney made statements to the press and various groups clearly indicating they believed defendant guilty and praising the description of defendant and his vehicle given by the 11-year-old victim. A disciplinary rule of Canons of Professional Ethics states that prosecutors shall not, in a pending case, make statements that a reasonable person would expect to be disseminated by means of public communication and that relate to the testimony or credibility of a prospective witness or to any opinion as to guilt or innocence of the accused or to the evidence or merits of the case. The failure of the County Attorney and a Deputy County Attorney to strictly adhere to the dictates of that rule jeopardized the impartial administration of justice to defendant by contributing to the establishment of prejudice against him, prejudice that the Supreme Court found to warrant a change of venue. State ex rel. Coburn v. Bennett, 202 M 20, 655 P2d 502, 39 St. Rep. 2300 (1982).

Authority of Judicial Standards Commission: Where the Judicial Standards Commission adopted in its rules power to investigate complaints on the basis that a judge had engaged in "conduct prejudicial to the administration of justice that brings the judicial office into disrepute", the court held the Commission in so acting would exceed its authority, since the Constitution and statute did not provide that such described conduct would be grounds for action by the Commission. Rather, the Constitution requires the more serious complaint of "misconduct in office" to provide a basis for action by the Commission. State ex rel. Shea v. Judicial Standards Comm'n, 198 M 15, 643 P2d 210, 39 St. Rep. 521 (1982).

Authority to Invalidate Labor Contract: Although a state court has the authority to construe and enforce collective bargaining agreements, it does not have the authority to invalidate a labor contract, proper on its face, because one of the parties has allegedly engaged in an unfair labor practice. Such a determination is exclusively a function of the federal system. Audit Serv., Inc. v. Elmo Rd. Corp., 175 M 533, 575 P2d 77 (1978).

Federal Courts — Reviewability of Montana Decisions: The U.S. District Court has no power to review the judgments of Montana courts. A litigant has no constitutional right to a correct result. Osburnsen v. Heller, 34 St. Rep. 193 (D.C. Mont. 1977) (apparently not reported in Federal Supplement).

Abstention: The Supreme Court will not decide constitutional questions when not at issue. Skrukrud v. Gallatin Laundry Co., Inc., 171 M 217, 557 P2d 278 (1976).

Rulemaking Power — Justice's Court Expenses: When a dispute arose between a Justice of the Peace and County Commissioners regarding expenditures for necessary expenses to bring Justice's Court within the provisions of 3-10-103 and 3-10-209, the Supreme Court exercised its powers under subsections (2) and (3) of this section to promulgate a rule for District Court Judges to review claims by Justices of the Peace for certification as to whether or not the claim was for an actual and necessary expense. State ex rel. Browman v. Wood, 168 M 341, 543 P2d 184 (1975).

Rulemaking Power — System for Juror Qualifications: Argument that since Legislature enacted different system for juror qualifications based on most recent list of registered electors rather than last assessment roll, without providing for jury selection commissions to meet after effective date of statute, and therefore no list of eligible jurors was available, failed because of Supreme Court's interpretation that various county jury selection commissions will meet as soon as possible after effective date of statute, invoking court's rulemaking power, under Art. VII, sec. 2(3), Mont. Const., by supplying a meeting and selection date. State ex rel. Bennick v. District Court, 167 M 389, 538 P2d 1369 (1975).

Disqualification of Judges: Statutory provisions regulating the disqualification of judges were not unconstitutional as being repealed by the Montana Constitution and not the subject of repromulgation under the rulemaking power of the Supreme Court. State ex rel. Lane v. District Court, 167 M 53, 535 P2d 174 (1975).

DECISIONS UNDER 1889 CONSTITUTION

JURISDICTION

Scope of Power to Issue Writs in General — Stay of Writ of Mandate:

Despite the prohibition in former Rule 7(c), M.R.App.Civ.P. (now Montana Rules of Appellate Procedure, now superseded), the Supreme Court had power under Art. VIII, sec. 3, 1889 Mont. Const., to stay the execution of a peremptory Writ of Mandamus issued by the District Court when necessary to provide an effective appellate remedy. State ex rel. Bennett v. Dowdall, 157 M 11, 482 P2d 572 (1971).

Even if a stay, in a case where a Writ of Mandate is issued by a District Court to compel the issuance of a license, is not provided for in the Code, still the Supreme Court has power under this section to issue a Supersedeas or other appropriate Writ to effectuate its appellate jurisdiction,

thus to insure the aggrieved board an appeal that otherwise might be of no value. Gill v. Rafn, 133 M 505, 326 P2d 974 (1958), distinguished in State ex rel. Ronish v. School District, 136 M 453, 348 P2d 797 (1960).

Original Jurisdiction — Constitutional Convention Questions: In view of necessity for 1971 Legislature to call a Constitutional Convention pursuant to the voters' mandate in the 1970 election and in order to prevent delays that might occur if the Legislature passed an unconstitutional act, Supreme Court would consider and answer questions arising during the legislative session with respect to the Constitutional Convention in an original proceeding for declaratory judgment authorized by act of the 1971 Legislature. Forty-Second Legislative Assembly v. Lennon, 156 M 416, 481 P2d 330 (1971), distinguished in Mahoney v. Murray, 159 M 176, 496 P2d 1120 (1972).

Factual Issues — Contempt Order: Order of contempt that failed to specify facts that constituted contempt before the court was deficient under 3-1-511 since it did not provide opportunity for appellate review. State ex rel. Shea v. District Court, 156 M 266, 479 P2d 281 (1971).

Review of Orders of Disqualified Judge: District Judge sitting for disqualified District Judge could not review validity of orders on the merits entered by disqualified judge since review amounted to attempt to exercise appellate jurisdiction in violation of Constitution. State ex rel. St. Highway Comm'n v. Kinman, 150 M 12, 430 P2d 110 (1967), distinguished in State ex rel. Stenberg v. Nelson, 157 M 310, 486 P2d 870 (1971).

Failure to File Notice of Appeal — Court-Appointed Counsel: Even though the Supreme Court dismissed an appeal in a criminal case because of failure to file timely notice of appeal, the court considered the questions raised, where the fault was that of court-appointed counsel in whose appointment defendant had no voice. St. v. Frodsham, 139 M 222, 362 P2d 413 (1961).

Exclusive Power of Interpretation: The Constitution vests in the courts the exclusive power to construe and interpret legislative acts as well as provisions of the Constitution. Cottingham v. St. Bd. of Examiners, 134 M 1, 328 P2d 907 (1958), overruled on other grounds in State ex rel. Ward v. Anderson, 158 M 279, 491 P2d 868 (1971).

"Cases" Construed: By "cases" and "controversies" is meant real controversies and not abstract differences of opinion or moot questions. Chovanak v. Matthews, 120 M 520, 188 P2d 582 (1948), distinguished in Helena Parents Comm'n v. Lewis & Clark County Comm'rs, 277 M 367, 922 P2d 1140, 53 St. Rep. 687 (1996).

Injunction: The Supreme Court may under Art. VIII, sec. 3, 1889 Mont. Const., and Rule IV, subdiv. 1, Rules of the Supreme Court of Montana, accept original jurisdiction of a cause (injunction in a matter pertaining to a general election) as necessary and proper to the complete exercise of its appellate jurisdiction, where it would have been impossible, under the ordinary procedure, to litigate the matter in the District Court and thereafter to bring it up by appeal in time to obtain a final decision before the election. State ex rel. Greene v. Anderson, 113 M 582, 129 P2d 874 (1942).

Declaratory Judgment: Where the importance and urgency of the questions presented (in a proceeding under the Uniform Declaratory Judgments Act) are apparent, the Supreme Court may accept original jurisdiction as necessary and proper to the complete exercise of its appellate jurisdiction, under Art. VIII, sec. 3, 1889 Mont. Const., and Rule IV, sec. 1, Rules of the Supreme Court of Montana. Gullickson v. Mitchell, 113 M 359, 126 P2d 1106 (1942).

Mandamus: Where time will not permit trial of a proceeding in mandamus in the District Court and final disposition of the cause on appeal and there are no disputed facts, the Supreme Court will take original jurisdiction when necessary and proper to the complete exercise of its appellate jurisdiction, under Art. VIII, sec. 3, 1889 Mont. Const., and under Rule IV, sec. 1, of its rules. State ex rel. Palagi v. Regan, 113 M 343, 126 P2d 818 (1942).

When Supreme Court Will Take Original Jurisdiction: Supreme Court may assume original jurisdiction and issue a Writ of Injunction under Art. VIII, sec. 3, 1889 Mont. Const., although private rights may be involved as well as those of the public. In protecting the public rights, private rights may incidentally be protected and enforced. Yet the rights of the public—that is, of the state—must be the paramount and moving consideration. Sawyer Stores, Inc. v. Mitchell, 103 M 148, 62 P2d 342 (1936).

After Original Jurisdiction Taken, Attack on Ground of Laches Too Late: After Supreme Court issues order to show cause on application for Writ of Injunction, intervenor may not object to its taking jurisdiction on ground applicant had ample time to obtain relief in District Court. Ford v. Mitchell, 103 M 99, 61 P2d 815 (1936).

Phrase "Necessary or Proper to Complete Exercise": Held, that Supreme Court has original jurisdiction to quo warranto proceeding by Attorney General to oust state Senator appointed

during his term to "civil office under the state" (Art. V, sec. 7, 1889 Mont. Const.), the exercise of such jurisdiction not being limited to issuance of writs "necessary or proper to the complete exercise" of the Court's appellate jurisdiction under Art. VIII, sec. 2, 1889 Mont. Const. State ex rel. Nagle v. Kelsey, 102 M 8, 55 P2d 685 (1936).

Court to Interpret Legislation: Chapter 149, sec. 6, L. 1935, omitted (authorizing the payment of delinquent taxes in installments), declaring the act should not be construed as a release or postponement of taxes and prescribing the manner of its construction, violates Art. VIII, sec. 2, 1889 Mont. Const., making it the exclusive province of the courts to construe and interpret legislative acts. State ex rel. DuFresne v. Leslie, 100 M 449, 50 P2d 959 (1935), followed in In re License Revocation of Gildersleeve, 283 M 479, 942 P2d 705, 54 St. Rep. 735 (1997). See also St. v. Guillaume, 1999 MT 29, 293 M 224, 975 P2d 312, 56 St. Rep. 117 (1999).

Appellate Jurisdiction Only: The jurisdiction of the Supreme Court was limited by Art. VIII, sec. 2, 1889 Mont. Const., to appellate matters. State ex rel. Lewis & Clark County v. District Court, 90 M 213, 300 P 544 (1931); Willis v. Pilot Butte Min. Co., 58 M 26, 190 P 124 (1920); Helena v. Helena Waterworks Co., 43 M 169, 115 P 200 (1911); Bordeaux v. Bordeaux, 29 M 478, 75 P 359 (1904); In re Weston, 28 M 207, 72 P 512 (1903); State ex rel. Sutton v. District Court, 27 M 128, 69 P 988 (1902); Finlen v. Heinze, 27 M 107, 69 P 829, 70 P 817 (1902); Bordeaux v. Bordeaux, 26 M 533, 69 P 103 (1902); State ex rel. Scharnikow v. Hogan, 24 M 379, 62 P 493 (1900).

Restrictions and Limitations: In the absence of constitutional restriction, the Legislature may grant or take away the right of appeal, and if it grants it, it may prescribe such restrictions and limitations as it may see fit to impose, and having prescribed that an appeal from a final judgment must be taken within 6 months after entry thereof (section 93-8004, R.C.M. 1947, now repealed), the Supreme Court does not acquire jurisdiction of such an appeal unless taken within that time. Kline v. Murray, 79 M 530, 257 P 465 (1927).

Power to Punish for Contempt: The framers of the Montana Constitution recognized, without limiting, the power of the courts to punish for contempt; but they understood the law of contempt to be a law of necessity and its exercise in any given instance to be measured and restricted by the necessity which calls it into existence. State ex rel. Metcalf v. District Court, 52 M 46, 155 P 278 (1916).

Statutory Limitation: While, under the provisions of Art. VIII, sec. 2 and 15, 1889 Mont. Const., all the decisions of District Courts are subject to review by the Supreme Court by some appropriate procedure, causes may be removed to it by appeal only under the limitations and regulations prescribed by statute. Pierson v. Daly, 49 M 478, 143 P 957 (1914).

Court of Review: The purpose of the state Constitution was to establish an exclusive court of review with all the auxiliary powers necessary to the exercise of this jurisdiction, except insofar as it expressly declared otherwise. State ex rel. Helena v. Helena Waterworks Co., 43 M 169, 115 P 200 (1911).

Effectuating Appellate Jurisdiction: Even if a stay, in a case where a Writ of Mandate is issued by the District Court to compel the transfer of a cause from a police to a Justice's Court, is not provided for in the code of civil procedure, still the Supreme Court has power, under Art. VIII, sec. 3, 1889 Mont. Const., to issue a Supersedeas or any other appropriate Writ, to effectuate its appellate jurisdiction, and thus to insure the aggrieved party an appeal which might otherwise be of no value. State ex rel. Brass v. Horn, 36 M 418, 93 P 351 (1908).

Legislative Guidelines: In pursuance of the grant of appellate jurisdiction to the Supreme Court and as furnishing methods for the exercise of the jurisdiction granted, the Legislature has enacted statutes providing how appeals may be taken, determining of what the record on such appeal shall consist, and how such records shall be certified to that court. Substantial compliance with these provisions is necessary to give the Supreme Court the right to exercise the jurisdiction granted. Emerson v. McNair, 28 M 578, 73 P 121 (1903).

Mode of Procedure: Under the last clause of Art. VIII, sec. 2, 1889 Mont. Const., the Legislature cannot decrease the power granted to the Supreme Court but has power to provide the mode of procedure to be employed, by which and the limitation as to time within which the power granted should be exercised. Featherman v. Granite County, 28 M 462, 72 P 972 (1903); State ex rel. Whiteside v. District Court, 24 M 539, 63 P 395 (1900).

Statutory Compliance Required: Under Art. VIII, sections 2, 3, and 15, 1889 Mont. Const., the Supreme Court had jurisdiction to entertain appeals or Writs of Error only when the statutory requirements have been complied with. Featherman v. Granite County, 28 M 462, 72 P 972 (1903).

Time and Mode of Appeal: The appellate jurisdiction of the Supreme Court may be exercised only under limitations and regulations prescribed by law touching the time within which and the mode by which appeals may be taken. Cornell v. Matthews, 28 M 457, 72 P 975 (1903).

Final Judgments: The power of limitation given the Legislature does not extend to the right of appeal from final judgments or to the power of the court on such appeals but merely to the time when and within which appeals may be taken, to matters of procedure, and to the extent of relief to be granted on appeals from interlocutory orders. Finlen v. Heinze, 27 M 107, 69 P 829, 70 P 517 (1902).

Certificate of Probable Cause: No appeal lies from a refusal of a District Judge to grant a certificate of probable cause in a criminal case, but a Justice of the Supreme Court can issue such certificate upon such refusal. St. v. Broadbent, 27 M 63, 69 P 323 (1902).

Legislative Power: The words "limitations" and "regulations", as used in Art. VIII, sec. 2, 1889 Mont. Const., mean restrictions of power and rules of conduct or proceeding. The Legislature has no power to regulate the physical form of the pleadings and instruments to be filed with the Supreme Court, and the act, approved March 9, 1901, providing that transcripts on appeal may be printed or typewritten, at the election of appellant, is invalid. Jordan v. Andrus, 26 M 37, 66 P 502 (1901).

Nature of Appellate and Supervisory Control Jurisdiction: The grant of appellate jurisdiction to the Supreme Court implies all the instrumentalities necessary to make it effective. The provision of Art. VIII, sec. 2, 1889 Mont. Const., that the Supreme Court "shall have a general supervisory control over all inferior courts", is a distinct and separate grant of jurisdiction, independent of any other power granted. State ex rel. Whiteside v. District Court, 24 M 539, 63 P 395 (1900). See State ex rel. Shores v. District Court, 27 M 349, 71 P 159 (1903).

Scope of Power to Issue Writs in General: The provision of Art. VIII, sec. 3, 1889 Mont. Const., authorizing the Supreme Court in its discretion to issue and to hear and determine the writs therein specified, is a grant of power without limitation or qualification, authorizing such court to issue these writs for whatever purposes they are suitable. State ex rel. Whiteside v. District Court, 24 M 539, 63 P 395 (1900).

SUPERVISORY CONTROL

Prevention of Needless Litigation: Writ of Supervisory Control was properly issued when resisting that action would have resulted in extended and needless litigation. Highway Comm'n v. District Court, 160 M 35, 499 P2d 1228 (1972), explained in Walker v. Tschache, 162 M 213, 510 P2d 9 (1973).

Scope of Power — Dismissal of Removal Petition: Writ of Supervisory Control was necessary and proper to compel District Court to dismiss removal petition that could not be granted even if facts alleged were proved. State ex rel. Arnot v. District Court, 155 M 344, 472 P2d 302 (1970).

Court Determines Requirements — Inappropriate When Appeal Adequate: There are no written laws promulgated or enacted by the lawmaking department of our government prescribing the regulations and limitations governing the issuance of so-called "Writs of Supervisory Control". There being no such provisions, the court has attempted to make its own regulations and limitations as to when such Writ may or may not issue, which regulations and limitations appear to change with each new petition for the "Writ". Supervisory control, invoking the original jurisdiction of the Supreme Court, is not a substitute for an appeal provided by statute. Original proceedings seeking supervisory control may not be employed to bypass the statutes allowing and requiring timely appeals to the Supreme Court. When the appeal is allowed, such remedy is exclusive and furnishes the only lawful means of review. State ex rel. Reid v. District Court, 126 M 489, 255 P2d 693 (1953).

Writ Issued Only in Extraordinary Circumstances: Supervisory control by Supreme Court is an extraordinary remedy to be exercised only in extraordinary circumstances. To justify such control, an emergency must be shown to exist or it must be shown that a gross injustice would result from a denial, absence of other relief must be shown, and mere inconvenience to a party or delay in final disposition of a cause is insufficient. State ex rel. O'Sullivan v. District Court, 119 M 429, 175 P2d 763 (1946), followed in Potter v. District Court, 266 M 384, 880 P2d 1319, 51 St. Rep. 853 (1994).

Remedy by Appeal Adequate: A Writ of Supervisory Control would not be issued to prevent court from continuing its hearing of quiet title action in which court allegedly made erroneous ruling on defendants' motion to strike when it did not appear that any injustice to defendants could not be corrected by an appeal from the final judgment. State ex rel. Barron v. District Court, 119 M 344, 174 P2d 809 (1946).

Moot Questions: In the exercise of its supervisory control powers the Supreme Court will deal only with such orders and acts of the court as are presently in force, not with moot questions. State ex rel. Gaspar v. District Court, 114 M 216, 133 P2d 767 (1943).

Not Mode of Piecemeal Review: The Writ of Supervisory Control should be seldom used and is not to be used as a convenient short route for consideration or as a means of piecemeal review. State ex rel. Hall v. District Court, 109 M 228, 95 P2d 438 (1939).

Effect of Motion to Quash Contempt Proceeding: When by Writ of Supervisory Control the Supreme Court orders the lower court to certify all the records, including the evidence, to it and relator makes the assertion that there was not evidence showing that he was guilty of contempt, the motion to quash, in effect a demurrer, admits such assertion, and failure to produce the evidence warrants the presumption that there was no evidence to support the finding of guilt. State ex rel. Floch v. District Court, 107 M 185, 81 P2d 692 (1938).

Emergency — Inability to Furnish Bond: Generally the extraordinary remedy by Writ of Supervisory Control is not available unless an emergency exists warranting immediate action under the Writ. Otherwise the remedy by appeal is adequate. State ex rel. Nelson v. District Court, 107 M 167, 81 P2d 699 (1938).

Properly Granted: Writ of Supervisory Control was properly granted. State ex rel. Duckworth v. District Court, 107 M 97, 80 P2d 367 (1938); State ex rel. Shores v. District Court, 27 M 349, 71 P 159 (1903); State ex rel. Anaconda Copper Min. Co. v. District Court, 25 M 504, 65 P 1020 (1901).

When Writ Does Not Lie: While an exigency may arise in the course of a proceeding which will justify the exercise of this extraordinary power to correct a manifest wrong resulting from an erroneous ruling upon an intermediate question arising in the course of litigation, the Writ does not lie to review every alleged erroneous ruling upon intermediate questions arising during the course of litigation and which may properly be reviewed on appeal from the final judgment. State ex rel. Haynes v. District Court, 105 M 89, 70 P2d 440 (1937).

Treated as Application for Writ of Prohibition: When a petition for a Writ of Supervisory Control (a Writ which lies only where the lower tribunal has committed error within jurisdiction) also prays for any other appropriate relief and it appears that the court has acted without or in excess of jurisdiction, the Supreme Court will treat the petition as one for a Writ of Prohibition. State ex rel. Stewart v. District Court, 103 M 487, 63 P2d 141 (1936).

Employed to Correct Error: The "supervisory writ" evolved by the Supreme Court as a necessary consequence of Art. VIII, sec. 2, 1889 Mont. Const., and 3-1-113 is employed to correct error within jurisdiction, independent of either the appellate or original jurisdiction declared in Art. VIII, and is not to be confused with the original writs therein authorized. State ex rel. Regis v. District Court, 102 M 74, 55 P2d 1295 (1936).

When Writ Appropriate:

The Writ of Supervisory Control lies to prevent a failure of justice through arbitrary and unlawful action by the court when there is no right of appeal or other adequate remedy and the case is exigent. State ex rel. Finley v. District Court, 99 M 200, 43 P2d 682 (1935); State ex rel. Thelen v. District Court, 93 M 149, 17 P2d 57 (1932).

The Supreme Court has jurisdiction to issue its supervisory writ to prevent a failure of justice where the court, while acting within jurisdiction, has committed manifest error and gross injustice is threatened by reason of action so arbitrary, unlawful, and in disregard of the rights of a litigant as to be tyrannical and no other adequate remedy is available to relator. State ex rel. Middleton v. District Court, 85 M 215, 278 P 122 (1929).

Time for Application: If application is made within a reasonable time, it should be considered timely against the objection of laches. The question of timeliness is determined case by case. State ex rel. Thelen v. District Court, 93 M 149, 17 P2d 57 (1932).

Litigant Not to Answer Writ: The Writ of Supervisory Control runs to inferior courts, not litigants or private individuals. Therefore, an answer by a party to the action of which the petition for the Writ arises, in addition to the return made by the respondent court, has no place in the proceeding. State ex rel. Spinazza v. District Court, 83 M 511, 273 P 638 (1929).

Review of Judgment in Contempt: The only way in which one adjudged guilty of contempt may have the proceedings reviewed by the Supreme Court under Art. VIII, sec. 3, 1889 Mont. Const., is by invoking the Writ of Review, or in a proper case, the Writ of Supervisory Control. State ex rel. Burns v. District Court, 83 M 200, 271 P 439 (1928).

Purpose: The supervisory power of the Supreme Court granted by Art. VIII, sec. 2, 1889 Mont. Const., was designed to control summarily the course of litigation in the inferior courts and prevent injustice being done through a mistake of law or a willful disregard of it. The power

applies when there is no appeal from the erroneous action or, being an appeal, the relief obtained thereby would be inadequate. State ex rel. Helena v. Helena Waterworks Co., 43 M 169, 115 P 200 (1911).

Power Extends Only Over Inferior Courts: The power of supervisory control is lodged in the Supreme Court sitting as an organized judicial body, and such power operates only upon inferior courts. It cannot extend to or affect any other body or any individual or individuals. In re Weston, 28 M 207, 72 P 512 (1903).

Function of Supervisory Power: One of the functions of the supervisory power of the Supreme Court is to control the course of litigation in the inferior courts, where those courts are proceeding within their jurisdiction but by a mistake of law or willful disregard of it are doing a gross injustice and there is no appeal or the remedy by appeal is inadequate. State ex rel. Shores v. District Court, 27 M 349, 71 P 159 (1903); State ex rel. Whiteside v. District Court, 24 M 539, 63 P 395 (1900).

Contempt Judgment: If section provides that the judgment in a case of contempt is final and conclusive and there is no appeal, except that the action of a District Court can be reviewed on a Writ of Certiorari by the Supreme Court, it violates the provision of Art. VIII, sec. 2, 1889 Mont. Const., giving the Supreme Court a general supervisory control over all inferior courts under such regulations and limitations as may be prescribed by statute. A Writ of Supervisory Control was the only means by which the question whether there is evidence to support a judgment of contempt can be determined. State ex rel. Sutton v. District Court, 27 M 128, 69 P 988 (1902).

Nature of Power: The power of supervisory control is a distinct power and may be exercised to control the discretion of an inferior court in making an order from which no appeal would lie and for which the writs appertaining to the appellate jurisdiction furnish no remedy. State ex rel. Anaconda Copper Min. Co. v. District Court, 25 M 504, 65 P 1020 (1901).

Judgment on Pleadings: A Writ of Supervisory Control will not be granted to command a District Court to sustain a motion for judgment on the pleadings, since the party has a remedy if he should finally be defeated in the action. State ex rel. Moore v. District Court, 25 M 31, 63 P 686 (1901).

Power to Issue Writ of Prohibition: The fact that the Constitution gives the Supreme Court supervisory control over inferior courts does not authorize it to grant a Writ of Prohibition, prohibiting a District Court from appointing a receiver of a corporation, merely to avert probable injury to the applicants for the Writ. State ex rel. Boston & Mont. Consol. Copper & Silver Min. Co. v. District Court, 22 M 220, 56 P 219 (1899).

HABEAS CORPUS

Powers of Individual Justices: The different Justices are clothed with power to issue, hear, and determine Writs of Habeas Corpus and also Writs of Certiorari to review proceedings for contempt in the District Courts, but these powers are conferred upon the Justices individually. State ex rel. Helena v. Helena Waterworks Co., 43 M 169, 115 P 200 (1911).

Actual Custody Required: An application for a Writ of Habeas Corpus will be dismissed if it appears that the petitioner is not "held in actual custody". In re O'Brien, 29 M 530, 75 P 196 (1904).

CERTIORARI

Submission of Record: The only method by which a convicted contemnor may submit a record of conviction to the appellate court for review is by invoking the Writ of Certiorari, or in proper cases, under the general supervisory power vested in the Supreme Court. State ex rel. Rankin v. District Court, 58 M 276, 191 P 772 (1920).

Defined in Jurisprudence: The framers of the Montana Constitution, in referring to the Writ of Certiorari, contemplated that proceeding as defined in our jurisprudence, as to its office and the conditions under which it may be invoked. In re Finkelstein, 13 M 425, 34 P 847 (1893); In re MacKnight, 11 M 126, 27 P 336 (1891).

Scope: The scope of the Writ of Certiorari is not enlarged by Art. VIII, sec. 3, 1889 Mont. Const., so as to permit a review by the Supreme Court of an order of the District Court for the payment of alimony where imprisonment for contempt is involved, notwithstanding the relator had a remedy by appeal from such an order. In re Finkelstein, 13 M 425, 34 P 847 (1893).

No Restriction on Issuance: Article VIII, sec. 3, 1889 Mont. Const., cannot be construed to restrict the Supreme Court to the use of a Writ of Certiorari in the exercise of its appellate jurisdiction only, as the clause "necessary and proper to complete exercise of its appellate jurisdiction" relates to "such other original and remedial writs" and not to the writs specifically named therein. In re MacKnight, 11 M 126, 27 P 336 (1891).

WRIT OF PROHIBITION

Nature of Writ: Among the devices prescribed for the exercise by the Supreme Court of its power and jurisdiction to superintend and control proceedings in the courts is the ancient Writ of Prohibition for which the Legislature has made provision. State ex rel. Middlemas v. District Court, 130 M 73, 295 P2d 233 (1956); State ex rel. Scharnikow v. Hogan, 24 M 379, 62 P 493 (1900).

End Litigation — Save Expense: The Writ of Prohibition may be issued to end litigation and save expense. Supreme Court had jurisdiction to grant Writ of Prohibition to prevent payment of grand jury illegally in session. State ex rel. Adami v. Lewis & Clark County, 124 M 282, 220 P2d 1052 (1950).

Authority to Review Action of District Court: Refusal of court to set aside indictments may be reviewed by Supreme Court on Writ of Prohibition. State ex rel. Porter v. District Court, 124 M 249, 220 P2d 1035 (1950).

INJUNCTIONS

Prerogative Writ: The Writ of Injunction is a jurisdictional, prerogative writ, correlative with the Writ of Mandamus; the Writ of Injunction, used as a judicial writ in aid of jurisdiction and not as a prerogative writ, is one of the writs classed with "other original and remedial writs". Finlen v. Heinze, 27 M 107, 69 P 829, 70 P 517 (1902).

Pending Appeal: The Supreme Court is not authorized to suspend the operation of, vacate, or set aside a prohibitory injunction order restraining parties from entering or mining in a lode claim during the pendency of an appeal therefrom. Maloney v. King, 26 M 487, 68 P 1012 (1902).

Equity Arm: Under the constitutional grant of original jurisdiction to the Supreme Court, the Writ of Injunction is the equity arm of the Court's original jurisdiction, and it, with the other writs granted, fully equip the Court as a court of first resort on all judicial questions affecting the sovereignty of the state, its franchises or prerogatives, or the liberties of the people. The Writ is made correlative with that of mandamus, and thus it may be resorted to to restrain excess, just as the Writ of Mandamus may be used in the same class of cases to compel action and supply defects. State ex rel. Clarke v. Moran, 24 M 433, 63 P 390 (1900).

Attorney General's Opinions

Chief Water Judge Not Subject to State Leave Policies — Executive Branch Not to Supervise Judicial Branch: Although the Chief Water Judge is appointed and not elected, the Chief Water Judge is a judicial officer and is not subject to the vacation leave policies of the Department of Administration. This interpretation of the statutes is also required by the application of the separation of powers clause of the Montana Constitution. To hold otherwise would subject a judicial officer to control by the Executive Branch of state government and not to the control of the Montana Supreme Court or the Judicial Standards Commission. 48 A.G. Op. 2 (1999).

Law Review Articles

"Purely the Creature of the Inventive Genius of the Court": State ex rel. Whiteside and the Creation and Evolution of the Montana Supreme Court's Unique and Controversial Writ of Supervisory Control, Howell, 69 Mont. L. Rev. 1 (2008).

Hate vs. Hipocracy: Matt Hale and the New Politics of Bar Admissions, Stevenson, 63 Mont. L. Rev. 419 (2002).

MDPs in Montana: It's the End of the World as We Know It . . . and I Feel Fine, Hume 63 Mont. L. Rev. 391 (2002).

Attorney Advertising in Montana: The Peel Decision and the Growing Need for a State Certification Program, Jones, 52 Mont. L. Rev. 177 (1991).

Advocacy and Responsibility: Conflicting Paradigms?, Bennett, 51 Mont. L. Rev. 1 (1990).

The Model Rules of Professional Conduct: No Standard for Malpractice, Faure & Strong, 47 Mont. L. Rev. 363 (1986).

The Temptations of Creon: Philosophical Reflections on the Ethics of the Lawyer's Professional Role, Huff, 46 Mont. L. Rev. 47 (1985).

Legal Specialization: A Proposal for More Accessible and Higher Quality Legal Services, Rice, 40 Mont. L. Rev. 287 (1979).

Compulsory Bar Dues in Montana: Two (and a Half) Challenges, Reynolds, 39 Mont. L. Rev. 268 (1978).

Collateral References

Montana Rules of Court, Volume I, West - Thomson Reuters.

Supreme Court and District Court Rules, Lawyers' Deskbook & Directory, State Bar of Montana.

Montana Court Rules, http://courts.mt.gov/supreme/default.mcpx.

State Bar of Montana, http://www.montanabar.org.

Section 3. Supreme court organization.

Convention Notes

Only change, except in grammar, allows legislature to increase number of justices to six should the need arise.

Compiler's Comments

Former Constitutional Provision: This section is similar to Art. VIII, sec. 5, 1889 Mont. Const.

Case Notes

DECISIONS UNDER 1972 CONSTITUTION

Obligations of Trustee to Beneficiary: A prejudgment Writ of Attachment brought by an auto dealer against a property division settlement in a marital dissolution was vacated by the Supreme Court upon finding that the attorney for the auto dealer was also the attorney for the husband making payments. The court held that when the attorney received money as trustee in satisfaction of the husband's contractual obligations to the wife, the attorney was bound to act in good faith toward the wife as beneficiary. The attorney was prohibited from dealing with the trust property for any purpose not connected with the trust. Pursuant to his duty under Rule 1.15 of the Rules of Professional Conduct, the attorney was required to promptly deliver the money to the wife, even though he had fully disclosed his relationship to both the husband and the auto dealer. The attorney was directed to pay over the full trust amount, plus interest, to the wife. Wild W. Motors, Inc. v. Lingle, 224 M 76, 728 P2d 412, 43 St. Rep. 2030 (1986).

Court Decisions as Binding Authority: Supreme Court decisions are binding authority even when the majority opinion is signed by only three justices, with one justice specially concurring and three justices dissenting. Kaiser v. Whitehall, 221 M 322, 718 P2d 1341, 43 St. Rep. 846 (1986).

DECISIONS UNDER 1889 CONSTITUTION

Reversal — Majority Need Not Agree as to Particular Errors: When three of the Justices of the Supreme Court, a majority, are of opinion that the trial court committed error resulting in denial of a fair trial to defendant but are unable to agree as to any one of the grounds urged by him in his assignment of errors being sufficient to warrant a reversal of the judgment, a retrial will be ordered. Under such circumstances it is immaterial that the majority do not agree as to any particular error set forth in his assignment. The real question was whether or not defendant had a fair trial. St. v. Le Duc, 89 M 545, 300 P 919 (1931).

Section 4. District court jurisdiction.

Convention Notes

(1) No change except in grammar. (2) New provision providing for appeal from lower courts and state agencies. (3) New provision which allows legislature to create other courts having the same power as district courts.

Compiler's Comments

Former Constitutional Provision: Subsection (1) of this section is similar to Art. VIII, sec. 11, 1889 Mont. Const.

Case Notes

Decisions Under 1972 Constitution
Original Jurisdiction 1036
Appellate Jurisdiction 1046
Removal and Substitution of Judges 1049
Decisions Under 1889 Constitution
Original Jurisdiction 1049
Appellate Jurisdiction 1050
Writs 1050
Limitations on Jurisdiction 1051
Removal and Substitution of Judges 1052

DECISIONS UNDER 1972 CONSTITUTION

ORIGINAL JURISDICTION

Ohio Law Governs Employment Contract Claim — Subject Matter Jurisdiction Not Necessarily Precluded — Reversed to Consider Application of Doctrine Forum Non Conveniens: The plaintiff was an Ohio resident who worked for the defendant, a company whose principal place of business was Montana. After he was terminated, the plaintiff filed a wrongful discharge suit against the defendant in Montana. The defendant filed a motion to dismiss for lack of subject matter jurisdiction, which the District Court granted. On appeal, the Supreme Court ruled that although the District Court correctly ruled that Ohio law governed the plaintiff's employment contract claim, it erred in concluding that it therefore lacked subject matter jurisdiction over the claim. The Supreme Court also concluded that, based on the record, it could not determine whether an alternative forum was available for the plaintiff's claim, and therefore vacated the District Court's dismissal and remanded for consideration of whether dismissal under the doctrine of forum non conveniens was appropriate. Harrington v. Energy West, Inc., 2015 MT 233, 380 Mont. 298, 356 P.3d 441.

Appeal in Commissioner of Political Practices Enforcement Action Premature — Dismissal for Lack of Subject Matter Jurisdiction Proper: In a Commissioner of Political Practices enforcement action, the defendant's motion to dismiss the enforcement action in the First Judicial District Court, Lewis and Clark County, for lack of subject matter jurisdiction was properly denied. Section 13-37-113, which allows for prosecutions in the county in which the violation occurred or in Lewis and Clark County, clearly conferred subject matter jurisdiction on the District Court. Because the issue at bar was not one of subject matter jurisdiction but, rather, was an issue of statutory interpretation, the Supreme Court determined that the defendant's appeal must be characterized as one seeking relief from the denial of a motion to dismiss, which is not appealable, and dismissed the appeal as premature. Comm'r of Political Practices v. Bannan, 2015 MT 220, 380 Mont. 194, 354 P.3d 601.

Mootness in Award of Attorney Fees: Plaintiffs sued the subdivision property owners over amendments to the covenants. Prior to trial, all but one of the subdivision property owners settled with the plaintiffs. The settlement included executing new covenants, making the remaining lawsuit moot. The District Court then ruled against the remaining defendant and awarded attorney fees. The Supreme Court held that because the issue was moot, it would not review the District Court's ruling and award of reasonable fees. Houden v. Todd, 2014 MT 113, 375 Mont. 1, 324 P.3d 1157.

Referendum — Issues Addressed Prior to Election Ballot — Justiciable Controversy: Legislative Referendum 123 (LR-123) was enacted by the Legislature in 2011 and was set to appear on the November 2012 general election ballot. The plaintiffs challenged the constitutionality of the referendum before it appeared on the ballot, and the Secretary of State claimed the challenge was not ripe and justiciable. The Supreme Court determined the constitutional issues could be raised and that a present case or controversy existed. In determining that the case could go forward, the Supreme Court reasoned that ripeness has both a constitutional dimension based on the case or controversy requirement and a prudential dimension that weighs the fitness of the issues for judicial decision and the hardship to the parties of withholding a decision. The issues were definite and concrete, and given the time and money involved, there was no prudential reason for allowing the election on LR-123 to proceed prior to addressing the constitutional issues. MEA-MFT v. McCulloch, 2012 MT 211, 366 Mont. 266, 291 P.3d 1075.

Personal Jurisdiction Over Nonresident Business — Exercise of Long-Arm Jurisdiction Proper: The nonresident defendant business conducted sufficient business in Montana to support the extension of long-arm jurisdiction over the defendant when the defendant knew that the plaintiff intended to use the defendant's product in its Montana business, the defendant had previously sold its product to the plaintiff, and the defendant had serviced its product through other Montana businesses. Further, because the defendant purposefully availed itself of the privilege of conducting business in Montana, resulting in the plaintiff's alleged injury in Montana, and because the defendant reasonably could have anticipated defending itself in Montana, Montana's exercise of personal jurisdiction over the defendant comported with due process. Grizzly Sec. Armored Express, Inc. v. The Armored Group, LLC, 2011 MT 128, 360 Mont. 517, 255 P.3d 143.

Jurisdiction Conferred on District Court When Acts of Stalking Committed Partly Within State: The District Court had jurisdiction over a petition for a temporary order of protection because the petition alleged that acts of stalking were committed partly within Montana. There is no statutory requirement under 40-15-102 or 45-5-220 that repeated acts of stalking must

occur in Montana in order to confer jurisdiction on the District Court. Jordan v. Kalin, 2011 MT 142, 361 Mont. 50, 256 P.3d 909.

Analysis for Jurisdiction of District Court Over Tribal Member and Tribal Property: The correct analysis in both regulatory and adjudicatory actions involving tribal members or lands is whether the exercise of jurisdiction by a state court or regulatory body is preempted by federal law or, if not, whether it infringes on tribal self-government. If either element is met, a state may not assume civil jurisdiction or take regulatory action over Indian people or their territories within the boundaries of their reservations. In re Estate of Big Spring, 2011 MT 109, 360 Mont. 370, 255 P.3d 121, overruling Iron Bear v. District Court, 162 Mont. 335, 512 P.2d 1292 (1973), in its entirety and In re Marriage of Skillen, 1998 MT 43, 287 Mont. 399, 956 P.2d 1, in part and overruling numerous cases to the extent they followed the principles of Iron Bear or Skillen.

No Subject Matter Jurisdiction for District Court in Probate for Tribal Member — Jurisdiction Presumptively With Tribal Court — Proceedings Before District Court Void: The District Court erred when it assumed subject matter jurisdiction over the probate of an enrolled Blackfeet Tribal member's estate when all of the decedent's estate property was located within the exterior boundaries of the Blackfeet Reservation. The Supreme Court overruled Iron Bear and held that civil jurisdiction over non-Indians and Indians on reservation lands presumptively lies in the tribal court. Absent express congressional limitation, the tribe maintained sovereign power and exclusive jurisdiction over the probate of the decedent. A state court has an independent obligation to determine whether it has jurisdiction in a case involving an Indian person and Indian Country. The court declared void the 7 years of proceedings before the District Court with reference to the decedent's estate. In re Estate of Big Spring, 2011 MT 109, 360 Mont. 370, 255 P.3d 121, overruling Iron Bear v. District Court, 162 Mont. 335, 512 P.2d 1292 (1973), in its entirety and In re Marriage of Skillen, 1998 MT 43, 287 Mont. 399, 956 P.2d 1, in part and overruling numerous cases to the extent they followed the principles of Iron Bear or Skillen.

Jurisdiction of Montana Courts Over Tribal Member: Montana courts have jurisdiction over a tribal member whose actions involve significant contacts with the state outside reservation boundaries. The Judicial Standards Committee and state courts have jurisdiction over a tribal member who is a justice of the peace and who runs for tribal office. Judicial Standards Comm'n v. Not Afraid, 2010 MT 285, 358 Mont. 532, 245 P.3d 1116.

Medical Negligence — Right of Tribal Member to Pursue State Court Action Against Nontribal Member — State Court Jurisdiction: The plaintiff alleged medical negligence against a medical clinic that cared for the plaintiff's husband, who was a member of the Confederated Salish and Kootenai Tribes. The plaintiff was not a tribal member, the clinic was not affiliated with a tribe, and the acts took place both on and off the reservation. The District Court held that state courts do not have jurisdiction on the Confederated Salish and Kootenai Reservation over actions for medical negligence. The plaintiff appealed, and the Supreme Court reversed. The court noted that it is well established under both state and federal law that tribal members may bring civil actions against nontribal members in state court, and that tribal autonomy and self-government are not impeded when a state allows an Indian to seek relief in state court against a non-Indian for a claim arising in Indian country. This right of access to courts applies to residents of each Montana Indian reservation. Therefore, the plaintiff was not precluded from bringing the medical negligence action in state court and the state court had jurisdiction to hear the case. Morigeau v. Gorman, 2010 MT 36, 355 Mont. 225, 225 P.3d 1260. See also State ex rel. Iron Bear v. District Court, 162 Mont. 335, 512 P.2d 1292 (1973), and Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'r, 476 US 877 (1986).

Original Court Jurisdiction Over Partner or Family Member Assault Charges, Misdemeanor or Felony: District Courts have original jurisdiction over felony partner or family member assault charges. District Courts and Justices' Courts have concurrent jurisdiction over misdemeanor partner or family member assault charges. St. v. Martz, 2008 MT 382, 347 M 47, 196 P3d 1239 (2008).

Change of Place of Trial — Jurisdiction Retained by Original Court: When the location of a criminal trial is changed, the court in which the proceeding is commenced ordinarily retains jurisdiction. However, a City Court Judge may call in a substitute judge to act in the original judge's place. Three Forks v. Schillinger, 2007 MT 331, 340 M 211, 173 P3d 681 (2007).

District Court's Subject Matter Jurisdiction Not Affected by Party's Lack of Standing — Appeal of Board of Adjustment Decision: Defendants asserted that the District Court lacked subject matter jurisdiction over them because plaintiffs failed to establish standing to challenge a boundary line relocation. The Supreme Court disagreed. Defendants mistakenly linked the requirement that a court have subject matter jurisdiction with the requirement that a plaintiff

have standing to sue. Both are required, but they are not interdependent. Subject matter jurisdiction refers to a court's power to hear a particular type of case, while standing refers to the threshold justiciability requirement that a plaintiff have a personal stake in a particular case. If a plaintiff lacks standing, a court can grant no relief because a justiciable controversy does not exist, but a party's lack of standing does not deprive a District Court of subject matter jurisdiction. A court lacks the power to resolve a case brought by a party without standing because that party can present no actual case or controversy, not because the court has been stripped of subject matter jurisdiction. Here, the District Court had statutory subject matter jurisdiction under 76-2-327 to hear the boundary line appeal of the City Board of Adjustment decision and determined that plaintiffs had standing to challenge the boundary relocation. Even though defendants stylized the appeal as a subject matter jurisdiction issue, which may be appealed by interlocutory appeal prior to final judgment, the actual issue was the District Court's ruling on plaintiffs' standing, which the Supreme Court will not review prior to final judgment. Defendants' appeal was therefore premature, so the Supreme Court dismissed the appeal and remanded for further proceedings. Ballas v. Missoula City Bd. of Adjustment, 2007 MT 299, 340 M 56, 172 P3d 1232 (2007).

No Challenge to Legality of Sentence on Direct Appeal — Postconviction Relief Barred: Hardin claimed in a petition for postconviction relief that the District Court lacked jurisdiction to accept a nolo contendere plea to a sexual offense because such a plea is prohibited under 46-12-204. The petition was denied, and on appeal, the Supreme Court affirmed. Hardin failed to challenge the legality of the sentence on direct appeal, so the claim was procedurally barred by 46-21-105 from postconviction relief. Hardin v. St., 2006 MT 272, 334 M 204, 146 P3d 746 (2006).

Standing of Person in Zoning District to Bring Action Against Developer of Condominiums in Same District: To establish standing to bring suit, a complaining party must clearly allege past, present, or threatened injury to a property right or a civil right that is distinguishable from an injury to the public generally. Thus, a property owner who lived in the same zoning district as a proposed condominium development and who would be directly affected by a subdivision review or the lack of a subdivision review had standing to challenge the development. Shults v. Liberty Cove, Inc., 2006 MT 247, 334 M 70, 146 P3d 710 (2006), following Fleenor v. Darby School District, 2006 MT 31, 331 M 124, 128 P3d 1048 (2006). Fleenor was overruled in Schoof v. Nesbit, 2014 MT 6, 373 Mont. 226, 316 P.3d 831, to the extent Fleenor requires a plaintiff in a right to know or right to participate case to allege an injury beyond failure to receive notice or to allege a personal stake in a particular governmental decision for purposes of establishing standing to pursue a claim.

District Court Jurisdiction Over Grandparent-Grandchild Contact Proceedings: In the case of a petition for grandparent-grandchild contact brought under Title 40, ch. 9, the District Court retains jurisdiction to hear the petition and to issue a ruling on it. In re Grandparent-Grandchild Contact of Stewart v. Evans, 2006 MT 102, 332 M 148, 136 P3d 524 (2006).

District Court Retention of Criminal Jurisdiction — State's Appeal of Order Granting Driving Privileges Not Timely: A condition of Jivelekas's sentence for felony DUI and misdemeanor driving with a revoked or suspended license provided that Jivelekas could not drive unless approval was granted by the sentencing court or Jivelekas's supervising officer. Nearly 2 years after Jivelekas completed all terms of his sentence, he asked the District Court for approval to operate a motor vehicle in order to maintain full-time employment. The state contended that because 61-8-731 required that Jivelekas's probation officer authorize motor vehicle operation, the District Court did not have jurisdiction to consider Jivelekas's motion. The Supreme Court disagreed. Even if the District Court exceeded its statutory authority in imposing the sentence condition, the court still retained jurisdiction to entertain Jivelekas's motion. Additionally, the Supreme Court was precluded from addressing the merits of the state's argument because the state failed to file a timely appeal pursuant to former Rule 5(b), M.R.App.P. (now superseded), so the appeal was time-barred. St. v. Jivelekas, 2005 MT 277, 329 M 204, 122 P3d 1248 (2005), following Pena v. St., 2004 MT 293, 323 M 347, 100 P3d 154 (2004).

Claim of Illegal Sentence Based on Lack of Jurisdiction to Be Raised on Direct Appeal, Not Postconviction Petition — Pena Applied: Camarillo was a minor when he was convicted in 1999 of deliberate homicide, robbery, and aggravated burglary and sentenced as an adult offender to 70 years in the state prison. The case was filed directly in District Court rather than Youth Court, as allowed under 41-5-206. Camarillo filed a petition for postconviction relief in 2003, claiming that the District Court lacked subject matter jurisdiction. The state responded that the claims could have been raised on direct appeal, and the District Court agreed and dismissed the petition. On appeal, the Supreme Court noted that the District Court properly exercised jurisdiction under

this section, so Camarillo's jurisdiction argument failed. The court then applied Pena v. St., 2004 MT 293, 323 M 347, 100 P3d 154 (2004), and held that the issues that Camarillo attempted to raise in the petition for postconviction relief could have been but were not raised on direct appeal and, pursuant to 46-21-105, could not be brought in the petition for postconviction relief. In addition, under 46-21-102, petitions for postconviction relief must be filed within 1 year of final judgment. Camarillo's petition was not filed until more than 3 years after judgment and thus was untimely. The District Court was affirmed. Camarillo v. St., 2005 MT 29, 326 M 35, 107 P3d 1265 (2005).

Lack of Membership in Homeowners' Association — Insufficient Standing to Sue Association — Lack of District Court Jurisdiction Affirmed: Edwards and other plaintiffs sued Burke and others for allegedly illegal fencing of tract 3, property commonly owned by a homeowners' association. The District Court dismissed the suit for lack of jurisdiction, ruling that Edwards was not a member of the homeowners' association, had no ownership interest in tract 3, and therefore had no standing to bring the action. The Supreme Court affirmed, holding that in as much as Edwards was not a tenant in common with the members of Burke's homeowners' association, he had no standing to sue. The Supreme Court, citing Rehder v. Rankin, 91 NW 2d 399 (Iowa 1958), and in part following and in part distinguishing Winchell v. Dept. of State Lands, 262 M 328, 865 P2d 249 (1993), which held that because an unincorporated association cannot hold property, the members of the association hold the property in place of the association, said, in dicta, that the association could not hold title to the tract 3 common property. However, the Supreme Court said that whether the association or members of the association owned the property made no difference because Edwards was not even a member of the homeowners' association. Although Edwards argued that he now owns land that would have made him a member of the association, his ownership interest in the common property at issue in the case is, according to the Rehder decision, only one of beneficial ownership caused by his potential membership in the homeowners' association, and he still was not a member of the association or, if ever a member, was divested of his membership when the association's articles changed. Without a sufficient interest in the association's common property by virtue of association membership, Edwards had no standing to bring the action regarding fencing of the common property, and the District Court therefore had no jurisdiction over the action. Edwards v. Burke, 2004 MT 350, 324 M 358, 102 P3d 1271 (2004).

No Continuing District Court Jurisdiction to Review Original Sentence and Resentence on Original Charge: Evert was sentenced to 65 years in prison with 15 years suspended for sexual assault. About 5 years into the sentence, Evert petitioned pro se for postconviction relief, alleging numerous claims related to his guilty plea and sentencing, but no hearing was held. Following appointment of two different public defenders, the District Court was notified that the parties had reached an agreement on Evert's petition. In exchange for a new sentence, Evert agreed to withdraw the petition, waive the right to appeal the amended sentence, and waive the right to file any further postconviction petitions based on the new sentence. The District Court agreed to the stipulation, noted Evert's criminal history and progress in prison, and resentenced Evert to 60 years with 20 years suspended, with credit for time served. Evert then appealed the new sentence on grounds that the District Court mistakenly described Evert's eligibility for parole and that because the court did not correctly advise him, he did not fully understand the consequences of waiving his postconviction claims. The Supreme Court reversed because the District Court did not have continuing jurisdiction to resentence Evert after final judgment. Under 46-18-117, the District Court could modify or correct an erroneous sentence but had no authority to resentence Evert on the original charge. Therefore, Evert's original sentence was reinstated, the postconviction claims that Evert waived were also reinstated, and the case was remanded for consideration of the postconviction claims. St. v. Evert, 2004 MT 178, 322 M 105, 93 P3d 1254 (2004), following Gilbert v. St., 2002 MT 258, 312 M 189, 59 P3d 24 (2002), and Vannatta v. Boulds, 2003 MT 343, 318 M 472, 81 P3d 480 (2003).

Jurisdiction of Montana Courts Over Wrongful Discharge Case Involving Montana Citizen When Montana Law Applies — Dismissal for Lack of Jurisdiction Reversed: Plaintiff was a Montana resident hired by a Florida corporation, which was operated out of Oklahoma, to lay fiber optic cable throughout the country. While working in Indiana, plaintiff had a dispute with a supervisor and was fired. Plaintiff brought an action in Montana, claiming a violation of the Wrongful Discharge From Employment Act. The District Court held that under 39-2-912, the Montana courts lacked subject matter jurisdiction and dismissed the claim. On appeal, the Supreme Court reversed. Even though plaintiff never signed a written employment contract, the court held that a contract provision may be broad enough to indicate that an entire contract be governed by the laws of the state governing the particular provision. The fact that the defendant

corporation paid income taxes, unemployment insurance premiums, and wages in Montana indicated an intent to be governed by Montana law. The court also concluded that under sections 187 and 188 of Restatement (Second) of Conflict of Laws (1971), the local law of the state with the most significant relationship to the transaction applies to questions of contract interpretation absent an effective choice of law by the parties. Plaintiff was considered a Montana resident despite the fact that employment required travel to other states, and the court concluded that it was appropriate to apply the Wrongful Discharge From Employment Act to the case even though the Act does not expressly provide for extraterritorial jurisdiction. Montana courts have subject matter jurisdiction in cases involving a Montana resident when Montana law applies, so plaintiff's case should not have been dismissed for lack of subject matter jurisdiction. Burchett v. MasTec N. America, Inc., 2004 MT 177, 322 M 93, 93 P3d 1247 (2004). See also Dailey v. Transitron Electronic Corp., 475 F2d 12 (5th Cir. 1973), and Harrington v. Energy West, Inc., 2015 MT 233, 380 Mont. 298, 356 P.3d 441.

No Authority of Courts to Expunge Criminal Records Absent Statutory Authorization: Montana courts have jurisdiction to expunge criminal records pursuant to statute, but absent explicit legislative authorization, courts have no inherent power to expunge criminal records. St. v. Chesley, 2004 MT 165, 322 M 26, 92 P3d 1212 (2004).

District Court Authority to Determine Constitutionality of Proposed County Ordinance: In 1994, Ravalli County voters passed three ordinances, seeking to control obscenity and the display and distribution of obscene material to minors. The ordinances were subsequently held unconstitutional, but in 2002, defendant again filed two proposed ordinances with the Ravalli County Clerk and Recorder, seeking to proscribe the same conduct. The county asked the District Court to rule on the constitutionality of the proposed ordinances pursuant to 7-5-135, but the court declined on grounds that: (1) the proposed ordinances were legislative rather than administrative and therefore valid under the Montana Constitution; (2) 7-5-135 did not vest a District Court with jurisdiction to determine the constitutionality of an ordinance prior to adoption; (3) a suit is not a method by which a party may have a District Court prematurely consider the constitutionality of the subject matter of a proposed initiative or referendum prior to placement of the measure on the ballot; (4) ruling on a proposed ordinance would force the court to issue an advisory opinion on constitutionality in the absence of any defined basis for a constitutional attack; and (5) under Hardy v. Progressive Specialty Ins. Co., 2003 MT 85, 315 M 107, 67 P3d 892 (2003), a preliminary ruling would allow the county to avoid the burden of showing the unconstitutionality of a legislative enactment beyond a reasonable doubt. The county appealed, and the Supreme Court reversed. The burden of proof requirement articulated in Hardy applies to constitutional challenges to existing statutes, not to proposed initiatives and referenda. Although the constitutionality of an enacted legislative statute is prima facie presumed, there is no presumption of validity of a proposed statute. Under the plain meaning of 7-5-135, a District Court must, after conducting any appropriate briefing and factfinding, determine whether a proposed ordinance would be constitutional and valid if passed. The case was remanded for substantive District Court review of the proposed ordinances. Ravalli County v. Erickson, 2004 MT 35, 320 M 31, 85 P3d 772 (2004).

Sufficient Allegations for Pursuit of State Claim for Violation of Federal Wage Standards Absent Remedy Under Federal Davis-Bacon Act: Plaintiff construction workers on a public works project brought a state action against a school district for alleged violation of wage standards established by the federal Davis-Bacon Act. The District Court held that before the workers could maintain a private cause of action in state court, the four-part test in St. Medical Oxygen & Supply, Inc. v. Am. Medical Oxygen Co., 230 M 456, 750 P2d 1085 (1988), must be met. The first prong requires a showing that the Davis-Bacon Act created a federal right in favor of plaintiffs. The District Court held that it did but then found that because there was no indication in the Act that Congress intended to create a remedy against the owner of the project and that implying such a remedy was inconsistent with the Act, a state action could not be maintained. The Supreme Court disagreed and reversed. Absent both a federal wage provision and a federal contracting party, the workers could invoke no federal regulatory remedy under 40 U.S.C. 3142(a), so a state court action was logical for pursuit of a remedy. Because the workers were not seeking a remedy under the Act, analysis under St. Medical Oxygen was unnecessary and inappropriate. The allegations in the workers' state claim were sufficient to survive the school district's claim for dismissal and to vest the District Court with subject matter jurisdiction, so the case was remanded to allow the workers to proceed with their negligence and breach of contract action against the school district. Herrmann v. Wolf Point School District, 2004 MT 10, 319 M 231, 84

P3d 20 (2004). See also Favel v. Am. Renovation & Constr. Co., 2002 MT 266, 312 M 285, 59 P3d 412 (2002).

Common-Law Recognition and Sovereignty of Little Shell Tribe — Suit Against Tribal Officials Barred: Plaintiffs were candidates in an election of the Little Shell Tribe of Indians and sued in Montana District Court for tort damages and injunctive relief against the incumbent candidates, claiming that plaintiffs had won the election. The District Court dismissed on grounds of lack of jurisdiction, and plaintiffs appealed. The Supreme Court noted that the tribe had been pursuing federal tribal recognition since the 1930s, but as yet, the tribe is not recognized by the federal government. Nevertheless, Montoya v. U.S., 180 US 261 (1901), establishes criteria for common-law recognition of a tribe. The court examined the Montoya criteria and held that the Little Shell Tribe satisfied each element of the test for common-law recognition, so the tribe is entitled to sovereignty. Tribal members are of the same or similar race, are united in a community, exist under one leadership or government, and inhabit a particular though sometimes ill-defined territory. Further, under Santa Clara Pueblo v. Martinez, 436 US 49 (1978), Indian tribes and their officials enjoy sovereign immunity from suit unless expressly limited by Congress. Thus, because the tribal officials in this case were acting in their official capacities, suit against them in state court was barred under the doctrine of sovereign immunity. Dismissal of the action by the District Court for lack of jurisdiction was affirmed. Koke v. Little Shell Tribe of Chippewa Indians of Mont., Inc., 2003 MT 121, 315 M 510, 68 P3d 814 (2003).

Error in Montana Court's Declination of Jurisdiction to Washington Court — Inconvenient Forum: Following several incidents of partner abuse over the years, the mother moved to Washington state and then requested that the Montana court decline jurisdiction as an inconvenient forum in order to allow the Washington court to assume jurisdiction. The request was denied, and the mother appealed. Under the Uniform Child Custody Jurisdiction Act, a Montana court has jurisdiction to make child custody determinations if Montana is the child's home state, as defined in 40-7-103, and Montana will continue to have exclusive continuing jurisdiction unless the Montana court declines to exercise its jurisdiction. In this case, the parties conceded that Montana was the home state. Jurisdiction may be declined at any time if the Montana court determines that it is an inconvenient forum and that a court of another state is a more appropriate forum to make custody determinations. The factors in 40-7-108 must be considered when evaluating a motion to decline jurisdiction, and the Act places domestic violence at the top of the list of factors to be considered. Although this factor alone is not dispositive, the Supreme Court held that, given the high propensity for recidivism in domestic violence, when a court finds that partner abuse or child abuse has occurred or that a party has fled Montana to avoid further violence or abuse, the court is authorized to consider whether the party and the child might be better protected if further custody proceedings are held in another state. Here, the District Court abused its discretion by failing to consider which forum would best protect the mother and children. The Supreme Court then went on to discuss the other statutory factors and concluded that the protection of the parties, the years that the children have resided in Washington, the significant distance between the courts, the parties' disparate financial circumstances, the location of evidence and convenience of witnesses, and the familiarity factors all supported the Montana court declining jurisdiction. None of the jurisdictional factors mitigated against declination, and no factor outweighed the concern for safety raised by the history of domestic violence. Thus, the Supreme Court ordered the District Court to decline jurisdiction as an inconvenient forum and arrange to transfer the case to Washington. In re Marriage of Stoneman v. Drollinger, 2003 MT 25, 314 M 139, 64 P3d 997 (2003).

Following remand, the District Court held that the issue of child support should be transferred to Washington state in conjunction with the custody and parenting issues. Nevertheless, the wife filed a cross-appeal in 2007 arguing that under 40-5-149 (renumbered 40-5-1012), Montana retained jurisdiction over the child support issue. However, the Supreme Court dismissed the claim as untimely. Under Rule 4, M.R.App.P., notice of appeal must be filed within 30 days of judgment or order, but the wife's notice of cross-appeal was filed more than 11 months after the District Court's order that finally settled the matter. In re Marriage of Stoneman & Drollinger, 2008 MT 448, 348 M 17, 199 P3d 232 (2008).

Venue Versus Jurisdiction — Failure to Move for Change of Venue at Initial Appearance Constituting Waiver of Right to Later Object to Venue: A mother filed in District Court in Judith Basin County for review of a child support modification consent order by the Department of Public Health and Human Services Child Support Enforcement Division (CSED) reducing the father's child support obligation. CSED moved for dismissal, claiming that the mother had failed to exhaust her administrative remedies. The District Court granted the motion based on lack

of jurisdiction, concluding that the petition should have been filed in a different county. The mother appealed, contending that the court confused the concepts of venue and jurisdiction and contending that dismissal of the petition for lack of jurisdiction was erroneous as a matter of law. The Supreme Court agreed and reversed. The District Court's interpretation of 2-4-702 as a requirement that a petition for judicial review must be filed in the correct venue for the court to obtain jurisdiction was incorrect as a matter of law. Jurisdiction is a court's authority to hear and determine a case that goes to the power of the court and cannot be waived or conferred by consent of the parties when there is no basis for jurisdiction under the law, while venue refers to the place where a case is to be heard or where the power of the court is to be exercised and is a personal privilege of defendant that may be waived and that is considered waived pursuant to former Rule 12(b), M.R.Civ.P. (now superseded), unless a motion to change venue is made at defendant's initial appearance. Thus, the mother's petition for judicial review vested the Judith Basin County District Court with jurisdiction under 2-4-702. Whether venue was proper in the county where the petition was filed was an entirely different issue. Section 2-4-702 also sets forth the proper place where a contested administrative decision can be heard, providing that the petition must be filed in the District Court for the county where the petitioner resides or has a principal place of business or where the agency maintains its principal office. Upon proper motion, the matter should have been transferred to the proper county, but CSED failed to move for a change of venue at the initial appearance, thereby waiving its right to later object to venue, opting instead to move to dismiss for lack of jurisdiction. Therefore, Judith Basin County was a proper place for trial absent agreement by the parties to transfer venue. In re Support Obligation of McGurran, 2002 MT 144, 310 M 268, 49 P3d 626 (2002).

Justiciable Controversy Created by Intervention of Child Support Enforcement Division With Continuing District Court Jurisdiction Over Child Support Orders: As part of a marriage dissolution, the District Court ordered that the husband pay monthly child support in a specific amount. The Child Support Enforcement Division (CSED) subsequently notified the court that it intended to modify the order pursuant to its authority in 40-5-272 and 40-5-273. The court, sua sponte, then enjoined CSED from modifying any child support orders issued by a Montana District Court, asserting that CSED's actions in modifying a court order violated the constitutional separation of powers clause. On appeal, CSED maintained that this case did not present a justiciable controversy, primarily because neither party to the dissolution action challenged the constitutionality of the statutes in question, and that the court was therefore without jurisdiction to decide the issue. The Supreme Court disagreed, finding that a justiciable controversy did exist. Once the original equitable jurisdiction of the District Court was invoked in the dissolution action, the court retained continuing jurisdiction following entry of the child support order. As a result, the court properly used its inherent authority to protect both its continuing jurisdiction and the husband's right not to be adversely affected by an act of CSED that the court considered unconstitutional. Further, the court had personal jurisdiction over CSED because CSED's notification that it intended to intervene interjected CSED into the ongoing matter, constituting a voluntary appearance into the case under former Rule 4B, M.R.Civ.P. (now superseded), and vesting personal jurisdiction over CSED with the District Court. Seubert v. Seubert, 2000 MT 241, 301 M 382, 13 P3d 365, 57 St. Rep. 1006 (2000). See also In re Marriage of Harper, 235 M 41, 764 P2d 1283 (1988), and Gryczan v. St., 283 M 433, 942 P2d 112 (1997).

Statutes Granting Child Support Enforcement Division Judicial Power to Make and Enforce Child Support Orders Violative of Constitutional Separation of Powers: As part of a marriage dissolution, the District Court ordered that the husband pay monthly child support in a specific amount. The Child Support Enforcement Division (CSED) subsequently notified the court that it intended to modify the order pursuant to its authority in 40-5-272 and 40-5-273. The court, sua sponte, then enjoined CSED from modifying any child support orders issued by a Montana District Court, asserting that CSED's actions in modifying a court order violated the constitutional separation of powers clause. On appeal, CSED maintained that the statutes did not violate the separation of powers clause because: (1) the statutory scheme was merely a quasi-judicial function that did not threaten the institutional integrity of the Judicial Branch; (2) the statutes in question were a reasonable response to both the federal legal requirements for expedited child support modification and the sheer magnitude of child support collection in Montana; (3) CSED was empowered to modify a support order only if the facts changed; (4) every contested modification was subject to a hearing before an administrative law judge; (5) all modifications were subject to judicial review; and (6) the Legislature's grant of jurisdictional authority to CSED was not exclusive. The District Court responded that the statutes were an unconstitutional violation of separation of powers because: (1) they gave CSED judicial power

that is exclusively reserved to the judiciary; (2) they gave CSED statutory authority to modify a child support order, file it with the District Court, and then enforce the order as a District Court judgment; and (3) the procedure for judicial review of a CSED modification was not automatic and was limited by the scope of the Montana Administrative Procedure Act. The Supreme Court concluded that 40-5-272 and 40-5-273 are an unconstitutional violation of the separation of powers clause to the extent that they grant CSED the judicial power to make and enforce child support orders without automatic and mandatory judicial review. Although appreciative of the magnitude of the agency's modification and enforcement tasks, the court found that that fact did not justify unbridled departure from constitutional norms respecting the autonomy of the individual branches of government. Seubert v. Seubert, 2000 MT 241, 301 M 382, 13 P3d 365, 57 St. Rep. 1006 (2000), distinguishing Chastain v. Chastain, 932 SW 2d 396 (Mo. 1996), and State of Iowa ex rel. Sara Allee v. Gocha, 555 NW 2d 683 (Iowa 1996).

Lack of District Court Jurisdiction Over Claims for Fees Incurred During Bankruptcy Proceedings: Watts filed a claim against Parsons in District Court for fees owing in a bankruptcy action, contending that the debt was incurred after the bankruptcy was discharged and closed and thus was not subject to review by the Bankruptcy Court. The District Court found that it had jurisdiction, based on Woodley v. Myers Capital Corp., 835 P2d 239 (Wash. Ct. App. 1992), and Metco, Inc. v. Huffman, 511 NW 2d 780 (Nebr. Ct. App. 1994), and granted Watts' request for fees. Citing In re Hathaway Ranch Partnership, 116 Bankr. Rep. 208 (Bankr. C.D. Calif. 1990), the Supreme Court noted that the burden of showing entitlement to fees was on Watts. Watts asserted that the parties entered into an agreement for payment of fees after the bankruptcy was discharged but that the agreement was never brought to the attention of or approved by the Bankruptcy Court. By withholding the terms of the agreement from the Bankruptcy Court, Watts denied Parsons the lawful protection of that court. The Supreme Court distinguished Woodley and Metco, noting that in the present case, Watts never submitted the question of fees to the Bankruptcy Court and that the District Court was not in a position to determine whether the fees were reasonable. Because the District Court did not have jurisdiction over the claim for professional fees incurred during the pendency of the bankruptcy action, the case was remanded to District Court with instructions to dismiss. Watts & Associates, Inc. v. Parsons, 1999 MT 56, 293 M 464, 976 P2d 984, 56 St. Rep. 237 (1999).

Standing to Bring Declaratory Judgment Action — Possibility of Prosecution Under Criminal Statute Held Sufficient: Gryczan and others, who were homosexuals, brought a declaratory judgment action against the state, seeking a determination of whether 45-5-505 (renumbered 45-8-218), proscribing deviate sexual conduct, was unconstitutional as applied, as a violation of their right to privacy. The plaintiffs alleged that they had in the past and intend in the future to engage in acts that violate the statute. The state contested the plaintiffs' right to bring the action, arguing that the statute had never been enforced. Relying upon Lee v. St., 195 M 1, 635 P2d 1282 (1981), and Helena Parents v. Lewis & Clark County, 277 M 367, 922 P2d 1140 (1996), the Supreme Court reviewed the criteria for standing generally and standing to challenge a criminal statute in particular and noted that it had never required a person to suffer arrest in order to challenge a criminal statute. Moreover, the Supreme Court noted that although it had never been enforced, the Legislature had amended the statute as late as 1991 and had even later rejected attempts to repeal the statute. The Supreme Court reviewed opinions decided by the U.S. Supreme Court and other federal courts and held that because the Legislature did not regard the statute as moribund and because the Attorney General had not foresworn the enforcement of the statute, plaintiffs had a legitimate and realistic fear of criminal prosecution along with other psychological harms. Noting that the plaintiffs are precisely the individuals against whom the statute is intended to operate, the Supreme Court held that the District Court did not err in holding that the plaintiffs had standing to challenge the statute. Gryczan v. St., 283 M 433, 942 P2d 112, 54 St. Rep. 699 (1997), followed in Mont. Envtl. Information Center v. Dept. of Environmental Quality, 1999 MT 248, 296 M 207, 988 P2d 1236, 56 St. Rep. 964 (1999). (See 2013 amendments to 45-2-101 and 45-8-218.)

Damage Claim Not Available as Challenge to District Court Subject Matter Jurisdiction: Although the jurisdiction of courts can be limited by constitutional or statutory provisions on the basis of the amount in controversy or dispute between the parties, Montana District Courts are not constrained by such limits. Therefore, the amount and type of a damage claim in District Court may not be raised to challenge a District Court's subject matter jurisdiction. Day v. Payne, 280 M 273, 929 P2d 864, 53 St. Rep. 1400 (1996).

State Probate Jurisdiction of Federal Claim — Homestead Exemption — Priority of Liens: Creditor obtained a default judgment in the U.S. District Court for the Southern District of

New York against an Alaska resident and attempted to execute on property in Montana that had subsequently come under Montana's exclusive probate jurisdiction. While the federal court retained jurisdiction over claims impacting the estate, the court could not seize and control property in the possession of the state probate court. It was within the jurisdiction of the state court to determine that the real property was subject to family protection allowances and exempt from execution. Although the lien was attached prior to debtor's death, the lien was extinguished upon the exercise of the family protection allowances, and the homestead allowance was exempt from and had priority over all other claims against the estate. In re Estate of Wilhelm, 233 M 255, 760 P2d 718, 45 St. Rep. 1468 (1988).

No State Jurisdiction of Reservation Commercial Transactions — Preemption by Tribal Jurisdiction: A state District Court did not have primary subject matter jurisdiction over a civil debt action arising out of a commercial transaction on an Indian reservation and brought by a non-Indian creditor against an enrolled tribal member debtor, both of whom resided on the reservation. State assumption of such jurisdiction interfered with tribal sovereignty and the tribe's right of self-government. Therefore, the state court's jurisdiction over the commercial transaction was preempted by tribal jurisdiction. Geiger v. Pierce, 233 M 18, 758 P2d 279, 45 St. Rep. 1257 (1988), followed in Balyeat Law, PC v. Pettit, 1998 MT 252, 291 M 196, 967 P2d 398, 55 St. Rep. 1038 (1998) (the state has no jurisdiction over an action to collect a debt for medical bills arising out of transactions, either on or off the reservation, brought by a non-Indian creditor against an enrolled tribal member residing on a reservation whose spouse incurred the debt but who engaged in no significant off-reservation contacts so as to subject herself to state jurisdiction).

Jurisdiction of Offense of Selling Alcohol Without a License: The District Court was the proper court to try the offense of sale of beer or wine without a valid state license. St. v. Barnes, 232 M 405, 758 P2d 264, 45 St. Rep. 1150 (1988).

Standing to Sue Government in General — Annexation Proceedings in Particular: Before one has standing to sue a governmental entity, there must be a case or controversy. The plaintiff must clearly allege past, present, or threatened injury to a property or civil right, and the injury must be distinguishable from injury to the public in general, though it need not be exclusive to the plaintiff. In an annexation protest, annexation is a political matter exclusively for legislative control, absent a constitutional prohibition. The annexation must be void ab initio, and the challenger must be a property owner who would suffer a tax increase. The available remedy is an injunction, not monetary damages. A count of petition signatures for only one of many annexed areas, by a plaintiff who used his own criteria for the count, is insufficient to support a claim that the government entity inaccurately counted the signatures. Since plaintiff here had no standing to directly attack the annexation, he could not collaterally attack it by attempting to show negligence. O'Donnell Fire Serv. & Equip. Co. v. Billings, 219 M 317, 711 P2d 822, 42 St. Rep. 2051 (1985), followed in Knudsen v. Ereaux, 275 M 146, 911 P2d 835, 53 St. Rep. 83 (1996), and Lohmeier v. Gallatin County, 2006 MT 88, 332 M 39, 135 P3d 775 (2006).

Termination of Youth Court Jurisdiction — No Bar to Jurisdiction of District Court: The defendant was under 18 years of age when the crime of which he was accused was committed. When the defendant was 20 years old he confessed, and the County Attorney filed a petition in the Youth Court, seeking a declaration that the defendant was a delinquent youth and requesting authority to incarcerate him. The defendant turned 21 before the motion was ruled on. He then was charged with deliberate homicide in District Court. The defendant contended that when the Youth Court lost jurisdiction over him under 41-5-205, the District Court did not have jurisdiction because once jurisdiction has attached under 41-5-203, the District Court can never assume jurisdiction over the offense underlying the Youth Court's proceeding absent transfer under 41-5-206, which did not occur here. The Supreme Court held that on termination of Youth Court jurisdiction, there was no bar to the exercise of jurisdiction by the District Court under Art. VII, sec. 4(1), Mont. Const., 3-5-302, and 46-2-201, over felony proceedings against the defendant. Exclusive original jurisdiction of the Youth Court does not divest a District Court of jurisdiction over crimes committed by a juvenile defendant. St. v. Beach, 217 M 132, 705 P2d 94, 42 St. Rep. 1080 (1985).

"Original Jurisdiction" Not Exclusive Jurisdiction: In cases pending before the Youth Court under the Youth Court Act (Title 41, ch. 5), two youths, ages 14 and 15, were charged with numerous felony counts. The State sought to arrest the proceeding in order to move that the youths be transferred to the jurisdiction of the District Court under 41-5-206. The State contends that the requirement for transfer contained in that statute effectively gives the Youth Court all jurisdiction over all felony cases if the youth charged is less than 16 years old and that this

provision conflicts with this section of the Montana Constitution, which provides for District Court jurisdiction. The State further contends that this constitutional provision gives the District Court exclusive jurisdiction in all criminal cases amounting to a felony and that a youth under 16 years is legally capable of committing a felony. In denying the state's application for relief, the Supreme Court held that: (1) the term "original jurisdiction", as used in this section, does not mean exclusive jurisdiction; and (2) felonies may be prosecuted in the Youth Court because when it acts in jurisdiction the Youth Court is acting as a District Court. In re T.L.G. & M.E.H., 214 M 164, 692 P2d 1227, 41 St. Rep. 2388 (1984).

All Parties in Equity Court Entitled to Have Their Legal Claims and Counterclaims Tried by Jury: Although, in the past, the court has purported to permit a court of equity to rule on all questions in a case, the court has never held that a court sitting in equity may try those issues of fact raised by plaintiff in a legal cause of action. The modern merger of law and equity courts and the liberal joinder provisions of the Rules of Civil Procedure force reevaluation of the traditional justification for permitting an equity court to decide legal issues. Upon timely demand, all parties are entitled to have their legal claims and counterclaims tried by jury. Gray v. Billings, 213 M 6, 689 P2d 268, 41 St. Rep. 1910 (1984). (To the extent that Butler Bros. Dev. Co. v. Butler, 111 M 329, 108 P2d 1041 (1941), and its progeny have been interpreted to deny plaintiff a right to jury trial of his legal claims, the cases are overruled.)

Youth Legally Capable of Committing Crime — Jurisdiction When Crime Disclosed After Majority: The District Court has jurisdiction to try an individual charged at age 22 for felonies allegedly committed at age 15, as provided in the court's constitutional grant of jurisdiction over all felonies. The Youth Court Act does not contain any direct statement or implication that the Legislature intended to set the minimum age of criminal responsibility at 16, making a 15-year-old incapable of committing a crime. The primary purposes of statutes defining a "delinquent youth" and providing for transfer to District Court are to clarify that delinquency proceedings are noncriminal and to prohibit prosecution of youths in District Court while they are youths. State ex rel. Elliot v. District Court, 211 M 1, 684 P2d 481, 41 St. Rep. 1184 (1984).

Title to and Public Use of Dearborn River — Subject Matter Jurisdiction Found: Landowner along the Dearborn River claimed the District Court lacked subject matter jurisdiction over action for determination of the public's right to use the river, basing his claim on the presumption that he held title to the riverbed and that the State had no power to strip him of that title under the guise of determining navigability of the waters over the riverbed. The claim lacked merit because the State holds title to the riverbed and the water flowing over it, so that there was no question of the District Court's subject matter jurisdiction. Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984).

District Court's Power to Order Payment of Expenditures Beyond Budget: District Court's fiscal year budget was overrun, and this stopped or threatened to stop the efficient and orderly administration of justice and court business, creating an emergency. As a court of competent jurisdiction, the District Court may issue orders for the payment of out-of-budget expenditures that are reasonable and necessary. Compliance with the orders by the members of the Board of County Commissioners or by any other officer in the exercise of his official duties is within the exception to personal liability of the officers provided in 7-6-2323 (now repealed). The officers may pass on the propriety of the claims but may not deny them on the basis that they are outside the budget if the court has duly ordered them paid. State ex rel. District Court v. Whitaker, 210 M 363, 681 P2d 1097, 41 St. Rep. 1104 (1984).

District Court Jurisdiction — Invoked by Probable Cause in Leave to File Information — Res Judicata After Appeal Process: The issue of subject matter jurisdiction cannot be waived or conferred by consent of a party and may be raised at any stage of a judicial proceeding or sua sponte by the court; but if the question of jurisdiction turns upon a finding of whether the affidavit of application for leave to file an information shows probable cause and the defendant has been found guilty and the judgment has not been appealed or has been affirmed on appeal, the issue of probable cause is res judicata. St. v. Davis, 210 M 28, 681 P2d 42, 41 St. Rep. 898 (1984). In St. v. Spreadbury, 2011 MT 176, 361 Mont. 253, 257 P.3d 392, the Supreme Court held that the issue of whether the information included allegations to establish probable cause is not a jurisdictional issue, and the court overruled statements to the contrary made in Davis and in St. v. Thompson, 243 Mont. 28, 792 P.2d 1103 (1990).

Jurisdiction of State Court Over Nonresident Federally Chartered Bank — Sufficiency of Evidence — Denial of Due Process and Equal Protection: Officers of the plaintiff corporation traveled to Reno, Nevada, to deposit money in the defendant branch bank in anticipation of business in Nevada and later brought an action in a Montana District Court against the

defendant for unlawful dishonor of a check and associated charges. The District Court did not err in dismissing the action for lack of jurisdiction. Under the provisions of 12 U.S.C. § 94, a federally chartered bank may be sued, among other places, where it is "located". The U.S. Supreme Court in Citizens & S. Nat'l Bank v. Bougas, 434 US 35 (1977), construed the term "located" to mean wherever branch offices are found. Because there is no branch bank in Montana and there has been no business operation conducted by the defendant in Montana that would constitute a waiver of the protection of federal law, the District Court had no jurisdiction. There was, moreover, sufficient evidence before the District Court for it to make the determination that there was no voluntary waiver and the U.S. Supreme Court has held in Mercantile Nat'l Bank at Dallas v. Langdeau, 371 US 555 (1963), that Congress "unquestionably" has the authority to determine those situations in which national banks can be sued. Hamelly Int'l, Inc. v. First Nat'l Bank of Nev., 199 M 221, 648 P2d 282, 39 St. Rep. 1304 (1982).

State Jurisdiction Over Indian Contract: One licensed to practice law in this state cannot make a contract as an attorney to be performed both on and off the reservation and then use his status as an Indian to defeat state jurisdiction when he is sued on the contract involved. Crawford v. Roy, 176 M 227, 577 P2d 392 (1978).

Authority to Invalidate Labor Contract: Although a state court has the authority to construe and enforce collective bargaining agreements, it does not have the authority to invalidate a labor contract, proper on its face, because one of the parties has allegedly engaged in an unfair labor practice. Such a determination is exclusively a function of the federal system. Audit Serv., Inc. v. Elmo Rd. Corp., 175 M 533, 575 P2d 77 (1978).

Standing to Challenge Tax Deed Sale: In an action to have a tax deed sale declared null and void and to exercise right of repurchase because notice of sale placed an "unreasonably low value" on the property, the Supreme Court held, although urged for the first time on appeal, that plaintiffs were without standing to bring the action since they forfeited their preferential right of repurchase. Stewart v. Bd. of County Comm'rs, 175 M 197, 573 P2d 184 (1977), followed in Sanders v. Yellowstone County, 276 M 116, 915 P2d 196, 53 St. Rep. 305 (1996), Bowen v. McDonald, 276 M 193, 915 P2d 201, 53 St. Rep. 343 (1996), and Helena Parents Comm'n v. Lewis & Clark County Comm'rs, 277 M 367, 922 P2d 1140, 53 St. Rep. 687 (1996), with Bowen distinguishing Kahle v. Smithers, 225 M 452, 733 P2d 844 (1987), and Hudson v. McDonald, 229 M 426, 747 P2d 221 (1987).

Jurisdiction Retained Upon Filing Reduced Charge: When District Court's jurisdiction is originally invoked by an information charging a felony, it is not lost by State subsequently reducing the charge to only a lesser included misdemeanor. St. v. Shults, 169 M 33, 544 P2d 817 (1976).

APPELLATE JURISDICTION

Proper Dismissal of Nonjusticiable Controversy — No Advisory Opinion by Supreme Court: Plaintiff filed an action to enjoin and declare unlawful the defendant airport authority's proposed lease of land adjacent to the airport. However, the potential lessee decided to not pursue the lease. The District Court suggested the lessee's decision would render the matter moot, but it ruled on the merits in favor of the defendant. The plaintiff appealed, and the Supreme Court concluded that the case was moot and did not present a controversy but rather called for an advisory opinion, which the Supreme Court does not render. Therefore, the appeal was dismissed as nonjusticiable. Plan Helena, Inc. v. Helena Regional Airport Authority Bd., 2010 MT 26, 355 Mont. 142, 226 P.3d 567. See also Kulko v. Davail, Inc., 2015 MT 340, 381 Mont. 511, 363 P.3d 430.

No Youth Court Authority to Expunge DUI Offenses — Elements of Judicial Estoppel Not Met: Following Darrah's completion of a Youth Drug Court program in 2004, the Youth Court ordered that Darrah's prior criminal record be expunged, including a previous minor in possession offense and a 2002 DUI. Darrah was subsequently charged in 2005 with second offense DUI, based on the prior 2002 DUI, and in 2006 Darrah was charged with third offense DUI. Citing the principle of judicial estoppel, Darrah asserted that because the Youth Court record had been expunged, the 2002 DUI should not count against him. The District Court disagreed and Darrah appealed. The Supreme Court applied the elements of judicial estoppel set out in Vogel v. Intercontinental Truck Body, Inc., 2006 MT 131, 332 M 322, 137 P3d 573 (2006), and determined that Darrah had failed to demonstrate that each element was met, so judicial estoppel did not apply. Further, there is no authority under which the Youth Court could order expungement of Darrah's DUI offenses. The District Court was affirmed. St. v. Darrah, 2009 MT 96, 350 M 70, 205 P3d 792 (2009), following St. v. Chesley, 2004 MT 165, 322 M 26, 92 P3d 1212 (2004).

Elimination of Trial De Novo on Appeals From Justices' Courts of Record Not Unconstitutional: Hernandez contended that the elimination of trials de novo following appeals from Justices' Courts of Record in 3-10-101 violated Art. VII, sec. 4(2), Mont. Const., which requires District Courts to hear appeals from inferior courts as new trials unless otherwise provided by law. The Supreme Court held that the phrase "as otherwise provided by law" authorizes the Legislature to provide for something other than trials de novo in District Court and that elimination of trials de novo through the creation of Justices' Courts of Record is constitutionally permissible under Art. VII, sec. 4(2), Mont. Const. Hernandez v. Yellowstone County Comm'rs, 2008 MT 251, 345 M 1, 189 P3d 638 (2008).

Out-of-Time Appeal in Criminal Matters — Exclusive Jurisdiction With Supreme Court: Under 46-20-101, the only method for review in criminal cases is by notice of appeal. Time limits for filing an appeal are mandatory and jurisdictional. If a defendant takes no action to perfect an appeal within 90 days of judgment, the District Court loses its jurisdiction and the appeal is out-of-time. However, an out-of-time appeal is a remedy that may be available to a criminal defendant who, through no fault of the defendant, misses a deadline for filing an appeal. Although former Rule 21(b), M.R.App.P. (now superseded), precludes an out-of-time appeal in a civil case, the Supreme Court is not precluded from addressing a motion for an out-of-time appeal in a criminal case. Further, a District Court lacks jurisdiction to grant an out-of-time appeal. The Supreme Court has exclusive jurisdiction to grant a motion for an out-of-time appeal, and the motion is considered an original proceeding subject to the provisions of former Rule 17, M.R.App.P. (now superseded). Upon a showing that the failure to timely notice a criminal appeal was excusable under the circumstances, the Supreme Court may conclude that an out-of-time appeal is the appropriate remedy pursuant to former Rule 21(b), M.R.App.P. (now superseded). In that event, the matter will be remanded to the District Court with instructions to vacate and reenter judgment to afford the defendant a second opportunity to act within the statutory timeframes for filing notice of appeal. St. v. Tweed, 2002 MT 286, 312 M 482, 59 P3d 1105 (2002).

Appeal to District Court Allowed Only After Trial in Lower Court, Not After Forfeiture of Bond — Exclusive Statutory Remedy for Appeals From Courts of Limited Jurisdiction: Kempin was charged in Justice's Court with seven fish and game violations but failed to appear for trial, so the appearance bonds that Kempin had posted were forfeited and Kempin's hunting, fishing, and trapping privileges were suspended for 10 years. Kempin appealed to the District Court within 10 days of the Justice's Court judgment, but the appeal was dismissed for lack of jurisdiction and because Kempin had no statutory right to appeal the forfeitures as a matter of law, so Kempin appealed to the Supreme Court. Under this section, District Courts must hear appeals from inferior courts as trials de novo unless otherwise provided by law, and appeal of a criminal conviction from a court of limited jurisdiction is governed exclusively by 46-17-311, which provides three circumstances under which a criminal defendant may appeal to District Court for a trial de novo: (1) when a defendant pleads guilty or nolo contendere but preserves legal issues raised by pretrial motion for appeal; (2) when a defendant files written notice of intention to appeal within 10 days after a judgment is rendered following a trial; and (3) when a defendant appeals revocation of a suspended sentence. Here, Kempin claimed that denial of a District Court trial by jury following forfeiture in Justice's Court violated his due process rights. However, Kempin raised no appealable pretrial issues, nor was the case an appeal of a suspended sentence, so the first and third circumstances did not apply. Kempin did appeal the judgment within 10 days, but there was no trial, so Kempin was not constitutionally entitled to a trial de novo when there had been no trial initially, nor is 46-17-311 unconstitutionally vague for not explicitly proscribing an appeal following a forfeiture. The Supreme Court agreed with the District Court's explanation in declining jurisdiction—that if a defendant was automatically entitled to a trial de novo on appeal without first having a trial in Justice's Court, a defendant could avoid Justice's Court altogether by not appearing and forfeiting the Justice's Court bonds and then pursuing a trial in District Court, which would render the Justice's Court system meaningless. Kempin's other due process arguments were also not compelling because Kempin waived his trial rights by failing to appear in Justice's Court to assert any constitutional rights and in light of his stated intention to forfeit the bonds and the advance notice of the suspension of the hunting, fishing, and trapping privileges. Absent any statutory basis for an appeal, dismissal of the appeal by the District Court was affirmed. St. v. Kempin, 2001 MT 313, 308 M 17, 38 P3d 859 (2001). See also St. v. Feight, 2001 MT 205, 306 M 312, 33 P3d 623 (2001), and St. v. Schulke, 2005 MT 77, 326 M 390, 109 P3d 744 (2005).

Improper Reliance by District Court on Justice's Court Proceeding Constituting Denial of Right to Trial De Novo — Reversal Warranted: Stedman was convicted in Justice's Court of criminal

mischief and appealed to District Court for a trial de novo. During the District Court trial, the judge referenced the Justice's Court proceedings in several instances, which strongly suggested that the judge was unduly influenced by the Justice's Court proceedings, denying Stedman of the constitutional and statutory right to a trial de novo. The Supreme Court remanded for a trial de novo. St. v. Stedman, 2001 MT 150, 306 M 65, 30 P3d 353 (2001), distinguished in McDunn v. Arnold, 2013 MT 138, 370 Mont. 270, 303 P.3d 1279.

Limitation to One Jury Trial Held Unconstitutional: In 1997, the Legislature enacted the provisions codified at 46-7-102(1)(g), 46-17-201(3), and 46-17-311(1), providing that a person tried for a misdemeanor in Justice's or City Court who appeals to the District Court has the right to only one jury trial. Woirhaye was charged with misdemeanor DUI and requested a jury trial in Missoula County Justice's Court. Upon his conviction by the Justice's Court jury, Woirhaye appealed to the District Court for a trial de novo pursuant to 46-17-311 and subsection (2) of this section. Woirhaye asked that the District Court declare 46-17-201(3) unconstitutional, but the District Court denied his motion. Woirhaye then petitioned the Supreme Court for a writ of supervisory control, which was granted on the grounds that Woirhaye would otherwise be denied a fundamental right. The Supreme Court held that Woirhaye's right to a jury trial in both the Justice's Court or City Court and the District Court was a fundamental right guaranteed by Art. II, sec. 24 and 26, Mont. Const. The Supreme Court pointed out that the right to a jury trial is guaranteed by Art. III, sec. 2, clause 3, of the U.S. Constitution and the sixth amendment to the U.S. Constitution and also that even if that were not the case, Montana may, under the rationale of St. v. Bullock, 272 M 361, 901 P2d 61 (1995), provide rights in excess of those guaranteed by the U.S. Constitution. The Supreme Court noted, in response to the state's argument that Art. II, sec. 24, Mont. Const., guarantees "a" jury trial, that the state's argument was not persuasive against the language of Art. II, sec. 26, Mont. Const. The Supreme Court also distinguished Ludwig v. Mass., 427 US 618 (1976), holding that subsection (2) of this section was not implicated in the case, and stated that any language in N. Cent. Serv., Inc. v. Hafdahl, 191 M 440, 625 P2d 56 (1981), indicating that a requirement for a jury trial applicable to Small Claims Court was satisfied if the right was granted at the District Court level, was dicta and could not be relied upon to support the state's case that only one jury trial was required. Consequently, the Supreme Court held 46-7-102(1)(g), 46-17-201(3), and 46-17-311(1) to be unconstitutional as violating Woirhaye's right to a jury trial. Woirhaye v. District Court, 1998 MT 320, 292 M 185, 972 P2d 800, 55 St. Rep. 1298 (1998), followed in Balyeat Law, P.C. v. Harrison, 1999 MT 144, 295 M 13, 983 P2d 902, 56 St. Rep. 566 (1999), and followed and clarified in St. v. Rensvold, 2006 MT 146, 332 M 392, 139 P3d 154 (2006).

Judgment and Sentence Prerequisite to Appeal to District Court — Misdemeanors: Except for misdemeanors listed in 3-5-302(2), a District Court is limited to appellate jurisdiction of misdemeanor cases. Imposition of sentence and entry of a final judgment by a Justice's Court or City Court are prerequisites to appeal to a District Court, and a party may not consent to subject matter jurisdiction or waive the want of jurisdiction. St. v. Hegeman, 248 M 49, 808 P2d 509, 48 St. Rep. 318 (1991), followed in St. v. Tweedy, 277 M 313, 922 P2d 1134, 53 St. Rep. 656 (1996), and St. v. Diesen, 1998 MT 163, 290 M 55, 964 P2d 712, 55 St. Rep. 655 (1998).

Legislative Provision for Judicial Review of Administrative Action Exclusive: Under this section, only the Legislature may provide for judicial review of administrative actions. Right of judicial review cannot be created by agency fiat. Nye v. Dept. of Livestock, 196 M 222, 639 P2d 498, 39 St. Rep. 49 (1982).

State Not to Appeal Justice's Court Dismissal: When a criminal cause in Justice's Court was dismissed because a witness subpoenaed by both parties testified for the prosecution and failed to appear for the defendant, the State had no right to appeal because 46-20-103 applies only to appeals from District Court and 46-17-311 allows appeals from Justice's Court only for the defendant. St. v. Sanchez, 187 M 434, 610 P2d 162 (1980).

Limitation of Judicial Review of Administrative Decisions to Particular Courts: The right of judicial review of decisions of administrative agencies may be denied or restricted to particular courts. Under 75-2-411, a final decision by the Board of Health and Environmental Sciences (now Board of Environmental Review) to issue preconstruction permits under the Clean Air Act of Montana is appealable only to the District Court of the judicial district of the state that is the situs of the affected property. N. Plains Resource Council v. Bd. of Health & Environmental Sciences, 184 M 466, 603 P2d 684 (1979).

Review by Administrative Appeal: When the Legislature did not adopt legislation to provide for appeal to court from the decision of a school board, review pursuant to an administrative appeal statute was proper. School District v. Hughes, 170 M 267, 552 P2d 328 (1976).

REMOVAL AND SUBSTITUTION OF JUDGES

Conviction Overturned When Rule on Disqualification and Substitution of Judges Not Followed: No published local court rule was discovered, so the Supreme Court's rule on disqualification and substitution of judges applied. There was no evidence that Judge Freebourn (the original judge) specifically called in Judge Olsen or that Judge Olsen filed an acceptance of jurisdiction as required by the Supreme Court rule. Judge Olsen decided the case. The conviction was overturned because Judge Olsen was presiding in violation of the rule and did not have the power to hear the case. St. v. Daugherty, 184 M 474, 603 P2d 1041 (1979).

Distinction Between Motion to Dismiss and for Summary Judgment: The District Judge did not reverse the previously disqualified District Judge's denial of defendants' motion to dismiss by granting defendants' motions for summary judgment and thereby improperly exercise appellate jurisdiction because the latter motion was a decision on the merits while the former was merely a determination of the sufficiency of the allegations in the complaint. Granger v. Time, Inc., 174 M 42, 568 P2d 535 (1977).

DECISIONS UNDER 1889 CONSTITUTION

ORIGINAL JURISDICTION

Divorce Proceedings: Proceedings for divorce undoubtedly are statutory, but jurisdiction in matters of divorce is constitutional and may not be abridged. Trudgen v. Trudgen, 134 M 174, 329 P2d 225 (1958).

Aggregation of Causes of Action to Meet Jurisdictional Amount: When there are several causes of action, each for less than the jurisdictional minimum for the court, they may be prosecuted in the court where their aggregate exceeds the jurisdictional minimum. Stokke v. Graham, 129 M 96, 281 P2d 1025 (1955).

"Cases" Construed: By "cases" and "controversies" is meant real controversies and not abstract differences of opinion or moot questions. Chovanak v. Matthews, 120 M 520, 188 P2d 582 (1948), distinguished in Helena Parents Comm'n v. Lewis & Clark County Comm'rs, 277 M 367, 922 P2d 1140, 53 St. Rep. 687 (1996).

Adoption Proceedings: If adoption proceedings do not constitute matters of probate, jurisdiction over which is conferred upon the court by Art. VIII, sec. 11, 1889 Mont. Const., they fall within the clause therein giving it jurisdiction over "all such special actions and proceedings as are not otherwise provided for". In re Hoermann's Estate, 108 M 386, 91 P2d 394 (1939).

Probate — General Jurisdiction:

When sitting in probate, the District Court is a court of record exercising general jurisdiction by virtue of the Constitution. It is not one of limited jurisdiction and in heirship proceedings has all the powers and jurisdiction made inherent in District Courts by the Constitution and statutes. In re Baxter's Estate, 101 M 504, 54 P2d 869 (1936).

"All matters of probate" and necessarily the administration of all laws relating thereto are now under the original jurisdiction of the District Courts. In re McFarland's Estate, 10 M 445, 26 P 185 (1891).

Venue — Real Property Actions:

In an action to adjudicate water rights on a main river and its tributaries, the District Court of a county in which plaintiff's lands lay and through which the main river flowed had jurisdiction to adjudicate the rights to waters of a tributary flowing entirely within another county. Whitcomb v. Murphy, 94 M 562, 23 P2d 980 (1933).

Article VIII, sec. 11, 1889 Mont. Const., did not require that an action as to real property must be tried in the county where the action was commenced when the property in question has been added to another county since the commencement of the action. Bookwalter v. Conrad, 15 M 464, 39 P 573 (1895).

Equity Jurisprudence: District Courts have original jurisdiction in all cases in equity. Thus, Montana has adopted the entire system of equity jurisprudence. The Legislature does not have the authority to restrict the powers of the court of equity. Link v. Haire, 82 M 406, 267 P 952 (1928); Burns v. Smith, 21 M 251, 53 P 742 (1898).

Nuisance: By Art. VIII, sec. 11, 1889 Mont. Const., the District Courts were clothed with general equity jurisdiction. At the time of the adoption of the Constitution and for many years before, courts of equity in England and America exercised jurisdiction for the suppression of nuisances, public as well as private. The right of the State to maintain these suits independently of statute cannot be questioned, but the State cannot act sua sponte. Someone authorized to do so must act on its behalf. State ex rel. Ford v. Young, 54 M 401, 170 P 947 (1918).

Contest of County Seat: In the absence of statutory provision authorizing a "contest" of a county seat selection alleged to have been the result of fraud and corrupt practices, Quo Warranto being available, the District Court has jurisdiction under its equity powers to hear and determine such a matter, until such time as the law shall provide the procedure. Poe v. Sheridan County, 52 M 279, 157 P 185 (1916).

Probate: The District Courts have exclusive jurisdiction in probate matters. State ex rel. King v. District Court, 42 M 182, 111 P 717 (1910).

Special Proceedings: Upon the organization of the state government, probate jurisdiction was given to the courts, and thereafter appeals to the Supreme Court from judgments and orders therein were possible only by classifying them under the head of special proceedings. In re Tuohy's Estate, 23 M 305, 58 P 722 (1899).

Action Against Estate: The District Court, sitting as a court of equity, has jurisdiction to try and determine an action brought against an estate of a decedent to enforce an agreement made by deceased to devise a certain share in his property. Jurisdiction in such cases is not confined to the District Court sitting as a court of probate. Burns v. Smith, 21 M 251, 53 P 742 (1898).

Filing of Information by County Attorney: When the County Attorney files an information against a person charging him with the crime of murder, the District Court has the capacity to entertain an information for that offense. State ex rel. Nolan v. Brantly, 20 M 173, 50 P 410 (1897).

Equity Power: The District Court, by virtue of its equity powers and independent of statute, can authorize the inspection and survey of a lode mining claim and the levels, shafts, winzes, and crosscuts therein and the prosecution of work to procure evidence, upon the motion of any party to the action. Blue Bird Min. Co. v. Murray, 9 M 468, 23 P 1022 (1890).

APPELLATE JURISDICTION

Review of Orders — Disqualified Judge: District Judge sitting for disqualified District Judge could not review validity of orders on the merits entered by disqualified judge since review amounted to attempt to exercise appellate jurisdiction in violation of Constitution. State ex rel. Highway Comm'n v. Kinman, 150 M 12, 430 P2d 110 (1967), distinguished in State ex rel. Stenberg v. Nelson, 157 M 310, 486 P2d 870 (1971).

Postconviction Relief: District Court has the jurisdiction to consider petition from inmates for postconviction relief if inmate was sent to prison from judicial district in which petition is filed. Gransberry v. St., 149 M 158, 423 P2d 853 (1967).

Appellate Powers: The District Court, sitting as an appellate court, is one of limited jurisdiction and may only proceed in the manner and to the extent provided by law. Clark v. Great N. Ry., 30 M 458, 76 P 1003 (1904).

Conference of Additional Jurisdiction: While the jurisdiction bestowed upon the District Court by the Constitution cannot be abridged by the Legislature, it may invest such court with additional jurisdiction in harmony with its character. Such additional jurisdiction is not a usurpation of the constitutional powers of any other court, and therefore the provision of the act to regulate the practice of medicine, approved February 28, 1899, allowing an appeal to the District Court by the aggrieved party in case of the revocation or refusal by the Board of Medical Examiners of a license to practice medicine, cannot be held to contravene Art. VIII, sec. 11, 1889 Mont. Const., providing that the District Court shall have appellate jurisdiction in all cases arising in Justices' Courts and other inferior courts, the latter provision not being prohibitory in form. State ex rel. Kellogg v. District Court, 13 M 370, 34 P 298 (1893).

WRITS

Prohibition — Ministerial Function: Article VIII, sec. 11, 1889 Mont. Const., did not give the District Courts the jurisdiction to issue a Writ of Prohibition to control the discretion of an administrative body in carrying out a ministerial function. State ex rel. Lee v. Livestock Sanitary Bd., 135 M 202, 339 P2d 487 (1959).

Correctness of Order — Appeal: When court denied Writ of Certiorari by contemnor in Justice's Court, the remedy left was appeal to the Supreme Court and not a Writ of Certiorari. State ex rel. Mercer v. District Court, 115 M 385, 145 P2d 527 (1943).

Habeas Corpus — Original Authority: In order that a judgment for contempt may be proof against an attack made by habeas corpus proceedings, the court rendering it must have had jurisdiction of the person and of the subject matter and must have possessed the power of authority to render the particular judgment it pronounced. In re Lockhart, 72 M 136, 232 P 183 (1924); In re Mettler, 50 M 299, 146 P 747 (1915), overruled on other grounds in State ex rel. Smith v. District Court, 210 M 344, 677 P2d 589 (1984).

Writ of Mandate to Officer in County Outside Judicial District: The District Court of one district or county has jurisdiction to issue a Writ of Mandate directed to an officer of another district or county to compel him to perform a ministerial act which the law especially enjoins as a duty resulting from his office. State ex rel. Carroll v. District Court, 69 M 415, 222 P 444 (1924), overruled on other grounds in USF&G v. St., 136 M 148, 345 P2d 734 (1959).

Injunction: A court of equity being possessed of jurisdiction to determine the questions presented in the action inherently has the authority to preserve the status quo, pending final determination. This may be done by a temporary injunction. Atkinson v. Roosevelt County, 66 M 411, 214 P 74 (1923).

Habeas Corpus — Limited to District: The jurisdiction granted to District Courts and their judges to issue the Writ of Habeas Corpus is exclusive. The power of a District Judge to inquire into the legality of the detention of persons in custody is confined to cases where the complainant, who seeks his release, is so detained within the boundaries of the district over which the judge presides. If such judge is absent and no judge temporarily presides over such court, the application should be made to the Supreme Court or a Justice thereof and not to a District Judge in another district. St. v. District Court, 35 M 51, 88 P 564 (1907). See In re Lewis, 51 M 539, 154 P 713 (1916).

Prohibition — Supreme Court Review: The District Courts have jurisdiction over the Writ of Prohibition. The Supreme Court has jurisdiction, on appeal from judgments and from orders made by District Courts, in proceedings of this nature instituted under the Code. State ex rel. Scharnikow v. Hogan, 24 M 379, 62 P 493 (1900).

LIMITATIONS ON JURISDICTION

Power of Legislature to Confer Jurisdiction: Within the limitations prescribed by Art. VIII, sec. 11, 1889 Mont. Const., the Legislature may confer jurisdiction in any class of cases upon either the District or Justice's Court. In re Sheehan, 100 M 244, 49 P2d 438 (1935); St. v. Wiles, 98 M 577, 41 P2d 8 (1935).

Jurisdiction Generally Limited to District: Primarily, though the Judge of the District Court is classed as a state officer, he is such only for the purpose of administering justice in his own district. Although the process of his court extends to all parts of the state, ordinarily the exercise of his power is limited to the territorial boundaries of his district. Whitcomb v. Murphy, 94 M 562, 23 P2d 980 (1933); State ex rel. Mannix v. District Court, 51 M 310, 152 P 753 (1915).

No Equity Powers in Criminal Cases: The power of the District Court, sitting in the discharge of its jurisdiction in a criminal case, to exercise powers known only to a court of equity is impliedly denied by the letter as well as the spirit of the Constitution. State ex rel. Stewart v. District Court, 77 M 361, 251 P 137 (1926).

Naturalization: District Courts possess concurrent jurisdiction with the federal courts (within the limitations prescribed by Congress) to naturalize aliens. Therefore, when such power is exercised by them the proceeding is a judicial and not a political one, and hence the Supreme Court may, on certiorari, review a judgment rendered in such a proceeding. State ex rel. Weisz v. District Court, 61 M 427, 202 P 387 (1921).

Probate — Matters of Equitable Cognizance: Though the District Court sitting in probate is without power, as a general rule, to determine questions of equitable cognizance, when a determination of such questions is a necessary incident to the carrying out of the powers expressly granted to it, it may take jurisdiction. In re Stinger's Estate, 61 M 173, 201 P 693 (1921).

Petty Cases: The District Court is a court of general jurisdiction. It therefore has power to hear and determine all classes of cases, except petty cases, of which Justices' Courts and police courts are by the Constitution given exclusive cognizance. Crawford v. Pierse, 56 M 371, 185 P 315 (1919).

Corrupt Practice Act:

Every power conferred upon the judges is judicial in character and insofar as the corrupt practice act seeks to make a judge a mere agent to gather evidence for the Legislature to consider in passing upon the qualifications of a member, that act is invalid. State ex rel. Smith v. District Court, 50 M 134, 145 P 721 (1914).

The Criminal Practice Act of 1887 (repealed), conferring upon the District and Justice's Courts concurrent jurisdiction in all misdemeanors, was in conflict with Art. VIII, sec. 11, 1889 Mont. Const., and did not become a law of the state upon the adoption of the Constitution. St. v. Myers, 11 M 365, 28 P 650 (1891).

REMOVAL AND SUBSTITUTION OF JUDGES

Disqualification of District Judges: The act providing for the disqualification of District Judges on the filing of an affidavit of prejudice is not in violation of the provision of Art. VIII, sec. 11, 1889 Mont. Const., conferring on District Courts original jurisdiction in "all" cases in law and in equity. State ex rel. Anaconda Copper Min. Co. v. Clancy, 30 M 529, 77 P 312 (1904).

Law Review Articles

A Mile Wide and an Inch Deep No More: Achieving Access to Justice in Rural Montana, Sitte, 70 Mont. L. Rev. 273 (2009).

Administering Justice in Montana's Rural Courts, McKeon & Rice, 70 Mont. L. Rev. 201 (2009).

Writ of Prohibition—Jurisdiction of District Courts—Power to Restrain Ministerial Acts, Ryan, 21 Mont. L. Rev. 139 (1959).

Section 5. Justices of the peace.

Convention Notes

(1) Revises 1889 constitution by requiring one justice of the peace in each county instead of two in each township and allows legislature to set qualifications, training standards and salaries. Provision for "dignified surroundings" is new. (2) Deletes references in 1889 constitution to types of cases which may not be handled by a justice of the peace and provides that legislature may determine this except that they may not try felony cases. (3) No change except in grammar.

Compiler's Comments

Former Constitutional Provisions: Subsections (1) and (3) of this section are similar to Art. VIII, sec. 20, 1889 Mont. Const. Subsection (2) of this section revises Art. VIII, sec. 21, 1889 Mont. Const.

Case Notes

DECISIONS UNDER 1972 CONSTITUTION

Original Court Jurisdiction Over Partner or Family Member Assault Charges, Misdemeanor or Felony: District Courts have original jurisdiction over felony partner or family member assault charges. District Courts and Justices' Courts have concurrent jurisdiction over misdemeanor partner or family member assault charges. St. v. Martz, 2008 MT 382, 347 M 47, 196 P3d 1239 (2008).

Agreement by County Commission to Pay Justice's Court Expenses — Failure to Object — Appeal Precluded: A Justice of the Peace requested approval of funds from the County Commission for employment of a temporary clerical assistant. The County Commission initially refused to approve the funds. The claim was then submitted for certification pursuant to Browman v. Wood, 168 M 341, 543 P2d 184 (1975), and was subsequently certified as an actual and necessary expense incurred in the performance of actual duties of the Justice's Court. When the bill was still not paid, the Justice of the Peace filed a petition for a contempt order against the County Commissioners for failure to pay the certified claim. The order was amended to include attorney fees. The County Commission then agreed to pay the claim and did not oppose the motion to amend, nor did it file a responsive brief. However, it later alleged error. The Supreme Court held that the County Commission waived the right to appeal by agreeing to pay the claim and then failing to object to the District Court order to pay the claim and taking no further action to challenge the claim. In re Certain Justice Court Expenses, 264 M 510, 872 P2d 795, 51 St. Rep. 372 (1994).

Initiating Felony Prosecution by Complaint in Justice's Court: Initiating a felony prosecution by complaint in Justice's Court is an established practice in Montana and is not prohibited by statute. St. v. Sor-Lokken, 247 M 343, 805 P2d 1367, 48 St. Rep. 142 (1991).

Authority to Issue Arrest Warrant: Defendant contended that issuance by a Justice's Court of an arrest warrant on a complaint charging a felony was a violation of Justice's Court jurisdiction as established by this section. Applying the rationale of St. v. Snider, 168 M 220, 541 P2d 1204 (1975), the Supreme Court concluded that initiating a felony prosecution by complaint in Justice's Court is an established practice in Montana that is not prohibited by statute. St. v. Sor-Lokken, 246 M 70, 803 P2d 638, 47 St. Rep. 2264 (1990).

Jurisdiction Retained Upon Reduction of Charge: When District Court's jurisdiction is originally invoked by an information charging a felony, it is not lost by State subsequently reducing the charge to only a lesser included misdemeanor. St. v. Shults, 169 M 33, 544 P2d 817 (1976).

Claim of Justice's Court for Unbudgeted Actual and Necessary Expenses: When Justice of the Peace filed claim to pay necessary extra clerical assistance, County Commissioners do not have discretion to disallow claim under 7-6-2324 and 7-6-2325 (both now repealed), as 3-10-103 prevails because where a specific statute conflicts with a general statute, the specific controls over the general to the extent of any repugnancy. State ex rel. Browman v. Wood, 168 M 341, 543 P2d 184 (1975). (Annotator's comment: In this case Supreme Court exercised supervisory powers to provide a procedure to prevent future actual or potential conflict between the Board of County Commissioners and Justices' Courts.)

Facilities Provided Justices' Courts: Article VII, sec. 5, Mont. Const., creates a duty on part of County Commissioners to approve actual and necessary expenses of Justice's Court, even though expense was unforeseen and not budgeted. State ex rel. Browman v. Wood, 168 M 341, 543 P2d 184 (1975).

Authority to Issue Search Warrant: The existing court system of Montana, whereby District Judges may serve several counties, leaving outlying counties without an available District Judge to issue a search warrant, supports a legislative intent to grant Justices of the Peace jurisdiction to issue search warrants. St. v. Snider, 168 M 220, 541 P2d 1204 (1975).

DECISIONS UNDER 1889 CONSTITUTION

Penalty Assessments on Fines: Statute providing penalty assessments in addition to statutory fines was void for indirectly enlarging jurisdiction of Justices' Courts and police courts in terms of maximum fine which may be imposed for offense charged. State ex rel. Sanders v. Butte, 151 M 171, 441 P2d 190 (1968).

Actions Included Within Terms "Forcible Entry and Unlawful Detainer": Held, that it was intended under Art. VIII, sec. 21, 1889 Mont. Const., giving Justices' Courts jurisdiction of "forcible entry and unlawful detainer", that all actions at the time of the adoption thereof falling within the general category of "forcible and unlawful entry" and "forcible and unlawful detainer" were and are included within its terms, the words "forcible entry" being sufficient to comprehend "unlawful entry" and the words "unlawful detainer" comprehending "forcible detainer". State ex rel. Hamshaw v. Justice Court, 108 M 12, 88 P2d 1 (1939).

No Application to Forcible Entry and Detainer Actions: Article VIII, sec. 20, 1889 Mont. Const., denying jurisdiction to the Justices' Courts "where the debt, damage, claim or value of the property involved exceeds the sum of three hundred dollars", has no application to forcible entry and detainer actions. State ex rel. Hamshaw v. Justice Court, 108 M 12, 88 P2d 1 (1939), following Cashman v. Vickers, 69 M 516, 223 P 897 (1924).

Power of Legislature to Confer Jurisdiction: Under Art. VIII, sec. 21, 1889 Mont. Const., discretion was vested in the Legislature to confer jurisdiction in misdemeanor cases on either the District Court or the Justice's Court. Ex parte Sheehan, 100 M 244, 49 P2d 438 (1935).

Scope of Authority in General: Within the limitations prescribed by the Constitution the Legislature has power to confer jurisdiction upon Justices' Courts in any class of cases; but these courts, being thus constituted courts of special and limited jurisdiction, are without power to hear and determine any case where such power is not, specifically or by clear implication, conferred by the statute defining their powers. St. v. Wiles, 98 M 577, 41 P2d 8 (1935); State ex rel. Matthews v. Taylor, 33 M 212, 83 P 484 (1905); Oppenheimer v. Regan, 32 M 110, 79 P 695 (1905).

Errors Not Objected to Waived: Although a Justice's Court is one of limited jurisdiction, errors during the proceeding must be objected to. Otherwise, they are waived. State ex rel. Gen. Oil Corp. v. Kelly, 94 M 445, 23 P2d 555 (1933); Hosoda v. Neville, 45 M 310, 123 P 20 (1912).

Jurisdiction Limited to Claims Under $300: The Writ of Prohibition is appropriate only when the lower court is acting without or in excess of jurisdiction and when the relator has no plain, speedy, and adequate remedy at law. Boucher v. St. George, 88 M 162, 293 P 315 (1930).

Forcible Entry and Unlawful Detainer: A Justice of the Peace has jurisdiction of an action by a landlord against a tenant holding after default in payment of rent, both under the forcible entry and unlawful detainer laws and by virtue of this section, whereby Justices' Courts are clothed with concurrent jurisdiction with the District Courts in cases of forcible entry and unlawful detainer. Doggett v. Johnson, 72 M 443, 234 P 252 (1925); State ex rel. Carter v. Votaw, 13 M 403, 34 P 315 (1893).

Issuance of Search Warrant: Under the rule that where the Legislature confers jurisdiction upon a Justice's Court where none existed before, it must be exercised in the manner and within the limits stated, held, that a search warrant issued by a Justice of the Peace under Ch. 116, L. 1923 (since repealed), without the approval of the County Attorney was void, that chapter

providing that the approval of that officer must first be obtained. State ex rel. Skrukrud v. District Court, 71 M 570, 230 P 1089 (1924).

"Concurrent Jurisdiction" Defined: "Concurrent jurisdiction", within the meaning of Art. VIII, sec. 21, 1889 Mont. Const., conferring concurrent jurisdiction with District Courts upon Justices' Courts, means that Justices' Courts are authorized equally with District Courts to try such actions at the choice of the suitors. Cashman v. Vickers, 69 M 516, 223 P 897 (1924).

Money Demands: Held, that the provision of Art. VIII, sec. 21, 1889 Mont. Const., conferring upon Justices' Courts concurrent jurisdiction with District Courts in cases of forcible entry and unlawful detainer actions, is not limited by the provision of section 20 of that article, declaring that Justices' Courts shall not have jurisdiction in any case where the debt, claim, etc., exceeds the sum of $300, but that as to forcible entry and unlawful detainer actions their jurisdiction is unlimited insofar as money demands are concerned. Cashman v. Vickers, 69 M 516, 223 P 897 (1924).

Violation of Prohibition — Original Jurisdiction: Held, under the decision in St. v. Bowker, 63 M 1, 205 P 961 (1922), that the District and not the Justice's Court has original jurisdiction in criminal actions for violations of the prohibition laws. St. v. Sorenson, 65 M 65, 210 P 752 (1922).

Limited Powers and Jurisdiction: Justices' Courts are of limited jurisdiction and have only such powers as are conferred upon them by statute. Miller v. Miller, 47 M 150, 131 P 23 (1913); Hosoda v. Neville, 45 M 310, 123 P 20 (1912); Jenkins v. Carroll, 42 M 302, 112 P 1064 (1910); State ex rel. Collier v. Houston, 36 M 178, 92 P 476 (1907); State ex rel. Matthews v. Taylor, 33 M 212, 83 P 484 (1905); Oppenheimer v. Regan, 32 M 110, 79 P 695 (1905); State ex rel. Kenyon v. Laurandeau, 21 M 216, 53 P 536 (1898), overruled on other grounds in State ex rel. King v. District Court, 24 M 494, 62 P 820 (1900); Layton v. Trapp, 20 M 453, 52 P 208 (1898).

Pleading Fraud — No Conversion to Equity: A Justice's Court has no equity jurisdiction; but defendants properly substituted in an action by the assignee of a labor claim cannot deprive the Justice of jurisdiction by the interposition of the defense of fraud in the assignment, since such defense does not convert the cause into an equitable one. Mettler v. Adamson, 38 M 198, 99 P 441 (1909).

Pleadings: The fact that a plaintiff formulates his pleadings on the theory that he is entitled to equitable relief does not deprive a Justice's Court of jurisdiction, if upon any theory of his pleadings he is entitled to other relief. Anderson v. Red Metal Min. Co., 36 M 312, 93 P 44 (1907).

Sheriff — Nonperformance of Duty: Section 3-10-301, enacted in pursuance of Art. VIII, sec. 20 and 21, 1889 Mont. Const., does not clothe a Justice of the Peace with jurisdiction to entertain an action against a Sheriff for damages for nonperformance of an official duty and a penalty imposed by law for such nonperformance. Oppenheimer v. Regan, 32 M 110, 79 P 695 (1905).

Examining Court in Cases of Felony: Article VIII, sec. 21, 1889 Mont. Const., provided that a Justice's Court shall have jurisdiction as an examining court in cases of felony, and the statute provided the method of procedure; but that jurisdiction must, of course, be properly invoked. St. v. Lagoni, 30 M 472, 76 P 1044 (1904).

No Equity Jurisdiction in Justices' Courts: Justices' Courts have no equity jurisdiction and cannot entertain actions involving matters of equitable cognizance. An action by a claimant to establish his claim for services, insofar as it seeks to establish and foreclose a lien on the attached property of the debtor, is a proceeding equitable in its nature and hence not within the jurisdiction of a Justice of the Peace as limited by Art. VIII, sec. 21, 1889 Mont. Const. Where a Justice of the Peace had no jurisdiction of a suit to enforce a lien for services as a preferred claim over the claim of attaching creditors, the District Court acquired no jurisdiction to enforce such lien by an appeal from the Justice's judgment. Shea v. Regan, 29 M 308, 74 P 737 (1903).

Misdemeanor: Jurisdiction of the misdemeanor of assault and battery reside in the Justice's Court, as having been "provided by law". St. v. Myers, 11 M 365, 28 P 650 (1891).

Attorney General's Opinions

Number of Justices of the Peace for 1974 Elections: Only one Justice of the Peace will be elected in each county in the 1974 elections unless otherwise specified by action of the 1974 Legislature. Only the Legislature may provide for additional Justices of the Peace, and no such power lies with the County Commissioners. 35 A.G. Op. 28 (1973).

Law Review Articles

Montana Justices' Courts—According to the Law, Mason & Kimball, 23 Mont. L. Rev. 62 (1961).

Section 6. Judicial districts.

Convention Notes

(1) (2) No change except in grammar. (3) New provision allowing the chief justice temporarily to assign judges to districts other than their own.

Compiler's Comments

Former Constitutional Provision: Subsections (1) and (2) of this section are similar to Art. VIII, sec. 12, 13, and 14, 1889 Mont. Const.

Case Notes

DECISIONS UNDER 1972 CONSTITUTION

Jurisdiction of Retired District Judge: A retired District Judge called into judicial duty during a judicial vacancy has complete jurisdiction of the District Court in all civil matters and cases at law. In re Marriage of Manus, 225 M 457, 733 P2d 1275, 44 St. Rep. 398 (1987).

Appointment of Defeated District Judge: Judge Sykes, a retired judge who was defeated for reelection, was appointed by the Chief Justice to hear several cases. A party to one of the cases appealed the appointment of a defeated judge. The court held that Judge Sykes is a member of the "pool" of retired judges and can be called in by the Chief Justice to preside under the provisions of Art. VII, sec. 6, Mont. Const. Section 3-5-201, which requires District Judges to be elected, does not overcome the constitutional power given to the Chief Justice. Judge Sykes was not appointed pursuant to 19-5-103, and it is therefore not applicable. State ex rel. Welch v. District Court, 209 M 397, 680 P2d 327, 41 St. Rep. 783 (1984).

Judge's Reappointment to Finish Case Started Before Retirement: That trial Judge retired prior to his issuance of orders in the case at issue did not make the orders void. Under the recent decision in State ex rel. Wilcox & Bradley v. District Court, 41 St. Rep. 397 (1984), the trial Judge had authority to perform all functions of an active District Judge, including the issuance of final orders and judgments. In re Pegg's Estate, 209 M 71, 680 P2d 316, 41 St. Rep. 558 (1984).

Retired Judges Eligible for Assignment for Temporary Service: The term "other judges" in subsection (3) of this section includes retired judges. This subsection empowers the Chief Justice of the Supreme Court, upon request of a District Judge, to assign retired judges for temporary service to any judicial district or county in Montana. Further, this provision is a constitutional grant of power exclusive of any statutory grant by the Legislature. State ex rel. Wilcox v. District Court, 208 M 351, 678 P2d 209, 41 St. Rep. 397 (1984), followed in St. v. Holmes, 212 M 526, 687 P2d 662, 41 St. Rep. 1535 (1984).

Disqualification of Judges: Statutory provisions providing for substitution of a disqualified District Judge are not in conflict with subsection (3) of Art. VII, sec. 6, Mont. Const., which provides that the Chief Justice may temporarily assign a District Judge for duty in another district. State ex rel. Lane v. District Court, 167 M 53, 535 P2d 174 (1975).

DECISIONS UNDER 1889 CONSTITUTION

"Any Judge of the District Court May Hold Court for Any Other District Judge" — Defined: The provision of Art. VIII, sec. 1, 1889 Mont. Const., that "any judge of the District Court may hold court for any other District Judge", does not, in the absence of constitutional or statutory provision giving District Judges concurrent jurisdiction, empower a Judge acting for another to exercise out of court the judicial power of the Judge whose court he is holding; and an order of injunction issued by such Judge in chambers, when the Judge of the District Court was present in his district and discharging his duties, is void. State ex rel. Mannix v. District Court, 51 M 310, 152 P 753 (1915); Wallace v. Helena Elec. Ry., 10 M 24, 24 P 626, 25 P 278 (1890).

Purpose of This Provision: In adopting Art. VIII, sec. 12, 1889 Mont. Const., the convention had three purposes in view: (1) to provide for the division of the state into districts; (2) to provide for District Judges and to fix their term of office; and (3) by way of exception, to fix the term of office of those first elected, so that they would hold until the general election in 1892 and until their successors should be elected and qualified. But for the exception, those first elected would also have held for the term of 4 years. The purpose of it was to so adjust the term of those first elected that thereafter the election would fall regularly upon presidential years and be uniform throughout the state. State ex rel. Patterson v. Lentz, 50 M 322, 146 P 932 (1915); State ex rel. Jones v. Foster, 39 M 583, 104 P 860 (1909).

Act Providing for the Disqualification of District Judges — Not Violative of This Provision: The act of December 10, 1903, amending section 180 of the Code of Civil Procedure of 1895 (section 93-901, R.C.M. 1947, now repealed), so as to provide for the disqualification of a District Judge on the filing of an affidavit of prejudice, thereupon disqualifying him to further act in the

case except to arrange his calendar, notify another judge to try the case, or if he fails to do so within 30 days, to change the place of trial, etc., and amending section 615 of the same Code (25-2-201), so that if another judge is called in within such time, the change of venue shall not be granted, is in harmony with Art. VIII, sec. 12, 1889 Mont. Const. State ex rel. Anaconda Copper Min. Co. v. Clancy, 30 M 529, 77 P 312 (1904).

Section 7. Terms and pay.

Convention Notes

(1) No change except in grammar. (2) Supreme Court justice terms increased from six to eight years, district court judges from four to six and justices of the peace from two to four years. [Note — See Terms During Transition Period compiler's comment to this section.]

Compiler's Comments

Terms During Transition Period: Section 4 of the Transition Schedule implementing the 1972 Montana Constitution provided: "Section 4. Terms of judiciary. Supreme court justices, district court judges, and justices of the peace holding office when this Constitution becomes effective shall serve the terms for which they were elected or appointed."

The convention note to section 4 of the Transition Schedule provided: "Since the proposed constitution changes the length of terms of office of judges this provision makes it clear that all judges may serve to the end of the term for which they were elected."

Former Constitutional Provisions: Subsection (1) of this section is similar to Art. VIII, sec. 29, 1889 Mont. Const. Subsection (2) of this section is similar to Art. VIII, sec. 7, 12, and 20, 1889 Mont. Const.

Case Notes

DECISIONS UNDER 1972 CONSTITUTION

Election of Judicial Nominees — Necessary Only After Senate Confirmation: The District Court held that Art. VII, sec. 8, and this section require judicial nominees currently filling positions to stand for election at the general election preceding the expiration of the term to which nominated, even though the Senate had not been in session and therefore had not confirmed the nominations. The Supreme Court relied on the decisions in Jones v. Judge, 176 M 251, 577 P2d 846 (1978), and Keller v. Smith, 170 M 399, 553 P2d 1002 (1976), as well as transcripts of the Constitutional Convention, in interpreting those constitutional provisions and in resolving the ambiguity in Art. VII, sec. 8(2), Mont. Const. The court decided that the general constitutional rule is that appointees and nonappointees must stand for contested and uncontested elections at the general election prior to the expiration of each judicial term. The exception to the rule is that when the Senate has not had an opportunity to confirm a nominee, the nominee must stand for election for the first time at the next election following Senate confirmation. State ex rel. Racicot v. District Court, 244 M 521, 798 P2d 1004, 47 St. Rep. 961 (1990).

Impairment of Contract and Diminution of Salary — Preventing Legislative Meddling in Judicial Decisions: Plaintiff contended 3-2-104 and 3-5-212 (now repealed), which imposed sanctions on judges if decisions were not reached or opinions were not written within the procedural constraints and time limits set by the statutes, were unconstitutional. The penalty provisions of both statutes required a 1-month salary forfeiture in the event of a violation. Plaintiff contended the penalty violated the impairment of contract and diminution of judicial salary provisions of the Montana Constitution. Defendant contended that since the judiciary imposed the sanctions, the constitution was not violated. The constitutional prohibition against diminution of salaries is designed to prevent lawmakers from exerting control over the judiciary. Even if the court were to allow the indirect violation by allowing the Legislature to mandate a scheme administered by the courts, the statutes would violate the impairment of contract prohibition. Public employment gives rise to certain obligations protected by the contract clause of the constitution. Promised compensation is one such protected right. Once vested, the right to compensation cannot be eliminated without unconstitutionally impairing the contract obligation. Coate v. Omholt, 203 M 488, 662 P2d 591, 40 St. Rep. 586 (1983).

Entitlement of Judges to Actual and Necessary Expenses: Statutory travel expenses as applied to District Judges and Supreme Court Justices are unconstitutional, as Judges are entitled to their actual and necessary expenses for travel, subsistence, and lodging to meet constitutional mandate that their salaries shall not be diminished during their term of office. In re Actual Necessary Expense of Judges, 168 M 170, 541 P2d 345 (1975).

DECISIONS UNDER 1889 CONSTITUTION

Payment for Reporting of Decisions: The Legislature is authorized to fix and change salaries of Justices of the Supreme Court, and therefore section which placed the duty of reporting the court's decisions upon the Justices and fixed a salary of $1,500 per year for those services was constitutional. Tipton v. Sands, 103 M 1, 60 P2d 662 (1936).

Taxation of Judge's Salary: The imposition of tax upon the net income derived from the official salary of a District Judge did not constitute a diminution of such salary and did not offend against Art. VIII, sec. 29, 1889 Mont. Const. Poorman v. St. Bd. of Equalization, 99 M 543, 45 P2d 307 (1935).

Order Filed After Expiration of Judge's Term of Office Void: When an order is made before term ends but is not filed with clerk until after term had ended, it is void. Marcellus v. Wright, 61 M 274, 202 P 381 (1921).

Successor — Right to Pay Increase: While a District Judge elected prior to and serving at the time of the passage of an act increasing the salary of the office would not have been entitled to the increase, his successor appointed to fill the vacancy created by the former's resignation some 7 months after its passage could rightfully demand the enlarged compensation. State ex rel. Jackson v. Porter, 57 M 343, 188 P 375 (1920).

Justice of the Peace: The term of office of a Justice of the Peace is 2 years and no more. State ex rel. Jones v. Foster, 39 M 583, 104 P 860 (1909).

Limitation of Term: Under Art. VIII, sec. 12 and 18, 1889 Mont. Const., the terms of District Court Judges and Clerks of the District Court are strictly limited to 4 years, and the words "and until their successors are elected and qualified", as used in this section, refer to those officers only who were first elected after the adoption of the Constitution and have no application to those thereafter chosen. State ex rel. Jones v. Foster, 39 M 583, 104 P 860 (1909).

Limitation on Legislative Power: Article VIII, sec. 29, 1889 Mont. Const., embodied an express restriction upon the powers of the Legislature. Lloyd v. Silver Bow County, 11 M 408, 28 P 453 (1891).

Attorney General's Opinions

Length of Term of Newly Created Judgeships to Be Six Years: Chapter 293, L. 1983, increased the number of judgeships in several judicial districts and provided that the new judgeships could be initially filled at either the 1983 or 1984 general election. According to this section and 3-5-203, the length of term of a District Court Judge is 6 years. In response to the question of the length of term of judges elected to positions created by Ch. 293, L. 1983, the Attorney General ruled that the term was 6 years because: (1) neither the constitutional provision nor the governing statute was altered by Ch. 293, L. 1983; (2) a provision in the original draft of the bill that altered the length of the term was deleted from the final version of the bill; and (3) assuming that the first election for new judgeships is compared to the filling of vacancies in office, it would be arbitrary to choose 1989, the year contained in the deleted provision of the original bill, as the year in which the terms of the new "vacant" offices expire. 40 A.G. Op. 13 (1983).

Justice of the Peace — Reduction From Full-Time Status: Absent a voluntary waiver by the incumbent, the proper time at which to reduce a full-time Justice of the Peace position to a part-time position is before the next election. 38 A.G. Op. 90 (1980).

Justice of the Peace — When Pay Raise May Be Diminished: Any pay raises given a Justice of the Peace must stand for the remainder of the term, and only at the beginning of the next term may such raises be diminished. 38 A.G. Op. 90 (1980).

Salary Diminution Prohibited for Justices of the Peace: The reduction of a full-time Justice of the Peace to a part-time Justice of the Peace with a salary commensurate to the workload and office hours constitutes a prohibited salary diminution within the language of Art. VII, sec. 7, Mont. Const. 38 A.G. Op. 90 (1980).

Compensation of Judges Other Than Annual Salary Improper: District Court Judges may not receive a fee for writing, research, and lecturing under programs funded by the Board of Crime Control. 35 A.G. Op. 32 (1973).

Section 8. Selection.

Convention Notes

Revises 1889 constitution. Contested election of judges is not changed, however if a judge in office does not have an opponent in an election his name will be put on the ballot anyway and the people asked to approve or reject him. If rejected, the governor appoints another judge. When there is a vacancy (such as death or resignation) the governor appoints a replacement but does not have unlimited choice of lawyers as under 1889 constitution. He must choose his

appointee from a list of nominees and the appointment must be confirmed by the senate—a new requirement.

Compiler's Comments

1992 Amendment by Referendum: Constitutional Amendment No. 22, proposed by Ch. 475, L. 1991, and approved at the general election held November 3, 1992, substituted current text for former text that read: "(1) The governor shall nominate a replacement from nominees selected in the manner provided by law for any vacancy in the office of supreme court justice or district court judge. If the governor fails to nominate within thirty days after receipt of nominees, the chief justice or acting chief justice shall make the nomination. Each nomination shall be confirmed by the senate, but a nomination made while the senate is not in session shall be effective as an appointment until the end of the next session. If the nomination is not confirmed, the office shall be vacant and another selection and nomination shall be made.

(2) If, at the first election after senate confirmation, and at the election before each succeeding term of office, any candidate other than the incumbent justice or district judge files for election to that office, the name of the incumbent shall be placed on the ballot. If there is no election contest for the office, the name of the incumbent shall nevertheless be placed on the general election ballot to allow voters of the state or district to approve or reject him. If an incumbent is rejected, another selection and nomination shall be made.

(3) If an incumbent does not run, there shall be an election for the office." Amendment effective November 3, 1992. (See text of referendum in final volume of 1993 Laws of Montana.)

Former Constitutional Provision: This section revises Art. VIII, sec. 6, 8, 12, and 34, 1889 Mont. Const.

Case Notes

DECISIONS UNDER 1972 CONSTITUTION

Election of Judicial Nominees — Necessary Only After Senate Confirmation: The District Court held that Art. VII, sec. 7, and this section require judicial nominees currently filling positions to stand for election at the general election preceding the expiration of the term to which nominated, even though the Senate had not been in session and therefore had not confirmed the nominations. The Supreme Court relied on the decisions in Jones v. Judge, 176 M 251, 577 P2d 846 (1978), and Keller v. Smith, 170 M 399, 553 P2d 1002 (1976), as well as transcripts of the Constitutional Convention, in interpreting those constitutional provisions and in resolving the ambiguity in subsection (2) of this section. The court decided that the general constitutional rule is that appointees and nonappointees must stand for contested and uncontested elections at the general election prior to the expiration of each judicial term. The exception to the rule is that when the Senate has not had an opportunity to confirm a nominee, the nominee must stand for election for the first time at the next election following Senate confirmation. (See 1992 amendment.) State ex rel. Racicot v. District Court, 244 M 521, 798 P2d 1004, 47 St. Rep. 961 (1990).

Constitutionality of Judicial Nomination Procedure: The established procedures for filling judicial vacancies in Montana are constitutional and not repugnant to applicable provisions of the Montana Constitution. Jones v. Judge, 176 M 251, 577 P2d 846 (1978).

Meaning of "Incumbent":

An "incumbent" judge, for the purposes of Art. VII, sec. 8, Mont. Const., is one who is in office and who seeks to remain a District Court Judge. Yunker v. Murray, 170 M 427, 554 P2d 285 (1976).

The language of the second sentence of subsection (2) of Art. VII, sec. 8, 1889 Mont. Const., is ambiguous, but the intent of the constitutional delegates collectively in using the word "incumbent" was that it apply to all unopposed District Judges and Supreme Court Justices irrespective of how they originally attained their judicial offices. Keller v. Smith, 170 M 399, 553 P2d 1002 (1976).

All Judges to Be on Ballot: All unopposed District Judges and Supreme Court Justices running for election or reelection are required to be placed on the general election ballot to allow the voters to approve or reject them. Keller v. Smith, 170 M 399, 553 P2d 1002 (1976).

Constitutionality of Provisions for Retention of Incumbent Judges: Statutory provisions for placing the names of incumbent judges whose positions are uncontested on the ballot and which were enacted to enforce the provisions of Art. VII, sec. 8, Mont. Const., are not unconstitutional as being in conflict with that section. Keller v. Smith, 170 M 399, 553 P2d 1002 (1976).

DECISIONS UNDER 1889 CONSTITUTION

Vacancies: Retirement of a District Judge under the provisions of sections 68-101 through 68-1313, R.C.M. 1947 (now repealed), creates a vacancy which must be filled by the Governor. State ex rel. Jardine v. Ford, 120 M 507, 188 P2d 422 (1948).

Term of Office of Appointees: In every instance of appointment to fill a vacancy in an elective office, unless an exception be made in the office of County Commissioner, Art. VIII, sec. 34, 1889 Mont. Const., specifically limits the tenure of the appointee to the next general election or "until his successor is elected and qualified"; and this phrase is literally construed by the concluding sentence of the above section, for if an appointee holds for the residue of the term, then there could never be "a person elected to fill a vacancy" if an appointment had been made. That sentence is intelligible only upon the theory that the appointee holds only until the next general election or until the person elected for the residue of the term qualifies. Bailey v. Knight, 118 M 594, 168 P2d 843 (1946); State ex rel. McGowan v. Sedgwick, 46 M 187, 127 P 94 (1912).

Intention of This Provision: The general policy of the state government is that election to office, when it may be conveniently done, is the rule, and that appointment to fill vacancies shall be effective only until the people can elect. That this was the intention of the Constitutional Convention is clearly indicated by the last two sentences of Art. VIII, sec. 34, 1889 Mont. Const. State ex rel. Patterson v. Lentz, 50 M 322, 146 P 932 (1915).

Election of District Judges: Under Art. VIII, sec. 12, 1889 Mont. Const., the right to nominate and elect District Judges belongs to the electors of the district, and no action of a state convention can validate a nomination for the office of District Judge, where the convention making it does not properly represent the electors of the district. State ex rel. Scharnikow v. Hogan, 24 M 383, 62 P 583 (1900).

Attorney General's Opinions

Term of Judge Nominated When Senate Not in Session: If the Governor nominates an individual to fill a vacancy in the office of District Court Judge when the Senate is not in session, the individual serves until the end of the next legislative session. If confirmed at the next session, he or she continues to serve until the next general election for which the statutory filing deadline has not passed. (See 1992 amendment.) 42 A.G. Op. 31 (1987).

When Judicial Appointee to Run for Election: An individual appointed by the Governor to the office of District Judge need not run in the general election in the year in which Senate confirmation takes place if, at the time of confirmation, the filing date for judicial candidates has passed. 41 A.G. Op. 52 (1986).

Appointment of Judges: The Senate confirmation of an individual appointed by the Governor to the office of District Judge is required before that office may be placed on the ballot for election. (See 1992 amendment.) 37 A.G. Op. 115 (1978).

Required Form of Ballots for Justice of the Peace: In an election for Justice of the Peace, the ballot must be the same in form as the ballot used to elect District Court Judges, including the form of ballot used by an incumbent who shall run against himself, if unopposed. 35 A.G. Op. 61 (1974).

Section 9. Qualifications.

Convention Notes

(1) Revises 1889 constitution by making residency requirements for candidates for district court judgeship the same as for supreme court and by deleting age requirements. Requirement for five years of law practice new. (2) Revises 1889 constitution by specifically allowing travel expense. (3) Only change specifically prohibits a judge from holding office in a political party. (4) No change except in grammar.

Compiler's Comments

1988 Amendment by Referendum: Constitutional Amendment No. 19, proposed by Ch. 459, L. 1987, and approved at the general election held November 8, 1988, substituted second sentence of (4) concerning residency of District Court Judges and Justices of the Peace for former second sentence that read: "Every other judge shall reside during his term of office in the district, county, township, precinct, city or town in which he is elected or appointed" and inserted last sentence providing for residency requirements for other judges. Amendment effective July 1, 1989. (See text of referendum in final volume of 1989 Laws of Montana.)

Former Constitutional Provision: Subsection (1) of this section revises Art. VIII, sec. 10 and 16, 1889 Mont. Const. Subsection (2) of this section revises Art. VIII, sec. 30, 1889 Mont. Const. Subsections (3) and (4) of this section are similar to Art. VIII, sec. 35 and 33, respectively, 1889 Mont. Const. See also Art. VIII, sec. 31, 1889 Mont. Const.

Case Notes

DECISIONS UNDER 1972 CONSTITUTION

Admission Eligibility Requirement — Inactive Status: The defendant was admitted to the State Bar of Montana in 2005 and was licensed as an active member in 2005, 2006, and 2013 and as an inactive member in 2007 through 2012. In 2014, he filed as a candidate for the Montana Supreme Court. Three former delegates to the 1972 Montana Constitutional Convention filed a complaint alleging that the defendant was not eligible to seek election because the time during which he was inactive precluded him from fulfilling the 5-year eligibility requirement under this section. The Supreme Court held that the defendant's time of admission, regardless of his choice to take inactive status, fulfilled the requirement that he be "admitted to the practice of law in Montana for at least five years". Cross v. VanDyke, 2014 MT 193, 375 Mont. 535, 332 P.3d 215.

Preelection Challenge to Legislative Referendum — Constitutional Amendments by Statutory Referendum — Justiciable Where Proposed Law Facially Defective: The Legislature passed a bill to put a referendum on the ballot to change elections for Supreme Court justices from statewide to regional. Prior to the election, citizens from each of the seven proposed regions filed an action against the Secretary of State, seeking a declaratory judgment that the proposed referendum was unconstitutional as well as an injunction to bar the Secretary of State from putting the measure on the ballot. The District Court granted the plaintiffs summary judgment and the state appealed. The Supreme Court agreed with the District Court that the matter was justiciable even though the voters had not yet passed the referendum. Nevertheless, the Supreme Court concluded that preelection consideration of the appeal was appropriate because the proposed law was facially unconstitutional. The measure sought to amend the Montana Constitution by means of a statutory referendum, in clear violation of constitutional provisions. Therefore, the Supreme Court agreed the matter was justiciable and affirmed the District Court's granting of summary judgment. Reichert v. St., 2012 MT 111, 365 Mont. 92, 278 P.3d 455.

Municipal Ordinance Prohibiting Outside Employment by Municipal Judge Void: The city of Bozeman passed municipal ordinance 2.06.050 prohibiting the Municipal Court Judge from obtaining outside employment. The city contended that under 3-6-202, it was allowed to enact an ordinance governing the qualifications of the judge, as long as the ordinance did not violate this section, and also argued that the ordinance was consistent with 3-1-604, which precludes a Municipal Court Judge from practicing law in that judge's own court. The Supreme Court agreed with the District Court that the ordinance was void because it conflicted with 3-1-604 when read in conjunction with 3-1-601. The legislative history also demonstrated that the statutes are intended to allow Municipal Court Judges to practice law in courts other than their own in order to supplement their income. Although the constitutional provision prohibits a District Court Judge from the outside practice of law and 3-6-202 requires a Municipal Court Judge to have the same qualifications as a District Court Judge, qualifications should not be confused with restrictions. Although 3-1-604 does not affirmatively declare that Municipal Court Judges can practice law outside their own courts, its intent is clear. The ordinance conflicted with the statutes and was therefore void. Carlson v. Bozeman, 2001 MT 46, 304 M 277, 20 P3d 792 (2001).

Entitlement of Judges to Actual and Necessary Expenses: Statutory travel expenses as applied to District Judges and Supreme Court Justices are unconstitutional, as Judges are entitled to their actual and necessary expenses for travel, subsistence, and lodging to meet constitutional mandate that their salaries shall not be diminished during their term of office. In re Actual Necessary Expense of Judges, 168 M 170, 541 P2d 345 (1975).

DECISIONS UNDER 1889 CONSTITUTION

Judicial Officers Ineligible for Constitutional Convention: Supreme Court Justices and District Court Judges may not serve as delegates to state Constitutional Convention, since a delegate holds public office. Forty-Second Legislative Assembly v. Lennon, 156 M 416, 481 P2d 330 (1971), distinguished in Mahoney v. Murray, 159 M 176, 496 P2d 1120 (1972).

Payment for Reporting Decisions: Section providing for payment to Justices of Supreme Court for reporting court's decisions held not to violate Art. VIII, sec. 30, 1889 Mont. Const., because the Legislature had authority to increase the salaries in that manner. Tipton v. Sands, 103 M 1, 60 P2d 662 (1936).

Additional Qualifications: The Legislature could not impose any additional conditions to those enumerated in Art. VIII, sec. 16, 1889 Mont. Const., as a prerequisite to any man's holding the office of District Judge who might be elected or appointed to that office. State ex rel. Anaconda Copper Min. Co. v. Clancy, 30 M 529, 77 P 312 (1904).

Disqualification Statutes: The act of providing for the disqualification of a District Judge by the filing of an affidavit of prejudice was not in violation of Art. VIII, sec. 16, 1889 Mont. Const. The qualification therein enumerated was limited to qualities necessary to render the person eligible to the office, without application to his qualifications to try particular cases. State ex rel. Anaconda Copper Min. Co. v. Clancy, 30 M 529, 77 P 312 (1904).

Limitation on Legislative Power: Article VIII, sec. 30, 1889 Mont. Const., embodied an express restriction upon the powers of the Legislative Assembly. Lloyd v. Silver Bow County, 11 M 408, 28 P 453 (1891).

Prohibition Against Practice of Law: Article VIII, sec. 31, 1889 Mont. Const., which prohibited judicial officers from the practice of law, was a prohibition directed against the District Judge. St. v. Jackson, 9 M 508, 24 P 213 (1890).

Attorney General's Opinions

County Residency Not Required of Acting Justice of the Peace: An acting Justice of the Peace who is called to act pursuant to 3-10-231 and who is otherwise qualified to serve under 3-10-202 need not be a resident of the county where the court sits. 43 A.G. Op. 51 (1990).

Residency for Justice of the Peace Serving as City Judge: A Justice of the Peace may not be appointed to serve as a City Judge in a town in which he does not reside without violating Art. VII, sec. 9, Mont. Const. 41 A.G. Op. 82 (1986). (See 1988 amendment.)

Ineligible Judicial Candidate — No Certification for Ballot: The Secretary of State should not certify to election administrators for the primary election ballot the name of an individual who cannot possibly meet the eligibility requirements of Art. VII, sec. 9, Mont. Const., for the office of Supreme Court Justice or District Court Judge. 41 A.G. Op. 55 (1986).

Compensation of Judges Other Than Annual Salary Improper: District Court Judges may not receive a fee for writing, research, and lecturing under programs funded by the Board of Crime Control. 35 A.G. Op. 32 (1973).

Section 10. Forfeiture of judicial position.

Convention Notes

New provision. A judge may not run for any other public office, or be out of state for more than 60 days.

Compiler's Comments

Former Constitutional Provision: This section is similar to Art. VIII, sec. 37, 1889 Mont. Const.

Case Notes

DECISIONS UNDER 1972 CONSTITUTION

Jurisdiction of Montana Courts Over Tribal Member: The phrase "elective public office" does not include the tribal office of Crow tribal chairman. A tribal member who held the state office of justice of the peace did not violate this provision by becoming a candidate for election as tribal chairman. Judicial Standards Comm'n v. Not Afraid, 2010 MT 285, 358 Mont. 532, 245 P.3d 1116.

Right of Sitting Judge to Run for Another Judicial Office Without Resigning: Article VII, sec. 10, Mont. Const., providing that one holding a judicial position forfeits that position by filing for an elective public office other than a judicial position, requires a Judge to forfeit his judicial office if he files for either a legislative or executive office. While it does not affirmatively declare that a Judge does not forfeit his judicial office by filing for another judicial office, that is its intent as shown by the minutes of the Constitutional Convention and that is what it means. Sections 3-1-607 and 3-1-608 forbid what Art. VII, sec. 10, Mont. Const., authorizes and are therefore unconstitutional as being in direct conflict with Art. VII, sec. 10, Mont. Const. The Comm. for an Effective Judiciary v. St., 209 M 105, 679 P2d 1223, 41 St. Rep. 581 (1984).

DECISIONS UNDER 1889 CONSTITUTION

Judges as Constitutional Convention Delegates: Supreme Court Justices and District Court Judges may not serve as delegates to state Constitutional Convention, since a delegate holds public office. Forty-Second Legislative Assembly v. Lennon, 156 M 416, 481 P2d 330 (1971), distinguished in Mahoney v. Murray, 159 M 176, 496 P2d 1120 (1972).

When Applied to Leave for Military Service: Law allowing certain elected officers leave for military service, thereby avoiding a vacancy in the office, was not invalid as a whole as class legislation because Art. VIII, sec. 37, 1889 Mont. Const., excluded judicial officers from its operation. Gullickson v. Mitchell, 113 M 359, 126 P2d 1106 (1942).

Attorney General's Opinions

City Judge Not to Hold Office as Community College Trustee: The provisions of this section apply to all judges, including City Judges. Because the position of trustee of a community college district is considered an elective public office, a City Judge is constitutionally prohibited from holding office as an elected trustee of a community college district. 44 A.G. Op. 21 (1991).

Effect When Judge or Justice Seeks New Position — Retirement Fund: A District Court Judge or Supreme Court Justice who runs for an elective public office other than a judicial position is not entitled to receive an involuntary retirement allowance under 19-5-503. A District Court Judge or Supreme Court Justice who runs for another judicial position that would entitle him to membership in the judges' retirement system and loses the election is entitled to receive an involuntary retirement allowance under 19-5-503. 39 A.G. Op. 24 (1981).

Section 11. Removal and discipline.

Convention Notes

New provision. A judicial standards commission may investigate whenever a judge, because of disability or bad habits, does not perform his duties properly. The commission can recommend to the supreme court that the judge be retired, censured, suspended or removed.

Compiler's Comments

1984 Amendment by Referendum — Coordination: Constitutional Amendment No. 13, proposed by Ch. 85, L. 1983, and approved at the general election held November 6, 1984, in (3)(b) after "duties" inserted "violation of canons of judicial ethics adopted by the supreme court of the state of Montana". Amendment effective November 6, 1984. (See text of referendum in final volume of 1985 Laws of Montana.)

Section 4, Ch. 85, L. 1983, provided: "If HB 629, introduced in the 48th legislature, is passed and approved, the date "November 8, 1983" in sections 2 and 3 of this act is changed to "November 6, 1984"." House Bill No. 629 was passed and approved as Ch. 603, L. 1983.

1980 Amendment by Referendum: Constitutional Amendment No. 9, proposed by Ch. 463, L. 1979, and approved at the general election held November 4, 1980, in (2) at end of first sentence deleted "and keep its proceedings confidential" and inserted (4) relating to confidentiality of proceedings except as provided by statute. Amendment effective January 1, 1981. (See text of referendum in final volume of 1981 Laws of Montana.)

Case Notes

District Court Judge's Comments — Erosion of Public Confidence in Judiciary — Public Censure — Suspension Without Pay: Prior to sentencing a 47-year-old teacher for having sexual intercourse without consent with a 14-year-old student, the District Court judge spoke from the bench and stated the victim was "a troubled youth, but a youth that was probably as much in control of the situation as [the teacher], one that was seemingly, though troubled, older than her chronological age". The teacher was then sentenced to 15 years in the state prison, with all but 31 days suspended. In explaining the sentence to the press, the judge explained that it "was horrible enough as it is just given her age, but it wasn't this forcible beat-up rape". The Judicial Standards Commission received numerous complaints after a public outcry regarding the judge's statements. The judge then attempted to increase the sentence, but the Supreme Court blocked the attempt based on lack of authority under Montana law to revise a sentence that was already imposed. In reviewing the complaints, the Judicial Standards Commission accepted the judge's admission that he violated Rule 1.2 of the Code of Judicial Conduct, which requires judges to act in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary and avoids impropriety or the appearance of impropriety. Subsequently, the Supreme Court ordered the judge to appear at a public censure and he was suspended without pay for the last 31 days of his term in office. Inquiry re Judicial Standards Comm'n v. Baugh, 2014 MT 149, 375 Mont. 257, 334 P.3d 352.

Judicial Standards Commission Authority to Investigate Justice of the Peace: A tribal member was subject to the commission's authority once the tribal member became a state official and took a constitutional oath of office to support, protect, and defend the Montana Constitution. Judicial Standards Comm'n v. Not Afraid, 2010 MT 285, 358 Mont. 532, 245 P.3d 1116.

Jurisdictional Challenge to Judicial Standards Commission's Authority to Recommend and Supreme Court's Authority to Impose Costs and Attorney Fees in Judicial Discipline Case: In Harris v. Smartt, 2002 MT 239, 311 M 507, 57 P3d 58 (2002), Smartt was ordered to pay all costs of a judicial ethics proceeding. Pursuant to the order, the Judicial Standards Commission assessed Smartt $52,539.02. Smartt challenged the assessment. The Commission contended that Smartt was precluded from challenging the award because he failed to object to the Commission's

recommendation or to the court's order. The Supreme Court disagreed. A party can never waive or consent to subject matter jurisdiction when there is no basis for the court to exercise jurisdiction. Thus, a jurisdictional challenge cannot be waived and may be raised at any time, so Smartt's challenge was allowed. Harris v. Smartt, 2003 MT 135, 316 M 130, 68 P3d 889 (2003). See also Balyeat Law, PC v. Pettit, 1998 MT 252, 291 M 196, 967 P2d 398 (1998), and In re Estate of Big Spring, 2011 MT 109, 360 Mont. 370, 255 P.3d 121.

No Authority of Judicial Standards Commission to Recommend and Supreme Court to Order Payment of Costs and Fees in Judicial Discipline Case: In Harris v. Smartt, 2002 MT 239, 311 M 507, 57 P3d 58 (2002), Smartt was ordered to pay all costs of a judicial ethics proceeding. Pursuant to the order, the Judicial Standards Commission assessed Smartt $52,539.02. Smartt challenged the assessment on grounds that it exceeded the Commission's authority because the constitution does not grant the Commission authority to adopt rules to assess costs and fees. Smart also asserted that the Supreme Court exceeded its limited constitutional authority in matters of judicial discipline by awarding costs and fees. The Supreme Court agreed. The constitution is very explicit as to what sanctions the Supreme Court may impose upon recommendation of the Commission and does not authorize the imposition of the prosecution's costs and legal fees. Rather, the essential functions of the Commission must be paid by the state. Thus, the prior order requiring Smartt to pay the costs of prosecution was vacated. Harris v. Smartt, 2003 MT 135, 316 M 130, 68 P3d 889 (2003).

Conduct of Justice of the Peace Violative of Canons of Judicial Ethics — Costs Associated With Sanction Attributed to Justice of the Peace: The Supreme Court found clear and convincing evidence that a Justice of the Peace violated the Canons of Judicial Ethics by knowingly accessing sexually explicit images on a county computer and by engaging in inappropriate behavior with a person with outstanding warrants. The conduct had a negative effect on the public's perception of the judiciary, and the court held that the appropriate sanction was to suspend the Justice of the Peace from the performance of judicial duties without pay for the remainder of the term of office, and to assess the Justice of the Peace with the costs of the sanction proceedings. Harris v. Smartt, 2002 MT 239, 311 M 507, 57 P3d 58 (2002).

Judicial Standards Commission Proceedings Not Violative of Constitutional Confidentiality Provisions: Records of the Judicial Standards Commission are confidential until the filing of a formal complaint. After a formal complaint is filed, certain papers, proceedings, and records of proceedings become accessible to the public. In order to protect the reputation of innocent judges wrongfully accused of misconduct, to maintain confidence in the judiciary by avoiding premature disclosure of alleged misconduct, and to encourage retirement as an alternative to costly lengthy formal proceedings and to protect Commission members from outside pressures, a complaint against a judicial officer is confidential until the Commission finds good cause to order a hearing, at which time the Legislature has determined that the public's right to know outweighs the individual judge's right to privacy. In this case, defendant argued that the Commission unlawfully provided copies of an investigation file to its members and the prosecutor, who in turn filed it as an exhibit during the formal hearing, making the matter a public record. The investigation file was never admitted into evidence during the hearing; however, it was included in the bound volume of prosecution exhibits. Defendant did not object at the hearing to inclusion of the file with other admitted exhibits, and thus waived any argument on appeal concerning a breach of privacy. Harris v. Smartt, 2002 MT 239, 311 M 507, 57 P3d 58 (2002).

No Error in Failure to Grant Continuance of Formal Hearing: Defendant requested a continuance of a formal hearing before the Judicial Standards Commission because there were dispositive motions pending in District Court and because the prosecution's witness list, provided 2 weeks before trial, included 15 previously undisclosed witnesses. A continuance was denied, and the Supreme Court found no error. The witness list was provided to defendant within the time limit set at the scheduling conference. Further, there is nothing unusual about preparing for a hearing while dispositive motions are pending, and defendant's failure to do so was not the fault of the Commission. Harris v. Smartt, 2002 MT 239, 311 M 507, 57 P3d 58 (2002).

Noninvestigatory, Work-Related Entry Into Judge's Chamber Not Considered Search: Smartt, a Justice of the Peace, left his office computer on after work hours. A county employee and another judge entered Smartt's chambers to shut down the computer so that a network backup could be performed and discovered pornographic images displayed on the computer screen. They reentered the chambers to note websites from the computer history file and took digital photographs of the long-term history of internet activity on Smartt's computer. The information was turned over to the FBI, and Smartt's computer was confiscated and searched. Smartt contended that the evidence seized from his chambers was obtained through an unlawful

search, violated the right to privacy, and should be suppressed. The Supreme Court disagreed. Under St. v. Boyer, 2002 MT 33, 308 M 276, 42 P3d 771 (2002), the Supreme Court considers three factors when determining whether there has been an unlawful government intrusion into one's privacy: (1) whether the person has an actual expectation of privacy; (2) whether society is willing to recognize that expectation as objectively reasonable; and (3) the nature of the state's intrusion. When no reasonable expectation of privacy exists, there is neither a search nor seizure. Although the Montana Constitution affords broader protection than the federal constitution in cases involving searches of and seizure from private property, a person may not expect the same degree of privacy in public that is afforded in the privacy of one's home. In this case, entry into the judge's chambers was for a legitimate, noninvestigatory, work-related purpose. Irrespective of whether Smartt had any expectation of privacy with regard to the computer images, the nature of the intrusion did not rise to the level of a search, and denial of the motion to suppress the evidence was proper. Harris v. Smartt, 2002 MT 239, 311 M 507, 57 P3d 58 (2002), distinguishing Gryczan v. St., 283 M 433, 942 P2d 112 (1997). See also St. v. Scheetz, 286 M 41, 950 P2d 722 (1997).

Standard of Review of Commission Proceedings: The proceedings of the Judicial Standards Commission are reviewed de novo by the Supreme Court. Recommendations of the Commission are not binding on the court; rather, the court will consider the evidence and exercise independent judgment. Harris v. Smartt, 2002 MT 239, 311 M 507, 57 P3d 58 (2002), followed in Judicial Standards Comm'n v. Not Afraid, 2010 MT 285, 358 Mont. 532, 245 P.3d 1116.

Form of Complaint Not Critical to Investigation of Judicial Misconduct — Dismissal of Writ of Prohibition Proper When Judicial Standards Commission Acting Within Authority: A Justice of the Peace obtained a writ of prohibition barring further proceedings by the Judicial Standards Commission based on an unverified complaint. The complaint was subsequently verified, and the District Court dismissed the writ. The Justice of the Peace objected that his formal verified complaint was not submitted on the standardized form set forth in the Commission's rules, was drafted by the Commission's attorney, and did not identify the specific sections of the Canons of Judicial Ethics that were allegedly violated. The Justice of the Peace also maintained that the Commission violated its authority in investigating the complaint, so dismissal of the writ was in error. The Supreme Court disagreed. The form of a complaint is not critical to the Commission's fulfilling of its constitutional mandate, and nothing in policy, statute, or Commission rules was abrogated by the Commission's attorney by assisting in the drafting of the complaint. Further, a writ of prohibition is an extraordinary remedy available to enjoin a judicial entity from an inappropriate exercise of jurisdiction when no other plain, speedy, and adequate legal remedy exists. Thus, the District Court did not err in dismissing the writ because the Commission acted within its jurisdiction throughout the investigation. State ex rel. Smartt v. Judicial Standards Comm'n, 2002 MT 148, 310 M 295, 50 P3d 150 (2002).

Judicial Standards Commission Authority to Institute Investigation — Investigation Based on Report of Criminal Investigation Within Commission Authority: A written, unverified complaint was filed with the Judicial Standards Commission against a Justice of the Peace, alleging judicial misconduct. The Justice of the Peace obtained a writ of prohibition barring further proceedings based on an unverified complaint. Subsequently, a report was obtained from a Department of Justice investigation of criminal charges against the Justice of the Peace. The Justice of the Peace claimed that the Commission overstepped its authority by obtaining a copy of the report and further investigating the allegations when no complaint had been filed with the Commission regarding the allegations in the report. Under 3-1-1106, a written complaint by any Montana citizen may initiate an investigation of judicial misconduct, and only when the initial investigation indicates that additional proceedings are warranted must the complaining citizen sign a verified complaint. Further, Commission rules provide that a complaint is not a prerequisite to Commission action. The Commission may act on its own motion as well, so the Commission did not exceed its jurisdiction in obtaining a copy of the report by court order and undertaking its own investigation of the subsequently verified allegations. State ex rel. Smartt v. Judicial Standards Comm'n, 2002 MT 148, 310 M 295, 50 P3d 150 (2002).

Judicial Standards Commission Investigation of Justice of the Peace — Writ of Prohibition Properly Modified to Cure Ministerial Defects: A written, unverified complaint was filed with the Judicial Standards Commission against a Justice of the Peace, alleging judicial misconduct. The Justice of the Peace obtained a writ of prohibition barring further proceedings based on an unverified complaint. Subsequently, information was obtained from a Department of Justice investigation of criminal charges against the Justice of the Peace. The Commission sought to vacate the writ. By the time that the hearing was held, the complaint was verified, so the

District Court modified the writ, allowing the Commission to proceed on the basis of the verified complaint. The Justice of the Peace appealed the modification that allowed the Commission to cure defects before commencing formal proceedings. The Supreme Court affirmed. The function of a writ of prohibition is to halt proceedings that are "without or in excess of the jurisdiction" of the entity exercising judicial functions. The writ here was to continue in force only until verified complaints were received. A procedural error, such as the failure to verify a complaint, will not be allowed to subvert the constitutional mandate of the Commission to investigate judicial misconduct. Because the complaint was verified by the time that the District Court considered modification of the writ, the court did not err in modifying the writ and allowing the Commission to proceed based on the verified complaint. State ex rel. Smartt v. Judicial Standards Comm'n, 2002 MT 148, 310 M 295, 50 P3d 150 (2002).

Constitutional Right to Equal Protection Not Violated by Confidentiality Provisions in Rule 13 Regulating Complaints Against Attorneys: Formal complaints against two attorneys were filed with the State Bar Commission on Practice, which recommended disciplinary actions against the attorneys. In their appeal, the attorneys contended that Rule 13 of the Rules on Lawyer Disciplinary Enforcement violated their rights to equal protection under the law, making a comparison with the constitutional provision in this section and statutes concerning the Judicial Standards Commission under which a judge responding to a disciplinary complaint may waive confidentiality. The Supreme Court found the argument inscrutable and unworthy of consideration. The attorneys failed to establish that they were treated differently under the Rules on Lawyer Disciplinary Enforcement from than any other attorney facing disciplinary charges. In re Goldstein & Albers v. Comm'n on Practice, 2000 MT 8, 297 M 493, 995 P2d 923, 57 St. Rep. 31 (2000), following In re Wyse, 212 M 339, 688 P2d 758, 41 St. Rep. 1780 (1984).

Misconduct in Office — Intemperate Language in Judicial Opinion: Statements in a dissenting opinion calling the majority opinion "intellectually dishonest" and accusing the majority of being "slippery with the facts" do not constitute misconduct in office. Unless profane, vulgar, or insulting language that offends good morals is used in writing the opinion, there can be no misconduct. State ex rel. Shea v. Judicial Standards Comm'n, 198 M 15, 643 P2d 210, 39 St. Rep. 521 (1982).

Misconduct in Office — What Constitutes: Misconduct in office, as required by this section, means conduct in or arising out of the duties or responsibilities of office and does not apply to alleged misconduct outside of office. Any involvement by a Supreme Court Justice in the incurrence of multiple parking tickets is conduct outside of office. State ex rel. Shea v. Judicial Standards Comm'n, 198 M 15, 643 P2d 210, 39 St. Rep. 521 (1982).

Necessity of Verified Complaint: The Judicial Standards Commission initiated an investigation upon receipt of a letter from a retired District Judge, contrary to its own rules and the statute requiring that such investigations be initiated by a verified complaint. It argued that because the Constitution prescribed its investigative authority and granted rulemaking power to implement its authority, the Legislature was without power to specify the procedure by which it exercised such authority. The court disagreed, finding that under Art. V, sec. 13(1), Mont. Const., the Legislature has broad powers relating to removal of public officers and that there can be no inhibition of the legislative power, irrespective of rulemaking authority granted to the Commission, to make suitable provision not in conflict with the constitutionally granted powers of the Commission, including the requirement that the Commission may act only upon a verified complaint. State ex rel. Shea v. Judicial Standards Comm'n, 198 M 15, 643 P2d 210, 39 St. Rep. 521 (1982).

Supreme Court Jurisdiction Over Actions of Judicial Standards Committee: Despite the constitutional status of the Judicial Standards Commission, the Supreme Court has power to issue a Writ of Prohibition to enjoin the Commission when acting in excess of its authority, where relator's remedy by appeal is inadequate and he has no other plain, speedy, or adequate remedy. State ex rel. Shea v. Judicial Standards Comm'n, 198 M 15, 643 P2d 210, 39 St. Rep. 521 (1982).

Disqualification of Judges: The intent of this section was to provide for the removal of Judges who, because of disability or bad habits, do not perform their work properly, and statutory provisions for the disqualification of District Judges are not unconstitutional as being in conflict with this section. State ex rel. Lane v. District Court, 167 M 53, 535 P2d 174 (1975).

Attorney General's Opinions

Chief Water Judge Not Subject to State Leave Policies — Executive Branch Not to Supervise Judicial Branch: Although the Chief Water Judge is appointed and not elected, the Chief Water Judge is a judicial officer and is not subject to the vacation leave policies of the Department of Administration. This interpretation of the statutes is also required by the application of the separation of powers clause of the Montana Constitution. To hold otherwise would subject a

judicial officer to control by the Executive Branch of state government and not to the control of the Montana Supreme Court or the Judicial Standards Commission. 48 A.G. Op. 2 (1999).

ARTICLE VIII

REVENUE AND FINANCE

Article Compiler's Comments

Former Constitutional Provision: This article is similar to Art. XII, Art. XIII, and Art. XXI, 1889 Mont. Const.

Article Case Notes

DECISIONS UNDER 1889 CONSTITUTION

Nonresident Contractors' License Fee Unconstitutional: Chapter 277, L. 1965, providing for nonresident contractors' license fees, was invalid under Art. XII, sec. 1, 1889 Mont. Const., since, by imposing a 1% tax on gross receipts rather than on profits, it was arbitrary and unreasonably discriminatory. State ex rel. Schultz-Lindsay Constr. Co. v. Bd. of Equalization, 145 M 380, 403 P2d 635 (1965), distinguished in Peter Kiewit Sons' Co. v. St. Bd. of Equalization, 161 M 140, 505 P2d 102 (1973).

Prohibitive Tax Unconstitutional: Chapter 153, L. 1961, which discriminatorily restrained the use of trading stamps or other redeemable devices in retail business by imposing an unreasonably high and prohibitive tax, was unconstitutional under Art. XII, sec. 1, 1889 Mont. Const. Garden Spot Market, Inc. v. Byrne, 141 M 382, 378 P2d 220 (1963).

License Tax — Purposes for Which License Tax May Be Levied: It was not the intention, in authorizing the Legislature to impose a license fee, to differentiate between the license tax, so-called, and the license fee extracted in regulatory matters but rather to refer the general subject of licenses to the Legislature. Mont. Milk Control Bd. v. Maier, 140 M 38, 367 P2d 305 (1961).

Income Tax:

Article XII, sec. 1(a), 1889 Mont. Const., did not impose an affirmative duty to replace property taxes entirely with income taxes. St. v. Toomey, 135 M 35, 335 P2d 1051 (1958).

The mere fact that the income tax law does not operate simultaneously upon the incomes of persons, firms, and corporations does not make it invalid. St. v. Toomey, 135 M 35, 335 P2d 1051 (1958).

The provisions of 15-30-111 (renumbered 15-30-2110), before the 1955 amendment, relating to adjusted gross income, did not violate Art. XII, sec. 1(a), 1889 Mont. Const. State ex rel. Anderson v. St. Bd. of Equalization, 133 M 8, 319 P2d 221 (1957).

License Fees: The provisions of the 1889 Montana Constitution relating to taxation had no application to license fees or taxes imposed for regulatory purposes as distinguished from property taxes. State ex rel. St. Aeronautics Comm'n v. Bd. of Examiners of St., 121 M 402, 194 P2d 633 (1948), overruled on other grounds in State ex rel. Ward v. Anderson, 158 M 279, 491 P2d 868 (1971).

Article Law Review Articles

Revenue and Finance Under Montana's 1972 Constitution, Towe, 51 Mont. L. Rev. 399 (1990).

Revenue and Taxation in the Montana Constitution: Present and Proposed, Harper, 33 Mont. L. Rev. 126 (1972).

Oleomargarine and the Constitution, Hughes, 10 Mont. L. Rev. 46 (1949).

Article Collateral References

Comparative Individual Tax Burdens in the Fifty States, Interim Report, Montana Legislative Council (1977-78).

Montana Taxation, Interim Report, Montana Legislative Council (1965-66).

Section 1. Tax purposes.

Convention Notes

Revises 1889 constitution by eliminating references to particular kinds of revenue sources (such as property taxes, license fees, and income taxes) and continues the legislative power to determine tax structures.

Compiler's Comments

Former Constitutional Provision: This section is similar to Art. XII, sec. 11, 1889 Mont. Const.

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DECISIONS UNDER 1972 CONSTITUTION

City Gross Revenue Franchise Fee on Facilities Using Public Right-of-Way Illegal Tax on Goods and Services: The city of Billings by ordinance established a franchise fee on several public utilities and telecommunications corporations with facilities located in the public right-of-way, and the utilities challenged the fee. The District Court held that the fee constituted an unlawful tax, and the city appealed. Despite the fact that the ordinance was subsequently rejected by voters, rendering the issue moot, the Supreme Court noted that the issue was capable of repetition and therefore accepted jurisdiction of the issue as appropriate in order to finally settle the legality of such fees in case similar ordinances were brought forth in the future. The fee in question was characterized as a franchise fee based on 4% of gross annual revenue generated by each utility that occupied the public right-of-way within the city. However, money collected was not earmarked for right-of-way maintenance or regulation, but was to be used to reduce general property taxes and to fund transportation improvement projects, public safety operations, and park maintenance, and the fee was separate from the city's police power over streets and alleys. The Supreme Court agreed that the unilaterally imposed, revenue-generating gross revenue fee, which was unrelated to the use or occupancy of the right-of-way, was in fact a tax based exclusively on the sale of a product or service within the city and was thus prohibited pursuant to 7-1-112. Mont.-Dak. Util. Co. v. Billings, 2003 MT 332, 318 M 407, 80 P3d 1247 (2003), distinguishing State ex rel. Malott v. Bd. of County Comm'rs, 89 M 37, 296 P 1 (1930). See also St. Louis v. W. Union Tel. Co., 148 US 92 (1893), W. Union Tel. Co. v. New Hope, 187 US 419 (1903), and Postal Tel.-Cable Co. v. Taylor, 192 US 64 (1904).

Equal Protection Analysis of Vocational-Technical School Levy — Rational Basis Test Applied: Plaintiffs challenged the constitutionality of 20-25-439, asserting that the tax levy for vocational-technical schools resulted in an unequal tax burden on five counties where the schools are located, even though the schools are part of the statewide University System. The state contended that the levy is not unconstitutional because it is rationally related to a legitimate government purpose. The District Court found that the levy is constitutional because it is rationally related to the legitimate government interest of supporting the schools, in that the schools provide specific benefits to their individual counties. The Supreme Court agreed that the rational basis analysis applied. The constitutional tax provisions in section 3 and this section are broad directives whose specifics are left to the Legislature, so no constitutionally significant interests are implicated that require greater than a rational basis analysis. A tax classification under the rational basis test will be upheld if it is reasonable and not arbitrary and if it applies equally to all who fall within the same classification. A classification is not reasonable if it confers particular privileges or imposes particular disabilities on a class of persons arbitrarily selected from a larger number of persons, all of whom stand in the same relation to privileges conferred or disabilities imposed. Neither the uniformity doctrine nor equal protection prevent the state from making classifications that result in different state taxes among the various counties as long as the classifications are rationally related to a legitimate government purpose. Simply because other state taxes for education funding are assessed in every county does not mean that the Legislature is prohibited from creating subclasses for tax purposes. Attendance at vocational-technical schools by local residents and course offerings related to local interests serve as a rational basis for putting the five counties in a separate class for purposes of the levy. Counties with vocational-technical schools are not arbitrarily selected from the rest of the state because those counties do not stand in the same relation to the greater privileges conferred on those counties by the schools than the rest of the state, so the disability of the levy is rationally imposed. The constitutionality of 20-25-439 was affirmed. Kottel v. St., 2002 MT 278, 312 M 387, 60 P3d 403 (2002), following Leuthold v. Brandjord, 100 M 96, 47 P2d 41 (1935), and distinguishing State ex rel. Woodahl v. Straub, 164 M 141, 520 P2d 776 (1974), Allegheny Pittsburgh Coal Co. v. County Comm'rs of Webster County, W. Va., 488 US 336 (1989), and Roosevelt v. Dept. of Revenue, 1999 MT 30, 293 M 240, 975 P2d 295 (1999).

Uniformity Doctrine of 1889 Constitution Embodied in Equal Protection Clause of 1972 Constitution: Plaintiffs challenged the constitutionality of 20-25-439, asserting that the tax levy for vocational-technical schools resulted in an unequal tax burden on five counties where the schools are located, even though the schools are part of the statewide University System. The state contended that the levy is not unconstitutional because it is rationally related to a legitimate government purpose. The 1889 Montana Constitution contained a uniformity doctrine that required a tax to be levied by a general law that is uniform within the same class of subjects within the territorial limits of the authority levying the tax; however, that uniformity doctrine does not appear in the plain language of the 1972 Montana Constitution. Nevertheless, plaintiffs asserted that the uniformity doctrine is still a constitutional requirement apart from equal protection guarantees. The state argued that because the uniformity doctrine is not part of the 1972 Montana Constitution, the levy could not be violative of the doctrine. The District Court agreed with the state and plaintiffs appealed. The Supreme Court agreed that the statement defining the uniformity doctrine in Hilger v. Moore, 56 M 146, 182 P 477 (1919), was subsequently applied in post-1972 cases, but disagreed that the definition supports any stricter limitation on taxation than that imposed by equal protection. The framers of the 1972 Montana Constitution intended to preserve the uniformity doctrine only as it is equivalent to equal protection requirements. Thus, the uniformity doctrine as interpreted under the 1889 Montana Constitution, which provided for equal protection in the area of taxation, is still embodied in the 1972 Montana Constitution in the equal protection clause. Analysis of the constitutionality of the levy in question was therefore conducted under the equal protection clause. Kottel v. St., 2002 MT 278, 312 M 387, 60 P3d 403 (2002).

County Allowed Choice Whether to Issue Bonds Secured by Revolving Fund — County Not Relieved of Obligation to Make Loans to Deficient Rural Special Improvement Districts: The plain meaning of statutes regarding revolving funds, as well as the legislative history, supports the legislative intent to allow counties to choose whether to finance a rural special improvement district by issuing bonds secured by the revolving fund. Nothing in the statutes voids the commitment to loan from the revolving fund if the district becomes deficient. In this case, County Commissioners agreed to a revolving fund obligation and issued bonds secured by the revolving fund. The District Court reasoned that this was a violation of the constitutional prohibition against indebtedness beyond a certain percent, holding that the county was thus relieved of its obligation to make such loans. However, special improvement bond obligations are limited to the district funds and, if necessary, receive loans from the revolving fund. If both funds are insufficient to meet bond payments, there is no other source to pay the bonds. Under 7-12-2182, revolving fund levies are limited to an amount that would increase the balance in the fund to no more than 5% of the principal amount of the outstanding bonds. The District Court erred in its decision that the county was not obligated to make loans to the special improvement districts. Having exercised the discretion to institute a revolving fund and freely enter into an agreement with the bondholders and the underwriters, under both the terms of the agreement and applicable statutes, a county is obliged to carry out that contractual obligation. Loans from the revolving fund and subsequent tax levies are within the constitutional mandates of this section, which requires that state funds be used for public purposes. Further, a county's obligation to make such loans and levy taxes to fund the revolving fund is mandatory, rather than discretionary, and is not an unconstitutional pledge of credit. Carbon County v. Dain Bosworth, Inc., 265 M 75, 874 P2d 718, 51 St. Rep. 436 (1994), distinguishing Stanley v. Jeffries, 86 M 114, 284 P 134 (1929), and Hansen v. Havre, 112 M 207, 114 P2d 1053 (1941).

Use of In-State Investment Fund to Guarantee Private Loans or Bonds Unconstitutional: The provisions of 17-6-308, which permit the use of in-state investment fund money derived from taxation to guarantee loans or bonds of private individuals or private entities either directly or through the capital reserve account or through the economic development guaranty fund, are unconstitutional under the provisions of this section, which provide that taxes shall be levied by general laws for public purposes. Hollow v. St., 222 M 478, 723 P2d 227, 43 St. Rep. 1435 (1986), distinguished in Duck Inn, Inc. v. Mont. St. Univ.-N., 285 M 519, 949 P2d 1179, 54 St. Rep. 1295 (1997).

Public Purpose Construed: Plaintiff filed a complaint for declaratory judgment in the Supreme Court seeking to determine the validity of several acts of the Legislature allowing the issuance of state revenue bonds. Plaintiff contended that the plan of issuing bonds under Ch. 705, L. 1983, for loans to local governments for water systems violated Art. VIII, sec. 1, Mont. Const. Plaintiff contended that the funds used to service a debt of coal severance tax bonds are generated by the general taxing powers of the state and that the funds were to be used for special local purposes.

The court held that the question of whether a particular purpose for which taxes may be levied and collected is a public purpose is for the Legislature in the first instance, and the courts will indulge every reasonable presumption in favor of the legislative decision. The court found that it was clear that the purposes for which the loans were authorized affected the inhabitants of the particular areas as communities and not merely as individuals. The use of the loan proceeds was clearly for public purposes. Grossman v. St., 209 M 427, 682 P2d 1319, 41 St. Rep. 804 (1984).

Coal Severance Tax — Nondiscriminatory — Not Burden on Commerce: Montana coal producers and out-of-state utility customers brought suit challenging the constitutionality of Montana's severance tax on coal mined in the State. The U.S. Supreme Court held that Montana may constitutionally raise general revenue by imposing a severance tax on coal mined in the State. The entire value of the coal before transportation originates in the State, and mining the coal depletes the resource base and wealth of the State, thereby diminishing a future source of taxes and economic activity. The severance tax was found not to discriminate against interstate commerce under the four-part test set forth in Complete Auto Transit v. Brady, 430 US 274 (1977). The court held when, as here, a general revenue tax does not discriminate against interstate commerce and is apportioned to activities occurring within the State, the State is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the State has exerted its power in relation to opportunities which it has given, to protection which it has afforded, and to benefits which it has conferred by fact of being an orderly civilized society. Commonwealth Edison Co. v. Mont., 101 S Ct 2946 (1981).

Public Purpose — Bond Proceeds: The use of the bond money authorized by Title 90, ch. 2, for the purpose of lending money to private individuals is not violative of this section as authorizing the levy to taxes for other than a "public purpose". Douglas v. Judge, 174 M 32, 568 P2d 530 (1977).

Public Purpose — Housing Act of 1975: An act to provide low-income housing is for a public purpose and is not violative of this section. Huber v. Groff, 171 M 442, 558 P2d 1124 (1976).

General Law — Property Tax Assessment for School Purposes: Property tax assessment requiring all property in Montana to be levied upon at the same rate was clearly a general law, and the Legislature was free to use the proceeds for any public purpose. State ex rel. Woodahl v. Straub, 164 M 141, 520 P2d 776 (1974), certiorari denied, Straub v. Woodahl, 419 US 845, 42 L Ed 2d 73, 95 S Ct 79 (1974).

DECISIONS UNDER 1889 CONSTITUTION

PUBLIC PURPOSE

Unreasonable Tax Imposed on Trading Stamps: Chapter which discriminatorily restrained the use of trading stamps or other redeemable devices in retail business by imposing an unreasonably high and prohibitive tax for nonpublic purpose was unconstitutional under Art. XII, sec. 1, 1889 Mont. Const. Garden Spot Market, Inc. v. Byrne, 141 M 382, 378 P2d 220 (1963).

Special Improvements — Revolving Funds: Contention that 7-12-4221 through 7-12-4228, referring to the matter of special improvement district revolving funds, conflict with this provision of the Constitution as authorizing a tax for private purposes, held groundless under authority of the case of Stanley v. Jeffries, 86 M 114, 284 P 134 (1929). Hansen v. Havre, 112 M 207, 114 P2d 1053 (1941).

Public Purpose — Test for Determination: The purpose must affect the inhabitants as a community and not merely as individuals. Whether a tax is levied for a public or private purpose is to be determined by the course or usage of the government, the object for which such a tax has by a long course of legislation been levied, and what objects have been considered necessary for the proper support and use of the government sanctioned by time and the acquiescence of the people. Lumberman's Trust Co. v. Ryegate, 61 F2d 14 (9th Cir. 1932); Stanley v. Jeffries, 86 M 114, 284 P 134 (1929).

County High School Bonds: Chapter 29, L. 1929 (now repealed), authorizing the issuance of county bonds for high school purposes was not violative of the provisions of Art. XII, sec. 11, 1889 Mont. Const. State ex rel. Henderson v. Dawson County, 87 M 122, 286 P 125 (1930).

Public Purpose — Governmental Purposes: The words "public purposes" are synonymous with "governmental purposes". State ex rel. Mills v. Dixon, 66 M 76, 213 P 227 (1923), overruled on other grounds in State ex rel. Graham v. Bd. of Examiners, 125 M 419, 239 P2d 283 (1952).

Public Purpose — Legislative Determination: The question whether a particular purpose for which taxes may be levied and collected is a public one is for the Legislature in the first instance, and courts will indulge every reasonable presumption in favor of the legislative decision in this respect. Lewis & Clark County v. Indus. Accident Bd., 52 M 6, 155 P 268 (1916).

UNIFORMITY

Public Contractors' Tax: Section 15-50-206, imposing a 1% gross receipts tax on public contractors, did not violate Art. XII, sec. 11, 1889 Mont. Const., since the separate classification of public contractors from private contractors is reasonable. Peter Kiewit Sons' Co. v. St. Bd. of Equalization, 161 M 140, 505 P2d 102 (1973), distinguished in Garrett Freightlines, Inc. v. Mont. R.R. & P.S.C., 161 M 482, 507 P2d 1040 (1973).

Discriminatory Enforcement: State Board of Equalization (now State Tax Appeal Board) could enforce statute providing for assessment of property brought into state subsequent to regular assessment date as against trucks and used cars without also enforcing it against every other type of retail inventory and without violating uniformity requirement of the Montana Constitution. Hardin Auto Co. v. Alley, 149 M 1, 422 P2d 346 (1967).

Special Improvements — Irrigation District: Article XII, sec. 1, 1889 Mont. Const., and sec. 11 of the same article, providing for a uniform rate of taxation and that taxes shall be levied and collected for public purposes only, relate to taxation for governmental purposes and have no reference to assessments for special improvements such as contemplated by the creation of an irrigation district. Bidlingmeyer v. Deer Lodge, 128 M 292, 274 P2d 821 (1954); Thaanum v. Bynum Irrigation District, 72 M 221, 232 P 528 (1925); Walden v. Bitter Root Irrigation District, 68 M 281, 217 P 646 (1923).

Railroad Freight Cars: A foreign corporation was not engaged in transportation of commodities within state but owned freight cars which were furnished to common carriers. The foreign corporation's cars were not taxed in proportion to amount of and actual physical presence and use within several taxing districts of state. Freight cars owned by others were taxed on a different basis. The state did not levy any tax against freight cars owned by railroads not operating within state but which were furnished for compensation to railroads operating within state. The tax against cars of foreign corporations was discriminatory and denied due process of law and equal protection. St. v. N. Am. Car Corp., 118 M 183, 164 P2d 161 (1945).

Relates to Uniform Assessment, Not Enforcement: The collection of taxes in an unusual way (Title 15, ch. 8, part 2, relating to motor vehicles) does not violate the uniformity provision of the Constitution. It is the levy or assessment of the tax which must be uniform, not the means of enforcement. Wheir v. Dye, 105 M 347, 73 P2d 209 (1937).

Uniform Upon Same Class of Subjects — Within Territorial Limits of the Authority Levying Tax: There is nothing in the act providing for the issuance of bonds for buildings at the state tuberculosis sanitarium which conflicts in any manner with Art. XII, sec. 11, 1889 Mont. Const., which provides that "taxes shall be levied and collected by general laws and for public purposes only. They shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax." As we have already noticed, the act does not impose any additional burden upon the various counties, either in the way of tax or otherwise. It is apparently conceded that the money which the institution now receives from the counties for the care of patients is "money lawfully acquired from the various counties of the state". There is nothing in Art. XII, sec. 11, 1889 Mont. Const., to prohibit the state from using money lawfully acquired from the counties for the purposes specified in Ch. 22, Ex. L. 1933-34 (omitted). The counties, without any additional burden or tax imposed upon them, will receive benefits corresponding to those which they are now receiving for the money thus expended by them. It is manifest that the proposed diversion of the payments now received from counties and heretofore used for maintenance will of necessity reduce the maintenance fund of the institution and require a larger contribution from the state in the way of appropriations from the general fund of the state. But this is a matter of legislative discretion and something with which we have nothing to do at this time. State ex rel. Hawkins v. St. Bd. of Examiners, 97 M 441, 35 P2d 116 (1934).

Taxation of Bank Shares: Where a state bank in an action to recover taxes paid under protest alleged, inter alia, that Ch. 64, L. 1929 (15-6-204), was invalid as offending against the uniformity clause of the 1889 Constitution, on the ground that while its shares were taxed there was no law under which shares of corporations other than those engaged in banking could be taxed, proof that the stock of a large number of corporations had not been taxed was insufficient in the absence of further evidence that the value of such outstanding stock exceeded the value of the property on which the corporations paid taxes. Bank of Miles City v. Custer County, 93 M 291, 19 P2d 885 (1933). See also Merchants' Nat'l Bank v. Dawson County, 93 M 310, 19 P2d 892 (1933).

State Bank Stock — National Bank Stock: Under Art. XII, sec. 11, 1889 Mont. Const., taxes must be uniform upon the same class of subjects. Defendant assessor placed the stock of shareholders of a state bank in class 6 of section 84-301, R.C.M. 1947 (now repealed), requiring payment of taxes on a basis of 40% of their value, while national bank shares—property of the

same kind, character, and class—be placed in class 5, assessable at 7% only of their true value. Held, on application for Writ of Injunction, that the action of the taxing officer was discriminatory as against relator bank and therefore void, but that, relator having asked that state bank shares be placed in the same class in which national bank shares were placed and the taxing officers under the circumstances not being in position to object, it is proper to so place them, the question whether they could arbitrarily place such shares in class 5 being, however, reserved. State ex rel. Conrad Banking Corp. v. Mady, 83 M 418, 272 P 691 (1928).

Gasoline Dealers' License Tax: Chapter 186, L. 1925 (since repealed), imposed a license tax upon dealers and distributors of gasoline (superseded by Initiative Measure No. 31, L. 1927, p. 604). A dealer sought to recover a tax paid under protest on the grounds that the act was unconstitutional as offending against the Equal Protection of the Law Clause of the federal Constitution, as well as against the provisions of Art. XII, sec. 11, Art. XV, sec. 11, and Art. V, sec. 26, 1889 Mont. Const., to the effect that taxes shall be uniform upon the same class of subjects, that foreign corporations engaged in business in the state shall not have any greater rights or privileges than domestic corporations, and that the Legislative Assembly shall not pass local or special laws where a general law can be made to apply. Chapter 186, L. 1925, was not open to the attacks made upon it. St. v. Silver Bow Ref. Co., 83 M 380, 272 P 684 (1928); Hart Refineries v. Harmon, 81 M 423, 263 P 687 (1928).

License Tax — Same Class of Subjects: The provision of Art. XII, sec. 11, 1889 Mont. Const., requiring uniformity in taxation, does not apply to the license system of taxation, and the state is not required to tax all occupations equally or uniformly. It may tax certain classes and leave others untaxed, but such taxes must be uniform upon the same class of subjects, and in imposing them it may not resort to unreasonable or arbitrary discrimination. Hale v. Mineral County, 82 M 98, 265 P 6 (1928).

License Tax or Occupation Tax Not Inhibited by This Provision — Exception: The tax imposed by 7-21-2216 (repealed in 1979) upon a manufacturer is the license or occupation tax provided for by the last sentence of Art. XII, sec. 1, 1889 Mont. Const., and is not controlled by the uniformity clause contained in sec. 11 of the same article. Hence such license tax may be graduated according to the amount of business done and is not open to attack as being discriminatory because one doing a business of $15,000 or less a year is relieved from payment thereof. St. v. Hennessy Co., 71 M 301, 230 P 64 (1924).

Special Assessments for Drainage: Special assessments for the construction and maintenance of drainage works are not taxes within the meaning of Art. XII, sec. 11, 1889 Mont. Const., providing that taxes shall be uniform upon the same class of subjects, and hence that provision has no application. In re Valley Center Drain District, 64 M 545, 211 P 218 (1922).

Livestock — Brought to State for Grazing: A statute requiring the taxation of all livestock brought into the state after a certain date for the purpose of grazing and not applying to all other personal property constitutes an unjust discrimination and violates the uniformity rate of taxation. Hayes v. Smith, 58 M 306, 192 P 615 (1920).

Fees Based on Size of Estate: Section 25-233, R.C.M. 1947 (now repealed), insofar as it made it incumbent upon the Clerk of the District Court to collect from petitioners filing letters of administration or guardianship sums ranging from $5 to $95, regulated by the appraised value of the estate, was obnoxious to Art. XII, sec. 1, 1889 Mont. Const., in that the burdens imposed upon the estates falling within the enumerated classes were fixed arbitrarily and at unequal rates. Hauser v. Miller, 37 M 22, 94 P 197 (1908).

Insurance Companies: Section 681 of the Civil Code of 1895 (repealed) applies to domestic as well as foreign insurance companies and therefore complies with Art. XII, sec. 11, 1889 Mont. Const., requiring taxes to be "uniform upon the same class of subjects". NW. Mut. Life Ins. Co. v. Lewis & Clark County, 28 M 484, 72 P 982 (1903).

PROPERTY TAXES

Classification of Property — Property Located in Commercial Area: Assessment of plaintiff's property based on "market value" rather than upon use of property for agricultural purposes did not violate Art. XII, sec. 11, 1889 Mont. Const., since evidence showed that such property was located within commercial area and its market value far exceeded its value for agricultural purposes. Mohland v. St. Bd. of Equalization, 155 M 49, 466 P2d 582 (1970), certiorari denied, 400 US 940, 91 S Ct 232 (1970).

Classification of Property: Chapter 178, L. 1951, which amended section 84-301, R.C.M. 1947 (now repealed), was an unconstitutional exercise of the legislative function to classify property for taxation. Victor Chem. Works v. Silver Bow County, 130 M 308, 301 P2d 730 (1956).

Purchase of Tax Deed Land by Delinquent Owner: Section (now repealed) authorizing the former owner of real property held by a county under tax deed to repurchase it under certain conditions was not in violation of Art. XII, sec. 6, 1889 Mont. Const., which prohibited discharging local governments or individuals from their share of taxes. Blackford v. Judith Basin County, 109 M 578, 98 P2d 872 (1940).

Redemption of Real Property: Held, that Ch. 88, L. 1935 (omitted), authorizing redemption of real property sold to the county for taxes without the payment of interest and penalties, is not violative of either Art. V, sec. 39, or Art. XII, sec. 11, 1889 Mont. Const., or of the 14th amendment to the Constitution of the United States. State ex rel. Sparling v. Hitsman, 99 M 521, 44 P2d 747 (1935).

Sale of Tax Deed Lands for Less Than Delinquent Amount: Under Art. XII, sec. 6, 1889 Mont. Const., which prohibited discharging local government or individuals from their share of taxes, lands held by counties under tax deed could be sold for an amount less than the general taxes delinquent thereon. State ex rel. Malott v. Bd. of County Comm'rs, 89 M 37, 296 P 1 (1930).

General Law — Partial Redemption From Tax Sale: Section 15-18-103 (now repealed), requiring the County Treasurer upon the request of one seeking to redeem from tax sale a portion of a tract of land on which he holds a mortgage and which portion had not been separately assessed to compute and apportion the tax on the portion sought to be redeemed, is not unconstitutional as authorizing levy and collection of taxes in any other manner than by general law. State ex rel. Fed. Land Bank v. Hays, 86 M 58, 282 P 32 (1929).

Inheritance Tax Not Inhibited: Article XII, sec. 11, 1889 Mont. Const., related to property taxes only and not to such as are imposed on inheritances. State ex rel. Rankin v. District Court, 70 M 322, 225 P 804 (1924).

"Subject of Taxation": The term "subject of taxation" found in Art. XII, sec. 11, 1889 Mont. Const., was held to have been used by the Constitutional Convention in its then proper sense, to denote the different kinds of property liable to taxation. Hilger v. Moore, 56 M 146, 182 P 477 (1919).

Local Improvements: Special assessments for local improvements in the shape of drains in order to relieve marshy lands of surplus moisture are laid under the taxing power. Their imposition does not fall within the restraints prescribed by Art. XII, sec. 4 and 11, 1889 Mont. Const., relative to how, upon whom, and on what property "taxes" may be levied. These sections refer solely to revenues which go to defray general governmental expenditures, as distinguished from special outlays to provide for purely local improvements. Billings Sugar Co. v. Fish, 40 M 256, 106 P 565 (1910).

MISCELLANEOUS

Operation and Effect: The fact that a lessor's percentages of the net smelter returns paid under its lease are net proceeds as to it and taxable as royalties under 15-23-505 and 15-23-507 and hence classified as class one of sections 84-301 and 84-302, R.C.M. 1947 (now repealed), does not of itself contravene Art. XII, sec. 1 and 11, 1889 Mont. Const. New Silver Bell Min. Co. v. Lewis & Clark County, 129 M 269, 284 P2d 1012 (1955).

Public Purpose — Prohibition Against Sale of Oleomargarine: Section levying a tax on dealers in oleomargarine was invalid in that it levied a tax for the purpose of prohibiting in large part the sale of oleomargarine in Montana in aid of the dairy industry and not for a public or government purpose. Brackman v. Kruse, 122 M 91, 199 P2d 971 (1948).

Ceding Jurisdiction: Section 2-1-202, ceding exclusive jurisdiction over certain state lands to federal government for public purposes without reserving the state's right to tax personal property of persons and private corporations upon such land, does not violate Art. XII, sec. 11, 1889 Mont. Const. State ex rel. Bd. of County Comm'rs v. Bruce, 106 M 322, 77 P2d 403 (1938), overruled on other grounds in Valley County v. Thomas, 109 M 345, 97 P2d 345 (1939).

Scope of Legislative Classification: Assertion that the Legislature in amending 61-3-502 (now repealed) and 15-8-202, by enacting Ch. 72, L. 1937, and making special provision for taxing automobiles included in class two of section 84-301, R.C.M. 1947 (now repealed), among other personal property without first amending such section, unlawfully discriminated against motor vehicles, held not well made, since the Legislature may properly go even to the extent of placing identical articles in the hands of different owners, different uses resulting in different productivity. Wheir v. Dye, 105 M 347, 73 P2d 209 (1937).

License Tax: A license tax imposed for the privilege of doing business in the state is not subject to the uniformity provisions of the 1889 Montana Constitution (Art. XII, sec. 1 and 11). State ex rel. Griffin v. Greene, 104 M 460, 67 P2d 995 (1937).

Tax Burden — Coextensive With Territorial Limits of Taxing Authority: The bonds authorized by sections 75-4601 to 75-4606, R.C.M. 1947 (now repealed), for the construction of high schools are high school district bonds, not county bonds. The levy of taxes with which to pay them cannot extend beyond the boundaries of the particular district liable for their payment. Therefore the tax burden is coextensive with the territorial limits of the authority levying the tax, conforming to Art. XII, sec. 11, 1889 Mont. Const. Pierson v. Hendricksen, 98 M 244, 38 P2d 991 (1934).

Money and Credits: The Legislature in enacting Ch. 64, L. 1929 (15-6-204), classifying money and credits for purposes of taxation, properly exercised its power, as against the contention of a state bank that such a classification is invalid under Art. XII, sec. 11, 1889 Mont. Const., and the 14th amendment to the federal Constitution since money and credits, when employed in the banking business, have a greatly increased productivity as compared to money and credits in the hands of the ordinary individual or corporation using them for casual investment only. Bank of Miles City v. Custer County, 93 M 291, 19 P2d 885 (1933).

Discrimination by Misapplication of Law Will Not Invalidate: Taxing officers assessed the shares of a national bank at their full cash value without deducting from such value governmental securities owned by the bank. In disregard of constitutional provisions relating to taxation and statutory provisions requiring like action in regard to shares in a state bank upon the assumption that such securities held by it were exempt, they deducted their value from the moneyed capital of the latter bank, the effect of which was nonassessment of its shares of stock. Held, upon a review of the statutes applicable, that they are not open to attack as offending against the provisions of section 5219, United States Revised Statutes, but that the resultant discrimination against plaintiff national bank was due to faulty administration of the law, and that therefore, under this case, the statutes may not be held invalid. Mont. Nat'l Bank v. Yellowstone County, 78 M 62, 252 P 876 (1926), reversed in Mont. Nat'l Bank v. Yellowstone County, 276 US 499, 72 L Ed 673, 48 S Ct 331 (1928).

Creation of New County — No Reimbursement to Old County: Failure to make provision for reimbursement of the county from which the greater area for a proposed new county is taken for the expense incident to the creation of the new county, held not to render Ch. 226, L. 1919 (Title 7, ch. 2, part 22), violative of Art. XII, sec. 11, 1889 Mont. Const., as casting an unequal burden of taxation upon the old county. State ex rel. Woodward v. Moulton, 57 M 414, 189 P 59 (1920).

Teachers' Pensions: Section 1113, et seq., R.C.M. 1935 (since repealed), providing for teachers' pensions, is not invalid as in contravention of Art. XII, sec. 11, 1889 Mont. Const. Trumper v. School District, 55 M 90, 173 P 946 (1918).

Seed-Grain Law: The seed-grain law, Ch. 13, L. 1915 (since repealed), designed to furnish aid to persons engaged in agriculture who, because they are so reduced in circumstances by natural or other conditions beyond their control, have no means wherewith to purchase seed, was not in contravention of Art. XII, sec. 11, 1889 Mont. Const. State ex rel. Cryderman v. Weinrich, 54 M 390, 170 P 942 (1918).

Counties — Guarantors of State Loans: A statute which seeks to make the counties of the state the guarantor of loans made by the state to individuals is invalid. State ex rel. Evans v. Stewart, 53 M 18, 161 P 309 (1916).

Discharge From Tax Liability: Article XII, sec. 6, 1889 Mont. Const., which prohibited discharging local governments or individuals from their share of taxes, referred only to state taxes and not to those imposed for county or local purposes, such as poll taxes. Pohl v. Chicago, Milwaukee & St. Paul Ry., 52 M 572, 160 P 515 (1916).

Banks — Deducting Deposits for Assessment: The part of section 8 of section 3695 of the Political Code of 1895 granting to private bankers the right to deduct their deposits (debts) from money on hand for purposes of assessment violated Art. XII, sec. 11 and 16, 1889 Mont. Const. Clark v. Maher, 34 M 391, 87 P 272 (1906).

Attorney General's Opinions

Tax Increment Fund Grant to Private Nonprofit Corporation: Under 7-15-4282, a municipality is authorized to provide for tax increment financing as part of its plan for urban renewal. The grant of tax increment funds to a private nonprofit corporation for construction of a parking lot for use by a public fine arts museum was not prohibited because the grant was essentially for a public purpose. 42 A.G. Op. 89 (1988).

Law Review Articles

Public Purpose and Economic Development: The Montana Perspective, Ellingson & Mahoney, 51 Mont. L. Rev. 356 (1990).

Taxation of Mineral Interests Under Article XII, Section 3 of the Montana State Constitution, Dye, 32 Mont. L. Rev. 47 (1971).

Home Rule in Montana—Present and Proposed, Mason, 19 Mont. L. Rev. 79 (1957).

Constitutional Questions Raised by Montana's New Income Tax Law, Hendricks, 17 Mont. L. Rev. 203 (1956).

Section 2. Tax power inalienable.

Convention Notes

New section which limits the power to tax to government.

Compiler's Comments

Former Constitutional Provision: This section is similar to Art. XII, sec. 7, 1889 Mont. Const.

Case Notes

DECISIONS UNDER 1972 CONSTITUTION

Suspension of Income Tax Increase Not Surrender of Taxing Power of Legislature: Natelson collected enough petition signatures on an income tax increase passed by the Legislature to suspend the increase and refer it to the people for a vote. Nicholson filed suit, claiming that the suspension of the law constituted a surrender of the legislative power of taxation. The Supreme Court held that it would not apply case law from other states cited by the plaintiffs and that the referendum simply resulted in the suspension of one law by which the taxing power was exercised. The court also noted that in any event, as pointed out by the District Court, the state was still collecting taxes and would continue to do so no matter which law was ultimately effective after the vote of the people. Nicholson v. Cooney, 265 M 406, 877 P2d 486, 51 St. Rep. 579 (1994).

No Private Contract Created by Statute — State Prohibited From Surrendering Power to Tax: After the Legislature enacted Ch. 823, L. 1991, to tax retirement pension benefits that had previously been untaxed, the retirees sued, claiming that they had a contractual right to a continued exemption from taxation. Citing Wage Appeal v. Bd. of Personnel Appeals, 208 M 33, 676 P2d 194 (1984), the Supreme Court held that the former tax exemption was only a policy statement that could be changed by the Legislature and that the Legislature did not clearly manifest an intention in the law in question to create a private contractual right. Additionally, the Supreme Court held that the state was prohibited by this section from promising any group of taxpayers that it would never tax them. Sheehy v. Pub. Employees Retirement Div., 262 M 129, 864 P2d 762, 50 St. Rep. 1477 (1993).

DECISIONS UNDER 1889 CONSTITUTION

Foreign Corporation's Property: The Legislature has no power to release foreign corporation's property in state from taxes for county, municipal, and other purposes. St. v. N. Am. Car Corp., 118 M 183, 164 P2d 161 (1945).

"Owned or Used": Article XII, sec. 7, 1889 Mont. Const., authorized the state to tax "all corporations in this state, or doing business therein" on all "corporate property", including "personal property owned or used by them". Held, on appeal from a judgment and order perpetually enjoining the county and city from collecting an ad valorem tax levied on credits and receivables in the business of financing sales of motor vehicles, refrigerators, etc., showing annually earned net profits, that these intangibles have a business situs in Montana and are here taxable. Commercial Credit Co. v. O'Brien, 115 M 199, 146 P2d 637 (1943).

Exemption From Income Tax: The purpose of the introductory clause of Art. XII, sec. 7, 1889 Mont. Const., that the power to tax corporations shall never be relinquished or suspended, is to prevent the creation of corporations under laws whereby the right to tax corporations is either extinguished during their existence or suspended for a definite period of time. The action of the Legislature in failing to make corporations subject to the income tax law does not amount to a relinquishment or suspension of the right to tax them, within the meaning of this section. Mills v. St. Bd. of Equalization, 97 M 13, 33 P2d 563 (1934).

Cession of Park Land: Act Mont. Feb. 14, 1891 (L. 1891, p. 262), ceding to United States exclusive jurisdiction over Montana land included in Yellowstone Park, reserving only concurrent jurisdiction for execution of civil and criminal process lawfully issued by courts of state, held not violative of Art. XII, sec. 7, 1889 Mont. Const., declaring that power to tax corporations or corporate property shall never be relinquished or suspended. Yellowstone Park Transp. Co. v. Gallatin County, 31 F2d 644 (9th Cir. 1929).

Capital Stock: The authorized capital stock of a corporation is not taxable as such against the corporation. Butte Land & Inv. Co. v. Sheehan, 44 M 371, 120 P 241 (1911).

Trust Companies: Section 611 of the Civil Code of 1895 (now repealed), providing that the property of trust deposit and security corporations shall be assessed for purposes of taxation in

the same manner as national banks, was repugnant to Art. XII, sec. 1 and 7, 1889 Mont. Const., in that it exempted the personal property of such companies from taxation. Daly Bank & Trust Co. v. Bd. of County Comm'rs, 33 M 101, 81 P 950 (1905).

Corporations to Bear Equal Share: The evident meaning of Art. XII, sec. 7, 1889 Mont. Const., is that the property of corporations shall bear its equal share of the burden of taxation. NW. Mut. Life Ins. Co. v. Lewis & Clark County, 28 M 484, 72 P 982 (1903).

Section 3. Property tax administration.

Convention Notes

Revises 1889 constitution by removing references to county boards of equalization and state board of equalization leaving the legislature free to determine the method of securing property tax equalization.

Compiler's Comments

Former Constitutional Provision: This section revises Art. XII, sec. 15, 1889 Mont. Const.

Case Notes

DECISIONS UNDER 1972 CONSTITUTION

Six-Year Appraisal Cycle — No Violation of Equal Protection Rights When Property Value Significantly Decreases at Beginning of Cycle: The value of the taxpayer's property significantly declined in the year following its tax appraisal. After the Department of Revenue refused to conduct a midcycle reevaluation of the property, the taxpayer challenged the constitutionality of the 6-year tax cycle, arguing that the Department should conduct a midcycle reevaluation to relieve it from paying taxes based on an inflated value of the property and that the failure to do so subjected the taxpayer to disparate treatment in violation of its equal protection rights. The District Court agreed and ordered the Department to conduct a midcycle reevaluation. The Department appealed and the Supreme Court reversed, concluding that a 6-year cyclical plan of reappraisal does not violate a taxpayer's rights when the property depreciates in value during the cycle because the Montana Constitution requires only a periodic attainment of equality of tax treatment. The court also determined that the District Court had improperly exercised legislative authority in ordering the Department to conduct a reevaluation. Covenant Inv., Inc. v. Dept. of Revenue, 2013 MT 215, 371 Mont. 186, 308 P.3d 54.

Lack of Genuine Issue of Material Fact Concerning Failure to Equalize Valuation: The plaintiff claimed that tax valuations for its refinery were higher than for other refineries in Yellowstone County. The plaintiff alleged that the Department of Revenue had failed to equalize its valuation of the plaintiff's property in violation of Art. VIII, sec. 3, Mont. Const., and it brought an action under 15-1-406. However, the Department established that it used the same method of valuation for all three properties, and the plaintiff failed to establish any issues of material fact showing that the Department had acted illegally or improperly. Thus, the Supreme Court affirmed summary judgment for the Department on the claim, finding that the action was not within the scope of declaratory actions under 15-1-406 without first appealing to administrative tax appeal boards. CHS, Inc. v. Dept. of Revenue, 2013 MT 100, 369 Mont. 505, 299 P.3d 813.

Equal Protection Analysis of Vocational-Technical School Levy — Rational Basis Test Applied: Plaintiffs challenged the constitutionality of 20-25-439, asserting that the tax levy for vocational-technical schools resulted in an unequal tax burden on five counties where the schools are located, even though the schools are part of the statewide University System. The state contended that the levy is not unconstitutional because it is rationally related to a legitimate government purpose. The District Court found that the levy is constitutional because it is rationally related to the legitimate government interest of supporting the schools, in that the schools provide specific benefits to their individual counties. The Supreme Court agreed that the rational basis analysis applied. The constitutional tax provisions in section 1 and this section are broad directives whose specifics are left to the Legislature, so no constitutionally significant interests are implicated that require greater than a rational basis analysis. A tax classification under the rational basis test will be upheld if it is reasonable and not arbitrary and if it applies equally to all who fall within the same classification. A classification is not reasonable if it confers particular privileges or imposes particular disabilities on a class of persons arbitrarily selected from a larger number of persons, all of whom stand in the same relation to privileges conferred or disabilities imposed. Neither the uniformity doctrine nor equal protection prevent the state from making classifications that result in different state taxes among the various counties as long as the classifications are rationally related to a legitimate government purpose. Simply because other state taxes for education funding are assessed in every county does not mean that

the Legislature is prohibited from creating subclasses for tax purposes. Attendance at vocational-technical schools by local residents and course offerings related to local interests serve as a rational basis for putting the five counties in a separate class for purposes of the levy. Counties with vocational-technical schools are not arbitrarily selected from the rest of the state because those counties do not stand in the same relation to the greater privileges conferred on those counties by the schools than the rest of the state, so the disability of the levy is rationally imposed. The constitutionality of 20-25-439 was affirmed. Kottel v. St., 2002 MT 278, 312 M 387, 60 P3d 403 (2002), following Leuthold v. Brandjord, 100 M 96, 47 P2d 41 (1935), and distinguishing State ex rel. Woodahl v. Straub, 164 M 141, 520 P2d 776 (1974), Allegheny Pittsburgh Coal Co. v. County Comm'rs of Webster County, W. Va., 488 US 336 (1989), and Roosevelt v. Dept. of Revenue, 1999 MT 30, 293 M 240, 975 P2d 295 (1999).

Uniformity Doctrine of 1889 Constitution Embodied in Equal Protection Clause of 1972 Constitution: Plaintiffs challenged the constitutionality of 20-25-439, asserting that the tax levy for vocational-technical schools resulted in an unequal tax burden on five counties where the schools are located, even though the schools are part of the statewide University System. The state contended that the levy is not unconstitutional because it is rationally related to a legitimate government purpose. The 1889 Montana Constitution contained a uniformity doctrine that required a tax to be levied by a general law that is uniform within the same class of subjects within the territorial limits of the authority levying the tax; however, that uniformity doctrine does not appear in the plain language of the 1972 Montana Constitution. Nevertheless, plaintiffs asserted that the uniformity doctrine is still a constitutional requirement apart from equal protection guarantees. The state argued that because the uniformity doctrine is not part of the 1972 Montana Constitution, the levy could not be violative of the doctrine. The District Court agreed with the state and plaintiffs appealed. The Supreme Court agreed that the statement defining the uniformity doctrine in Hilger v. Moore, 56 M 146, 182 P 477 (1919), was subsequently applied in post-1972 cases, but disagreed that the definition supports any stricter limitation on taxation than that imposed by equal protection. The framers of the 1972 Montana Constitution intended to preserve the uniformity doctrine only as it is equivalent to equal protection requirements. Thus, the uniformity doctrine as interpreted under the 1889 Montana Constitution, which provided for equal protection in the area of taxation, is still embodied in the 1972 Montana Constitution in the equal protection clause. Analysis of the constitutionality of the levy in question was therefore conducted under the equal protection clause. Kottel v. St., 2002 MT 278, 312 M 387, 60 P3d 403 (2002).

Phasein of Real Property Value Modifications Violative of Equal Protection Rights: Roosevelt and the Department of Revenue filed a joint interlocutory petition to adjudicate issues raised before the State Tax Appeal Board, asking the District Court to determine whether the 2% phasein of changes in real property value in 15-7-111 violated the state constitution or statutes. Although the appraised value of Roosevelt's property declined by $161,757 in 1997, under 15-7-111, he was given credit for only a $3,235 difference and was assessed taxes based on a value of $817,362 rather than the actual 1997 appraised value of $658,840. In District Court, Roosevelt raised numerous alleged statutory and constitutional violations, including equal protection and due process concerns. The District Court held 15-7-111 unconstitutional on its face, in conflict with Art. VIII, sec. 7, Mont. Const., and this section with the equal protection and due process clauses of both the state and federal constitutions, and with statutes pertaining to the valuation and assessment of real property. On appeal, the Supreme Court cited U.S. v. Raines, 362 US 17, 4 L Ed 2d 524, 80 S Ct 519 (1960), in reversing the holding that the statute was unconstitutional on its face because even though it imposed different tax burdens on various classes of taxpayers, the statute was neutral on its face. However, the court did not find it necessary to address all other issues raised or decided by the District Court beyond the equal protection question. The court first noted that the level of scrutiny applicable to this case did not rise to the level of strict scrutiny, which requires a compelling state interest for statutory classifications that treat otherwise similarly situated persons differently and is reserved for situations when a statutory classification impermissibly interferes with the exercise of a fundamental right or operates to a peculiar disadvantage of a suspect class. Although a legitimate state interest exists in reducing reliance on property taxes and avoiding property tax increases, the method in 15-7-111, which taxed property owners, such as Roosevelt, based on 124% of market value while other taxpayers paid less than full market value, was not rationally related to a legitimate state interest, so the court declined to decide whether a higher level of scrutiny applied to classifications created for property tax assessment. Rather, the court held that creating a class of property owners whose taxes are assessed on a basis greater than the market values of their property, while

other property owners are assessed on the actual or less than the actual market values of their property, causes the property owners in the first class to pay a disproportionate share of state taxes, in violation of the equal protection guarantee in Art. II, sec. 4, Mont. Const. General adjustments over a short time to equalize the treatment of similarly situated property holders is permissible, but seasonable attainment of the equality is required. The 2% phasein accomplished neither. In this case, Roosevelt and similarly situated taxpayers were entitled to be assessed at the actual 1997 market value of their property for purposes of calculating 1997 property taxes. (See changes to phase-in system in Ch. 584, L. 1999.) Roosevelt v. Dept. of Revenue, 1999 MT 30, 293 M 240, 975 P2d 295, 56 St. Rep. 125 (1999), following Allegheny Pittsburgh Coal Co. v. County Comm'rs of Webster County, W. Va., 488 US 336, 102 L Ed 2d 688, 109 S Ct 633 (1989), and distinguishing Nordlinger v. Hahn, 505 US 1, 120 L Ed 2d 1, 112 S Ct 2326 (1992).

Use of Single Approach to Estimating Market Value Not Required: The constitutional framers did not intend for equalization to require the use of a single approach to estimating market value. Rather, the framers anticipated and intended that the Department of Revenue could use a number of different approaches, including the income approach and the market data approach. The Department's method of assessing property and estimating market value is by no means perfect, but the interdisciplinary method is a reasonable attempt to equalize appraisal of real property, comports with the most modern and accurate appraisal practices available, and meets the constitutional requirement for equalization of property values. Albright v. St., 281 M 196, 933 P2d 815, 54 St. Rep. 132 (1997). See also Ostergren v. Dept. of Revenue, 2004 MT 30, 319 M 405, 85 P3d 738 (2004).

Constitutionality of Partial State Funding of County Assessors: Legislative funding of less than 100% of the salaries of County Assessors was not in conflict with this section despite the contention that the constitutional imposition on the state of the duty to appraise, assess, and equalize property valuations mandated that the state should fully fund Assessors' salaries. This section was adopted with a conscious choice of leaving to the Legislature the method of implementing the state's duties. Fallon County v. St., 231 M 443, 753 P2d 338, 45 St. Rep. 748 (1988).

Power to Uniformly Lower Appraisals of a Type of Property to Equalize Appraisals — "34% Cases": Due to the use of different appraisal manuals for residential property and commercial improvements to real property, equivalent values were not always placed upon similar properties although the two types of property are in the same tax class. The Department of Revenue determined that the commercial valuations averaged 12% higher than the residential valuations and ordered each county assessor to reduce all commercial valuations by 12%. The Department properly assumed the responsibility of solving the problem and in equalizing the valuations in the manner it did was acting under its constitutional mandate and authority to equalize values of taxable property. The 12% reduction did not constitute a reappraisal. The power and duty to equalize included the power to alter appraised values set at the beginning of an appraisal cycle. Hanley v. Dept. of Revenue, 207 M 302, 673 P2d 1257, 40 St. Rep. 2054 (1983).

Taxpayer Relief for Inequitable Assessment: To obtain relief on the ground that his property is assessed inequitably, it is essential that the taxpayer prove: (1) that there are several other properties within a reasonable area comparable to his; (2) the amount of assessments on these properties; (3) the actual value of the comparable properties; (4) the actual value of his property; (5) the assessment complained of; and (6) that by comparison his property is assessed at a higher proportion of its actual value than are the comparable properties, thereby creating discriminations. These criteria are among those to be used in a comparison of true value to assessed value ratios. Where no such criteria were followed and no ratio comparisons made, the State Tax Appeal Board's blanket reduction of 34% on commercial improvement appraisals was set aside. Dept. of Revenue v. St. Tax Appeal Bd., 188 M 244, 613 P2d 691 (1980), followed in Devoe v. Dept. of Revenue, 233 M 190, 759 P2d 991, 45 St. Rep. 1414 (1988).

Taxation Standards — Uniformity Versus True Value: Where it is impossible to secure both the standard of the true value of a taxpayer's property and the uniformity and equality in taxation required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law. Therefore, unequal appraisals may be reduced even though they result in an assessment as true market value or 100% of market value as required by 15-8-111. Reduction is required where it is satisfactorily shown that under the system as applied, it is impossible to meet both the true value and equality standards. Dept. of Revenue v. St. Tax Appeal Bd., 188 M 244, 613 P2d 691 (1980).

Late Assessments: Section 15-8-201 implements Art. VIII, sec. 3, Mont. Const., and requires that assessments be made by the second Monday in July. Assessments made after the second

Monday in July are invalid. Butte Country Club v. Dept. of Revenue, 186 M 424, 608 P2d 111 (1980), overruled in Albright v. St., 281 M 196, 933 P2d 815, 54 St. Rep. 132 (1997).

Montana Appraisal Plan: The Montana appraisal plan and its implementing legislation are constitutional. Patterson v. Dept. of Revenue, 171 M 168, 557 P2d 798 (1976).

Montana Appraisal Plan — Violation of Administrative Procedure Act: The Montana appraisal plan was voided because it was never legally adopted in accordance with the Montana Administrative Procedure Act. Patterson v. Dept. of Revenue, 171 M 168, 557 P2d 798 (1976).

Determination of Accounting Method: This section when taken together with 15-9-101 allows the Department of Revenue to determine what method of valuation shall be used for tax assessment purposes. Mont. Nat'l Bank of Roundup v. Dept. of Revenue, 167 M 429, 539 P2d 722 (1975).

DECISIONS UNDER 1889 CONSTITUTION

County Commissioners — No Power Over Taxes: Boards of County Commissioners have no power, authority, or jurisdiction under the Constitution or statutes to reduce, compromise, remit, release, cancel, diminish, or extinguish any state tax, obligation, or liability or any assessed tax valuation or percentage assignments of property after the same has been found, determined, and fixed by the State Board of Equalization. Carlson v. Flathead County, 130 M 24, 293 P2d 279 (1956).

Attorney General's Opinions

County Assessor — Status Under Self-Government Charter: A self-government unit does not have the authority to enact any ordinance inconsistent with state law regarding the functions of the office of County Assessor. 37 A.G. Op. 68 (1977).

Law Review Articles

A Historical Perspective on Montana Property Tax: 25 Years of Statewide Appraisal and Appeal Practice, Powell, 70 Mont. L. Rev. 21 (2009).

The State of the Montana Constitution (Turkey Feathers on the Constitutional Eagle), Petesch, 64 Mont. L. Rev. 23 (2003).

Of Castles and Kings: A Perspective for Property Tax Reform, Even, 50 Mont. L. Rev. 243 (1989).

Real Property Tax Assessment in Montana, Sullivan, 34 Mont. L. Rev. 300 (1973).

Section 4. Equal valuation.

Convention Notes

No change except in grammar. Guarantees the same assessed value will be used by all taxing authorities.

Compiler's Comments

Former Constitutional Provision: This section is similar to Art. XII, sec. 5, 1889 Mont. Const.

Case Notes

DECISIONS UNDER 1889 CONSTITUTION

Powers of Former State Board of Equalization:

That an order of the State Board of Equalization (now State Tax Appeal Board) prescribing a uniform method of appraising timberlands may not have been supported by the evidence adduced at a hearing does not give the counties ground for ignoring the order until such time as the order has been adjudicated invalid by a court of competent jurisdiction. State ex rel. Conrad v. Managhan, 157 M 335, 485 P2d 948 (1971).

When the Board held "show cause hearings" to afford opportunity to protest Board's order of uniform county land value reclassification but provided no opportunity to cross-examine witnesses or hear evidence and no stenographic record was kept of the proceedings, such hearings did not fulfill the requirements of due process and uniformity. State ex rel. St. Bd. of Equalization v. Kovich, 142 M 201, 383 P2d 818 (1963).

The Board has the power to determine what a particular class should include. Yellowstone Pipe Line Co. v. St. Bd. of Equalization, 138 M 603, 358 P2d 55 (1960).

Board is charged with the duty of adjusting and equalizing the valuation of all taxable property among the several counties and between individual taxpayers. State ex rel. Reid v. District Court, 134 M 128, 328 P2d 634 (1958).

Increased Valuation: State Board of Equalization (now State Tax Appeal Board) directive to county officials requiring use of certain valuations on grades of farm land for subsequent years was enforceable by mandamus since the Board had not only powers of adjustment, equalization,

and supervision over assessors under Art. XII, sec. 15, 1889 Mont. Const., and 15-2-201 but also the power to issue directives for those purposes. State ex rel. St. Bd. of Equalization v. Koch, 145 M 474, 401 P2d 765 (1965).

Uniformity of Taxation:

As long as the State Board of Equalization (now State Tax Appeal Board) treats property of similar nature and productivity the same, it cannot be said that the constitutional mandate of uniformity is not subserved. Yellowstone Pipe Line Co. v. St. Bd. of Equalization, 138 M 603, 358 P2d 55 (1960).

Under the 1889 Montana Constitution the State Board of Equalization (now State Tax Appeal Board) had the power, in adjusting and equalizing taxation between oil pipelines and other properties, i.e., town and city lots, to recognize pipelines as a class in itself and still not violate the requirement of uniformity. Yellowstone Pipe Line Co. v. St. Bd. of Equalization, 138 M 603, 358 P2d 55 (1960).

Writ of Prohibition — Intervention of Court: District Court acted prematurely in issuing Writ prohibiting State Board of Equalization (now State Tax Appeal Board) from proceeding further under 15-9-101(2), holding a public hearing, and equalizing or increasing the assessed values of farmlands in county, which prevented Board from discharging its constitutional duties. Court may not intervene where action of Board was not arbitrary, fraudulent, or contrary to law. State ex rel. Reid v. District Court, 134 M 128, 328 P2d 634 (1958).

Prohibition of Discrimination: Article XII, sec. 15, 1889 Mont. Const., as amended (L. 1923), conferring broad powers upon the State Board of Equalization (now State Tax Appeal Board) in the matter of adjusting, equalizing, changing, increasing, or decreasing valuations of property for taxation purposes, impliedly prohibits the Board from intentionally discriminating in favor of one county against another or between the different classes of property in any county or in favor of one individual and against another. State ex rel. Schoonover v. Stewart, 89 M 257, 297 P 476 (1931).

Power of Legislature to Add Powers to Board of Equalization: Held, that the Legislature could properly add powers additional to those specifically conferred by Art. XII, sec. 15, 1889 Mont. Const., upon the State Board of Equalization (now State Tax Appeal Board), as it did by Ch. 237, L. 1921 (15-23-502 through 15-23-522), by imposing upon the Board the duty to assess net proceeds of mines. Butte & Superior Min. Co. v. McIntyre, 71 M 254, 229 P 730 (1924).

Net Proceeds of Mines: The State Board of Equalization (now State Tax Appeal Board) is a special tribunal with limited powers and must, in making an assessment of net proceeds of mines, pursue the method of procedure prescribed by Ch. 237, L. 1921 (15-23-502 through 15-23-522). In it is lodged no discretion to permit deductions from the gross proceeds other than those specifically provided for or to allow reimbursement to the taxpayer for taxes paid by him by mistake in previous years. Mandamus lies to compel the Board to follow the law. State ex rel. Bourquin v. St. Bd. of Equalization, 67 M 340, 215 P 667 (1923).

Increase of Total Valuation — State Property: The State Board of Equalization (now State Tax Appeal Board) has no power to increase the total valuation of the property of the state as disclosed and fixed by the abstracts and statements transmitted to it by the assessors and County Boards of Equalization (now County Tax Appeal Boards). State ex rel. Wallace v. St. Bd. of Equalization, 18 M 473, 46 P 266 (1896).

Municipal Levy Based on County and State Assessment: Under Art. XII, sec. 5, 1889 Mont. Const., the municipal authorities of an incorporated city could make a legal assessment in electing to take the assessment made by the county and state assessing authorities as the basis for the levy of municipal taxes on property within such city. The levy of lawful taxes thereon by that city for municipal purposes, according to the provisions of its charter and ordinances, constituted a legal levy. Lockey v. Walker, 12 M 577, 31 P 639 (1892).

Section 5. Property tax exemptions.

Convention Notes

1889 constitution makes it mandatory that all property listed in subsection (1)(a) be exempt from taxation. Revision leaves all exemptions at discretion of legislature. Specifically permits taxation of private interests in government-owned property and assessment of special improvement district charges on tax exempt property.

Compiler's Comments

Former Constitutional Provision: This section revises Art. XII, sec. 2, 1889 Mont. Const.

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DECISIONS UNDER 1972 CONSTITUTION

GENERAL

Execution of Assets — Alleged Abuse of Process, Wrongful Levy, and Conversion — Improper Dismissal of Complaint: The plaintiffs owed a judgment debt to the defendants. After the plaintiffs had filed a notice of claimed exemptions and requested a hearing, the defendants secured a warrant of execution and had sheriff's officials remove the contents of the plaintiffs' home. The plaintiffs ultimately filed an action against the defendants for a variety of violations of their rights related to the seizure of their property, most of which was exempt from execution. The District Court dismissed the complaint, and the plaintiffs appealed. The Supreme Court reversed, finding that the District Court had erred in dismissing the claims of abuse of process, wrongful levy, and conversion. The Supreme Court concluded that certain facts alleged by the plaintiffs, if proved, would entitle them to relief. Salminen v. Morrison & Frampton, PLLP, 2014 MT 323, 377 Mont. 244, 339 P.3d 602.

Absent Equal Protection Violation, No Constitutional Violation for Legislature to Tax or Exempt From Taxation Property Without First Classifying Property: Certain counties and individual taxpayers argued that statutes enacted to tax coal, oil, and natural gas while at the same time exempting those properties from a statewide mill levy for education were invalid because the statutes did not classify those properties as required by 15-6-101 and, in addition, created a partial exemption from school funding instead of creating a total exemption. The Supreme Court held that the Legislature is not constitutionally limited to a classification system and that the Legislature is not constitutionally limited to providing tax exemptions for property exclusively within a classification system. Powder River County v. St., 2002 MT 259, 312 M 198, 60 P3d 357 (2002).

Tax Exemption for Business Inventory While Taxing Livestock Not Violative of State or Federal Equal Protection Laws: The Supreme Court reversed a lower court decision that held that taxing livestock while exempting business inventories was unconstitutional in that the law denied certain individuals equal protection under the federal and state constitutions. The Supreme Court ruled that a middle tier scrutiny was not required; rather the proper test was a rational basis test to determine if there was a basis for treating inventory and livestock differently. Under the rational basis test, it was clear that the Legislature had acted rationally in applying different classifications, and historically the two properties had been treated differently. Mont. Stockgrowers Ass'n v. St., 238 M 113, 777 P2d 285, 46 St. Rep. 1132 (1989).

DECISIONS UNDER 1889 CONSTITUTION

FEDERAL PROPERTY

Private Interest in Federal Property Taxable: The appellants were investor-owned utility companies that used portions of federally owned power lines located in Montana to transmit electrical power to out-of-state users. The companies argued that their interest in the power lines did not give them the right to possession and control and therefore was not an interest that was subject to a beneficial use tax. The Supreme Court disagreed, stating that what was involved was a private contractual right to use a portion of the transmission capacity of the exempt federal power line. The contract right clearly fit into the state constitutional language establishing that any private interest in property may be taxed separately. Pac. Power & Light Co. v. Dept. of Revenue, 237 M 77, 773 P2d 1176, 46 St. Rep. 636 (1989).

When United States Owns Equitable Title, Land Not Taxable: When United States acquired option to purchase privately owned land and exercised its option and took possession of the land prior to first Monday of March and deed to the government was executed and delivered the following November, the government was the equitable and beneficial owner on the tax date and

the property was exempt from taxation by the county. Calvin v. Custer County, 111 M 162, 107 P2d 134 (1940).

Real Property Purchased With Exempt United States Pension: It was within the power of the Legislature to declare it the policy of the state, based upon an admissible construction of the federal statutes in that behalf, that title to the funds received from the United States as pension, etc., after their delivery to the guardian should remain in the United States and that the benefit of such statutes should extend to real property purchased with such funds. Henderson v. Missoula, 106 M 596, 79 P2d 547 (1938).

United States Property — Indian Property: The general provision of the Constitution that property of the United States is exempt from taxation is controlled by the special provisions of ordinance No. 1, that lands granted to an Indian by act of Congress shall be exempt from taxation only so long as Congress may not otherwise prescribe. British-American Oil Co. v. St. Bd. of Equalization, 101 M 293, 54 P2d 129 (1936).

United States Bonds Exempt: Property of a state bank represented by bonds of the United States is exempt from taxation under the supreme law of the land, irrespective of the fact that it is not made so by the state Constitution or statutes. E. Helena St. Bank v. Rogers, 73 M 210, 236 P 1090 (1925), overruled on other grounds in Mont. Nat'l Bank v. Yellowstone County, 78 M 62, 252 P 876 (1926).

Special Assessments Taxes — Exemptions Cover: Special assessments are within the meaning of the Constitution when it prohibits imposition by the Legislature of taxes upon any property or instrumentality of the federal government. Ford v. Great Falls, 46 M 292, 127 P 1004 (1912).

STATE PROPERTY

Special Assessment Not Taxes: The Legislature may authorize the inclusion of state-owned land within special improvement districts or drainage districts and authorize assessments to the extent that the land is benefited. Such assessments are not taxes within the meaning of the constitutional prohibition. However, in the absence of clear legislative consent thereto, such land cannot be subjected to tax deed proceedings for delinquency of assessments. State ex rel. Freebourn v. Yellowstone County, 108 M 21, 88 P2d 6 (1939).

Irrigation District Assessments Not Taxes: Assessments for irrigation district purposes, in their nature akin to special assessments for local improvements, are not "taxes" within the meaning of Art. XII, sec. 2, 1889 Mont. Const., declaring that state property shall be exempt from taxation, and state-owned lands within the district are subject to assessments levied by the district for district purposes. Toole County Irrigation District v. St., 104 M 420, 67 P2d 989 (1937).

Payment Under Protest: Taxes paid by the state under protest on the value in excess of the equity the purchaser had in the land were illegally levied as upon state property. Courtney v. Missoula County, 21 M 591, 55 P 359 (1898), distinguished in St. v. Lewis & Clark County, 84 M 200, 274 P 854 (1929).

State Land Being Sold, Subject to Taxation: State lands, after sale but before the price is fully paid, are subject to taxation as the property of the purchaser, notwithstanding Art. XII, sec. 2, 1889 Mont. Const. Courtney v. Missoula County, 21 M 591, 55 P 359 (1898).

LOCAL GOVERNMENT PROPERTY

Trust Property: Provision for taxing property in which county or municipality has only a trust interest as opposed to a beneficial interest did not violate Art. XII, sec. 2, 1889 Mont. Const., since taxation of property is based on its use. Fickes v. Missoula County, 155 M 258, 470 P2d 287 (1970).

Irrigation Districts Not Municipal Corporations, Hence Not Exempt: An irrigation district is not a "municipal corporation" within the meaning of the 1889 Montana Constitution. Therefore, the county in which such a district was located had the power to assess and levy a tax upon lands acquired by the district by tax deed. Buffalo Rapids Irrigation District v. Colleran, 85 M 466, 279 P 369 (1929).

County Property Special Improvement Taxes: When a city lot owned by the county is not used for county purposes and special municipal improvements enhance its value for building purposes, the county is liable for the payment of the consequent special assessments. Constitutional and statutory provisions exempting its property from taxation did not apply under such conditions. State ex rel. Great Falls v. Jeffries, 83 M 111, 270 P 638 (1928).

Property Willed to Town for Public Purpose Exempt: A mortgagee bequeathed a sum of money and a mortgage on land for town library purposes. The will provided that the trust fund thus created should be administered by trustees for the use and benefit of the town. The mortgagor in

lieu of foreclosure gave a deed for the property to the trustees of the town—the cestui que trust. The property became that of the town and not that of the trust and was therefore exempt from taxation under Art. XII, sec. 2, 1889 Mont. Const. Cascade v. Cascade County, 75 M 304, 243 P 806 (1926).

PUBLIC PROPERTY

Property and Securities of Housing Authority: The property and securities of a housing authority are essentially public property used for public purposes and were expressly exempted from taxation by Art. XII, sec. 2, 1889 Mont. Const. Rutherford v. Great Falls, 107 M 512, 86 P2d 656 (1939).

Public Corporation Not Exempt: The property of a public corporation may not be declared exempt from taxation unless it is made exempt by virtue of express pronouncement of the Montana Constitution or legislative declaration permitted by the Constitution. Buffalo Rapids Irrigation District v. Colleran, 85 M 466, 279 P 369 (1929).

Express Exemption of Public Property: It was not the intention of the framers of the Montana Constitution to write into the fundamental law any useless or meaningless phrases. The fact that they declared an exemption from taxation in favor of public property is a recognition of the principle that, without such express exemption, that property would be subject to taxation, along with the property of the private individuals, corporations, and others. Kalispell v. School District, 45 M 221, 122 P 742 (1912).

EDUCATIONAL PROPERTY

Exemption of Church Camp — Educational Purposes — Status of Religious Education: When church summer camp, containing 22 acres of land and 28 improvements, was "used exclusively for educational purposes", it was therefore exempt from taxation. Religious education is exempt as an "educational purpose" and not as "actual religious worship" even though elements of the latter may be present and may serve to strengthen the exemption of all the property. Flathead Lake Methodist Camp v. Webb, 144 M 565, 399 P2d 90 (1965).

Property Leased for School Purposes: Under Art. XII, sec. 2, 1889 Mont. Const., ownership of the property is of no importance. It is exempt from taxation if it is used exclusively for educational purposes. NW. Improvement Co. v. Rosebud County, 129 M 412, 288 P2d 657 (1955).

Educational Exemption — Purpose: The purpose of exempting from taxation property used exclusively for educational purposes was to promote and encourage the cause of education. NW. Improvement Co. v. Rosebud County, 129 M 412, 288 P2d 657 (1955).

CHARITABLE OR RELIGIOUS PROPERTY

Tax Exemption for Undeveloped Property Adjacent to Church Buildings — Application of Doctrine of Strict Construction of Tax Exemptions: Where the plaintiff church owned land, adjacent to the church, that was used for a church road and recreational activities of church members, the District Court erred, in a quiet title action brought by the church, in denying a tax exemption for the land actually used for the road providing access to the church. However, as there was no direct evidence of the use for church purposes of the other undeveloped property adjacent to the road and church, the Supreme Court strictly construed the tax exemption laws to deny an exemption for the other undeveloped property. Old Fashion Baptist Church v. Dept. of Revenue, 206 M 451, 671 P2d 625, 40 St. Rep. 1774 (1983).

Charitable Exemption — Home for Aged Persons: Nonprofit foundation operating home for aged was entitled to tax exemption under statute granting a tax exemption to institutions of purely public charity, notwithstanding evidence that the foundation charged fees, imposed admission requirements, and maintained a high standard of care and notwithstanding argument that amendment to statute, specifically including homes for aged, was unlawful attempt by Legislature to expand exemption allowed by Constitution. Deaconess Foundation v. Ford, 151 M 143, 439 P2d 915 (1968).

Charitable Exemption — Extent of Exemption: When exempting an institution of charity, sufficient residence and recreation area may also be exempt. Flathead Lake Methodist Camp v. Webb, 144 M 565, 399 P2d 90 (1965).

Charitable Exemption — Limits on Institution: An institution of purely public charity that is exempt from taxation may be devoted to bringing people under religious influence, the beneficiaries of the charity may pay a small portion of the cost, and the activity may be limited to a particular class so long as the numbers who may participate remain somewhat indefinite. Flathead Lake Methodist Camp v. Webb, 144 M 565, 399 P2d 90 (1965).

Corporate License Tax on Organization of Church Society: The corporate license tax imposed on the agricultural activities of a religious society formed for the purposes of farming, stock growing, and other branches of agriculture does not conflict with constitutional provisions relating to religious freedom. St. v. King Colony Ranch, 137 M 145, 350 P2d 841 (1960).

Charitable Use — Exclusive Devotion Required: Only property that is devoted exclusively to a charitable use can be exempt from taxation. Catholic Missions v. Lewis & Clark County, 13 M 559, 35 P 2 (1893).

MISCELLANEOUS

Property Tax Exemptions Under 1889 Constitution: At the time 15-6-206 was enacted (1965), there was in effect Art. XII, sec. 2, 1889 Mont. Const., which provided that only the property specifically mentioned therein could be the subject of an exemption. The claimed exemption for agricultural irrigation equipment did not fall within this category. Accordingly, the Legislature could not constitutionally grant an exemption to the taxpayers. Bucher v. Powell County, 180 M 145, 589 P2d 660 (1979).

"Exclusive Use" Defined: The words "exclusive use" consistently have been held to mean the primary and inherent use and not the mere secondary or incidental uses of the property. Flathead Lake Methodist Camp v. Webb, 144 M 565, 399 P2d 90 (1965).

Exemption for Personal Property Prohibited: Laws which purported to levy a tax on real property only, thus exempting all personal property, is unconstitutional as violating constitutional provision that all property be taxed for any public purpose excepting only such property as set forth and mentioned in Art. XII, sec. 2, 1889 Mont. Const. Schladweiler v. St. Bd. of Equalization, 131 M 13, 306 P2d 673 (1957).

Provisions Absolute and Self-Executing: The property of the United States, the states, counties, cities, towns, school districts, municipal corporations, and public libraries were absolutely exempt from taxation under Art. XII, sec. 2, 1889 Mont. Const., regardless of question of exclusive use. Colwell v. Great Falls, 117 M 126, 157 P2d 1013 (1945), overruled on other grounds in Prezeau v. Whitefish, 198 M 416, 646 P2d 1186 (1982).

Mortgages — Extent of Power of Legislature to Exempt: Under the power granted it by the Montana Constitution, the Legislature could exempt mortgages to the full extent or in part or decline to exempt at all. Bank of Miles City v. Custer County, 93 M 291, 19 P2d 885 (1933).

Strict Construction of Exemptions — Provision Not Limited to Land: The constitutional provision prescribing what property is exempt from taxation was broad enough to include every kind of property—real, personal and mixed—capable of private ownership. Section prescribing the property that shall be absolutely exempt from taxation and the class that may be exempt if exclusively used for certain designated purposes must be strictly construed. Therefore, the contention that, under a strict construction, it must be construed as meaning the unqualified ownership of land merely has no merit. Cascade v. Cascade County, 75 M 304, 243 P 806 (1926).

"Property" Defined: State and county bonds held in private ownership within the state are "property" within the meaning of that term as employed in the Constitution and revenue laws of the state and, not being declared exempt, are taxable as such. Cruse v. Fischl, 55 M 258, 175 P 878 (1918).

Provisions Mandatory and Self-Executing — Power of Legislature: The provisions of Art. XII, sec. 2, 1889 Mont. Const., were mandatory in character and self-executing and deny the Legislature authority to tax any property of the class therein specified. The Legislature may extend the exemption to the property enumerated in this section, but it cannot go further or include any other. Cruse v. Fischl, 55 M 258, 175 P 878 (1918).

Exemptions Exclusive: As the provisions of the Constitution are mandatory and prohibitory, the enumerations in Art. XII, sec. 2, 1889 Mont. Const., were exclusive of any other. Daly Bank & Trust Co. v. Bd. of County Comm'rs, 33 M 101, 81 P 950 (1905).

Attorney General's Opinions

School District Not Exempt From Payment of Solid Waste Management District Assessments: This section authorizes the Legislature to exempt state property from taxation, and 15-6-201 exempts school district property from taxation. However, taxation does not generally include special assessments or user fees. The purpose of a solid waste management district assessment is to recoup the costs of providing infrastructure and services that directly and tangibly benefit affected properties, not to raise general revenue or fund other programs. Therefore, solid waste management district assessments are not considered taxes within the meaning of 15-6-201. School district properties are not exempt from paying reasonable solid waste management fees

that do not exceed the cost of waste management services. 48 A.G. Op. 21 (2000). See also 46 A.G. Op. 7 (1995).

No Authority for Self-Governing City to Assess Fire Service Fees to State Property Within Fire Service Area: The city of Helena, a self-governing city, is precluded from assessing fire service fees to state property located in the city fire service area because the fees are a tax for services provided for the general public good, and thus prohibited by 15-6-201(1)(a)(ii), rather than an assessment commensurate with a specific benefit conferred on the assessed property. 46 A.G. Op. 7 (1995).

Law Review Articles

Of Castles and Kings: A Perspective for Property Tax Reform, Even, 50 Mont. L. Rev. 243 (1989).

Section 6. Highway revenue non-diversion.

Convention Notes

Revises 1956 amendment to the 1889 constitution by removing motor vehicle registration fees from the earmarking provision; by including local government road and street systems, highway safety programs and driver education programs as permissible uses of earmarked funds; and by allowing the legislature by a three-fifths vote to divert the earmarked funds to other purposes.

Compiler's Comments

Former Constitutional Provision: This section revises Art. XII, sec. 1(b), 1889 Mont. Const.

Case Notes

DECISIONS UNDER 1889 CONSTITUTION

Payment of Special Assessments: Use of highway trust funds derived essentially from motor vehicle license fees and gasoline taxes to pay assessment levied against property owned or leased by Highway Commission (now Transportation Commission) and located within flood control and drainage district was proper, and such use did not violate Art. XII, sec. 1(b), 1889 Mont. Const. Highway Comm'n v. Flood Control & Drainage District, 155 M 157, 468 P2d 753 (1970).

Appropriation to Park Fund: Deposit of 1% gasoline tax revenues into park fund as provided by statute did not violate antidiversion amendment of Constitution in the absence of proof that legislative finding that not less than 1% of all gasoline sold is consumed by motorboats is erroneous and in absence of proof that all motor fuel taxes resulting from use of vehicles on public highways are not expended on public highways. Harvey v. Blewett, 151 M 427, 443 P2d 902 (1968).

Section 7. Tax appeals.

Convention Notes

New provision requiring the legislature to establish procedures for taxpayer appeals. Appeal procedures must include an opportunity to have the complaint heard at the local level.

Compiler's Comments

Former Constitutional Provision: This section is similar to Art. XII, sec. 15, 1889 Mont. Const.

Case Notes

DECISIONS UNDER 1972 CONSTITUTION

Authority of State Tax Appeal Board to Independently Assess Taxpayer's Market Value in Excess of Department of Revenue's Original Assessment: Puget Sound Energy appealed the Department of Revenue's final ad valorem assessment of Puget to the State Tax Appeal Board (STAB). STAB, concluding the Department erred, assessed Puget's value in excess of the Department's assessment. Puget petitioned the District Court for review, arguing STAB lacked authority to adopt an assessment that exceeded the Department's original assessment and violated Puget's due process rights. The District Court agreed. On appeal, the Supreme Court reversed the District Court. Appeals to STAB, in accordance with Art. VIII, sec. 7, Mont. Const., differ depending on whether the appeal is from the county tax appeal board, pursuant to 15-2-301, or is brought directly from a Department decision, pursuant to 15-2-302. Because Puget appealed directly, STAB was the factfinding tribunal and had authority to adopt assessments in excess of the Department's original assessments. Section 15-8-111(1) mandates that all property must be assessed at 100% of its market value and applies equally to the Department and to STAB. Department error does not create an exception for STAB to assess a taxpayer's property at less than 100% of its market value. Puget's due process claim lacked merit, as it placed the determination of ultimate market value before STAB. Puget Sound Energy, Inc. v. Dept. of Revenue, 2011 MT 141, 361 Mont. 39, 255 P.3d 171.

Unconstitutional Provision Disallowing Appeal of Yearly Property Tax Percentage Adjustments: The provisions of 15-7-102 prohibiting a property owner from appealing the yearly percentage adjustments made as the result of the sales assessment ratio study, the stratum, or area designations are an unconstitutional violation of this section, which provides independent appeal procedures for taxpayer grievances. (The offensive provisions were subsequently deleted by 1991 amendment of 15-7-102.) Dept. of Revenue v. Barron, 245 M 100, 799 P2d 533, 47 St. Rep. 1869 (1990).

Appellate Review of Appraisal Methods: Section 15-7-102 gives the State Tax Appeal Board specific power to hear tax appraisal appeals, including the power to pass judgment on appraisal methods. Dept. of Revenue v. St. Tax Appeal Bd., 188 M 244, 613 P2d 691 (1980).

Taxpayer Relief for Inequitable Assessment: To obtain relief on the ground that his property is assessed inequitably, it is essential that the taxpayer prove: (1) that there are several other properties within a reasonable area comparable to his; (2) the amount of assessments on these properties; (3) the actual value of the comparable properties; (4) the actual value of his property; (5) the assessment complained of; and (6) that by comparison his property is assessed at a higher proportion of its actual value than are the comparable properties, thereby creating discriminations. These criteria are among those to be used in a comparison of true value to assessed value ratios. Where no such criteria were followed and no ratio comparisons made, the State Tax Appeal Board's blanket reduction of 34% on commercial improvement appraisals was set aside. Dept. of Revenue v. St. Tax Appeal Bd., 188 M 244, 613 P2d 691 (1980), followed in Devoe v. Dept. of Revenue, 233 M 190, 759 P2d 991, 45 St. Rep. 1414 (1988).

Taxation Standards — Uniformity Versus True Value: Where it is impossible to secure both the standard of the true value of a taxpayer's property and the uniformity and equality in taxation required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law. Therefore, unequal appraisals may be reduced even though they result in an assessment at true market value or 100% of market value as required by 15-8-111. Reduction is required where it is satisfactorily shown that, under the system as applied, it is impossible to meet both the true value and equality standards. Dept. of Revenue v. St. Tax Appeal Bd., 188 M 244, 613 P2d 691 (1980).

Appeal to Local Board Exclusive Remedy — Late Assessment Precluding Hearing: The Montana Legislature determined that the County Tax Appeal Board provides the review procedure at the local government unit level mandated by Art. VIII, sec. 7, Mont. Const. An appeal and review before the local Board is a condition precedent to a State Tax Appeal Board review. Except in cases where fraud or the adoption of a fundamentally wrong principle of assessment is shown, an appeal to the local Board is the exclusive remedy granted the taxpayer. If a taxpayer is denied a hearing before the local Board because of a late assessment, the assessment is invalid because it denies the taxpayer a constitutional right to a hearing before the local Board. Butte Country Club v. Dept. of Revenue, 186 M 424, 608 P2d 111 (1980), followed in Boehm v. Nelson, 229 M 452, 747 P2d 213, 44 St. Rep. 2127 (1987), and overruled in Albright v. St., 281 M 196, 933 P2d 815, 54 St. Rep. 132 (1997).

Division of Powers of State Board of Equalization: State Tax Appeal Board has the power to conduct trials de novo on appeals from the Department of Revenue in the absence of promulgated administrative rules and regulations covering the tax matter where the State Tax Appeal Board is of the opinion firsthand knowledge of all facts is necessary, as the Department of Revenue received the administrative powers of the State Board of Equalization while the appellate powers of the State Board of Equalization were transferred to the State Tax Appeal Board. Because of the presumption the Legislature knows the law as then enacted, the Legislature must have intended the State Tax Appeal Board have the use of the oath and contempt powers of 15-2-201 according to 15-2-301. To do so, the State Tax Appeal Board must be able to take additional testimony and receive additional evidence, according to the presumption "legislature does not perform useless acts". Dept. of Revenue v. Burlington N., Inc., 169 M 202, 545 P2d 1083 (1976).

DECISIONS UNDER 1889 CONSTITUTION

When Aggrieved Taxpayer May Resort to Courts: The State Board of Equalization (now State Tax Appeal Board) in a hearing on appeal to it involving a tax matter acts in a quasi-judicial capacity, and the presumption obtains that its findings were justified by the evidence taken at the hearing. An aggrieved taxpayer may resort to the courts for review if he can show fraud or other unlawful acts, such as arbitrary increase of valuation, wrong principle of assessment, or error so gross as to be inconsistent with any honest exercise of judgment. If his complaint is not so

predicated it does not state a cause of action. Int'l Business Mach. Corp. v. Lewis & Clark County, 111 M 384, 112 P2d 477 (1941).

Supervision of County Assessors: Under Art. XII, sec. 15, 1889 Mont. Const., the State Board of Equalization (now State Tax Appeal Board) has supervisory power over the acts of County Assessors and County Boards of Equalization (now County Tax Appeal Boards) and is authorized to increase or decrease valuations of property for taxation purposes. State ex rel. St. Bd. of Equalization v. Jacobson, 107 M 461, 86 P2d 9 (1938).

Review of Decisions of Board: The decision of the State Board of Equalization (now State Tax Appeal Board) made after hearing the appeal of a taxpayer from an adverse ruling of a County Board of Equalization (now County Tax Appeal Board) is quasi-judicial. On application for Writ of Certiorari, the Supreme Court may not go back of the record made by the State Board, the presumption obtaining that its findings were justified by the testimony heard by it at the hearing. State ex rel. Schoonover v. Stewart, 89 M 257, 297 P 476 (1931).

Attorney General's Opinions

Independent Appeals Procedure Required: In order to provide independent taxpayer appeal procedures, County Commissioners cannot appoint themselves to the County Tax Appeal Boards. 35 A.G. Op. 16 (1973).

Section 8. State debt.

Convention Notes

Revises 1889 constitution by replacing obsolete $100,000 limit on state debt with provision that only a 2/3 vote of the legislature or majority vote at an election may create state debt.

Compiler's Comments

Former Constitutional Provision: This section revises Art. XIII, sec. 2, 1889 Mont. Const.

Case Notes

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DECISIONS UNDER 1972 CONSTITUTION

Bonded Debt — Not Invalid as Continuing Appropriation: Plaintiff filed a complaint for declaratory judgment in the Supreme Court seeking to determine the validity of several acts of the Legislature allowing the issuance of state revenue bonds. The bonds would be financed by coal severance taxes to provide proceeds for development of state water resources. Plaintiff contended that this was an invalid "continuing appropriation". Plaintiff contended that the 48th Legislature by enacting the program could not constitutionally bind future Legislatures to "appropriate" the coal tax money necessary to service the bonds; that the principal of the coal severance tax trust funds had been invaded for years; and that each bond issue requires a separate appropriation of coal severance tax revenues by a three-fourths vote of each house of the Legislature. The Supreme Court harmonized the various constitutional provisions involved. The court held that the Legislature can authorize long-term borrowing by issuing and selling bonds and can provide for the servicing for such indebtedness by repayment or refunding. The court found nothing making the coal severance tax trust fund immune from use as a source of funding for long-term state bonds. When the Legislature validly acts to establish a debt, that indebtedness becomes a state obligation extending over the life of the indebtedness, and every succeeding legislative assembly has an unavoidable duty to provide for it in the manner required by the authorizing law. Grossman v. St., 209 M 427, 682 P2d 1319, 41 St. Rep. 804 (1984).

Housing Act of 1975 Not "State Debt": The Legislature did not intend to create a state debt in this act. The language of the act is permissive in its direction to the Legislature, and the enacting Legislature did not bind a future Legislature to appropriate money. Huber v. Groff, 171 M 442, 558 P2d 1124 (1976).

DECISIONS UNDER 1889 CONSTITUTION

CREATION BY LEGISLATURE

No Requirement of Time Limit: Article XIII, sec. 2, 1889 Mont. Const., did not require that the Legislature set a time limit on a debt. It merely required that irrevocable and irrepealable law be passed providing for the levy of a tax sufficient to pay the interest and extinguish the principal of the debt within the time limited by law. Where there was no specific time limited by law and the law was made irrepealable until the debt and interest have been extinguished, the constitutional mandate had been met. State ex rel. Graham v. Bd. of Examiners, 125 M 419, 239 P2d 283 (1952).

Aviation Gasoline Tax Regulatory Rather Than Revenue Measure: Practical operation of the aviation gasoline tax placed burden of paying 1 cent per gallon tax on user of gasoline for aviation purposes. Because income generated is used to regulate aviation operators it was clearly a regulatory, not a revenue measure, and as such was not subject to constitutional provisions relating to taxation. State ex rel. St. Aeronautics Comm'n v. Bd. of Examiners, 121 M 402, 194 P2d 633 (1948), overruled on other grounds in Bd. of Regents v. Judge, 168 M 433, 543 P2d 1323 (1975).

Erection of Dormitories: Held, by this case, that Ch. 94, L. 1929 (section 75-201, et seq., R.C.M. 1947, now repealed), does not violate Art. XIII, sec. 2, 1889 Mont. Const., prescribing how state indebtedness shall be created by the Legislature and placing a limitation upon the amount thereof without submitting the question to the people at a general election. The scheme of financing the erection of dormitories at educational institutions provided for making the obligations incurred payable out of the rents from the contemplated dormitories and from income derived from gifts and bequests. The act specifically provided that no obligation created by the board should ever become a charge against the state. State ex rel. Veeder v. St. Bd. of Education, 97 M 121, 33 P2d 516 (1934); Barbour v. St. Bd. of Education, 92 M 321, 13 P2d 225 (1932).

Requirements for Creation of State Debt: When a debt is sought to be created for state purposes it must, under Art. XIII, sec. 2, 1889 Mont. Const., be by a law which shall be irrepealable until the obligation is fully discharged, which law shall specify a single purpose to which the funds so raised shall be applied and provide for the levy of a tax sufficient to pay the interest on and extinguish the principal of the debt within the time limited for the payment thereof. Herrin v. Erickson, 90 M 259, 2 P2d 296 (1931), overruled on other grounds in Nordquist v. Ford, 112 M 278, 114 P2d 1071 (1941).

State Indebtedness Payable Out of Special Fund: The rule that when contemplated state indebtedness represented by bonds is made payable out of a special fund, its creation is not in violation of the constitutional limitation was applicable to the funds to be raised under the gasoline license tax, they being state funds raised by one of the constitutional methods of raising public revenue, the license system, which the state may make payable into the general fund and devote to any public purpose desired. State ex rel. Diederichs v. St. Highway Comm'n, 89 M 205, 296 P 1033 (1931).

BONDS

Issuance of Bonds: Issuance of bonds to be repaid from proceeds of income tax, corporation license tax, tobacco tax, and gasoline tax would create a liability, if not a debt, within the meaning of Art. XIII, sec. 2, 1889 Mont. Const., and the bonds must be approved by a vote of the people before they may be issued. State ex rel. Ward v. Anderson, 158 M 279, 491 P2d 868 (1971), distinguishing Cottingham v. St. Bd. of Examiners, 134 M 1, 328 P2d 907 (1958).

"Debt or Liability" — Issuance of Bonds: Issuance of bonds to be repaid from proceeds of income tax, corporate license tax, tobacco tax, and gasoline tax would create either a "debt or liability". Cottingham v. St. Bd. of Examiners, 134 M 1, 328 P2d 907 (1958), overruled in State ex rel. Ward v. Anderson, 158 M 279, 491 P2d 868 (1971).

Capitol Building Refunding Bonds: Held, that the contemplated issuance of Capitol building refunding bonds under authority of Ch. 133, L. 1939 (omitted), to redeem bonds held by the state Board of Land Commissioners does not create a debt within the meaning of Art. XIII, sec. 2, 1889 Mont. Const., requiring submission of the question to the voters. Lodge v. Ayers, 108 M 527, 91 P2d 691 (1939).

Validity of Bonds — Interim of Possible Referendum of Creative Act: Where state bonds are sold before the expiration of 6 months after adjournment of the Legislature, within which period the creative act is subject to action by the people on referendum, during which period the act is attacked as unconstitutional but found valid, and the act is "still in full force and effect" within

the terms of Art. V, sec. 1, 1889 Mont. Const., the bonds are subsisting obligations of the state, since to hold otherwise would in effect declare that a state debt once created does not have the benefit of Art. XIII, sec. 2, 1889 Mont. Const. Lodge v. Ayers, 108 M 527, 91 P2d 691 (1939).

Bonds Payable From Works Constructed: Held, that the issuance of bonds authorized by Title 85, ch. 1, does not create a debt of the state in excess of the limitation prescribed in this provision, in view of the provision of Title 85, ch. 1, part 3, that all bonds shall contain a statement that they shall not constitute a state debt or liability and are made payable only from revenues derived from the works constructed. State ex rel. Normile v. Cooney, 100 M 391, 47 P2d 637 (1935).

Buildings at State Normal School: Chapter 7, Ex. L. 1933-34 (omitted), by authorizing the State Board of Education to erect buildings at the state normal school at a cost not to exceed $250,000 and to finance the project by an issue of bonds, held not invalid as running counter to the provisions of Art. XIII, sec. 2, 1889 Mont. Const., prohibiting the creation of a state debt in excess of $100,000 without submitting the question to the electors of the state. Under its provisions the entire principal and interest on the bonds are payable out of sources other than taxation, and the bonds shall not be or become the obligations of the state. State ex rel. Blume v. St. Bd. of Education, 97 M 371, 34 P2d 515 (1934). See also Willett v. St. Bd. of Examiners, 112 M 317, 115 P2d 287 (1941).

State Educational Bond: Upon the sale of the state educational bonds under the provisions of Initiative Measure No. 19, the duty to levy and collect for their payment a tax on the assessed value of all taxable property in the state became an obligation of the contract between the state and the holders of such bonds, which under Art. XIII, sec. 2, 1889 Mont. Const., was beyond the power of the Legislature to impair by passage of Ch. 158, L. 1923 (omitted as unconstitutional), in effect providing that where a statute authorizes the imposition of a tax, its basis shall be the taxable and not the assessed or true value of such property. State ex rel. Judd v. Cooney, 97 M 75, 32 P2d 851 (1934).

Funding Outstanding Warrants: Chapter 10, L. 1933 (omitted), authorizing the issuance and sale of bonds for purpose of funding outstanding registered warrants held not to create a debt within the meaning of Art. XIII, sec. 2, 1889 Mont. Const., prohibiting the creation of state debt in excess of $100,000 without the approval of the electors, the contemplated issue being no more than the issuance of a new evidence of an existing debt. State ex rel. Tipton v. Erickson, 93 M 466, 19 P2d 227 (1933).

Question of Sufficiency of Levy: The fact that Initiative Measure No. 19 is indefinite as to the time during which it shall be operative and the tax levy provided for is limited, held not to render it violative of Art. XIII, sec. 2, 1889 Mont. Const., the question of whether the tax provided for proved to be sufficient to pay the principal and interest on the bonds being one addressed to legislative action, in the absence of an affirmative showing that it is not sufficient. State ex rel. Bonner v. Dixon, 59 M 58, 195 P 841 (1921), overruled on other grounds in Bd. of Regents v. Judge, 168 M 433, 543 P2d 1323 (1975).

State Elevator Bonds: A statute which in substance provides for the levy of a tax on agricultural lands for the purpose of paying interest and principal on state terminal elevator bonds only in the event that the receipts from the operation of the elevator are insufficient to provide the proper amount is not invalid for failure to provide for the extinguishment of the debt within a specified time when it can be ascertained therefrom by rules of statutory construction that the Legislature intended to impose a tax for the payment of the bonds and that the surplus accumulated from the operation of the elevator might be used to discharge the debt at such time as the Legislature may make provision therefor. State ex rel. Lyman v. Stewart, 58 M 1, 190 P 129 (1920), overruled on other grounds in Stoner v. Timmons, 59 M 158, 196 P 520 (1921), and Pritchard v. Hannah, 59 M 298, 196 P 517 (1921).

AD VALOREM TAXES

"Debt or Liability" — Limitation to Ad Valorem Taxes:

Since the U.S. Supreme Court held invalid limiting to taxpayers the right to vote on questions of debt or liability, there is no longer any reason to limit the words "debt or liability" as used in Art. XIII, sec. 2, 1889 Mont. Const., to debts to be retired out of ad valorem taxes. State ex rel. Ward v. Anderson, 158 M 279, 491 P2d 868 (1971), distinguishing Cottingham v. St. Bd. of Examiners, 134 M 1, 328 P2d 907 (1958).

Article IX, sec. 2, 1889 Mont. Const., amended the words "debt or liability" as they appeared in Art. XIII, sec. 2, 1889 Mont. Const., and effectively confined them to debts or liabilities which must be retired out of ad valorem taxes. Cottingham v. St. Bd. of Examiners, 134 M 1, 328 P2d 907 (1958), distinguished in State ex rel. Ward v. Anderson, 158 M 279, 491 P2d 868 (1971).

TREASURY NOTES

"Debt" — Notes to Pay Outstanding Warrants: By the issuance of treasury notes to secure funds to pay outstanding registered warrants, no new debt is created within the meaning of the Constitution, the effect of their authorization being merely to change the evidence of indebtedness from warrants to treasury notes. State ex rel. Toomey v. St. Bd. of Examiners, 74 M 1, 238 P 316 (1925).

"Debt or Liability" — Tax Anticipation Notes: The issuance and sale of treasury notes in anticipation of the payment of taxes levied to procure funds with which to pay outstanding valid claims against and current expenses of the state did not constitute the incurring of a "debt or liability". State ex rel. Rankin v. St. Bd. of Examiners, 59 M 557, 197 P 988 (1921).

ELECTION REQUIREMENTS

Persons Entitled to Vote: Article XIII, sec. 2, 1889 Mont. Const., requiring that laws creating an indebtedness be submitted to the people, is qualified by Art. IX, sec. 2, 1889 Mont. Const., which provides that in questions concerning the creation of a levy, debt, or liability the voter "must also be a taxpayer whose name appears on the last preceding completed assessment roll". Thomas v. Bd. of Examiners, 122 M 564, 207 P2d 553 (1949).

"General Election" Defined: The concluding provision of Art. XIII, sec. 2, 1889 Mont. Const., prohibiting the incurring of state indebtedness in excess of $100,000, unless the law authorizing it shall have been submitted to the people at a "general election" and approved by them, held not necessarily to mean the general biennial election but does mean a statewide election at which all the people entitled to vote may vote on a question affecting them as a whole. Pioneer Motors, Inc. v. St. Highway Comm'n, 118 M 333, 165 P2d 796 (1946); Arps v. St. Highway Comm'n, 90 M 152, 300 P 549 (1931), overruled on other grounds in Burgan & Walker, Inc. v. St. Highway Comm'n, 114 M 459, 137 P2d 663 (1943); State ex rel. Diederichs v. St. Highway Comm'n, 89 M 205, 296 P 1033 (1931).

Law Creating Debt: Held, that Ch. 168, L. 1939 (omitted), construed in connection with Ch. 55, L. 1941 (omitted), directing the state Board of Examiners to issue and sell the bonds for the erection of necessary buildings at the state hospital for the insane, does not run counter to the provisions of Art. XIII, sec. 2, 1889 Mont. Const. Article XIII, sec. 2, 1889 Mont. Const., does not require that a law creating a state debt in excess of $100,000 shall be submitted to the people at a general election for their approval or rejection but only a law authorizing the debt. Nordquist v. Ford, 112 M 278, 114 P2d 1071 (1941).

Express Statutory Exception: Since Ch. 22, Ex. L. 1933-34 (omitted), expressly provides that any bonds issued under its authority "shall not constitute or be a debt, liability or obligation of the state", contention that it nevertheless does create a debt in excess of $100,000 and therefore violates Art. XIII, sec. 2, 1889 Mont. Const., in that the question of creating the debt was not first submitted to the people at a general election, may not be sustained. State ex rel. Hawkins v. St. Bd. of Examiners, 97 M 441, 35 P2d 116 (1934). See also Rutherford v. Great Falls, 107 M 512, 86 P2d 656 (1939).

Insufficient Information to Electorate: Chapter 126, L. 1929 (omitted), in providing that there shall be levied annually an ad valorem tax sufficient to pay the interest on the bonds for the first 10 years and sufficient thereafter to pay interest and provide for a sinking fund, held void for the further reason that it fails to fix a specific tax levy required for the purposes mentioned, the people in voting upon the question thus not having been advised to what extent the tax levy for state purposes, otherwise fixed and definite, would be increased, and in leaving it to future legislative assemblies to make provision for a tax levy as occasion might arise. Herrin v. Erickson, 90 M 259, 2 P2d 296 (1931), overruled on other grounds in Nordquist v. Ford, 112 M 278, 114 P2d 1071 (1941).

State Highway Treasury Anticipation Debenture Act: Under this case, held that Ch. 95, L. 1931 (omitted), the State Highway Treasury Anticipation Debenture Act of 1931, creating indebtedness in excess of the constitutional limitation, approved by the people on May 5, 1931, is not invalid as having been submitted for approval or rejection at other than a general election within the meaning of Art. XIII, sec. 2, 1889 Mont. Const. Arps v. St. Highway Comm'n, 90 M 152, 300 P 549 (1931), overruled on other grounds in Burgan & Walker, Inc. v. St. Highway Comm'n, 114 M 459, 137 P2d 663 (1943).

Highway Debentures: Held, that Ch. 1, L. 1931 (omitted), authorizing the sale of state highway debentures in the sum of $6,000,000 maturing serially at a given rate during a period of 6 years and made payable out of the state highway fund, in which all money received from the collection of gasoline license taxes shall be deposited, the act providing that such excise tax

shall not be reduced but shall remain at the rate fixed therein until all of such debentures are paid, is unconstitutional as creating a liability (which includes a debt) within the meaning of Art. XIII, sec. 2, 1889 Mont. Const., prohibiting the creation by the Legislative Assembly of a debt or liability in excess of $100,000 unless the law authorizing the same shall first have been submitted to and received the approval of the people at a general election. State ex rel. Diederichs v. St. Highway Comm'n, 89 M 205, 296 P 1033 (1931).

MISCELLANEOUS

Debt Payable Out of Surplus: Held, that section 78-403, R.C.M. 1947 (now repealed), appropriating $30,000 for architect's fee for preparation of plans and specifications for erection of addition to state Capitol building, the appropriation to be paid out of the unexpended surplus of nearly $5 million in the general fund of the state, is not invalid under Art. XIII, sec. 2, 1889 Mont. Const. Graham v. St. Bd. of Examiners, 116 M 584, 155 P2d 956 (1945).

Presumption of Adequacy of Funds: When it appears that the funds provided by the Legislature will be sufficient, it is presumed that the provision for payment is and will be sufficient to meet the requirements of Art. XIII, sec. 2, 1889 Mont. Const. Willett v. Bd. of Examiners, 112 M 317, 115 P2d 287 (1941).

Debenture Act: Initiative Measure No. 41, the 1938 Debenture Act (omitted), does not offend against Art. XIII, sec. 2, 1889 Mont. Const., as not providing for a sufficient tax to pay the interest on and extinguish the principal of the debt created within the time limited by the law for payment thereof, in view of the admissions in the pleadings as to the net revenue derived from a previous like act. The contract is irrevocable and the act irrepealable. Martin v. St. Highway Comm'n, 107 M 603, 88 P2d 41 (1939). See also Pioneer Motors, Inc. v. St. Highway Comm'n, 118 M 333, 165 P2d 796 (1946).

Inapplicable to Indebtedness of School Districts: Article XIII, sec. 2, and Art. XII, sec. 12, 1889 Mont. Const., having to do, respectively, with state indebtedness and legislative power in making appropriations and authorizing expenditures, have no application to cities or school districts, which are governed in that behalf by Art. XIII, sec. 6, 1889 Mont. Const. Decisions defining state indebtedness or holding that warrants issued pursuant to lawful appropriations do not create such indebtedness have no application in determining the status of a school district issued after it has reached its constitutional limit of indebtedness. Farbo v. School District, 95 M 531, 28 P2d 455 (1933).

Specific Obligation Contemplated: The terms of Art. XIII, sec. 2, 1889 Mont. Const., implied and contemplated a specific obligation, created by the Legislature itself, of such a character that computation will disclose in advance what tax levy is requisite to pay the interest on and to extinguish the debt at its maturity. State ex rel. Campbell v. Stewart, 54 M 504, 171 P 755 (1918).

Attorney General's Opinions

Unfunded Liability in Industrial Insurance Expendable Trust Fund (Now Private Purpose Trust Fund) Not State Debt: To the extent an unfunded liability may exist in the industrial insurance expendable trust fund (now private purpose trust fund), it has arisen not by conscious act of the Legislature but from a combination of circumstances that resulted in a mismatch between liability incurred and trust fund deposits. Further, no claim was made that the trust fund's corpus would be inadequate to satisfy accrued benefit payment obligations. For these reasons, the unfunded liability was not considered a "state debt" within the meaning of Art. VIII, sec. 8, Mont. Const. 42 A.G. Op. 46 (1987).

Lease-Purchase Agreement as Debt: The Legislature authorized the Department of Administration to incur future lease and/or purchase payments not to exceed $1.5 million for a building for the Department of Social and Rehabilitation Services (now Department of Public Health and Human Services). The Attorney General relied on State ex rel. Simmons v. Missoula, 144 M 210, 395 P2d 249 (1964), to determine that a lease-purchase agreement constitutes a "debt" within the meaning of this section. Because the bill authorizing the agreement did not pass both houses of the Legislature by a two-thirds majority, there was no legal method for carrying out the agreement. 35 A.G. Op. 41 (1973).

Law Review Articles

Montana Constitution—State Debt Limit—Submission to the People, Conklin, 20 Mont. L. Rev. 117 (1958).

Section 9. Balanced budget.

Convention Notes

No change except in grammar. Requires legislature to stay within estimated revenue limits when appropriating funds.

Compiler's Comments

Former Constitutional Provision: This section is similar to Art. XII, sec. 12, 1889 Mont. Const.

Case Notes

DECISIONS UNDER 1972 CONSTITUTION

Suspension of Income Tax Increase — No Violation of Balanced Budget Provisions: Natelson collected enough petition signatures on an income tax increase passed by the Legislature to suspend the increase and refer it to the people for a vote. Nicholson filed suit, claiming that the suspension unbalanced the state budget and that the meaning of this article in this case was that general revenue bills could not be suspended and referred. The Supreme Court held that it was not the action of the Legislature that put the budget out of balance but the action of the people in referring the tax and that this article did not place any restrictions on the power of the people to suspend and refer a tax. Nicholson v. Cooney, 265 M 406, 877 P2d 486, 51 St. Rep. 579 (1994).

Bonded Debt — Not Invalid as Continuing Appropriation: Plaintiff filed a complaint for declaratory judgment in the Supreme Court seeking to determine the validity of several acts of the Legislature allowing the issuance of state revenue bonds. The bonds would be financed by coal severance taxes to provide proceeds for development of state water resources. Plaintiff contended that this was an invalid "continuing appropriation". Plaintiff contended that the 48th Legislature by enacting the program could not constitutionally bind future Legislatures to "appropriate" the coal tax money necessary to service the bonds; that the principal of the coal severance tax trust funds had been invaded for years; and that each bond issue requires a separate appropriation of coal severance tax revenues by a three-fourths vote of each house of the Legislature. The Supreme Court harmonized the various constitutional provisions involved. The court held that the Legislature can authorize long-term borrowing by issuing and selling bonds and can provide for the servicing for such indebtedness by repayment or refunding. The court found nothing making the coal severance tax trust fund immune from use as a source of funding for long-term state bonds. When the Legislature validly acts to establish a debt, that indebtedness becomes a state obligation extending over the life of the indebtedness, and every succeeding legislative assembly has an unavoidable duty to provide for it in the manner required by the authorizing law. Grossman v. St., 209 M 427, 682 P2d 1319, 41 St. Rep. 804 (1984).

Separation of Powers — Budget a Legislative Function: Notwithstanding Art. VI, sec. 9, Mont. Const., the budget is a legislative budget, not an executive budget. Article V, sec. 1 and 11, and Art. VIII, sec. 9, 12, and 14, Mont. Const., vest not only the power to approve appropriation bills and a budget in the legislative branch but to create an interim committee to gather information from other branches of government necessary to form a rational basis for its budget determinations. State ex rel. Judge v. Legislative Fin. Comm., 168 M 470, 543 P2d 1317 (1975).

DECISIONS UNDER 1889 CONSTITUTION

Korean War Honorariums: Statute amending initiative act providing for honorarium for World War II veterans so as to make Korean veterans eligible to receive honorariums did not violate Art. XII, sec. 12, 1889 Mont. Const. Cottingham v. St. Bd. of Examiners, 134 M 1, 328 P2d 907 (1958), overruled on other grounds in State ex rel. Ward v. Anderson, 158 M 279, 491 P2d 868 (1971).

Special or Trust Funds: Article XII, sec. 12, 1889 Mont. Const., had no application to special or trust funds which have never been placed in the general funds of the state. State ex rel. St. Aeronautics Comm'n v. St. Bd. of Examiners, 121 M 402, 194 P2d 633 (1948), overruled on other grounds in Bd. of Regents v. Judge, 168 M 433, 543 P2d 1323 (1975).

Not Applicable to Bond and Debenture Measures: The Highway Treasury Anticipation Debenture Act of 1945 (omitted) was not unconstitutional as violative of Art. XII, sec. 12, 1889 Mont. Const., since the provision had no application to bond and debenture measures. Pioneer Motors, Inc. v. Highway Comm'n, 118 M 333, 165 P2d 796 (1946).

Appropriation to Be Paid Out of Surplus: Section appropriating architect's fee for preparation of plans and specifications for erection of addition to Capitol, the appropriation to be paid out of the unexpended surplus of the general fund, was not invalid under Art. XII, sec. 12, 1889 Mont. Const. Graham v. St. Bd. of Examiners, 116 M 584, 155 P2d 956 (1945).

Meaning: Article XII, sec. 12, 1889 Mont. Const., meant that no appropriation may be made or any expenditure authorized by the Legislature whereby the expenditures of the state during any fiscal year exceed the total of funds available and applicable to such appropriation or expenditure. Available funds include not only funds in the treasury not otherwise appropriated but money to be derived from taxes and other sources provided for by the Legislature for the year. Graham v. St. Bd. of Examiners, 116 M 584, 155 P2d 956 (1945).

Not Applicable to Initiative Levying Tax to Cover Appropriation: Initiative Measure did not violate Art. XII, sec. 12, 1889 Mont. Const. The term "appropriation" as used did not apply to an act providing for the issuance of bonds or debentures wherein the act creating the debt also levies a tax to pay it. Martin v. Highway Comm'n, 107 M 603, 88 P2d 41 (1939). See Pioneer Motors, Inc. v. Highway Comm'n, 118 M 333, 165 P2d 796 (1946).

Special Funds — Two-Year Limitation: The provision of Art. XII, sec. 12, 1889 Mont. Const., that appropriations shall not be made for a longer term than 2 years had no application to special funds. State ex rel. Normile v. Cooney, 100 M 391, 47 P2d 637 (1935).

Special Funds: Since law expressly provided for a special fund for carrying out its provisions, it was not invalid as attempting to appropriate money without regard to this section. State ex rel. Hawkins v. St. Bd. of Examiners, 97 M 441, 35 P2d 116 (1934).

Building Construction: Neither Ch. 10, L. 1933 (not codified), nor the plan adopted by the State Board of Education for financing construction violated Art. XII, sec. 12, or Art. XIII, sec. 1, 1889 Mont. Const. State ex rel. Blume v. St. Bd. of Education, 97 M 371, 34 P2d 515 (1934); State ex rel. Veeder v. St. Bd. of Education, 97 M 121, 33 P2d 516 (1934).

Inapplicable to Indebtedness of Cities or School Districts: Article XII, sec. 12, 1889 Mont. Const., had no application to cities or school districts. Therefore, decisions defining state indebtedness or holding that warrants issued pursuant to lawful appropriations do not create such indebtedness have no application in determining the status of a school district issued after it has reached its constitutional limit of indebtedness. Farbo v. School District, 95 M 531, 28 P2d 455 (1933).

State Contracts Extending Beyond Appropriation Limit: In the absence of a constitutional prohibition, the Legislature may authorize a contract for a longer term than 2 years, although appropriations of public money in payment may not be made for a longer period. A contract for fire insurance for 3 years did not invalidate an appropriation in payment of premiums made for 2 years only. Miller Ins. Agency v. Porter, 93 M 567, 20 P2d 643 (1933).

Bonds to Fund Outstanding Warrants: Laws authorizing the issuance of bonds for the purpose of funding an accumulation of outstanding general warrants were not invalid on the alleged ground that the appropriations on which the warrants were based had been made in violation of Art. XII, sec. 12, 1889 Mont. Const. State ex rel. Tipton v. Erickson, 93 M 466, 19 P2d 227 (1933).

Inapplicable to Past Appropriations: Article XII, sec. 12, 1889 Mont. Const., had to do only with the relation of future expenditures to income and not with past appropriations made within the reasonably estimated income and in good faith, but which by reason of unforeseen contingencies resulted in registration of warrants. State ex rel. Tipton v. Erickson, 93 M 466, 19 P2d 227 (1933).

Authorization of Future Appropriations: Section increasing the tax levy for state purposes by 1.5 mills for the period of 10 years and directing successive Legislatures for that period how the proceeds thereof shall be appropriated and authorizing the Assembly to make the appropriations for each of the 10 years was not unconstitutional. State ex rel. Jones v. Erickson, 75 M 429, 244 P 287 (1926).

University Appropriation Valid: Under the showing made on application for Writ of Injunction against the Board of Examiners, the appropriations made by the Legislature for the four teaching units comprising the University of Montana (now University of Montana-Missoula) do not exceed the amount received from the 1.5 mill levy authorized for their maintenance and therefore do not transgress Art. XII, sec. 12, 1889 Mont. Const. State ex rel. Jones v. Erickson, 75 M 429, 244 P 287 (1926).

Appropriations in Excess of Income Prohibited: Article XII, sec. 12, 1889 Mont. Const., must be interpreted to refer not only to the money raised by direct taxation but also to anticipated income from all other sources. State ex rel. Toomey v. St. Bd. of Examiners, 74 M 1, 238 P 316 (1925).

War Appropriations — Exception: The War Defense Act was to assist in the defense of the United States. The appropriation made therein falls within the exception found in Art. XII, sec. 12, 1889 Mont. Const., under which the Legislature may properly make an appropriation without a fund behind it and without provision having been first made for levying a tax to furnish the

fund. St. v. Kahn, 56 M 108, 182 P 107 (1919); State ex rel. Campbell v. Stewart, 54 M 504, 171 P 755 (1918).

Time Limit on Appropriations: Article XII, sec. 12, 1889 Mont. Const., operated as an automatic limit so that an unlimited appropriation as to time would expire at the end of 2 years and was not void ab initio. Hill v. Rae, 52 M 378, 158 P 826 (1916).

Attorney General's Opinions

Expenditure Limits Not Extended to Future Biennial Budget Cycles: A County Commissioner questioned whether 17-8-106 (enacted 1981) limited the power of subsequent Legislatures to appropriate funds by establishing a cap on expenditures in the 1981 budget biennium and for future biennial budget cycles. The Attorney General noted that, consistent with constitutional design, the Legislature lacks the power to pass a law that purports to establish binding legislative spending policy for future Legislatures. Each Legislature is vested with full legislative power, and there is no cap on state spending in the Montana Constitution. Thus, the 1981 enactment of 17-8-106 placed no enforceable limits on the spending power of subsequent Legislatures. 51 A.G. Op. 4 (2005).

No Encumbrance of Unexpended Microbusiness Development Funds After End of Fiscal Year: The Department of Commerce entered contracts with several microbusiness development corporations in June 1997, contingent upon matching funds being provided by September 30, 1997. However, when the matching funds were not received by that date, the Department amended the contracts to extend the time for providing matching funds to September 30, 1999. The Legislative Auditor conceded that Department rules allowed a valid encumbrance through September 30, 1997 (see ARM 8.99.505(3)), but maintained that after that time, the funds were no longer validly encumbered and should have reverted to the coal tax trust fund from which they were appropriated. The Attorney General agreed. In light of the balanced budget requirement in this section, 17-7-304 contemplates that an appropriation for a specific purpose will revert to the fund or account from which it was appropriated after the expiration of the time for which it was appropriated, and appropriations for an unspecified period of time must revert at the end of the biennium. In this case, the appropriation was subject to reversion on June 30, 1997. The Department had administrative authority to create a valid encumbrance until September 30, 1997, but once that contingency expired, the Department had no authority to contract further in order to encumber the funds. There is no legal provision allowing encumbrance of funds after the end of a fiscal year. Because the Department's commitments were made after fiscal yearend, they were not valid obligations pursuant to 17-7-302; thus any unexpended balance from the appropriation should have reverted to the coal tax trust fund as of September 30, 1997. 48 A.G. Op. 26 (2000). See also 40 A.G. Op. 4 (1983).

Section 10. Local government debt.

Convention Notes

Revises 1889 constitution. Debt limitations for all local governmental entities will be set by law rather than by the constitution.

Compiler's Comments

Former Constitutional Provision: This section revises Art. XIII, sec. 5 and 6, 1889 Mont. Const.

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DECISIONS UNDER 1972 CONSTITUTION

County Allowed Choice Whether to Issue Bonds Secured by Revolving Fund — County Not Relieved of Obligation to Make Loans to Deficient Rural Special Improvement Districts: The plain meaning of statutes regarding revolving funds, as well as the legislative history, supports the legislative intent to allow counties to choose whether to finance a rural special improvement district by issuing bonds secured by the revolving fund. Nothing in the statutes voids the commitment to loan from the revolving fund if the district becomes deficient. In this

case, County Commissioners agreed to a revolving fund obligation and issued bonds secured by the revolving fund. The District Court reasoned that this was a violation of the constitutional prohibition against indebtedness beyond a certain percent, holding that the county was thus relieved of its obligation to make such loans. However, special improvement bond obligations are limited to the district funds and, if necessary, receive loans from the revolving fund. If both funds are insufficient to meet bond payments, there is no other source to pay the bonds. Under 7-12-2182, revolving fund levies are limited to an amount that would increase the balance in the fund to no more than 5% of the principal amount of the outstanding bonds. The District Court erred in its decision that the county was not obligated to make loans to the special improvement districts. Having exercised the discretion to institute a revolving fund and freely enter into an agreement with the bondholders and the underwriters, under both the terms of the agreement and applicable statutes, a county is obliged to carry out that contractual obligation. Loans from the revolving fund and subsequent tax levies are within the constitutional mandates of section 1 of this article, which requires that state funds be used for public purposes. Further, a county's obligation to make such loans and levy taxes to fund the revolving fund is mandatory, rather than discretionary, and is not an unconstitutional pledge of credit. Carbon County v. Dain Bosworth, Inc., 265 M 75, 874 P2d 718, 51 St. Rep. 436 (1994), distinguishing Stanley v. Jeffries, 86 M 114, 284 P 134 (1929), and Hansen v. Havre, 112 M 207, 114 P2d 1053 (1941).

DECISIONS UNDER 1889 CONSTITUTION

WHAT CONSTITUTES INDEBTEDNESS

"Indebtedness or Liability": County Commissioners who overlevied a tax on the county taxpayers in order to provide a reserve fund greater than $21,000 to finance capital improvements and remodeling of existing airport violated this section; county could not circumvent this section by arguing that the funds were already on hand and that hence they had not created an "indebtedness or liability" on the county. Burlington N., Inc. v. Flathead County, 162 M 371, 512 P2d 710 (1973), distinguished in Yovetich v. McClintock, 165 M 80, 526 P2d 999 (1974).

Industrial Development Revenue Bonds: Industrial development project laws (Title 90, ch. 5, part 1) do not violate Art. XIII, sec. 5, 1889 Mont. Const., since they provide for revenue bonds and do not create debt or liability within the meaning of that section. Fickes v. Missoula County, 155 M 258, 470 P2d 287 (1970).

Lease Payments: Under resolution providing that city would convey title to properties to party who would cause to be built on one property a city-approved building which the city would rent for an annual rental for a period of 3 years with option in the city to purchase property together with the building thereon, lease payments were forms of indebtedness within the meaning of Art. XIII, sec. 6, 1889 Mont. Const. State ex rel. Simmons v. Missoula, 144 M 210, 395 P2d 249 (1964).

Special Improvement District — Revolving Fund: Funds obtained from a special improvement district revolving fund created under Title 7, ch. 12, part 42, to make good any deficiency in the bond and interest accounts of any one of several special improvement districts created to take care of a city's share of the cost of constructing a diversion dam for protection of city property from overflow of a creek were mere loans to the improvement district fund, for which the revolving fund, under 7-12-4224, has a lien as security. Therefore, the contemplated bonds would not amount to the incurring of a city debt in excess of Art. XIII, sec. 6, 1889 Mont. Const. Hansen v. Havre, 112 M 207, 114 P2d 1053 (1941).

Housing Bonds: The bonds authorized to be issued by a housing authority, by the very terms of 7-15-4503, are not to be considered an indebtedness falling within the limitations of Art. XIII, sec. 6, 1889 Mont. Const. Rutherford v. Great Falls, 107 M 512, 86 P2d 656 (1939).

County Indebtedness to Refer to Fixed Not Contingent Liability: The contingency that at some time in the future counties which have patients at the state tuberculosis sanitarium may be required to incur an indebtedness in excess of $10,000 to pay for their care as their number increases is not sufficient to condemn Ch. 22, Ex. L. 1933-34 (omitted), under Art. XIII, sec. 5, 1889 Mont. Const., which prohibits the incurring of such a debt without submitting the proposition to the electors thereof, that section apparently contemplating a fixed and not a contingent liability or indebtedness. State ex rel. Hawkins v. St. Bd. of Examiners, 97 M 441, 35 P2d 116 (1934).

Uncollected Delinquent Taxes — Not Deductible: "Indebtedness" of a school district, within the constitutional provision limiting it, means what it owes, irrespective of demands it may have against others. In determining whether a district has reached its limit, uncollected delinquent taxes are not deductible from its gross indebtedness. Farbo v. School District, 95 M 531, 28 P2d 455 (1933).

Cash on Hand — Approved Purpose: The provision of Art. XIII, sec. 5, 1889 Mont. Const., that no county shall incur any indebtedness or liability for a single purpose in an amount exceeding $10,000 without the approval of a majority of the electors thereof applies to the creation of an obligation to be met and paid in the future by the taxpayers and has no application to the "expenditure", in excess of that amount, of cash on hand usable only for a designated purpose already approved by the electors. State ex rel. Diederichs v. Bd. of Trustees, 91 M 300, 7 P2d 543 (1932).

Lease With Purchase Option: The Board of Commissioners of a county having no courthouse entered into a contract of lease with the owner of a building, the term of the lease being 4 years at a rental of $2,400 per annum, with the privilege in the county of renewal for a like period. The lease contained an option giving the county the right to purchase during the existence of the contract at the price of $31,000. Held, in an action to enjoin the carrying out of the contract, that the lease portion thereof calling for an expenditure of only $9,600 during a period of 4 years did not come within the constitutional prohibition of Art. XIII, sec. 5, 1889 Mont. Const. The option portion, separate and apart from that relating to the lease, did not bind the county and was presumably entered into with the understanding that before the option could be exercised the question would have to be submitted to a vote of the electors and that therefore the court erred in granting the writ. Bennett v. Petroleum County, 87 M 436, 288 P 1018 (1930).

"Incur Indebtedness or Liability": The term "incur indebtedness or liability", as used in Art. XIII, sec. 5, 1889 Mont. Const., is not synonymous with the term "borrow money" used in section 2933, R.C.M. 1907 (7-7-2402). Edwards v. Lewis & Clark County, 53 M 359, 165 P 297 (1917).

New Indebtedness: Article XIII, sec. 5, 1889 Mont. Const., had to do with the creation of new indebtedness or liability. Edwards v. Lewis & Clark County, 53 M 359, 165 P 297 (1917).

Mileage and Per Diem: The mileage and per diem of County Commissioners, charged to their county on account of trips made to the site of a bridge, and expenses incurred for services of the County Surveyor in surveying and locating the site are not proper items to be taken into consideration in arriving at the amount of indebtedness which could be lawfully incurred by the county on account of the construction of the bridge, without first obtaining the approval of a majority of the electors of the county. Jenkins v. Newman, 39 M 77, 101 P 625 (1909).

"Indebtedness" — What Owed: The word "indebtedness", as used in Art. XIII, sec. 6, 1889 Mont. Const., means what a city owes, irrespective of the demands which it may hold against others. The amount of cash on hand may be deducted from the "indebtedness", but claims against a county for road taxes collected for the city and the amount due from landowners for sidewalks cannot be so deducted. Jordan v. Andrus, 27 M 22, 69 P 118 (1902).

CHANGE OF FORM OF INDEBTEDNESS

Refunding Bonds: The issuance of refunding bonds merely changes the form of the evidence of preexisting indebtedness and does not involve the creation of any new indebtedness within the meaning of Art. XIII, sec. 5, 1889 Mont. Const. The inhibition therein contained is directed to the Legislature. Edwards v. Lewis & Clark County, 53 M 359, 165 P 297 (1917); Palmer v. Helena, 19 M 61, 47 P 209 (1896); Hotchkiss v. Marion, 12 M 218, 29 P 821 (1892).

Claim of Assignment — Unauthorized Payment: A city which has exceeded its debt limit prescribed by Art. XIII, sec. 6, 1889 Mont. Const., cannot incur an indebtedness not payable from a specially authorized tax but payable from funds previously appropriated. An agreement was entered that the claimants should accept warrants in payment of their claims, and that if the warrant should not be paid, the city should not be liable therefor. The payment of such claims on the theory that the appropriation by ordinance was an assignment of the funds so appropriated for the payment of the claims was unauthorized. Helena Waterworks Co. v. Helena, 27 M 205, 70 P 513 (1902). See Palmer v. Helena, 40 M 498, 107 P 512 (1910).

Change of Form of Indebtedness Not Within Inhibition of This Provision: The funding by a city of an existing indebtedness by the issuance of bonds does not create a new or additional indebtedness but merely changes the form of the liability. Article XIII, sec. 6, 1889 Mont. Const., forbidding the creation by a city of an indebtedness greater than 3% of the assessed value of property within its limits unless the creation thereof is necessary and authorized by a vote of the taxpayers for the purpose of constructing a sewer or water system, prohibits the creation of an indebtedness beyond the 3% limit for such purposes by a city which had its sewerage system at the time of the adoption of the Constitution. Palmer v. Helena, 19 M 61, 47 P 209 (1896). See Butler v. Andrus, 35 M 575, 90 P 785 (1907); Edwards v. Lewis & Clark County, 53 M 359, 165 P 297 (1917).

Redemption of Warrants: The issuance by a county of coupon bonds to the extent of $150,000 for the purpose of redeeming outstanding county warrants to that amount is merely a change in the form of a subsisting liability and not the creation of a new indebtedness or liability and is therefore not within the inhibition of Art. XIII, sec. 5, 1889 Mont. Const., and laws of the state which provide, in effect, that counties shall not incur an indebtedness or liability for any single purpose in an amount exceeding $10,000 without the approval of a majority of the electors of the county. Hotchkiss v. Marion, 12 M 218, 29 P 821 (1892). See also Hoffman v. Bd. of County Comm'rs, 18 M 224, 44 P 973 (1896); Palmer v. Helena, 19 M 61, 47 P 209 (1896); E.H. Rollins & Sons v. Bd. of Comm'rs, 80 F 692, 26 CCA 91 (1897); Huron v. Second Ward Sav. Bank, 86 F 272, 30 CCA 38 (1898); State ex rel. Diederichs v. Bd. of Trustees, 91 M 300, 7 P2d 543 (1932).

JOINT OBLIGATIONS

Combined Bond Issue: Bonds issued pursuant to a plan authorizing high school district and common school district included therein to build grade school and high school in one compact unit sharing common facilities was not an attempt to circumvent debt limits imposed on the districts by Art. XIII, sec. 6, 1889 Mont. Const. Long v. School District, 149 M 220, 425 P2d 822 (1967).

Overlapping School Districts: A high school district was created which overlapped the common school districts. The high school district could incur indebtedness so long as such indebtedness, when apportioned among the common school districts in proportion to the assessed valuation of the property in each, added to the existing indebtedness of the common school districts respectively, did not bring the debt of any of the latter in excess of the limit prescribed by Art. XIII, sec. 6, 1889 Mont. Const. Wright v. Browning High School District, 125 M 495, 240 P2d 862 (1952).

Taxpayer Not to Question Constitutionality — When: A taxpayer contended that Ch. 47, Ex. L. 1933 (sections 75-4601 through 75-4606, R.C.M. 1947, now repealed), authorizing creation of high school districts, was in conflict with Art. XIII, sec. 6, 1889 Mont. Const., limiting the indebtedness of school districts. This contention was based on the possibility of including in the district created a common school district already indebted to such an extent that its proportion of a proposed bond issue under the act, when added to the existing indebtedness, would exceed the constitutional limit. Such a contention may only be made by a taxpayer in a district or by a district in such situation. Pierson v. Hendricksen, 98 M 244, 38 P2d 991 (1934).

Joint Contract of Counties: The Commissioners of two counties entered into a contract for the construction of a bridge over a river separating them, the contract price of which was $19,998, and each county became obligated in the sum of $9,999. Without proper approaches, the cost of which would approximate $300, the bridge would be useless, although the contract did not make any provision for them. It was held that, in view of a section of the Code then in force declaring that the word "bridge" included the approaches thereto, the single purpose sought to be accomplished by the Commissioners was the building of a bridge with approaches thereto and that, since that purpose could not be consummated without exceeding the constitutional limitation, the contract was void. Jenkins v. Newman, 39 M 77, 101 P 625 (1909).

LIMITATION BY LEGISLATURE

Legislature — May Fix Lower Limit: Under Art. XIII, sec. 5, 1889 Mont. Const., a county was prohibited from becoming indebted "in any manner or for any purpose" in excess of 5% of the full cash value of all its taxable property. Under section 4614, R.C.M. 1921 (since repealed), the statutory limitation in that respect was that a county's bonded indebtedness shall not exceed 5% of the value fixed by the classification act (sections 84-301 and 84-302, R.C.M. 1947, now repealed) for assessment purposes, thus greatly reducing the limit of indebtedness which a county may lawfully incur. The provision of Art. XIII, sec. 5, 1889 Mont. Const., is not a grant of power to counties to incur indebtedness but merely fixes the maximum limit of indebtedness permissible. Therefore, the Legislature, not being prohibited by the Constitution from doing so, may, as it did by enacting Ch. 21, L. 1923 (since repealed), fix a lower limit than that prescribed. State ex rel. Henderson v. Dawson County, 87 M 122, 286 P 125 (1930); Heckman v. Custer County, 70 M 84, 223 P 916 (1924).

Statutes Changing Value Upon Which Limit Is Based: Chapter 21, L. 1923, amendatory of section 4614, R.C.M. 1921 (since repealed), substituting the taxable value (the percentage of the assessed value upon which taxes are made computable by sections 84-301 and 84-302, R.C.M. 1947, now repealed) for the assessed value (the value fixed upon taxable property by the County Assessor and County and State Boards of Equalization, now County and State Tax Appeal Boards) of property as the basis for determining the limit of county bonded indebtedness, thus in effect fixing a lower limit of indebtedness than that prescribed by Art. XIII, sec. 5, 1889

Mont. Const., is a valid exercise of legislative authority. Heckman v. Custer County, 70 M 84, 223 P 916 (1924).

"Last Assessment": The last assessment roll, within the meaning of Art. XIII, sec. 5, 1889 Mont. Const., from which the limit of indebtedness of a county shall be computed, is the last complete roll before the debt is contracted and not the last assessment roll in existence at the time the indebtedness was authorized at the polls. State ex rel. Galles v. Bd. of County Comm'rs, 56 M 387, 185 P 456 (1919).

Limitation Interpreted: The constitutional limitation contained in Art. XIII, sec. 6, 1889 Mont. Const., is clear and unambiguous and means just what it says, namely, that no indebtedness may be contracted in any manner or amount, for any purpose, in excess of the prescribed limit. Lepley v. Fort Benton, 51 M 551, 154 P 710 (1916); Butler v. Andrus, 35 M 575, 90 P 785 (1907); State ex rel. Helena Waterworks Co. v. Helena, 24 M 521, 63 P 99 (1900).

Void to Extent of Repugnancy: The act of March 5, 1891, authorizing certain incorporated cities to incur indebtedness for specific purposes by the issuance of bonds to an extent not exceeding 4% of their assessed valuation instead of 3% as limited by Art. XIII, sec. 6, 1889 Mont. Const., was not void as being wholly in conflict with said section but is void only to the extent of such repugnancy. Therefore bonds issued by a city under such act are valid where the amount of indebtedness so incurred is less than 3% of the assessed valuation of such city. Dunn v. Great Falls, 13 M 58, 31 P 1017 (1893).

ELECTION REQUIREMENTS

Approval by Resolution — Invalid: City-County Airport Commission, which made two $100,000 loans from the State Aeronautics Commission (now Board of Aeronautics) without approval of either loan by the electorate and which was obligated to repay a total sum of $238,500 over 10 years, had incurred a debt upon which an amount over $10,000 was due each year in violation of Art. XIII, sec. 5, 1889 Mont. Const.; resolution by Airport Commission that approved the loan and which obligated county to repay only $10,000 did not bring the debt within the constitutional limitation since the resolutions approving the loans made it clear that the county intended the loans to be a debt on the county treasury and that the county's budget was an integral part of the repayment schedule. Burlington N., Inc. v. Richland County, 162 M 364, 512 P2d 707 (1973), distinguished in Yovetich v. McClintock, 165 M 80, 526 P2d 999 (1974).

Power to Ratify Bond Election: Legislature in its representative capacity is the sovereign power of a state, and as the power to prescribe the form of ballot in the first instance was in the Legislature, it had the power to ratify an election where the form of ballot used was other than that prescribed. Chapter 99, L. 1935 (omitted), remedied irregularities occurring in procedure taken by commissioners under authority of Ch. 24, Ex. L. 1933-34. Church v. Lincoln County, 100 M 238, 46 P2d 681 (1935).

Proposition to Exceed Debt Limitation — Contents: A city intended to incur indebtedness in excess of the 3% constitutional limit by the issuance of bonds for water plant purposes. The proposition submitted to the voters for their approval must, in addition to setting forth the purpose of the bond issue and the amount to be issued, incorporate the question whether such constitutional limit is to be extended. Edmunds v. Glasgow, 89 M 596, 300 P 203 (1931).

Seed-Grain Law: The seed-grain law, Ch. 13, L. 1915 (since repealed), designed to furnish aid to persons engaged in agriculture who, because they are so reduced in circumstances by natural or other conditions beyond their control, have no means wherewith to purchase seed, insofar as it seeks to create an indebtedness by a county bond issue in excess of $10,000 upon a mere petition and no provision for an election having been made, is in conflict with Art. XIII, sec. 5, 1889 Mont. Const. State ex rel. Cryderman v. Wienrich, 54 M 390, 170 P 942 (1918).

Erection of High School: A statute authorizing the erection of a county high school immediately after a favorable vote thereon at a cost in excess of the constitutional limitation without requiring the question of the indebtedness to be submitted to the electors is invalid on the ground that the Legislature cannot authorize an expenditure in excess of such limitation. Panchot v. Leet, 50 M 314, 146 P 927 (1915).

"Majority of Electors Thereof Voting at an Election" — Meaning: The evident meaning of Art. XIII, sec. 5, 1889 Mont. Const., is that the approval must be the result of an expression of a majority of those voting. The expression "majority of the electors thereof voting at an election" clearly means a majority of those who vote and not a majority of all the electors of the county or of those who vote upon any other issue at the same or some other time. This conclusion is reached because the language employed indicates that the Constitutional Convention had adopted the theory that the control of public affairs must be regarded as belonging to those electors who take

sufficient interest in them to give expression to their views at the ballot box. Morse v. Granite County, 44 M 78, 119 P 286 (1911); Tinkel v. Griffin, 26 M 426, 68 P 859 (1902).

Authority to Proceed Under Special Election: The authority conferred upon a City Council by a special election called for that purpose, to incur additional indebtedness for water and sewer purposes, does not lapse upon the completion of the assessment roll for the year in which the election is held. The requirement of Art. XIII, sec. 6, 1889 Mont. Const., that the question whether the debt shall be incurred must be submitted to the taxpayers "to be affected thereby", is satisfied if the Council, after authority to act has been voted, proceeds with reasonable diligence to issue and sell the bonds. Carlson v. Helena, 39 M 82, 102 P 39 (1909).

WATER SUPPLY

Issuance of Warrants Without Authorization: A city extended the limit of its indebtedness to acquire a water supply system beyond the 3% constitutional limit provided in Art. XIII, sec. 6, 1889 Mont. Const., and section 11-966, R.C.M. 1947 (now repealed), to the extent of $25,000. It issued registered warrants for $75,000 without authorization by its voters, then funded the indebtedness by selling bonds which recited that all proper steps had been taken to make them legal obligations of the city. The city was estopped from questioning their validity on constitutional grounds and refusing further payment thereon. Clerihew v. Baker, 109 M 317, 96 P2d 269 (1939).

Bonds Increasing Net Revenue: Article XIII, sec. 6, 1889 Mont. Const., declaring that where a city's indebtedness is increased beyond the 3% limit for water supply purposes the revenues derived therefrom must be used to pay the debt, is not violated by the city's entering into a contract with the Water Conservation Board (now Water Resources Division) for a new supply whereby the net revenue will be increased rather than diminished. The holder of bonds sold for funds to acquire the old plant has no cause for complaint. Farmers St. Bank of Conrad v. Conrad, 100 M 415, 47 P2d 853 (1935).

Constitutional Exception Matter of Defense: To render a complaint in an action to enjoin a city from allowing claims against it and ordering payment by warrant on the ground that it had exceeded its constitutional limit of indebtedness sufficient, plaintiff is not required to allege that the debt limit has not been extended for water or sewer purposes, the exception in that behalf provided for in Art. XIII, sec. 6, 1889 Mont. Const., being a matter to be asserted in defense. Commonwealth Pub. Serv. Co. v. Deer Lodge, 96 M 15, 28 P2d 472 (1934).

Taxpayer Not a Water User — Not Required to Contribute: Where a city water system bond issue is beyond the 3% limit, the revenues from the city-owned water plant are irrevocably set aside and dedicated to the discharge of the interest and principal. A taxpayer who is not a water user may not be called upon to contribute unless the water plant revenues are insufficient, when a property tax may be levied to supply such deficiency. Edwards v. Helena, 58 M 292, 191 P 387 (1920).

"To Procure a Water Supply": Where a city had a water supply sufficient in quantity but unsuitable as to quality, issued bonds with the approval of the electors, and sold the same to procure funds to install a filtration plant, the constitutional 3% limit of indebtedness having already been reached, the contemplated expenditure was properly justifiable as one "to procure a water supply" within the meaning of Art. XIII, sec. 6, 1889 Mont. Const. McClintock v. Great Falls, 53 M 221, 163 P 99 (1917).

Use of Surplus Funds From Water System: After making ample provision for retiring bonds issued to procure a water system, a city had accumulated a surplus over and above the amount necessary to discharge the interest on the indebtedness as it became due. It could properly expend such surplus in part payment of a necessary filtration plant, without the sanction of the taxpayers' vote, transfer it to its general fund, place it in a special fund, or devote it to any legitimate municipal purpose without violating the provisions of Art. XIII, sec. 6, 1889 Mont. Const. McClintock v. Great Falls, 53 M 221, 163 P 99 (1917).

Limitation — Not Grant of Power: Since the Constitution limits rather than grants power, any of its provisions open to construction should be held to come within the general rule unless a contrary conclusion is forced by the circumstances of the particular case. The concluding sentence of Art. XIII, sec. 6, 1889 Mont. Const., must be understood as expressing constitutional restrictions imposed as a condition to the exercise of the privilege implied in the provision for extended indebtedness and not as a grant of power not enjoyed by a city acquiring a water system without incurring additional indebtedness. P.S.C. v. Helena, 52 M 527, 159 P 24 (1916).

Revenues From Water Systems — Devoted to Payment of Debt: It cannot be said that the injunction contained in Art. XIII, sec. 6, 1889 Mont. Const., that the revenues derived from a water system shall be devoted to the payment of the extended indebtedness, secures to a city

any special privilege. On the contrary, that language is not susceptible of any meaning other than that the city is prohibited from dissipating the funds derived from the operation of its water system or using them for general municipal purposes and is commanded to devote them to the single purpose indicated. It is strictly a limitation imposed in the interest of the city and the holders of its securities. P.S.C. v. Helena, 52 M 527, 159 P 24 (1916).

Water System — May Be Paid for by Taxation as Well as From Revenues From System: The provision of Art. XIII, sec. 6, 1889 Mont. Const., that the revenues derived from a water system purchased or installed by a city shall be devoted to the payment of the debt incurred in its acquisition, does not impliedly prohibit the municipality from resorting to taxation to pay the principal and interest on the bonds evidencing the indebtedness. Carlson v. Helena, 39 M 82, 102 P 39 (1909).

Extended Indebtedness: Under Art. XIII, sec. 6, 1889 Mont. Const., a city could not resort to the 10% extended limit of indebtedness until its financial condition and the needs of the people had created the necessity for such action. A city had no authority to arbitrarily declare a second bond issue of $10,000 for water supply purposes, within the extended limit, so long as there was ample margin within the constitutional limit to cover such issue. Butler v. Andrus, 35 M 575, 90 P 785 (1907).

City Not Liable for Water Furnished: A city had already exceeded the constitutional limit of its indebtedness. A water company had furnished it water for municipal purposes under an ordinance providing for the obtaining of water for such purposes for a certain period and at a certain price, appropriating out of the city's yearly revenues sufficient money to pay for it, and ordering the City Council for such term to levy annual taxes to meet the appropriation. The company could not recover for water so furnished, inasmuch as the liability of the city would be general and not special. The contract entered into created and the amount due for water furnished thereunder constituted an indebtedness within the prohibition of Art. XIII, sec. 6, 1889 Mont. Const. State ex rel. Helena Waterworks Co. v. Helena, 24 M 521, 63 P 99 (1900).

MISCELLANEOUS

"Single Purpose": Held, that the words "single purpose" as used in Art. XIII, sec. 5, 1889 Mont. Const., providing that "no county shall incur any indebtedness or liability for any single purpose to an amount exceeding $10,000, without the approval of a majority of the electors thereof", mean a project or undertaking, the elements entering into which are so related that when combined they constitute an entity—something complete in itself but separate and apart from other objects. State ex rel. Nelson v. Bd. of County Comm'rs, 111 M 395, 109 P2d 1106 (1941); Nelson v. Jackson, 97 M 299, 33 P2d 822 (1934); Herrin v. Erickson, 90 M 259, 2 P2d 296 (1931), overruled on other grounds in Nordquist v. Ford, 112 M 278, 114 P2d 1071 (1941); Bennett v. Petroleum County, 87 M 436, 288 P 1018 (1930); State ex rel. Turner v. Patch, 64 M 565, 210 P 748 (1922).

Pay-As-You-Go Plan: Where a city has reached its limit of indebtedness as prescribed by Art. XIII, sec. 6, 1889 Mont. Const., any further indebtedness incurred is void. It is without power to allow claims against it and draw warrants in payment thereof but under sections 7-6-4301 and 7-6-4302 may operate under the pay-as-you-go plan, i.e., by payment in cash. Commonwealth Pub. Serv. Co. v. Deer Lodge, 96 M 15, 28 P2d 472 (1934).

Anticipated Revenue — Must Be Considered: Under Art. XIII, sec. 6, 1889 Mont. Const., prohibiting cities and school districts from becoming indebted in any manner or for any purpose in the aggregate exceeding 3% of their taxable property, warrants issued for current expenses in anticipation of revenue to be collected under valid tax levies made must be considered in determining whether a district's limit of indebtedness has been reached. Farbo v. School District, 95 M 531, 28 P2d 455 (1933).

Implied Contract: Purchaser of special improvement district's bonds issued to contractor could not recover on theory of implied contract to pay for labor and material furnished, if the bonds were invalid. There was no privity between purchaser and municipality. Lumbermen's Trust Co. v. Ryegate, 61 F2d 14 (9th Cir. 1932). See also Lumbermen's Trust Co. v. Ryegate, 50 F2d 219 (9th Cir. 1931).

Recital in Bonds of Compliance With This Provision as an Estoppel: Recitals in municipal bonds that the constitutional and statutory limit of indebtedness has not been exceeded creates an estoppel as against innocent purchasers where there is nothing on the face of the bonds to indicate that the recitals are untrue. Edmunds v. Glasgow, 89 M 596, 300 P 203 (1931).

Indebtedness Limit — Not to Be Exceeded: Cities and towns may not go beyond the prescribed limit of indebtedness in any manner or for any purpose except as prescribed in the Constitution.

They cannot transcend this limit except when necessary. Lepley v. Fort Benton, 51 M 551, 154 P 710 (1916).

When Additional Debt Permissible: Where a city's existing indebtedness incurred under the constitutional 3% limit has, by reason of payments thereon, fallen below that limit or because of the increase of the assessed valuation of its taxable property a sufficient margin within such limit is left for the purpose, it may, irrespective of any legally incurred indebtedness under the 10% limit authorized by the statute relating to the powers of municipal councils, contract an additional debt for general purposes. Arnold v. Miles City, 46 M 478, 128 P 915 (1912).

Restriction on County Commissioners: Article XIII, sec. 5, 1889 Mont. Const., is a restriction upon the authority of the Board of County Commissioners and has no reference to the power of the people. The power of the Board is limited but that of the people themselves is unlimited, save as affected by other constitutional declarations. Reid v. Lincoln County, 46 M 31, 125 P 429 (1912), overruled on other grounds in State ex rel. McMaster v. District Court, 80 M 228, 260 P 134 (1927).

Surplus Revenues — Use Prohibited: A city which is indebted beyond the constitutional limitation may not use its surplus revenues, no matter from what source derived, to acquire an electric light plant to supply itself and its inhabitants with light where a company, operating both gas and electric light systems under a franchise from the city, has ample facilities to meet all requirements. Palmer v. Helena, 40 M 498, 107 P 512 (1910).

Construction: The argument of ab inconvenienti cannot avail in the interpretation of constitutional provisions relative to the limitations placed upon the power of a city to contract indebtedness. The rule of strict construction must be applied, and any doubt as to such power must be resolved against it. Butler v. Andrus, 35 M 575, 90 P 785 (1902); State ex rel. Helena Waterworks Co. v. Helena, 24 M 521, 63 P 99 (1900); Palmer v. Helena, 19 M 61, 47 P 209 (1896).

Attorney General's Opinions

County Debt Limitations Determined by the Legislature: The Montana Legislature may constitutionally authorize County Commissioners to issue, by resolution, revenue bonds in excess of $40,000 without an election. The Commissioners of a county having a population of less than 10,000 have authority to levy, without an election, 3 mills in addition to its present funding in the event the bonds issued under 7-34-2411, 7-34-2413 through 7-34-2416, and 7-34-2418 become delinquent or cannot be paid from ordinary revenues of the facility. 36 A.G. Op. 20 (1975). See also 35 A.G. Op. 52 (1973).

Law Review Articles

County Zoning in Montana: A New Look at an Old Constitutional Problem, Lundberg, 33 Mont. L. Rev. 63 (1972).

Section 11. Use of loan proceeds.

Convention Notes

No change except in grammar.

Compiler's Comments

Former Constitutional Provision: This section is similar to Art. XIII, sec. 3, 1889 Mont. Const.

Case Notes

DECISIONS UNDER 1889 CONSTITUTION

High School Bonds: Laws (now repealed) authorizing the issuance of county bonds for high school purposes were not violative of the provisions of Art. XIII, sec. 3, 1889 Mont. Const. State ex rel. Henderson v. Dawson County, 87 M 122, 286 P 125 (1930).

Use of Proceeds of Bridge Bonds: Funds provided by the sale of bonds by the County Commissioners for the purpose of constructing bridges, after securing the consent of the electors, may not be expended for any purpose other than that for which they have been provided. State ex rel. Furnish v. Mullendore, 53 M 109, 161 P 949 (1916).

Advances Paid on Invalid Bonds: A statute which authorizes payment of advances to a board of school trustees for the purpose of building a school, in reliance upon the proceeds of bonds which were declared to be invalid from the proceeds of the sale of bonds subsequently issued, was not invalid under Art. XIII, sec. 3, 1889 Mont. Const. State ex rel. NW. Nat'l Bank of Great Falls v. Dickerman, 16 M 278, 40 P 698 (1895).

Section 12. Strict accountability.

Convention Notes

Revises 1889 constitution by leaving specific details of accounting procedures, reporting requirements, etc. to the legislature.

Compiler's Comments

Former Constitutional Provision: This section revises Art. XII, sec. 13, 1889 Mont. Const.

Case Notes

Housing Act of 1975: The Legislature provided for strict accountability of funds, and the Housing Act of 1975 does not violate this section. Huber v. Groff, 171 M 442, 558 P2d 1124 (1976), followed in Grossman v. St., 209 M 427, 682 P2d 1319, 41 St. Rep. 804 (1984) (coal severance tax water bonds).

Budget a Legislative Function: Notwithstanding Art. VI, sec. 9, Mont. Const., the budget is a legislative budget, not an executive budget. Article V, sec. 1 and 11, and Art. VIII, sec. 9, 12, and 14, Mont. Const., vest not only the power to approve appropriation bills and a budget in the legislative branch but to create an interim committee to gather information from other branches of government necessary to form a rational basis for its budget determinations. State ex rel. Judge v. Legislative Fin. Comm., 168 M 470, 543 P2d 1317 (1975).

Attorney General's Opinions

Gift to Private Nonprofit Corporation: Under 20-8-111, the Board of Public Education, in its discretion, may give money that has been donated for the use and benefit of the Montana School for the Deaf and Blind to a private nonprofit corporation created and controlled by the Board and operated for the benefit of that school. However, the Board remains accountable for the money until it is used directly for the general support, maintenance, or improvement of the Montana School for the Deaf and Blind. 38 A.G. Op. 111 (1980).

Section 13. Investment of public funds and public retirement system and state compensation insurance fund assets.

Convention Notes

Revises 1889 constitution by providing for a unified investment program for all state funds. Allows retirement funds to be invested in private corporate stock, but provides that the public school fund and university system funds may be invested only in interest bearing securities.

Compiler's Comments

2000 Amendment by Referendum: Constitutional Amendment No. 34, proposed by Ch. 516, L. 1999, and approved at the general election held November 7, 2000, in (1) in first sentence inserted "and state compensation insurance fund" and in third sentence inserted reference to subsection (4); inserted (4) concerning investment of up to 25% of state compensation insurance fund assets in private corporate capital stock; and made minor changes in style. Amendment effective January 1, 2001. (See text of referendum in final volume of 2001 Laws of Montana.)

1994 Amendment by Referendum: Constitutional Amendment No. 25, proposed by Ch. 43, L. 1993, and approved at the general election held November 8, 1994, in (1) in first sentence after "public funds" inserted "and public retirement system assets" and in third sentence at beginning substituted exception clause for "Except for monies contributed to retirement funds"; and inserted (3) concerning retirement system assets. Amendment effective January 1, 1995. (See text of referendum in final volume of 1995 Laws of Montana.)

Former Constitutional Provision: This section revises Art. XXI, 1889 Mont. Const.

Case Notes

DECISIONS UNDER 1972 CONSTITUTION

Use of In-State Investment Fund to Guarantee Private Loans or Bonds Unconstitutional: The provisions of 17-6-308, which permit the use of in-state investment fund money derived from taxation to guarantee loans or bonds of private individuals or private entities either directly or through the capital reserve account or through the economic development guaranty fund, are unconstitutional under subsection (1) of this section providing for a unified investment program, insofar as 17-6-308 allows guaranties of private obligations as permissible investments. Hollow v. St., 222 M 478, 723 P2d 227, 43 St. Rep. 1435 (1986).

Housing Act of 1975: The provisions of this section for the unified investment fund do not require that all agencies participate regardless of the nature of the agency. Huber v. Groff, 171 M 442, 558 P2d 1124 (1976), followed in Grossman v. St., 209 M 427, 682 P2d 1319, 41 St. Rep. 804 (1984) (coal severance tax water bonds).

DECISIONS UNDER 1889 CONSTITUTION

"Bonds Fully Guaranteed": Under Art. XXI, sec. 8, 1889 Mont. Const., which defined permissible investments for the Montana trust and legacy fund, the phrase "bonds fully guaranteed" meant "instruments in writing constituting a promise to pay a sum certain with interest at a definite rate, to a holder or bearer by a defined future date, which are fully guaranteed at 100% of their face value provided the sale price is not less than the purchase price". In re Mont. Trust & Legacy Fund, 143 M 218, 388 P2d 366 (1964).

Sale of Securities — Selling Price: The securities which constitute funds included in Art. XXI, 1889 Mont. Const., could have been sold before maturity for the benefit of the funds and the state institutions for which they were created and may even be sold for less than face value provided that the sale price is not less than the purchase price. In re Mont. Trust & Legacy Fund, 143 M 218, 388 P2d 366 (1964).

State Insurance Act — Investment of Fund: The claim that by reason of the provision of the state insurance laws requiring fund thereunder collected to be invested in Montana trust and legacy fund, sections 79-1201 to 79-1216, R.C.M. 1947 (now repealed), subject to limitations of this article, the credit of contributing counties and school districts is donated or loaned in violation of Art. XIII, sec. 1, 1889 Mont. Const., cannot be maintained. State ex rel. Missoula v. Holmes, 100 M 256, 47 P2d 624 (1935).

Attorney General's Opinions

Public University Endowment Funds Not "Public Funds" — Not Required to be Invested Through Unified Investment Program: Article VIII, sec. 13, Mont. Const., does not require that endowments granted to Montana's public universities be invested through the unified investment program. 53 A.G. Op. 6 (2010).

Expenditure Limits Not Extended to Future Biennial Budget Cycles: A County Commissioner questioned whether 17-8-106 (enacted 1981) limited the power of subsequent Legislatures to appropriate funds by establishing a cap on expenditures in the 1981 budget biennium and for future biennial budget cycles. The Attorney General noted that, consistent with constitutional design, the Legislature lacks the power to pass a law that purports to establish binding legislative spending policy for future Legislatures. Each Legislature is vested with full legislative power, and there is no cap on state spending in the Montana Constitution. Thus, the 1981 enactment of 17-8-106 placed no enforceable limits on the spending power of subsequent Legislatures. 51 A.G. Op. 4 (2005).

Law Review Articles

Montana's Constitutionally Established Investment Program: A State Investing Against Itself, Fitzgerald, 51 Mont. L. Rev. 378 (1990).

Section 14. Prohibited payments.

Convention Notes

No change except in grammar.

Compiler's Comments

Former Constitutional Provision: This section is similar to Art. XII, sec. 10, 1889 Mont. Const. See also Art. V, sec. 34, 1889 Mont. Const.

Case Notes

Decisions Under 1972 Constitution....1102
Decisions Under 1889 Constitution
Applicability....1103
Appropriation Made by Law....1104
Special Funds....1104
Miscellaneous....1105

DECISIONS UNDER 1972 CONSTITUTION

Amount of Funding Indefinite — Certainty Upon Sale of Bonds: Plaintiff filed a complaint for declaratory judgment in the Supreme Court seeking to determine the validity of several acts of the Legislature allowing the issuance of state revenue bonds. The plaintiff contended that H.B. 846, L. 1981, whereby the Legislature authorized issuance of up to $10 million in coal severance tax bonds for the state's share of construction costs of Tongue River Dam rehabilitation, violated Art. VIII, sec. 14, and Art. IX, sec. 5, Mont. Const., in that the amount of money necessary to finance the project was not definite or certain. The court found that at the time of the bill's passage, it was impossible for the Legislature to determine the exact cost. The authorization

is contingent on legislative approval of a detailed project plan. Sections 17-5-709 and 17-5-710 place limits on the bonds that may be issued. The court found that no legislative assembly can be expected to predict the interest rate which will meet the market for the issuance of state bonds. The court found that when the bonds are issued and sold, the interest rate to be paid by the state will become certain. The amounts necessary to service and repay the indebtedness will be definite. The court relied on State ex rel. Toomey v. St. Bd. of Examiners, 74 M 1, 238 P 316 (1925), which held "that is certain which can be made certain" to uphold the authorization for the project. Grossman v. St., 209 M 427, 682 P2d 1319, 41 St. Rep. 804 (1984).

Bonded Debt — Not Invalid as Continuing Appropriation: Plaintiff filed a complaint for declaratory judgment in the Supreme Court seeking to determine the validity of several acts of the Legislature allowing the issuance of state revenue bonds. The bonds would be financed by coal severance taxes to provide proceeds for development of state water resources. Plaintiff contended that this was an invalid "continuing appropriation". Plaintiff contended that the 48th Legislature by enacting the program could not constitutionally bind future Legislatures to "appropriate" the coal tax money necessary to service the bonds; that the principal of the coal severance tax trust funds had been invaded for years; and that each bond issue requires a separate appropriation of coal severance tax revenues by a three-fourths vote of each house of the Legislature. The Supreme Court harmonized the various constitutional provisions involved. The court held that the Legislature can authorize long-term borrowing by issuing and selling bonds and can provide for the servicing for such indebtedness by repayment or refunding. The court found nothing making the coal severance tax trust fund immune from use as a source of funding for long-term state bonds. When the Legislature validly acts to establish a debt, that indebtedness becomes a state obligation extending over the life of the indebtedness, and every succeeding legislative assembly has an unavoidable duty to provide for it in the manner required by the authorizing law. Grossman v. St., 209 M 427, 682 P2d 1319, 41 St. Rep. 804 (1984).

Money Derived Under Housing Act of 1975: The money derived under the Housing Act of 1975 is not derived by taxation and need not be handled in the manner prescribed by this section. Huber v. Groff, 171 M 442, 558 P2d 1124 (1976).

State Money Exempt From Execution: The state cannot be a judgment debtor because an execution would result in the impairment of sovereign powers and would be contrary to public policy and because construction would not result in the state gaining any beneficial powers. First Nat'l Bank v. Sourdough Land & Cattle Co., 171 M 390, 558 P2d 654 (1976).

Budget Legislative Function: Notwithstanding Art. VI, sec. 9, Mont. Const., the budget is a legislative budget, not an executive budget. Article V, sec. 1 and 11, and Art. VIII, sec. 9, 12, and 14, Mont. Const., vest not only the power to approve appropriation bills and a budget in the legislative branch but to create an interim committee to gather information from other branches of government necessary to form a rational basis for its budget determinations. State ex rel. Judge v. Legislative Fin. Comm., 168 M 470, 543 P2d 1317 (1975).

DECISIONS UNDER 1889 CONSTITUTION

APPLICABILITY

Korean War Honorarium: Statute amending initiative act providing for honorarium for World War II veterans so as to make Korean veterans eligible to receive honorariums did not violate Art. V, sec. 34, 1889 Mont. Const. Cottingham v. St. Bd. of Examiners, 134 M 1, 328 P2d 907 (1958), overruled on other grounds in State ex rel. Ward v. Anderson, 158 M 279, 491 P2d 871 (1971).

Aviation Gasoline Tax Regulatory Rather Than Revenue Measure: Practical operation of the aviation gasoline tax placed burden of paying 1 cent per gallon tax on user of gasoline for aviation purposes. Because income generated is used to regulate aviation operators, it was clearly a regulatory rather than a revenue measure, and as such was not subject to constitutional provisions relating to taxation. The constitutional provisions relating to taxation have no application to license fees or taxes imposed for regulatory purposes as distinguished from property taxes. State ex rel. St. Aeronautics Comm'n v. Bd. of Examiners, 121 M 402, 194 P2d 633 (1948), overruled in Bd. of Regents v. Judge, 168 M 433, 543 P2d 1323 (1975).

Inapplicable to Highway Treasury Anticipation Debenture Act: Article V, sec. 34, 1889 Mont. Const., was inapplicable to Highway Treasury Anticipation Debenture Act of 1945 (omitted). Pioneer Motors, Inc. v. Highway Comm'n, 118 M 333, 165 P2d 796 (1946).

Inapplicable to License Fees: Section providing that the treasurer of the Montana State Board of Food Distributors (since abolished) was the custodian of the license fees collected and that disbursements shall be made by it did not offend against Art. XII, sec. 10, 1889 Mont.

Const., since the license fees collected are for a specific purpose and are not taxes collected for the ordinary expenses of state or municipal government. Cramer v. Bd. of Food Distrib., 113 M 450, 129 P2d 96 (1942), overruled in Jones v. Burns, 138 M 268, 357 P2d 22 (1960).

Inapplicable to Funds From School Land Grants: The State Board of Education was vested with exclusive power to receive and control the funds derived from lands granted the state for the use of its institutions of learning. Therefore, it is free from the limitations and restrictions of the Constitution as to the expenditures of the ordinary revenues of the state. State ex rel. Blume v. St. Bd. of Education, 97 M 371, 34 P2d 515 (1934).

"Public Debt": Under Art. V, sec. 34, 1889 Mont. Const., the term "public debt" embraced floating debt evidenced by warrants as well as bonded indebtedness. State ex rel. Palmer v. Hickman, 11 M 541, 29 P 92 (1892).

APPROPRIATION MADE BY LAW

"Appropriations Made by Law" Construed: While Art. V, sec. 34, 1889 Mont. Const., providing that no money shall be paid out of the treasury except upon "appropriations made by law", did not require the introduction of an appropriation bill and was satisfied if the people have expressed an intention that the money in question be paid, the mere duty of the Legislature to make adequate appropriations for what it requires to be done does not constitute an appropriation "made by law", any more than a promise of the government to pay money or make an appropriation. State ex rel. Dean v. Brandjord, 108 M 447, 92 P2d 273 (1939).

Effect of Initiative: Since initiative does not appropriate money out of the treasury, the provision of Art. V, sec. 34, 1889 Mont. Const., had no application to such measure. Martin v. Highway Comm'n, 107 M 603, 88 P2d 41 (1939).

Refund of Taxes — Appropriation Required: Section 15-16-601 (now repealed), authorizing the commissioners to order a refund of erroneously or illegally collected taxes, was inoperative insofar as it provided that the State Auditor must draw his warrant for the state's portion of the taxes. The Auditor was prohibited by law from drawing a warrant in the absence of legislative appropriation to cover it. First Nat'l Bank v. Sanders County, 85 M 450, 279 P 247 (1929).

Appropriation Bill Not Required: Section of the Constitution providing that no money shall be paid out of the state treasury except upon appropriation "made by law" does not require the introduction of an appropriation bill, the requirement being met by an appropriation sanctioned by law. State ex rel. Toomey v. St. Bd. of Examiners, 74 M 1, 238 P 316 (1925).

Escheated Property: When a judgment ordered the State Auditor to draw his warrant on the State Treasurer for the payment of money held as escheated property although the Legislature had not made an appropriation for that purpose, it was invalid as in direct conflict with Art. V, sec. 34, 1889 Mont. Const. In re Pomeroy, 51 M 119, 151 P 333 (1915).

Lawful Appropriation Required: When relator applied for a Writ of Mandate to compel the State Auditor to draw his warrant for the payment of an account due it for printing, under a statute providing that the Governor and Auditor shall examine the "itemized accounts" of the contractor, which shall be rendered "once in each month", and "if they find it to be correct and in accordance with the provisions of the law, the Auditor shall draw his warrant on the territorial treasurer for the payment of the same", the relator was not entitled, under Art. V, sec. 34, 1889 Mont. Const., to the relief demanded in the absence of a lawful appropriation. State ex rel. Journal Publishing Co. v. Kenney, 9 M 389, 24 P 96 (1890).

Appropriation by Constitution: When the State Treasurer refused to pay a warrant drawn on him by the State Auditor in favor of the Secretary of State upon the ground that no appropriation had been made by law for the payment of any warrant issued to state officers for their services, the Treasurer was required to pay the warrant. The provision of the Constitution that certain enumerated officers shall receive the compensations specified therein is an appropriation made by law, and no legislative act is necessary. State ex rel. Rotwitt v. Hickman, 9 M 370, 23 P 740 (1890). See State ex rel. Buck v. Hickman, 10 M 497, 24 P 93 (1891).

SPECIAL FUNDS

Inapplicability: The provisions of Art. XII, sec. 10, 1889 Mont. Const., were inapplicable to special funds. State ex rel. St. Aeronautics Comm'n v. Bd. of Examiners, 121 M 402, 194 P2d 633 (1948), overruled in Bd. of Regents v. Judge, 168 M 433, 543 P2d 1323 (1975); State ex rel. Normile v. Cooney, 100 M 391, 47 P2d 637 (1935); State ex rel. Missoula v. Holmes, 100 M 256, 47 P2d 624 (1935); State ex rel. Hawkins v. St. Bd. of Examiners, 97 M 441, 35 P2d 116 (1934); State ex rel. Veeder v. St. Bd. of Education, 97 M 121, 33 P2d 516 (1934).

Special Trust Funds: Article V, sec. 34, 1889 Mont. Const., had no application to special or trust funds which had never been placed in the general funds of the state. State ex rel. St. Aeronautics Comm'n v. Bd. of Examiners, 121 M 402, 194 P2d 633 (1948).

Inapplicable to State Insurance Fund: State insurance fund, sections 173.2 to 173.20, R.C.M. 1935 (now repealed), was a special fund designated for a specific purpose as to which Art. XII, sec. 10, 1889 Mont. Const., had no application. State ex rel. Missoula v. Holmes, 100 M 256, 47 P2d 624 (1935).

Erection of Buildings: Since Ch. 7, Ex. L. 1933 (not codified), dealt only with a special fund provided for therein, provisions thereof relating to the method of making disbursements for the erection of the buildings authorized did not violate Art. V, sec. 34, 1889 Mont. Const. State ex rel. Blume v. St. Bd. of Education, 97 M 371, 34 P2d 515 (1934).

Funds From Operation of Buildings: As to laws having to do only with a special fund derived from the operation of the buildings authorized to be constructed from student fees, gifts, and bequests, and to be devoted to a special purpose, the provisions of Art. V, sec. 34, 1889 Mont. Const., had no application. State ex rel. Veeder v. St. Bd. of Education, 97 M 121, 33 P2d 516 (1934).

MISCELLANEOUS

Payment of Money Not in Treasury: The Board of Examiners in making settlement with an insurance company on cancellation of a contract after defeat of the state insurance act referendum by permitting the insurer to retain the portion of the unearned premium and applying it on a new policy did not contravene Art. XII, sec. 10, 1889 Mont. Const. The contract for new insurance had been executed by the Board and the claim for premium was no longer unliquidated, and the sum retained was not then in the treasury. Fitzpatrick v. St. Bd. of Examiners, 105 M 234, 70 P2d 285 (1937).

Treasury Notes — Payment by Treasurer: Law was not rendered invalid for failing to provide payment of principal and interest of treasury notes on warrant drawn by the State Auditor and in providing for payment directly by the State Treasurer. State ex rel. Toomey v. St. Bd. of Examiners, 74 M 1, 238 P 316 (1925).

Payment of Funds Into State Treasury: The only reasonable construction of Art. XII, sec. 10, 1889 Mont. Const., which required all taxes be paid into the state treasury, in connection with a provision that the County Treasurer shall be the collector, is that the collector shall collect and then pay into the treasury all taxes levied for state purposes. Mut. Life Ins. Co. v. Martien, 27 M 437, 71 P 470 (1903).

Attorney General's Opinions

Transfer of Money Between State Treasury Accounts — Statutory Appropriation Not Required: This section requires a statutory appropriation only when money is paid out of the state treasury, but neither the constitution nor state law requires a statutory appropriation when money is transferred between accounts within the state treasury. 44 A.G. Op. 43 (1992).

Applicability of Budget Amendment Process to Statutory Appropriations: Legislative history and case law support the conclusion that the scope of the budget amendment process is restricted to the expenditure of funds by state agencies in excess of their appropriations. The budget amendment process does not apply to "statutory appropriations", which are those appropriations accomplished by legislative enactment, either with or without specific appropriation laws. 40 A.G. Op. 25 (1983).

Role of Montana Wheat Research and Marketing Committee in Political Action and Legal Action: "Marketing" is to be interpreted in its broadest sense to include the transportation of goods, including transportation rates. The Committee may take action to assure reasonable transportation rates if it is in the best interest of the wheat and barley growers of Montana as a whole. Political action, not legal action, is prohibited. Although in some situations, lawsuits against purchasers or growers of wheat or barley for violation of the wheat research and marketing statutes must be brought by the Department of Agriculture, that requirement did not govern a situation when the litigation in question was brought not merely to enforce the procedural requirements of the wheat research and marketing statutes but also to assure reasonable transportation rates. Actual use of Committee funds for permissible legal action is impermissible if the use of the funds is not under state control. The Committee also is prohibited from contributing to a legal fund over which it has no control; however, the Committee is not prohibited from engaging indirectly in litigation by funding research if it controls the expenditure of the funds for the studies by way of contract or agreement. 39 A.G. Op. 8 (1981).

Appropriations — Legislative Control Over Marketing Assessment Funds: Although the control of the Legislature over appropriations to state agencies is based upon broad constitutional provisions, certain money may either be exempt from the appropriation process or the purposes for which that money may be appropriated may be limited by statute. Thus, the Legislature may control appropriations from the wheat marketing and research account but those appropriations are subject to the statutorily stated purposes of the account. Any attempt by the Legislature in an appropriation bill to alter the purposes for which appropriations from the account are made is subject to the constitutional restriction that the purpose of legislation must be clearly stated in the title of the bill. 39 A.G. Op. 3 (1981).

Section 15. Public retirement system assets.

Compiler's Comments

Effective Date: Section 3, Const. Amend. No. 25, provided that this section is effective January 1, 1995.

Case Notes

State Control Over Financial Consequences of Pension Plan Associated With Public Employment — Retirement Policy Rationally Related to Government Interest: Plaintiff challenged the statutory scheme governing the eligibility for public pensions for employees who work for a school district, retire, and then work for the University System. The District Court held that the statutory proscription in 19-21-202 that prevents a retired teacher from receiving benefits from a state-sponsored retirement program while remaining an employee and contributing member of another private retirement program violated the constitutional right to equal protection. On appeal, the Supreme Court applied the rational basis test and reversed. There remains nothing irrational about the state deciding that at any one time, a public employee should not be both drawing a new salary and accruing a public pension and receiving an old public pension. When the job and its associated pension plan involve public employment, the state's interest in and control over the financial consequences are a legitimate exercise of the constitutional mandate in this section, and the District Court incorrectly held that the statutory scheme was an equal protection violation. Farrier v. Teachers' Retirement Bd., 2005 MT 229, 328 M 375, 120 P3d 390 (2005).

Constitutional Authority of Public Employees' Retirement Board to Make Actuarial Calculations — No Overbroad Delegation of Legislative Authority: The District Court held that 2001 amendments contained in House Bill No. 294, which included a definition of actuarial equivalent that changed the method by which the Public Employees' Retirement Board calculated certain benefits, unconstitutionally delegated unconstrained discretion to the Board in violation of the separation of powers doctrine in Art. III, sec. 1, Mont. Const. On appeal, the Board asserted that this section gave the Board the authority to make actuarial evaluations and thus to implement the 2001 amendments, so there was no constitutional violation. The Supreme Court agreed. Article III, sec. 1, Mont. Const., allows one branch of government to exercise power properly belonging to another branch if the constitution expressly directs or permits that exercise. Because this section delegated authority to the Board to make actuarial determinations, the District Court committed reversible error in concluding that the Legislature and House Bill No. 294 (2001) unconstitutionally delegated authority to the Board to make determinations allowed by another section of the constitution. Baumgardner v. Pub. Employees' Retirement Bd., 2005 MT 199, 328 M 179, 119 P3d 77 (2005), following Duck Inn, Inc. v. Mont. St. Univ.-N., 285 M 519, 949 P2d 1179 (1997).

Judgment Against "State" Binding Against Two Agencies — Retirement Benefits Setoff Barred as Compulsory Counterclaim: During a longstanding dispute by firefighters employed by the Montana Air National Guard and involving several separate lawsuits, the plaintiff was fired and began receiving retirement benefits. The plaintiff sued "the State" for reinstatement of employment, lost wages, employment benefits during the period of termination, liquidated damages, and attorney fees and costs. After other firefighters' suits were decided in the firefighters' favor, the plaintiff settled with the Department of Military Affairs (DMA) for reinstatement, lost wages, lost annual leave and sick leave benefits, retirement contributions that the DMA would have made during the termination period, and attorney fees and costs of suit. After settlement, the Public Employees' Retirement System (PERS) claimed that it was entitled to repayment of the retirement benefits that the plaintiff had been paid before reinstatement. The DMA and PERS agreed to offset the settlement damages by the retirement amount. The Supreme Court held that the state's setoff claim was barred as a compulsory counterclaim, that both agencies were bound by the DMA's settlement agreement because they were the same party collectively

known as the "State of Montana", and that the plaintiff was entitled to the full settlement amount without setoff. Peters v. St., 285 M 345, 948 P2d 250, 54 St. Rep. 1185 (1997).

Section 16. Limitation on sales tax or use tax rates.

Compiler's Comments

Compiler's Comment: This section was enacted as section 15 by sec. 1, Const. Amend. No. 27. The Code Commissioner has designated the section as section 16 because section 2 of Const. Amend. No. 25, approved at the same election, enacted a new section 15.

Effective Date: Section 2, Const. Amend. No. 27, provided that this section is effective upon approval by the electorate. Approved November 8, 1994.

Section 17. Prohibition on real property transfer taxes.

Compiler's Comments

Retroactive Applicability: Section 2, Const. Initiative No. 105, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to the sale or transfer of real property beginning after January 1, 2010."

Severability: Section 3, Const. Initiative No. 105, was a severability clause.

Effective Date: Section 4, Const. Initiative No. 105, provided that this section is effective upon approval by the electorate. Approved November 2, 2010.

ARTICLE IX

ENVIRONMENT AND NATURAL RESOURCES

Article Law Review Articles

Going With the Flow: The Montana Court's Conservative Approach to Constitutional Interpretation, Tuholske, 72 Mont. L. Rev. 237 (2011).

The Battle for the Environmental Provisions in Montana's 1972 Constitution, Cross, 51 Mont. L. Rev. 449 (1990).

Environmental Rights, Kemmis, 39 Mont. L. Rev. 224 (1978).

Environmental Defense Fund v. Hoerner Waldorf Corporation: Environment, Industry, and Constitutional Rights, Mudd, 32 Mont. L. Rev. 161 (1971).

Section 1. Protection and improvement.

Convention Notes

New provision creating a duty of the state and its people to protect and improve the environment.

Case Notes

Leasing State Land Mineral Interests Without Environmental Review — No Violation of Right to Clean and Healthful Environment: Plaintiffs sought declaratory rulings that the State Land Board wrongfully failed to conduct environmental studies required by the Montana Constitution prior to entering leases with the coal company. Section 77-1-121(2) expressly exempts the State Land Board from conducting any environmental review under the Montana Environmental Policy Act (MEPA) prior to issuing a lease as long as the lease is subject to further state permitting regulations. The Supreme Court held that because the leases did not remove any action by the coal company from environmental review or regulation provided by Montana law, such environmental review was only deferred from the leasing stage to the permitting stage. The terms of the leases required the coal company to comply with all applicable state and federal laws and specifically with Montana laws regarding mine siting and reclamation as well as with the provisions of MEPA. Because the leases themselves did not allow for any degradation of the environment, the act of issuing the leases without environmental review under 77-1-121(2), did not violate Article II, section 3, or Article IX, section 1, 2, or 3, of the Montana Constitution. N. Plains Resource Council v. Mont. Bd. of Land Comm'rs, 2012 MT 234, 366 Mont. 399, 288 P.3d 169.

Civil, Private, and Attractive Nuisance and Trespass Claims Against Shooting Range — Opportunity to Further Develop Certain Claims Allowed on Remand: After an individual defendant transferred property to defendant ranch company and helped the ranch develop a shooting range on the property, plaintiff neighbors brought multiple claims alleging that operation of the shooting range in close proximity to a subdivision and elementary school constituted a public

nuisance, private nuisance, attractive nuisance, trespass, and a violation of various constitutional provisions. The District Court dismissed all claims and plaintiffs appealed. Citing Barnes v. Thompson Falls, 1999 MT 77, 294 Mont. 76, 979 P.2d 1275, the Supreme Court noted that the Legislature explicitly exempted shooting ranges from civil nuisance liability, so plaintiffs' public nuisance claims were properly dismissed. Regarding the private nuisance claims, the District Court should have focused on injury to specific plaintiffs rather than dismissing the claims as related to all plaintiffs. The trespass claims concerned noise from the shooting range invading plaintiffs' property and thus took the form of intangible trespass. The District Court prematurely dismissed the trespass claims by failing to recognize that an intangible invasion supported by actual damages may support a trespass action, and plaintiffs should have been allowed to develop evidence and facts demonstrating actual damages. Plaintiffs should also have been allowed to develop facts of an actual threat of irreparable injury in support of the attractive nuisance claims. Lastly, plaintiffs failed to show how common law or statutory remedies would not adequately address any potential damages or to demonstrate how the constitutional provisions in question directly addressed the conduct of private parties, so the constitutional claims were properly dismissed. The case was remanded to allow plaintiffs the opportunity to develop their trespass and public, private, and attractive nuisance claims. Tally Bissell Neighbors, Inc. v. Eyrie Shotgun Ranch, LLC, 2010 MT 63, 355 Mont. 387, 228 P.3d 1134.

Nonapplicability of Constitutional Tort Theory When Adequate Remedy Exists Under Statutory or Common Law: Plaintiffs brought a common-law action against defendant for restoration damages related to environmental damage caused by defendant's refinery. The trial court held defendant strictly liable for conducting an abnormally dangerous activity and instructed the jury to award monetary damages pursuant to Art. II, sec. 3, Mont. Const., for any constitutional tort violating the fundamental right to a clean and healthful environment. Defendant appealed the application of the constitutional tort theory. The Supreme Court noted that Dorwart v. Caraway, 2002 MT 240, 312 M 1, 58 P3d 128 (2002), recognized that common-law causes of action that are intended to regulate relationships among and between individuals may not always be adequate to redress the type of damage caused by the invasion of constitutional rights by government actors and that, as a result, recognition of a constitutional tort was necessary in the absence of any other remedy. However, in the present case, the Supreme Court also adopted Restatement (Second) of Torts 929 to allow for recovery of restoration damages, which served to ensure restoration of a clean and healthful environment. Absent a showing that restoration costs were inadequate to address potential damages caused by defendant's contamination, it was error for the trial court to instruct the jury on the constitutional tort theory when adequate remedies existed under statutory or common law. Sunburst School District No. 2 v. Texaco, Inc., 2007 MT 183, 338 M 259, 165 P3d 1079 (2007), followed in Shammel v. Canyon Resources Corp., 2007 MT 206, 338 M 541, 167 P3d 886 (2007).

Initiative Banning Cyanide Mining Not Unconstitutional Taking or Impairment of Contract — Opportunity to Apply for Mining Permit Not Property Right: Plaintiffs had an operating permit pending for a cyanide leach pit gold mine when voters passed Initiative Measure No. 137 (I-137) that prohibited cyanide mining in Montana. Plaintiffs sued on grounds that I-137 interfered with their property right in the permit, constituted an unconstitutional regulatory taking for which they should be compensated, and violated the contract clause in Art. II, sec. 31, Mont. Const. The District Court found for the state on all issues, and plaintiffs appealed, but the Supreme Court affirmed. Plaintiffs' mere opportunity to seek a mining permit did not constitute a property right, given the state's wide discretion to reject the application even without the passage of I-137. Further, I-137 did not constitute a taking because plaintiffs had not yet obtained a right to mine that the initiative took away. Moreover, even though the District Court incorrectly held that plaintiffs' corporate mining agreement was not substantially impaired by I-137, the court nonetheless correctly concluded that there was no contract clause violation because I-137 was reasonably related to the legitimate and significant public purpose of protecting the environment. Seven Up Pete Venture v. St., 2005 MT 146, 327 M 306, 114 P3d 1009 (2005).

Water Appropriation Application Amendments So Significant as to Constitute New Appropriations — Original Applications Considered Shams — New Applications Barred by Subbasin Closure: Just 10 days before the Legislature closed the Bitterroot River subbasin to new water appropriations in 1999, defendants submitted four appropriation applications to develop ponds on their property for the beneficial use of wildlife. All four applications were subsequently amended to variously revise volume and flow rates, proposed pond depth, points and means of diversion, place of use, and beneficial uses. Numerous parties objected to the proposed appropriations, including plaintiff, which moved to terminate the applications on grounds that

the amendments were submitted in bad faith and were new applications and that deficiencies in the applications were not cured within the statutory time limit. A hearings examiner denied the motion to terminate the applications, but nevertheless denied the applications on numerous grounds. Defendants filed exceptions to the hearings examiner's decision, and the Department of Natural Resources and Conservation reversed the hearings examiner and granted all four applications. Plaintiff petitioned the District Court for review, and the court concluded that the Department erred in accepting and processing the amended applications after the subbasin closure and in other ways and denied the applications. On appeal, the Supreme Court affirmed. The amendments to the applications were not mere refinements, but constituted changes so significant that the amended applications bore such little resemblance to the original applications as to be considered shams. The nature and extent of the changes could be consistent only with new applications with new priority dates, which were prohibited by the subbasin closure. The Supreme Court noted that to hold otherwise would establish a precedent allowing a prospective appropriator to file a deficient application and later amend the application without penalty, thereby gaining an advantage over other appropriators and circumventing other restrictions associated with a subbasin closure. Bitterroot River Protective Ass'n, Inc. v. Siebel, 2005 MT 60, 326 M 241, 108 P3d 518 (2005).

Purpose of Alternative Livestock Transfer Regulations — Quarantine Exception to Commerce Clause Applicable: The Wallaces, licensed alternative livestock ranchers, sought to reduce the size of their elk herd by transferring about 500 elk to the Crow Indian Reservation for release into the wild. The Department of Fish, Wildlife, and Parks requested and received an injunction prohibiting any transfer of elk to tribal lands, and the Wallaces appealed, asserting that the injunction violated Art. I, sec. 8, clause 3, of the U.S. Constitution, known as the commerce clause. The Wallaces contended that prohibiting the transfer of alternative livestock to a recipient that is not licensed by the state constituted extraterritorial application of Montana's regulatory scheme to foreign nations, other states, and Indian nations in violation of federal law. The Supreme Court found that this case falls within the quarantine exception to the traditional commerce clause analysis. The quarantine exception recognizes that states may have a local interest in protecting public safety as a competing value when reviewing state burdens on interstate commerce. With the alarming spread of serious wildlife diseases throughout the country, the state has a compelling interest to enact regulations to ensure that alternative livestock cannot simply roam into Montana and threaten native populations. Because elk released on the Crow Indian Reservation could migrate back into Montana, the restrictions regarding transfer of alternative livestock in 87-4-414 fall squarely within the quarantine exception to the commerce clause. Thus, the permanent injunction was affirmed. Hagener v. Wallace, 2002 MT 109, 309 M 473, 47 P3d 847 (2002). See also Bowman v. Chicago & NW. Ry. Co., 125 US 465 (1888).

No Reasonable Expectation of Privacy in Possession of Game Fish — Probable Cause Not Required for Game Warden's Inspection of Angler's Concealed Catch: Initially concerned for the safety of the occupants of a seemingly unoccupied watercraft, a game warden approached the watercraft. When informed that Boyer had been fishing, the warden asked to see Boyer's license and catch. After Boyer requested a later inspection, he reluctantly exhibited eight fish. At that point, the warden looked into the live well of Boyer's boat, and in the process found unlawfully killed game fish. Boyer contended that the warden needed probable cause to believe that Boyer had committed a violation at the time that the request was made in order to inspect his catch, and that conducting a warrantless search of Boyer's live well was impermissible. The Supreme Court noted that under the Montana Constitution, an impermissible search occurs only when a reasonable expectation of privacy exists. To determine whether the warden unlawfully intruded into Boyer's privacy, the court considered: (1) whether Boyer had an actual expectation of privacy; (2) whether society was willing to recognize that expectation as objectively reasonable; and (3) the nature of the state's intrusion (see St. v. Bassett, 1999 MT 109, 294 M 327, 982 P2d 410 (1999)). The court concluded that Boyer's subjective expectation of privacy in his catch was not one that society would recognize as reasonable. This section, the state must maintain a clean and healthful environment, and the Legislature has provided for game wardens to enforce the environmental laws regarding fish and game by implementing a system that includes the ability of wardens to inspect game in the field, which encompasses proper licensing and game limitation requirements. In this capacity, wardens act as public trustees protecting and conserving Montana wildlife and habitat for all citizens. Fishing is a privilege accorded by the state, not a private right, and anglers must assume the burdens of the sport, as well as its benefits, and acknowledge the prospect of at least some governmental intrusion into their activities, including license checks, inquiries about game taken, and requests to inspect game in the field. Because Boyer had no

reasonable expectation of privacy in his catch, the warden's request for and inspection of the catch was not considered a search, so probable cause was not necessary. St. v. Boyer, 2002 MT 33, 308 M 276, 42 P3d 771 (2002).

Unenforceability of Buy-Sell Agreement on Grounds of Impossibility or Impracticality of Performance — Requiring Performance of Contract With Potential for Environmental Degradation Unconstitutional: Cape-France Enterprises (Cape-France) entered a buy-sell agreement with Peed (now deceased) and Moore to purchase some property near Bozeman for a subdivision. Before the subdivision could be completed, water needed to be procured for the site. According to the agreement, as buyers, Peed and Moore were responsible to bring water to the property, but because city water was not available, a well needed to be drilled. However, the presence of a pollution plume was discovered near the land. After the subdivision process was commenced, the Department of Environmental Quality notified Cape-France that: (1) the plume may have advanced under the property; (2) a subdivision would not be approved unless a well was drilled and tested; (3) a well could be drilled, but if testing showed pollution in the water, treatment would be extensive; and (4) if drilling or pumping of the water caused expansion of the pollution, then Cape-France, as owner of the property, would be held liable for cleanup costs. On cross-motions for summary judgment, the District Court held that the buy-sell agreement could be rescinded on the basis of mutual mistake of fact and impossibility or impracticality of performance and that specific performance would not be granted. The Supreme Court affirmed. A court may determine that an act is impossible in legal contemplation when it is not practicable, when the act can be done only at an excessive, unreasonable, and unbargained-for cost. The doctrine of impossibility or impracticability is applied when, aside from the object of a contract being unlawful, the public policy underlying the strict performance of the contract is outweighed by the senselessness of requiring performance. The doctrine is not limited to cases of literal impossibility but may also be applied in cases that present a potential for substantial and unbargained-for damages. In this case, requiring Cape-France to go forward with the performance of the contract when there was a very real possibility of substantial environmental degradation and resultant financial liability for cleanup was not in the public interest or in the interests of the contracting parties and was not in accord with the guarantee of a clean and healthful environment in Art. II, sec. 3, Mont. Const., or the mandate to maintain and improve a clean and healthful environment for present and future generations in this section. Thus, rescission of the contract was proper. Cape-France Enterprises v. Estate of Peed, 2001 MT 139, 305 M 513, 29 P3d 1011 (2001). See also Smith v. Zepp, 173 M 358, 567 P2d 923 (1977), and Mont. Envtl. Information Center v. Dept. of Environmental Quality, 1999 MT 248, 296 M 207, 988 P2d 1236 (1999).

Arbitrary, Blanket Exclusion of Certain Activities From Nondegradation Review Unconstitutional as Applied — Actual Danger Not Required — Degradation of Environment Sufficient to Implicate Fundamental Rights: The District Court erred when it held that the fundamental right to a clean and healthy environment is not implicated unless there is a finding of actual injury and that mere degradation of water quality, absent actual injury, is not sufficient to implicate the fundamental right or to require strict scrutiny analyses. The right to a clean and healthful environment contained in Art. II, sec. 3, Mont. Const., is fundamental. Therefore, as applied to the facts of this case, to the extent that 75-5-317(2)(j) arbitrarily excludes certain activities from nondegradation review without regard to the nature or volume of the substance being discharged, it violates the environmental rights guaranteed by Art. II, sec. 3, Mont. Const., and this section. (See 1999 amendments.) The intention of the framers of the constitution was to provide language and protections that are both anticipatory and preventative. The delegates did not intend to merely prohibit that degree of environmental degradation that can be conclusively linked to ill health or physical endangerment. Mont. Envtl. Information Center v. Dept. of Environmental Quality, 1999 MT 248, 296 M 207, 988 P2d 1236, 56 St. Rep. 964 (1999).

Fundamental Right to Clean and Healthful Environment — Strict Scrutiny of Compelling State Interest and Nondegradation Policy: The right to a clean and healthful environment contained in Art. II, sec. 3, Mont. Const., is fundamental. Any statute or rule implicating that right will be strictly scrutinized and will survive scrutiny only if the state establishes a compelling state interest and its action is closely tailored to effectuate that interest and is the least onerous path that can be taken to meet the state's objectives. Because rights provided for in this section are not found in the declaration of rights, a statute implicating rights under this section would normally be subject to a middle-tier scrutiny test. However, those rights guaranteed by Art. II, sec. 3, and those rights provided for in this section were intended by the constitution's framers to be interrelated and interdependent, so state action under either section is subject to strict scrutiny. Mont. Envtl. Information Center v. Dept. of Environmental Quality, 1999 MT 248, 296

M 207, 988 P2d 1236, 56 St. Rep. 964 (1999). See also Butte Community Union v. Lewis, 219 M 426, 712 P2d 1309, 43 St. Rep. 65 (1986), and Wadsworth v. St., 275 M 287, 911 P2d 1165, 53 St. Rep. 146 (1996).

Standing to Challenge Mining Activity With Arguably Adverse Environmental Impact: Plaintiffs' uncontroverted allegations of a violation of their right to a clean and healthful environment established their standing to challenge mine water discharge activities that had an arguably adverse impact on the headwaters of the Blackfoot River in which they fished and recreated and that was a source of their drinking water. Mont. Envtl. Information Center v. Dept. of Environmental Quality, 1999 MT 248, 296 M 207, 988 P2d 1236, 56 St. Rep. 964 (1999), following Missoula City-County Air Pollution Control Bd. v. Bd. of Envtl. Review, 282 M 255, 937 P2d 463, 54 St. Rep. 338 (1997), and Gryczan v. St., 283 M 433, 942 P2d 112, 54 St. Rep. 699 (1997).

Environmental Impact Statement Not Given Constitutional Status: An environmental impact statement (EIS) was not required before granting a permit under the Hard-Rock Mining Act (HRMA) because the 60-day period was a woefully inadequate period for the preparation of a proper EIS, the same reason that an EIS was not required in Flint Ridge Dev. Co. v. Scenic Rivers Ass'n, 426 US 776 (1976). Furthermore, the statutory requirement of an EIS was not given constitutional status by the enactment of Art. II, sec. 3, and Art. IX, sec. 1, Mont. Const., subsequent to the Montana Environmental Policy Act and HRMA. Kadillak v. The Anaconda Co., 184 M 127, 602 P2d 147 (1979).

Federal Clean Air Act — Administrative Regulations — Effect — Remedies: In an action to enjoin the Environmental Protection Agency from mandating preconstruction review of an electrical power facility, the U.S. District Court discussed many of the major issues involved in this type of case and found that power companies were exempt from such review. Mont. Power Co. v. E.P.A., 429 F. Supp. 683 (D.C. Mont. 1977).

Law Review Articles

The Public Trust Doctrine and the Montana Constitution as Legal Bases for Climate Change Litigation in Montana, Munro, 73 Mont. L. Rev. 123 (2012).

A Non-Indian Entity Is Polluting Indian Waters: "Water" Your Rights to the Waters, and "Water" Ya Gonna Do About It?, Hanlon, 69 Mont. L. Rev. 173 (2008).

A Battle of Public Goods: Montana's Clean and Healthful Environment Provision and the School Trust Land Question, Sienkiewicz, 67 Mont. L. Rev. 65 (2006).

Murky Waters: Private Action and the Right to a Clean and Healthful Environment—An Examination of Cape-France Enterprises v. Estate of Peed, Naber, 64 Mont. L. Rev. 357 (2003).

Constitutionalizing the Environment: The History and Future of Montana's Environmental Provisions, Thompson, 64 Mont. L. Rev. 157 (2003).

MEIC v. DEQ: An Inadequate Effort to Address the Meaning of Montana's Constitutional Environmental Provisions, Horwich, 62 Mont. L. Rev. 269 (2001).

Montana's Constitutional Environmental Quality Provisions: Self-Execution or Self-Delusion, Horwich, 57 Mont. L. Rev. 323 (1996).

Markets, Regulation, and Environmental Protection, Huffman, 55 Mont. L. Rev. 425 (1994).

The Montana Constitution and the Right to a Clean and Healthful Environment, Schmidt & Thompson, 51 Mont. L. Rev. 411 (1990).

"Public Trust" as a Constitutional Provision in Montana, Leaphart, 33 Mont. L. Rev. 175 (1972).

The Coming of Age of State Environmental Policy Acts, Renz, 5 Pub. Land L. Rev. 31 (1984).

Section 2. Reclamation.

Convention Notes

New provision requiring restoration of land after removal of natural resources.

Compiler's Comments

1974 Amendment by Referendum: Constitutional Amendment No. 1, proposed by Ch. 117, L. 1974, and approved at the general election held November 5, 1974, inserted (2) and (3) establishing the resource indemnity trust fund and requiring that the principal remain forever inviolate in the amount of $1 million. Amendment effective July 1, 1975. (See text of referendum in final volume of 1975 Laws of Montana.)

Case Notes

Leasing State Land Mineral Interests Without Environmental Review — No Violation of Right to Clean and Healthful Environment: Plaintiffs sought declaratory rulings that the State Land Board wrongfully failed to conduct environmental studies required by the Montana

Constitution prior to entering leases with the coal company. Section 77-1-121(2) expressly exempts the State Land Board from conducting any environmental review under the Montana Environmental Policy Act (MEPA) prior to issuing a lease as long as the lease is subject to further state permitting regulations. The Supreme Court held that because the leases did not remove any action by the coal company from environmental review or regulation provided by Montana law, such environmental review was only deferred from the leasing stage to the permitting stage. The terms of the leases required the coal company to comply with all applicable state and federal laws and specifically with Montana laws regarding mine siting and reclamation as well as with the provisions of MEPA. Because the leases themselves did not allow for any degradation of the environment, the act of issuing the leases without environmental review under 77-1-121(2), did not violate Article II, section 3, or Article IX, section 1, 2, or 3, of the Montana Constitution. N. Plains Resource Council v. Mont. Bd. of Land Comm'rs, 2012 MT 234, 366 Mont. 399, 288 P.3d 169.

No Constitutional Limitation on Appropriation of Resource Indemnity Trust Funds Beyond Principal: Nothing in the Montana Constitution as a whole or in the plain language of Art. IX, sec. 2, Mont. Const., places a limitation on the appropriation of resource indemnity trust funds beyond the $100 million principal, which must remain inviolate. Butte-Silver Bow Local Gov't v. St., 235 M 398, 768 P2d 327, 46 St. Rep. 87 (1989).

Law Review Articles

A Constitutional Challenge to the Surface Mining Control and Reclamation Act, Meissner, 2 Pub. Land L. Rev. 138 (1981).

Hardrock Mining on the Public Lands, Shanahan, 2 Pub. Land L. Rev. 57 (1981).

Section 3. Water rights.

Convention Notes

(1) New provision guaranteeing all existing rights to the use of water. (2) No change except in grammar. (3) New provision recognizing state ownership of all water subject to use and appropriation by its people. (4) New provision requiring legislature to pass laws establishing a central records system so that records of water rights may be found in a single location as well as locally.

Compiler's Comments

Former Constitutional Provision: Subsection (2) of this section is similar to Art. III, sec. 15, 1889 Mont. Const.

Case Notes

DECISIONS UNDER 1972 CONSTITUTION

Crow Compact Upheld — Compact Held Reasonable — Public Property and Water Rights Reasonable Under Compact — Public Comment Satisfied Due Process: Individual objectors to the Crow Water Compact appealed to the Supreme Court following the Water Court's determination that the Compact was valid. This action was subsequent to In re Crow Water Compact, 2015 MT 217, 380 Mont 168, 354 P.3d 1217. The objectors, who were not parties to the Compact but who owned land and water rights near the reservation, argued that the Water Court did not apply the proper legal standard, that they sustained injury because the Compact was unreasonable, and that their due process rights were violated during the Compact negotiation process. The Supreme Court disagreed with the objectors, holding that the Water Court correctly applied the correct standard articulated in Crow I, that the Compact was reasonable and had reasonable protection of state water and property rights, that the objectors' argument of future potential problems was beyond the scope of its review, that reservation of water for public recreation, wildlife, and aquatic life was for the benefit of the public, and that the record demonstrated sufficient opportunities for public comment during the Compact approval process. In re Crow Water Compact, 2015 MT 353, 382 Mont. 46, 364 P.3d 584.

Retroactive Applicability of 79 Ranch — Presumption of Abandonment Rebutted: The state appealed the Water Court's decision that the plaintiffs produced sufficient evidence to overcome the presumption that they abandoned their water right claim. The Supreme Court affirmed, concluding that the Water Court properly retroactively applied 79 Ranch, Inc. v. Pitsch, 204 Mont. 426, 666 P.2d 215 (1983), in analyzing the abandonment of a pre-1973 water right and that the claimants submitted sufficient evidence to overcome the presumption of abandonment. Heavirland v. St., 2013 MT 313, 372 Mont. 300, 311 P.3d 813.

Leasing State Land Mineral Interests Without Environmental Review — No Violation of Right to Clean and Healthful Environment: Plaintiffs sought declaratory rulings that the

State Land Board wrongfully failed to conduct environmental studies required by the Montana Constitution prior to entering leases with the coal company. Section 77-1-121(2) expressly exempts the State Land Board from conducting any environmental review under the Montana Environmental Policy Act (MEPA) prior to issuing a lease as long as the lease is subject to further state permitting regulations. The Supreme Court held that because the leases did not remove any action by the coal company from environmental review or regulation provided by Montana law, such environmental review was only deferred from the leasing stage to the permitting stage. The terms of the leases required the coal company to comply with all applicable state and federal laws and specifically with Montana laws regarding mine siting and reclamation as well as with the provisions of MEPA. Because the leases themselves did not allow for any degradation of the environment, the act of issuing the leases without environmental review under 77-1-121(2), did not violate Article II, section 3, or Article IX, section 1, 2, or 3, of the Montana Constitution. N. Plains Resource Council v. Mont. Bd. of Land Comm'rs, 2012 MT 234, 366 Mont. 399, 288 P.3d 169.

Public Recreation and Conservation Interests in Water Adjudication Proceedings—Department of Fish, Wildlife, and Parks Not Exclusive Representative: After the Water Court issued a temporary preliminary decree for the Big Hole River Basin, the objector filed timely objections to the claims of several claimants and requested a hearing. The Water Court granted summary judgment to the claimants on the basis that the objector lacked standing to file objections to the claims. The Supreme Court reversed. The Water Court erred in holding that under 85-2-223, only the Department of Fish, Wildlife, and Parks may represent public recreation and conservation interests in water rights adjudications. Section 85-2-223 does not prohibit other entities from filing objections. No statutory or regulatory restrictions exist regarding who may file an objection to a water rights claim contained in a temporary preliminary decree. Mont. Trout Unlimited v. Beaverhead Water Co., 2011 MT 151, 361 Mont. 77, 255 P.3d 179.

Water Rights Adjudication — Standing to Object to Preliminary Decree: After the Water Court issued a temporary preliminary decree for the Big Hole River Basin, the objector filed timely objections to the claims of several claimants and requested a hearing. The Water Court granted summary judgment to the claimants on the basis that the objector lacked standing to file objections to the claims. Although the objector had sufficiently alleged environmental and recreational interests of its members that were distinct from those of the general public, the Water Court concluded such interests were not sufficient to demonstrate standing because the objector lacked ownership of a water right. The Supreme Court reversed. The Water Court erroneously applied the "good cause" requirement contained in 85-2-233 to require an ownership interest in a water right. When a party has met all common-law and statutory requirements for standing and has shown that its interest in the use of water has been affected by the decree, that party is entitled to object to a preliminary decree under 85-2-233. Mont. Trout Unlimited v. Beaverhead Water Co., 2011 MT 151, 361 Mont. 77, 255 P.3d 179.

No Right of Hydroelectric Facility to Make Free Appropriation of Water on State-Owned Land: A hydroelectric facility does not have the right to make free appropriation of water on and within state-owned land without paying compensation to the state. PPL Mont., LLC v. St., 2010 MT 64, 355 Mont. 402, 229 P.3d 421, distinguishing Smith v. Deniff, 24 Mont. 20, 60 P 398 (1900), U.S. v. Conrad Invest. Co., 156 F 123 (D.C. Mont. 1907), and Mattson v. Mont. Power Co., 2009 MT 286, 352 Mont. 212, 215 P.3d 675. See also Prentice v. McKay, 38 Mont. 114, 98 P 1081 (1909).

Following the Montana Supreme Court's decision, PPL appealed to the United States Supreme Court. The United States Supreme Court reversed the Montana court's ruling, holding that the Montana court had not properly considered the rivers in question on a segment-by-segment basis and had not determined whether they were navigable in fact at the time of statehood. The United States Supreme Court remanded the case for proceedings consistent with its opinion. PPL Montana, LLC v. Montana, 565 US __, 132 S Ct 1215 (2012).

Water Use Changes — Interaction of State Regulatory Authority and Tribal Self-Government: There are two general and overlapping approaches to analyzing the interaction of state regulatory authority and tribal self-government. The first takes the perspective of the tribe and seeks to identify the scope of authority that the tribe possesses (see Mont. v. U.S., 450 US 544 (1981)), while the second takes the perspective of the state and seeks to prescribe the limits of the state's power (see White Mtn. Apache Tribe v. Bracker, 448 US 136 (1980)). In cases adjudicating water rights, the weight of the state's interest depends in large part on the extent to which waterways or aquifers transcend the exterior boundaries of Indian country. In the case at bar, the District Court enjoined the state from processing a change of use application for a state water right. The question on appeal was whether the state had sovereign authority to process a change of use

application concerning two appropriative water rights owned by non-Indians on the Flathead Reservation to allow a change from irrigation to recreation so that the owners could operate a waterski pond. Whether the change would adversely affect the tribe and whether assertion of regulatory authority by the state would have a direct effect on the tribes were legal conclusions. The Supreme Court concluded that the state's authority was not preempted by federal or tribal interests because neither the federal government nor the tribe asserted regulatory authority over the owner's water rights, so the state was not preempted from reviewing the change application. The Legislature acted within its constitutional prerogative in enacting 85-2-402, providing that no presumption is to work against a water right holder who seeks a change of use and providing that the state should be able to process change of use applications. The record was not clear whether the use change would adversely affect the tribe; however, the Supreme Court found no compelling reason to deprive the state water right holders of the opportunity to prove by a preponderance of the evidence that the proposed change in use, not amount, would not adversely affect the use of other water rights, including the tribe's reserved rights. Therefore, the injunction was removed, and the case was remanded to the District Court for a determination of whether the state had sovereign authority to conduct change of use proceedings and, if so, to allow the owners to attempt to prove that the proposed change in use would not adversely affect the use of other water rights, including the tribe's reserved rights. Confederated Salish & Kootenai Tribes v. Clinch, 2007 MT 63, 336 M 302, 158 P3d 377 (2007).

Exercise of Original Supreme Court Jurisdiction Based on Statewide Importance of Tribal Water Rights: The Confederated Salish and Kootenai Tribes petitioned the Supreme Court to exercise original jurisdiction in a case involving the use of ground water on the Flathead Indian Reservation. The Supreme Court found this to be an appropriate case in which to exercise original jurisdiction because: (1) the petition implicated constitutional water rights issues under this section; (2) tribal water rights are of statewide importance; (3) the decisive issue was purely legal or constitutional; and (4) the normal litigation process was inadequate. Confederated Salish & Kootenai Tribes v. Stults, 2002 MT 280, 312 M 420, 59 P3d 1093 (2002), following In re Application for Beneficial Water Use Permit, 278 M 50, 923 P2d 1073 (1996), and Confederated Salish & Kootenai Tribes v. Clinch, 1999 MT 342, 297 M 448, 992 P2d 244 (1999).

Issuance of Permits for Ground Water on Indian Reservations Precluded Until Tribes' Federally Reserved Water Rights Defined and Quantified: The Department of Natural Resources and Conservation (DNRC) granted a permit for the use of ground water on the Flathead Indian Reservation. Despite prior holdings in In re Application for Beneficial Water Use Permit, 278 M 50, 923 P2d 1073 (1996), and Confederated Salish & Kootenai Tribes v. Clinch, 1999 MT 342, 297 M 448, 992 P2d 244 (1999), that the state does not have jurisdiction to issue new use permits prior to formal adjudication of the tribes' reserved water rights, DNRC contended that this case was distinguishable because the tribes' federally reserved water right concerning ground water is legally uncertain. However, the only federal authority cited by either party, Tweedy v. Tex. Co., 286 F. Supp. 383 (D.C. Mont. 1968), supported the conclusion that there is no distinction between surface water and ground water for purposes of determining what water rights are reserved because those rights are necessary to the purpose of an Indian reservation. Further, neither of the prior state cases excluded ground water. The tribes contended that as a sovereign nation, they should not be required to defend their water rights in piecemeal fashion before a hostile forum and that pursuant to 85-2-311 and the prior case law, the ground water permit was illegal. The Supreme Court agreed with the tribes and vacated the permit, finding no reason to limit the scope of the prior holdings by excluding ground water from the tribes' federally reserved water rights in this case. Two statutory methods for comprehensively adjudicating Indian reserved water rights already exist—a general inter sese adjudication or negotiations with the Montana Reserved Water Rights Compact Commission. Therefore, the tribes should not be required to defend their water rights by participating in the DNRC hearings process. Thus, DNRC cannot determine whether water is available on the Flathead Reservation, whether surface water or ground water, because DNRC cannot determine whether the issuance of permits would affect existing water rights until the tribes' preeminent water rights are defined and quantified. Confederated Salish & Kootenai Tribes v. Stults, 2002 MT 280, 312 M 420, 59 P3d 1093 (2002).

Fish, Wildlife, and Recreational Purposes as Valid Basis for Appropriative Water Use — Diversion Not Requisite Element of Appropriation When Diversion Not Required — Bean Lake Overruled: The Water Court ruled that five pre-1973 water rights claims based on diversions for fish, wildlife, or recreation were potentially invalid based on the holding in In re Water Rights in Dearborn Drainage, 234 M 331, 766 P2d 228 (1988) , commonly known as the Bean Lake decision, because under Montana law before 1973, no appropriation right was recognized for fish, wildlife,

or recreation except through a Murphy right statute. The Department of Fish, Wildlife, and Parks appealed. The Supreme Court noted that the common-law elements of a valid appropriation are intent, notice, diversion, and application to a beneficial use and held that to the extent that the Bean Lake decision suggests that diversions for fish, wildlife, or recreation are not beneficial uses, that case is overruled. The court went on to address the Bean Lake rationale that claims for the nondiversionary use of water for fish, wildlife, or recreation are not recognized under the prior appropriation doctrine, noting that although most traditional uses necessitate a diversion for application to a beneficial use, the prior appropriation doctrine's history supports the holding that a diversion is not a requisite element of an appropriation when it is not a physical necessity for application to a beneficial use. Thus, instream and inlake appropriations for beneficial uses may be valid when the purpose does not require a diversion. Beneficial use rather than diversion is the touchstone of the prior appropriation doctrine. Montana has validated nondiversionary appropriations, so Montana law prior to 1973 cannot be said to absolutely require a diversion for a valid appropriation of water. The conclusion in the Bean Lake decision that the framers of the 1972 Montana Constitution did not accept fish, wildlife, or recreation uses as a valid basis for appropriative water rights is not reflected in the convention transcripts, which indicate that it was the fear of future limitations on fish, wildlife, and recreation rights, rather than a belief that those rights did not exist, that led to the deletion of proposed constitutional language specifically referencing those uses. Therefore, the Bean Lake conclusion that prior to 1973, Montana did not recognize appropriations for fish, wildlife, and recreation, whether diversionary or nondiversionary, was overruled. In re Adjudication of Existing Water Rights of Basin 41I, 2002 MT 216, 311 M 327, 55 P3d 396 (2002), distinguished in Mont. Trout Unlimited v. Beaverhead Water Co., 2011 MT 151, 361 Mont. 77, 255 P.3d 179.

Quantification of Tribal Water Rights Required — 1997 Amendment Unconstitutional: In an effort to avoid the result created by In re Application for Beneficial Water Use Permit, 278 M 50, 923 P2d 1073, 53 St. Rep. 777 (1996), the 1997 Legislature passed Senate Bill No. 97, which substantively eliminated the former protection of Indian reserved water rights provided by 82-5-311. The state conceded that the protection of existing water rights in this section includes water rights reserved for Indian reservations and contended that those rights were not affected by Senate Bill No. 97, but rather that those rights would be considered in that part of the analysis requiring that water be legally available. The state also pointed out the provisional nature of any water use permit and alleged that there were some uses that would not diminish instream flow and that use permits could thus be issued without affecting reserved Indian water rights, regardless of the quantification of those rights. However, under State ex rel. Greely v. Confederated Salish & Kootenai Tribes of the Flathead Reservation, 219 M 76, 712 P2d 754 (1985), it was found that Indian reserved water rights are owned by the Indians, and because that ownership interest exists under federal law and does not depend on the use of the water, the Supreme Court was not persuaded that the state's permitting process might allow uses of Indian reserved water that in the long term might not diminish instream flows. The provisional nature of permits was not determinative either because use of water that may have been reserved by federal law for the tribes was no less impermissible simply because it was temporary and subject to termination following final quantification of the tribes' rights by adjudication or negotiation. Under the 1997 amendments, permits are still limited to water that is "legally available", but that phrase is not defined. Construing the phrase in a manner that sustains its constitutional validity, the Supreme Court interpreted "legally available" to mean that there is water available that, among other things, has not been federally reserved for Indian tribes. Therefore, as in In re Application for Beneficial Water Use Permit, the state cannot determine whether water is legally available on the Flathead Reservation because it cannot determine whether the issuance of permits would affect existing water rights until the tribes' rights are quantified by a compact negotiation under 85-2-702 or by a general inter sese water rights adjudication. To allow the issuance of water use permits on the reservation prior to quantification of the tribes' pervasive reserved right would require use of water that might belong to the tribes, in violation of this section, which protects existing water rights whether adjudicated or not. Confederated Salish & Kootenai Tribes v. Clinch, 1999 MT 342, 297 M 448, 992 P2d 244, 56 St. Rep. 1356 (1999).

Question of Issuance of Water Use Permits on Reservation Appropriate for Exercise of Supreme Court Original Jurisdiction: The Confederated Salish and Kootenai Tribes petitioned the Supreme Court to accept original jurisdiction and enjoin the state from issuing water use permits on the Flathead Indian Reservation until such time as the tribes' water rights were quantified. The state contended that this was not an appropriate case for the exercise of original jurisdiction because a factual record was necessary in order to determine whether the tribes'

rights had been affected and that the appeal process was adequate for development of the factual and legal issues presented by the tribes' petition. The Supreme Court concluded that this was an appropriate case in which to exercise original jurisdiction and entertain the tribes' petition because: (1) the petition implicated this section; (2) tribal water rights are of statewide importance; (3) the decisive issue was purely legal or constitutional; and (4) the normal litigation process was inadequate because in the time that it might take for the case to proceed through the courts, any number of water use permits could be issued and water appropriated unlawfully pursuant to those permits. Confederated Salish & Kootenai Tribes v. Clinch, 1999 MT 342, 297 M 448, 992 P2d 244, 56 St. Rep. 1356 (1999). See also Grossman v. St., 209 M 427, 682 P2d 1319, 41 St. Rep. 804 (1984), and Stuart v. Dept. of Social and Rehabilitation Services, 247 M 433, 807 P2d 710, 48 St. Rep. 238 (1991).

Rebuttable Presumption of Abandonment Not Violative of Constitutional Recognition of Existing Water Rights: After hearing, the Water Court determined that three water rights held by appellants Pitsch had been abandoned because of nonuse over approximately 40 years. The Supreme Court held that the Water Court did not err in finding an abandonment based upon the holding in 79 Ranch, Inc. v. Pitsch, 204 M 426, 666 P2d 215 (1983). The rebuttable presumption of abandonment established in that case is constitutional. The Supreme Court has previously recognized that water rights existing at the time of adoption of the constitution have not been granted indefeasible status and are subject to the sovereign powers of the state. In re Adjudication of Musselshell River Rights, 255 M 43, 840 P2d 577, 49 St. Rep. 866 (1992).

No Duty for State to Warn of Hazards on Rivers: Drugge brought an action against the state on behalf of the estate of a relative who died in a boating accident. The Supreme Court upheld the dismissal of the suit, ruling that the constitutional vesting to the state of ownership of the waters within the state boundaries did not create a duty based on liability or other tort law for the state to warn of hazards on rivers. Drugge v. St., 254 M 292, 837 P2d 405, 49 St. Rep. 798 (1992).

Post-1973 Evidence Unpersuasive as to Adjudication of Existing Water Right: The purpose of statewide water rights adjudication is to adjudicate those rights as they existed on July 1, 1973, the effective date of the Montana Water Use Act. Therefore, the Water Court did not err in refusing to consider evidence pertaining to a water right claimant's actions taken after 1973 as showing a lack of intent to abandon the water right. In re Adjudication of Clark Fork River Drainage, 254 M 11, 833 P2d 1120, 49 St. Rep. 591 (1992).

Duty to File Water Rights — Due Process Satisfied: The objective of the Legislature in enacting 85-2-226was to meet the mandate of this section to establish a system of centralized records for the administration of water rights. Before water rights could be adjudicated statewide, it was essential that existing rights be firmly established. Section 85-2-226 provides a reasonable means of compelling comprehensive participation, extinguishing duplicative and exaggerated rights, and ridding local records of stale, unused water claims. The filing duty was not burdensome, unreasonable, or unrelated to the legitimate and proper legislative objective. Procedural due process considerations were sufficiently addressed through: (1) ample published and personal notice over a 4-year period; (2) an expanded opportunity to file a claim through an extension of the filing deadline; (3) an adequate opportunity for each claimant to show that he did not intend to abandon or forfeit water rights; and (4) an opportunity for all late claimants to request an evidentiary hearing with the Water Court to determine whether the deadline had in fact been missed. In re Adjudication of Existing Yellowstone River Water Rights, 253 M 167, 832 P2d 1210, 49 St. Rep. 413 (1992).

No Constitutional Protection for Pre-1973 Water Rights: Appellants who forfeited their water rights for failing to file a timely claim pursuant to 85-2-226 contended that subsection (1) of this section provided a guarantee of existing water rights and that while the Legislature may constitutionally affirm and protect existing water rights, those rights may not be statutorily forfeited or extinguished. The Supreme Court held that that subsection does not establish immunity from sovereign powers for pre-1973 water rights. Water rights, like other property rights, are protected against unreasonable state action but do not have indefeasible status. The Legislature may enact constitutionally sound regulations, including the requirement for property owners to take affirmative actions to maintain their water rights. In re Adjudication of Existing Yellowstone River Water Rights, 253 M 167, 832 P2d 1210, 49 St. Rep. 413 (1992).

Retroactivity and Validity of Change in Burden of Proof for Change of Water Appropriation: The fact that a water right existing at the time of adoption of the 1972 Montana Constitution is recognized by that constitution does not mean that if the owner of the right applies for a change in the right, the burden of proof must be placed on the objector. The objector had the burden in 1972, but the holder now has the burden under 85-2-402. The change in the burden of proof is not

an impermissible retroactive application of the statute to the detriment of vested rights acquired under the 1972 Montana Constitution. Statutes that modify the procedure for exercising a vested right or for carrying out a duty do not constitute retroactive legislation. In re Application for Change of Appropriation of Water Rights for Royston, 249 M 425, 816 P2d 1054, 48 St. Rep. 747 (1991).

State's Right to a Pre-1973 Appropriation Use Right to Bean Lake for Recreation, Fish, and Wildlife: As part of the statewide water rights adjudication process, the Department of Fish, Wildlife, and Parks filed a claim for a pre-1973 "use" water right appropriation for recreation, fishing, and wildlife purposes in the waters of Bean Lake. The Department had stocked the lake, maintained the fishery resource, made studies of lake surface levels and fish population, and enforced rules relating to motor boats, and the public had made general use of the lake. The Department had been involved with the lake since 1933 and in 1964 obtained a warranty deed to 16.33 acres abutting the lake. The Department's use of the lake was beneficial within the meaning of the appropriation doctrine, but the Water Court correctly denied the claim because of a lack of diversion, intent, and notice. It is clear that under Montana law before 1973, no appropriation right was recognized for recreation, fish, and wildlife purposes, except through a Murphy right statute. The prevailing legal theory was that some form of diversion or capture of water was necessary for an appropriation, though some forms of nondiversionary water rights were given appropriation status. Since the law recognized no appropriation, the Department and public could not have intended one and adverse appropriators could not have had notice of a claim. In re Water Rights in Dearborn Drainage, 234 M 331, 766 P2d 228, 45 St. Rep. 1948 (1988), overruled in In re Adjudication of Existing Water Rights of Basin 41I, 2002 MT 216, 311 M 327, 55 P3d 396 (2002). See also Mont. Trout Unlimited v. Beaverhead Water Co., 2011 MT 151, 361 Mont. 77, 255 P.3d 179 (distinguishing In re Adjudication of Existing Water Rights of Basin 41I, 2002 MT 216, 311 Mont. 327, 55 P.3d 396).

Expression of Water Rights in Volume Rather Than Flow Rate — Not Unconstitutional: Even though almost every irrigation water right prior to the 1973 water use law was expressed in flow rate, the requirement of 85-2-234(6)(b) that the final decree state the amount of water, rate, and volume included in the right is not unconstitutional under Article IX, sec. 3(1) of the Montana Constitution. The amount, rate, and volume are at all times subject to the requirement of beneficial use. McDonald v. St., 220 M 519, 722 P2d 598, 43 St. Rep. 576 (1986), rehearing denied, 220 M 519, 722 P2d 598, 43 St. Rep. 1397 (1986).

Supreme Court Original Jurisdiction Over Declaratory Action Concerning Statewide Water Adjudication: The Supreme Court had power to determine an action for declaratory judgment involving the constitutionality of the requirement in 85-2-234 that final water decrees state "the amount of water, rate, and volume, included in the right". The issue affects all rights in the statewide adjudication process. Determination of the issue by the Supreme Court: (1) will provide guidance to the water court; (2) is in the interests of judicial economy; and (3) would serve the public policy of the state by expediting the determination of existing water rights. McDonald v. St., 220 M 519, 722 P2d 598, 43 St. Rep. 576 (1986), rehearing denied, 220 M 519, 722 P2d 598, 43 St. Rep. 1397 (1986).

State Water Court — Jurisdiction to Adjudicate Indian Reserved Water Rights: In an original proceeding to determine jurisdiction of the Water Court over Indian tribes and water flowing through state reservations, the Supreme Court held that this article of the Montana Constitution does not bar state jurisdiction to adjudicate Indian reserved water rights. With the 1952 McCarran amendment, the U.S. Congress diminished the scope of absolute federal jurisdiction by allowing state courts concurrent jurisdiction to adjudicate federal water rights. In Colo. River Water Conserv. District v. U.S., 424 US 800 (1976), the U.S. Supreme Court held that the McCarran amendment applied to Indian water rights. The state legislature's enactment of the Water Use Act (Title 85, ch. 2) pursuant to Art. IX, sec. 3, Mont. Const., constitutes a valid and binding consent of the people of Montana to Congress' grant of state jurisdiction over Indian reserved water rights. State ex rel. Greely v. Confederated Salish & Kootenai Tribes, 219 M 76, 712 P2d 754, 42 St. Rep. 1856 (1985).

No Implied Severance of Water From School Trust Lands: Neither 77-6-115, nor the principles of the Water Use Act set forth in 85-2-101, nor the prior appropriation doctrine gives rise to an implied severance of water from land in the school trust land leases or estops the state from claiming title to the water rights on school trust land. Dept. of State Lands v. Pettibone, 216 M 361, 702 P2d 948, 42 St. Rep. 869 (1985).

Public Right to Use Beaverhead River for Recreational Purposes: Following the decision in Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984),

the Supreme Court held that: (1) the Beaverhead River is navigable for recreational purposes and the public has a right to use its bed and banks up to the ordinary high-water mark with limited right to portage across private property in order to bypass barriers in the water; (2) determination of navigability for title is not necessary; (3) the public does not have the right to trespass over private property in order to reach the state-owned waters; and (4) plaintiff's action did not constitute inverse condemnation because public use of waters, rather than title, was determined. Mont. Coalition for Stream Access, Inc. v. Hildreth, 211 M 29, 684 P2d 1088, 41 St. Rep. 1192 (1984).

Determination of Public's Right to Use Dearborn River — Standing of Coalition of Citizens: In action for determination of the public's right to use the Dearborn River, whether the Montana Coalition for Stream Access, Inc., had standing to bring suit was immaterial because the Department of State Lands (now Department of Natural Resources and Conservation) and the Department of Fish, Wildlife, and Parks were also plaintiffs. Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984).

Determining Public's Right to Use Dearborn River — Indispensable Parties: Stream access coalition, the Department of State Lands (now Department of Natural Resources and Conservation), and the Department of Fish, Wildlife, and Parks sued landowner along the Dearborn River, seeking a determination of the public's right to use the river. The District Court did not err for failure to dismiss the plaintiffs' claims for failure to join indispensable parties. When litigation seeks vindication of a public right, those who may be adversely affected by a decision do not thereby become indispensable parties. Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984).

Navigability for Title Purposes — Federal Test — Dearborn River Navigable: Federal law controlled the issue of whether the Dearborn River was, at the time Montana became a state, navigable for the purpose of determining title to its bed. Under federal law, rivers are navigable in law if they are navigable in fact, and they are navigable in fact if they were used or capable of being used, in their ordinary condition, as highways for commerce over which trade and travel were or could be conducted in the customary modes of trade and travel on the water at the time of the state's admission to the Union. Navigability in fact can be determined by using the log-floating test. That test was satisfied by evidence that in 1887, 2 years before Montana became a state, the Dearborn was used to float about 100,000 railroad ties and that in 1888 or 1889, one or two log drives a year were floated down the river, one of them containing 700,000 board feet. Title to the riverbed was thus in the federal government when Montana became a state in 1889 and was transferred to the State upon its admission to the Union. Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984).

Navigability for Title Purposes — Summary Judgment — Dearborn River: The District Court properly granted the coalition for stream access and two state departments summary judgment on the issue of navigability of the Dearborn River in 1889 for title purposes. The affidavits and depositions of plaintiffs' two competent historians were admissible because the historians were qualified experts who provided evidence of the history of the river, their affidavits and depositions disclosed circumstantial guarantees of trustworthiness, and the facts and data they relied on were of a type reasonably relied on by experts in their field; the facts and data did not themselves have to be admissible. The affidavits of defendant landowner's witnesses were worthless, were not admissible, and did not create any genuine issue of material fact concerning the navigability of the river at the time Montana became a state in 1889. Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984).

Public Recreational Use of Dearborn River — No Inverse Condemnation: Landowner along Dearborn River was sued by parties seeking a determination of the public's right to use the river for recreational uses. Landowner counterclaimed for inverse condemnation, basing the counterclaim on his claim to ownership of the riverbed. The Supreme Court held that the question of title to the bed was irrelevant to determining navigability for use by the public; that landowner had no claim to the waters; that since there was no claim to the waters, nothing was taken and thus there was no ground for an inverse condemnation claim; and that, consequently, the District Court did not err in dismissing the counterclaim. Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984).

Public Recreational Use Rights on Dearborn River — Limits: Navigability for public use is governed by state law and is separate from the question of navigability under federal law for title purposes. The question is whether waters owned by the State under Art. IX, sec. 3(3), Mont. Const., are susceptible to recreational use by the public. The capability of use of the waters for recreational purposes determines the availability of the waters for recreational use by the public.

Whether or not a private party owns the bed beneath the waters is irrelevant. The constitution and the Public Trust Doctrine bar a private party from interfering with the public's right to use of the surface of the waters owned by the State, and any surface waters that are capable of recreational use may be so used by the public without regard to streambed ownership or navigability for nonrecreational purposes. The public's recreational use right extends to the point of the high-water marks. The public does not have the right to cross over private property to reach waters upon which they have a recreational use right, though they may portage around barriers in the water in the least intrusive way possible, avoiding damage to any private property holder's rights. Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984).

Title to and Public Recreation on Dearborn River — Ex Post Facto, Contract Clause, and Irrevocable Privileged Considerations: The Supreme Court held that the State, not the landowner along the Dearborn River, held title to the bed of the river under the federal test of navigability (at the time Montana became a state) for purposes of determining title to the riverbed. The court also held that landowner had no right to exclude the public from recreational use of the waters of the Dearborn. Because of these holdings, landowner's questions relating to ex post facto laws, violation of the contract clause of the constitution, and irrevocable rights and privileges were not germane to the case. Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984).

Title to and Public Use of Dearborn River — Federal Commerce Clause Navigability Immaterial: In action for determination of the public's right to use the Dearborn River, whether Montana has adopted the log-floating test of commercial navigability and whether the Dearborn is navigable under the federal commercial use test were immaterial because the question was one of recreational use or navigability, not commercial navigability. Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984).

Title to and Public Use of Dearborn River — Subject Matter Jurisdiction Found: Landowner along the Dearborn River claimed the District Court lacked subject matter jurisdiction over action for determination of the public's right to use the river, basing his claim on the presumption that he held title to the riverbed and that the State had no power to strip him of that title under the guise of determining navigability of the waters over the riverbed. The claim lacked merit because the State holds title to the riverbed and the water flowing over it, so that there was no question of the District Court's subject matter jurisdiction. Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984).

Forty Years of Nonuse as Raising Rebuttable Presumption of Intent to Abandon: Where the plaintiff and defendant became involved in litigation to establish their respective priorities to water appropriated from Big Coulee Creek and the evidence showed that neither had used previously appropriated water for a period of at least 40 years, the District Court did not err in holding that under section 89-802, R.C.M. 1947 (now repealed), the appropriation rights of both parties had been abandoned for lack of use of the water. While abandonment of a water right is a question of fact, nonuse for a period of at least 40 years raises, in effect, a rebuttable presumption of abandonment. Failure to use the water was not excused and the presumption not rebutted by a claim that the predecessors of the parties could not afford to use the water by irrigating their land, as economics could excuse nearly every otherwise abandoned water right. 79 Ranch, Inc. v. Pitsch, 204 M 426, 666 P2d 215, 40 St. Rep. 981 (1983), followed in In re Adjudication of Clark Fork River Drainage, 254 M 11, 833 P2d 1120, 49 St. Rep. 591 (1992), in which nonuse for 23-plus years was sufficient to constitute a presumption of abandonment despite the fact that the water right was carried as an asset on the county's books during the period of nonuse. See also Heavirland v. St., 2013 MT 313, 372 Mont. 300, 311 P.3d 813, in which the Supreme Court concluded that the 79 Ranch abandonment analysis applies retroactively.

Statute Requiring State Approval of Sale or Severance of Water Right — Rights Perfected Prior to Statute: Section 85-2-403, pertaining to surface and groundwater, provides that prior approval of the Department of Natural Resources and Conservation must be obtained before an appropriator may sell or sever an appropriation right. Application of that section to water rights perfected prior to its effective date does not violate this section of the Montana Constitution. The law has not changed, and the Department has simply been given a review function to determine an issue that could previously be determined only by a District Court. Castillo v. Kunnemann, 197 M 90, 642 P2d 1019, 39 St. Rep. 460 (1982), modifying on rehearing Castillo v. Kunnemann, 38 St. Rep. 1618 (1981) (apparently not reported in Montana Reports or Pacific 2d Reporter).

Use of Water — Public Use — Eminent Domain: Title 69, ch. 4, part 4, allows a landowner to cause a utility to relocate an overhead utility line for the purpose of installing an improved

irrigation system. The use of water in the irrigation of farmland is a public use for which the right of eminent domain will lie. McTaggart v. Mont. Power Co., 184 M 329, 602 P2d 992 (1979).

Preservation of Existing Rights — Effect of 1972 Constitution: Plaintiff who had filed petition for appropriation before repeal of the former water law had an existing right in the priority of his application, which was preserved by subsection (1) of this section and by section 6(2) of the Transition Schedule of the 1972 Constitution. Gen. Agriculture Corp. v. Moore, 166 M 510, 534 P2d 859 (1975).

Self-Executing Provisions: All of this section, except subsection (4), is self-executing, and plaintiff was permitted to proceed with an action to adjudicate rights to appropriate surplus waters from an adjudicated stream which had been commenced prior to the repeal of statutory provisions providing for such an action. Gen. Agriculture Corp. v. Moore, 166 M 510, 534 P2d 859 (1975).

DECISIONS UNDER 1889 CONSTITUTION

Protection of Rights: Mandamus to compel fish pond licensee, in compliance with later statute, to construct fish ladder on diversion dam installed 7 years before with approval of Commission was denied on theory that individuals who have put water to beneficial use should not have their rights arbitrarily diluted under claim of sovereign right. Paradise Rainbow v. Fish & Game Comm'n, 148 M 412, 421 P2d 717 (1966).

Rights-of-Way of Necessity: For example of implied reservations or implied grants of easement by necessity see: Thisted v. Country Club Tower Corp., 146 M 87, 405 P2d 432 (1965), which overruled Simonson v. McDonald, 131 M 494, 311 P2d 982 (1957); Violet v. Martin, 62 M 335, 205 P 221 (1922); and Herrin v. Sieben, 46 M 226, 127 P 323 (1912).

Public Use — Ranch Irrigation: Impounding of water for the irrigation of a ranch was a public use and a lawful undertaking. Farmers Union Oil Co. v. Anderson, 129 M 580, 291 P2d 604 (1955); Richland County v. Anderson, 129 M 559, 291 P2d 267 (1955).

Impounding of Water a Lawful Business: Article III, sec. 15, 1889 Mont. Const., provided that the appropriation and use of waters, as well as the sites for reservoirs necessary for collecting and storing the same, shall be held to be a public use. The impounding of water in a reservoir for the purpose of irrigation, etc., was held to be a lawful business. Fed. Land Bank v. Morris, 112 M 445, 116 P2d 1007 (1941).

Sale or Rental: An appropriation of water may be made for purposes of sale or rental. Sherlock v. Greaves, 106 M 206, 76 P2d 87 (1938).

Prior Right Not to Be Impaired: Under Art. III, sec. 15, 1889 Mont. Const., the use of water in streams is a public use, and every citizen is entitled to divert and use it so long as he does not infringe upon the rights of others who have acquired a prior right by appropriation. State ex rel. Reeder v. District Court, 100 M 376, 47 P2d 653 (1935).

Legislative Power: While the effect of the provisions of Art. III, sec. 15, 1889 Mont. Const., was to foreclose inquiry into the subject by Legislature and the judiciary, the questions whether the power of eminent domain is put in motion for any particular purpose and whether the exigencies of the occasion and the public welfare require its exercise rest entirely with the Legislature. St. v. Aitchison, 96 M 335, 30 P2d 805 (1934).

Construction: Article III, sec. 15, 1889 Mont. Const., declaring that the use of sites for reservoirs necessary for collecting and storing water shall be a public one, should receive a broad construction to the end that floodwaters which would otherwise go to waste may be conserved for the purpose of making arid lands productive. Donich v. Johnson, 77 M 229, 250 P 963 (1926).

Beneficial Use Required — When Right Ceases: The use of water flowing in streams is a public use. The use must be beneficial, and when the appropriator or his successor ceases to use the water for such purpose, the right ceases. Conrow v. Huffine, 48 M 437, 138 P 1094 (1914).

Appropriator Need Not Own Land: The appropriator of water need not be an owner of or a person in the possession of land in order to make a valid appropriation for irrigation purposes. The use of water is a public use, and a public service corporation can appropriate water independently of present or future customers. Otherwise, the improvement of arid lands in localities when the undertaking by individuals would be too difficult would never take place. Bailey v. Tintinger, 45 M 154, 122 P 575 (1912).

Use of Appropriated Water Made a Public Use: A person may divert stream waters if he does not infringe upon the rights of others and if he restores the water to the stream after the cessation of the necessity. Featherman v. Hennessy, 42 M 535, 113 P 751 (1911); Bullerdick v. Hermsmeyer, 32 M 541, 81 P 334 (1905).

Acquisition of Prior Right by Eminent Domain: A beneficial use of the water flowing in the streams of the state is a public use, but it may nevertheless be appropriated to a more necessary public use, an example of which is the right of a city to acquire a water supply by the exercise of the right of eminent domain, even though it may have already been appropriated to some other public use. Carlson v. Helena, 39 M 82, 102 P 39 (1909).

Right to Appropriate May Be Acquired by Condemnation: Since the use of water is declared by the Constitution to be a public use, the right to appropriate water on the land of another may be acquired by condemnation proceedings. Prentice v. McKay, 38 M 114, 98 P 1081 (1909).

Section Self-Executing: The language of Art. III, sec. 15, 1889 Mont. Const., in the light of our history and natural conditions, in a region where the conservation and use of its waters are all-important to its development and progress, was a mandate from the sovereign people to the courts. The words "sale" and "rental" are especially significant. Article III, sec. 15, 1889 Mont. Const., was self-executing and should receive a broad construction. Spratt v. Helena Power Transmission Co., 37 M 60, 94 P 631 (1908).

Public Use — Flooding Land for Dam: The taking of land for the purpose of flooding it, rendered necessary by the construction of a dam for generating electric power to be sold to industrial enterprises and the general public and utilized for pumping water upon arid lands, is for such a public use as will support the right to acquire the land by condemnation. Helena Power Transmission Co. v. Spratt, 35 M 108, 88 P 773 (1907).

Public Use — Farm Irrigation: The use of water to irrigate a farm under the water-right law is a public use. Helena v. Rogan, 26 M 452, 68 P 798 (1902).

Restoration After Cessation: Under Art. III, sec. 15, 1889 Mont. Const., the use of appropriated water was made a public use. Smith v. Denniff, 24 M 20, 60 P 398 (1900), distinguished in Dept. of State Lands v. Pettibone, 216 M 361, 702 P2d 948, 42 St. Rep. 869 (1985).

Limitation on Right to Appropriate: While any person is permitted to appropriate water for useful purpose, it must be used with some regard for the rights of the public. Fitzpatrick v. Montgomery, 20 M 181, 50 P 416 (1897). See Schodde v. Twin Falls Water Co., 224 US 107, 56 L Ed 686, 32 S Ct 470 (1912).

"Other Beneficial Use" Defined: The phrase "other beneficial use" includes other uses than such as are kindred to rental, sale, or distribution. It includes in the term "public use" the use of water for the purpose of irrigating a particular tract of agricultural land or working a particular mine, as well as the use of water for irrigating a number of tracts of land or working a number of mines owned by different persons. Ellinghouse v. Taylor, 19 M 462, 48 P 757 (1897). See E. Oreg. Land Co. v. Willow River Land & Irrigation Co., 204 F 516 (9th Cir. 1913).

Attorney General's Opinions

Access to Rivers and Streams Via County Road Right-of-Way and Bridges: Given that the public has the right to use public highways in any manner and for any purpose consistent with or reasonably incidental to public travel, this right includes the use of public rights-of-way created by county roads to gain access to rivers and streams. Using a county road right-of-way as an access point to a river or stream right-of-way is consistent with and reasonably incidental to the public's right to travel on county roads. Further, a bridge and its abutments, as part of a public highway, offer the same access to rivers and streams for recreational use as the highway to which they are attached. However, the public's right of access is not unlimited and is subject to the following limitations: (1) the recreating public must stay within the county road and bridge right-of-way, which is assumed to be 60 feet unless otherwise stated by petition or dedication; (2) access may be limited by the reasonable exercise of a governing body's police power to control the use of roads for purposes such as safety and parking; and (3) use of a public highway may be limited by the manner in which it was created, such as a road created by prescriptive easement, which is limited both in size and usage to the original use during the prescriptive period and may include access for hunting, fishing, and recreation. 48 A.G. Op. 13 (2000).

Law Review Articles

Public Water, Private Rights: All are Not Equally Protected When the State Allows Some to Divert Small Quantities of Ground Water Outside the Permitting System, Sime, 75 Mont. L. Rev. 237 (2014).

Montana Groundwater Law in the Twenty-First Century, Carter, 70 Mont. L. Rev. 221 (2009).

A Non-Indian Entity Is Polluting Indian Waters: "Water" Your Rights to the Waters, and "Water" Ya Gonna Do About It?, Hanlon, 69 Mont. L. Rev. 173 (2008).

Indian Aboriginal and Reserved Water Rights, an Opportunity Lost, Carter, 64 Mont. L. Rev. 377 (2003).

The Prior Appropriation Doctrine in Montana: Rooted in Mid-Nineteenth Century Goals—Responding to Twenty-First Century Needs, MacIntyre, 55 Mont. L. Rev. 303 (1994).

Privatization of the Water Resource: Salvage, Leases and Changes, Stone, 54 Mont. L. Rev. 99 (1993).

Public Use of the Banks and Beds of Montana Streams, Stone, 52 Mont. L. Rev. 107 (1991).

The Adjudication of Montana's Waters—A Blueprint for Improving the Judicial Structure, MacIntyre, 49 Mont. L. Rev. 211 (1988).

A New Rule of Law for the Abandonment of Water Rights, Hightower, 45 Mont. L. Rev. 167 (1984).

Federal and Interstate Conflicts in Montana Water Law: Support for a State Water Plan, Ladd, 42 Mont. L. Rev. 267 (1981).

Adjudication of Indian Water Rights: Implementation of the 1979 Amendments to the Water Use Act, Lamb, 41 Mont. L. Rev. 73 (1980).

Comments on Indian Water Rights, Morrison, 41 Mont. L. Rev. 39 (1980).

Once Released Irrigation Waters: Liability and Litigation, Meshorer, 36 Mont. L. Rev. 14 (1975).

Montana Water Rights—A New Opportunity, Stone, 34 Mont. L. Rev. 57 (1973).

Water Pollution Control Under the Refuse Act of 1899, Leaphart, 32 Mont. L. Rev. 120 (1971).

Water—A Problem in Montana, Harper, 32 Mont. L. Rev. 81 (1971).

Legal Background on Recreational Use of Montana Waters, Stone, 32 Mont. L. Rev. 1 (1971).

The Long Count on Dempsey: No Final Decision in Water Right Adjudication, Stone, 31 Mont. L. Rev. 1 (1969).

Problems Arising Out of Montana's Law of Water Rights, Stone, 27 Mont. L. Rev. 1 (1965).

Ground Water Legislation in the Light of Experience in the Western States, Clark, 22 Mont. L. Rev. 42 (1960).

Western Water Rights: May They Be Taken Without Compensation?, Hyatt, 13 Mont. L. Rev. 102 (1952).

Water Rights Under the Law of Montana, Heman, 10 Mont. L. Rev. 13 (1949).

The Remarkable Odyssey of Stream Access in Montana, Lane, 36 Pub. Land L. Rev. 69 (2015).

The Shadow of the Mono Lake Decision in Montana, Summerville, 6 Pub. Land L. Rev. 203 (1985).

Taming the Rapids: Negotiation of Federal Reserved Water Rights in Montana, Miller, 6 Pub. Land L. Rev. 167 (1985).

Forging Public Rights in Montana's Waters, Thorson, Brown, & Desmond, 6 Pub. Land L. Rev. 1 (1985).

Namen II: Do the Tribes Have the Authority to Regulate Non-Indian Riparian Rights on Flathead Lake?, Flies, 4 Pub. Land L. Rev. 170 (1983).

Northern Cheyenne Tribe v. Adsit, Vogel, 4 Pub. Land L. Rev. 157 (1983).

The Future of State Regulation of Interstate Water Export After Sporhase v. Nebraska, Bronson, 4 Pub. Land L. Rev. 89 (1983).

Coal Slurry: All Quiet on the Western Front?, Bronson, 3 Pub. Land L. Rev. 156 (1982).

Recreational Use of Montana's Waterways: An Analysis of Public Rights, Frantz, 3 Pub. Land L. Rev. 133 (1982).

The Use of Public Land and Water Resources — Agrarianism, Huffman, 2 Pub. Land L. Rev. 75 (1981).

In the Aftermath of the Bighorn River Decision: Montana Has Title, Indian Law Doctrines Are Clouded, and Trust Questions Remain, Arnott, 2 Pub. Land L. Rev. 1 (1981).

Namen: Riparian Rights on Flathead Lake, Sande, 1 Pub. Land L. Rev. 103 (1980).

Impliedly Reserved Federal Water Rights: A Status Report, Stone, 1 Pub. Land L. Rev. 39 (1980).

Collateral References

Determination of Existing Water Rights, Interim Report, Montana Legislative Council (1977-78).

Section 4. Cultural resources.

Convention Notes

New provision. Self-explanatory.

Collateral References

Montana's Historical and Cultural Resources, Interim Report, Montana Legislative Council (1977-78).

Section 5. Severance tax on coal — trust fund.

Compiler's Comments

New Section: New section proposed by Ch. 499, L. 1975, adopted at the general election of November 2, 1976, effective July 1, 1977.

Case Notes

1999 Coal Producer's License Tax Violative of Constitutional Coal Severance Tax Provisions: By simple majority vote, the 1999 Legislature passed House Bill No. 260, which created a license tax on the production of coal and allocated revenue from the tax to various state programs. Several legislators challenged the validity of the new tax, contending that by creating a license tax on the same taxable event for which the state coal severance tax is imposed and then providing a credit against the severance tax in an amount slightly greater than the amount of the license tax, the Legislature simply diverted what in substance and character are coal severance taxes to purposes other than the coal tax trust fund, in violation of this section. The Supreme Court agreed, noting that the only difference between the coal severance tax and the coal producer's license tax was the purpose for which each was allocated. A tax on the production of natural resources is characterized by the nature of the activity upon which the tax is imposed, and the effect of a legislative assessment is more important than its label in determining the character of the tax. Legislative imposition of a tax can become unlawful when done to accomplish an unlawful end, which was the case in this instance because the coal producer's license tax diverted production-based coal severance taxes for an unconstitutional purpose. Although the Legislature has the authority to determine the percentage of the coal severance tax, in this case, the Legislature simply gave a different name to the same tax and thereby diverted revenue to causes other than the coal tax trust fund. A coal severance tax by any other name is just as dedicated. By diverting and allocating coal severance tax revenue in a manner contrary to the requirement in this section and by doing so without the required three-fourths vote of each house of the Legislature, House Bill No. 260 violated the constitution; thus, the state was enjoined from enforcing House Bill No. 260. Montanans for the Coal Trust v. St., 2000 MT 13, 298 M 69, 996 P2d 856, 57 St. Rep. 73 (2000). See also Oliver Iron Co. v. Lord, 262 US 172, 67 L Ed 929, 43 S Ct 526 (1923), Gomillion v. Lightfoot, 364 US 339, 5 L Ed 2d 110, 81 S Ct 125 (1960), and Dept. of Revenue v. Kurth Ranch, 511 US 767, 128 L Ed 2d 767, 114 S Ct 1937 (1994).

Tax Inapplicable to Tribally Owned Coal: State taxation of coal owned by the Crow Tribe is an invalid interference with tribal autonomy and economic development even though the incidence of the tax falls on the non-Indian mineral developer. Crow Tribe of Indians v. St., 469 F. Supp. 154 (D.C. Mont 1979), reversed, 650 F2d 1104 (9th Cir. 1981), amended order rehearing denied, 665 F2d 1390 (9th Cir. 1982), certiorari denied, 103 S Ct 230 (1982); 657 F Supp. 573 (D.C. Mont. 1985), reversed, 819 F2d 895 (9th Cir. 1987), certiorari denied, 459 US 916 (1987).

Amount of Funding Indefinite — Certainty Upon Sale of Bonds: Plaintiff filed a complaint for declaratory judgment in the Supreme Court seeking to determine the validity of several acts of the Legislature allowing the issuance of state revenue bonds. The plaintiff contended that H.B. 846, L. 1981, whereby the Legislature authorized issuance of up to $10 million in coal severance tax bonds for the state's share of construction costs of Tongue River Dam rehabilitation, violated Art. VIII, sec. 14, and Art. IX, sec. 5, Mont. Const., in that the amount of money necessary to finance the project was not definite or certain. The court found that at the time of the bill's passage, it was impossible for the Legislature to determine the exact cost. The authorization is contingent on legislative approval of a detailed project plan. Sections 17-5-709 and 17-5-710 place limits on the bonds that may be issued. The court found that no legislative assembly can be expected to predict the interest rate which will meet the market for the issuance of state bonds. The court found that when the bonds are issued and sold, the interest rate to be paid by the state will become certain. The amounts necessary to service and repay the indebtedness will be definite. The court relied on State ex rel. Toomey v. St. Bd. of Examiners, 74 M 1, 238 P 316 (1925), which held "that is certain which can be made certain" to uphold the authorization for the project. Grossman v. St., 209 M 427, 682 P2d 1319, 41 St. Rep. 804 (1984).

Bonded Debt — Not Invalid as Continuing Appropriation: Plaintiff filed a complaint for declaratory judgment in the Supreme Court seeking to determine the validity of several acts of the Legislature allowing the issuance of state revenue bonds. The bonds would be financed by coal severance taxes to provide proceeds for development of state water resources. Plaintiff contended that this was an invalid "continuing appropriation". Plaintiff contended that the 48th Legislature by enacting the program could not constitutionally bind future Legislatures to "appropriate" the coal tax money necessary to service the bonds; that the principal of the coal severance tax trust funds had been invaded for years; and that each bond issue requires a separate appropriation

of coal severance tax revenues by a three-fourths vote of each house of the Legislature. The Supreme Court harmonized the various constitutional provisions involved. The court held that the Legislature can authorize long-term borrowing by issuing and selling bonds and can provide for the servicing for such indebtedness by repayment or refunding. The court found nothing making the coal severance tax trust fund immune from use as a source of funding for long-term state bonds. When the Legislature validly acts to establish a debt, that indebtedness becomes a state obligation extending over the life of the indebtedness, and every succeeding legislative assembly has an unavoidable duty to provide for it in the manner required by the authorizing law. Grossman v. St., 209 M 427, 682 P2d 1319, 41 St. Rep. 804 (1984).

Coal Severance Tax — Nondiscriminatory — Not Burden on Commerce: Montana coal producers and out-of-state utility customers brought suit challenging the constitutionality of Montana's severance tax on coal mined in the State. The U.S. Supreme Court held that Montana may constitutionally raise general revenue by imposing a severance tax on coal mined in the State. The entire value of the coal before transportation originates in the State, and mining the coal depletes the resource base and wealth of the State, thereby diminishing a future source of taxes and economic activity. The severance tax was found not to discriminate against interstate commerce under the four-part test set forth in Complete Auto Transit v. Brady, 430 US 274 (1977). The court held when, as here, a general revenue tax does not discriminate against interstate commerce and is apportioned to activities occurring within the State, the State is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the State has exerted its power in relation to opportunities which it has given, to protection which it has afforded, and to benefits which it has conferred by fact of being an orderly civilized society. Commonwealth Edison Co. v. Mont., 453 US 609, 69 L Ed 2d 884, 101 S Ct 2946 (1981).

Attorney General's Opinions

Three-Fourths Vote Required to Appropriate Severance Tax Trust Fund Income: Income deposited in the coal severance tax permanent fund under 17-5-704 becomes part of the principal of the trust. As such, the Legislature may not appropriate by a simple majority the income and interest earned on the trust fund since July 1, 1983; rather, a three-fourths vote of each house is required. 42 A.G. Op. 110 (1988).

Collateral References

Report of the Coal Tax Oversight Committee, Interim Report, Montana Legislative Council (1977-78).

Section 7. Preservation of harvest heritage.

Compiler's Comments

Compiler's Comments: This section was enacted as sec. 6 by sec. 1, Const. Amend. No. 41. The code commissioner has designated the section as sec. 7 because sec. 1 of Const. Amend. No. 40, approved at the same election, enacted a new sec. 6.

Effective Date: Section 2, Const. Amend. No. 41, provided that this section is effective upon approval by the electorate. Approved November 2, 2004.

Law Review Articles

A Solution in Search of a Problem: The Difficulty with State Constitutional "Right to Hunt" Amendments, Gordon, 35 Pub. Land & Resources L. Rev. 3 (2014).

ARTICLE X

EDUCATION AND PUBLIC LANDS

Article Compiler's Comments

Former Constitutional Provision: This article is similar to Art. XI and Art. XVII, 1889 Mont. Const.

Article Law Review Articles

The Legal Status of the Montana University System Under the New Montana Constitution, Schaefer, 35 Mont. L. Rev. 189 (1974).

Constitutional Control of the Montana University System: A Proposed Revision, Waldoch, 33 Mont. L. Rev. 76 (1972).

Article Collateral References

School Equalization Aid, Interim Report No. 49, Montana Legislative Council (1971-72).

Section 1. Educational goals and duties.

Convention Notes

Revises 1889 Constitution. Expresses the goal of the State to educate all of its citizens regardless of their ages. Creates a right to equal educational opportunity and specifically recognizes unique heritage of Indians.

Compiler's Comments

Former Constitutional Provision: This section revises Art. XI, sec. 1, 6, and 7, 1889 Mont. Const.

Case Notes

DECISIONS UNDER 1972 CONSTITUTION

Complaint of School Use of Indian Mascots — Montana Commission for Human Rights Proper Forum for Claim of Unlawful Discrimination: Dupuis brought a discrimination claim against a reservation school district for using mascots allegedly degrading to Indian students. Without ruling on whether the use of the mascots was degrading, the Supreme Court held that Dupuis's remedy for a human dignity and racial discrimination case was to bring a claim before the Montana Commission for Human Rights before bringing an action in District Court. Failure to exhaust administrative remedies precluded the Supreme Court's consideration of the discrimination claims. Dupuis v. Ronan School District No. 30, 2006 MT 3, 330 M 232, 128 P3d 1010 (2006).

Challenge to State Education Funding Considered Justiciable Question: The District Court held that the state system of funding public education was unconstitutional. On appeal, the state contended that the issue was nonjusticiable under the political question doctrine in Baker v. Carr, 369 US 186 (1962). The Supreme Court recognized that nonself-executing constitutional clauses addressed to the Legislature are nonjusticiable political questions. Because this section constitutes a directive to the Legislature, that section initially presents a nonself-executing, nonjusticiable political question. However, once the Legislature executes a provision that implicates individual constitutional rights, under City of Boerne v. Flores, 521 US 507 (1997), courts can determine whether the enactment fulfilled the Legislature's constitutional responsibility. Here, once the Legislature addressed the threshold political issue by creating a basic system of free public schools, the Supreme Court found it not only justiciable but incumbent upon the court to ensure that the education system met the constitutional guarantee of the individual right to a quality education. Columbia Falls Elementary School District No. 6 v. St., 2005 MT 69, 326 M 304, 109 P3d 257 (2005).

Failure of Legislature to Define Quality Education — Inability of Court to Determine That Education System Adequately Funded: The District Court held that the state system of funding public education was unconstitutional under subsection (3) of this section but did not violate the equal protection clause in Art. II, sec. 4, Mont. Const. On appeal, the Supreme Court held that because the Legislature has not defined what "quality" means, it was not possible to conclude that the current funding system was designed to provide a quality education. Although deferring to the Legislature to provide a definition of a quality education, given the unchallenged findings of the District Court regarding subsection (3) of this section, the Supreme Court nevertheless concluded that whatever definition the Legislature devises, the current system was not sufficiently grounded in principles of quality to be considered constitutional. Because the unconstitutionality of the present funding system was affirmed, the Supreme Court held that the District Court need not have addressed the equal protection issue, so the District Court was directed to vacate its conclusion that the present system did not violate equal protection. Columbia Falls Elementary School District No. 6 v. St., 2005 MT 69, 326 M 304, 109 P3d 257 (2005). In Stroebe v. St., 2006 MT 19, 331 M 23, 127 P3d 1051 (2006), plaintiffs also challenged the constitutionality of Montana's system of funding public schools. The District Court granted the state's motion for summary dismissal on grounds that the equitable funding challenge was not currently justiciable. On appeal, the Supreme Court noted that plaintiffs' issues had been previously addressed in Columbia Falls, id., and that the circumstances under which plaintiffs brought the present case had sufficiently changed under Columbia Falls, so that rendering another decision while the funding system was undergoing legislative reform would not only interfere with the Columbia Falls decision but would decide a question that was essentially moot. The equitable funding challenge was therefore not currently justiciable, and the appeal was dismissed.

Failure to Follow Procedural Requirements of Individuals With Disabilities Education Act Held Not to Deny Free Appropriate Public Education — Independent Cause of Action for Misdiagnosis and Misplacement Dismissed as Barred by Res Judicata: Brian Parini was diagnosed with a learning disability and was placed in special education pursuant to the requirements of the Individuals With Disabilities Education Act (IDEA), 20 U.S.C. 1400, et seq. Subsequently, Brian's mother filed a petition with the Office of Public Instruction (OPI), alleging that Brian's condition had not been subjected to a 3-year reevaluation as required by IDEA and that Brian was therefore denied his right under IDEA to a free appropriate public education (FAPE). OPI found that while IDEA may not have been complied with as to certain procedural requirements, Brian was not denied a FAPE. Brian then filed a complaint with the District Court in which he alleged that OPI had erred and also asserted an independent cause of action for damages, claiming that school employees had negligently misdiagnosed and misplaced him, denying him a FAPE. Relying extensively upon federal case law interpreting and applying IDEA, the Supreme Court held that the absence of a reevaluation did not deny Brian an educational opportunity because there was no causal linkage between the absence of the reevaluation and the educational opportunity afforded to Brian. The Supreme Court also concluded, in reliance upon its opinion in B.M. v. St., 200 M 58, 649 P2d 425 (1982), and this section, that Brian was entitled to bring an independent tort action for negligent misdiagnosis and misplacement. However, the Supreme Court held that because a nearly identical claim had been brought before OPI and the District Court and decided against Brian, his independent tort action was barred by the doctrine of res judicata. Parini v. Missoula County High School District No. 1, 284 M 14, 944 P2d 199, 54 St. Rep. 711 (1997).

Private School Student Not Entitled to Participate in Public School Extracurricular Events: The Kapteins sought an order requiring the Conrad School District to allow their daughter, a private school student, to play on the public school basketball team. The Supreme Court stated that participation in extracurricular activities is not a fundamental right but is subject to constitutional protection and would be subject to a middle-tier analysis of the rights infringed versus the governmental interest served by the infringement. The Supreme Court held that in the present case, it was unable to conclude that a private student's interest in participating in extracurricular activities was more important than the school district's policy decision that, in order to effectively integrate academics and extracurricular activities, the district needed to restrict participation to those students enrolled in the public school system. Kaptein v. Conrad School District, 281 M 152, 931 P2d 1311, 54 St. Rep. 106 (1997).

High School Association Enforcement of Sports Eligibility Rules — Learning Disabled Student Lacking Individualized Education Program — Injunction Improper: The Montana High School Association (MHSA) ruled that J.M., an alleged learning disabled student, was ineligible for participation in interscholastic sports activities during his senior year because he had already participated in four seasons of sports. The District Court, relying on T.H. v. Mont. High School Ass'n, CV-92-150-BLG-JFB (D.C. Mont. Sept. 24, 1992), enjoined MHSA from enforcing the four-season rule because J.M. had a federally protected right under the federal Individuals With Disabilities Education Act (IDEA), 20 U.S.C. 1400, et seq. On appeal, the Supreme Court found that it was improper to elevate J.M.'s privilege of participation in interscholastic sports to the level of a federally protected right under IDEA and to afford him individualized inquiry when J.M. had not followed the statutorily and administratively mandated mechanism for identification and qualification under IDEA and for developing a formal, written individualized education program. Because MHSA was not a state or local education agency, as defined in IDEA, MHSA had no obligation to identify or evaluate J.M.'s special education needs. The District Court's reliance on T.H. was in error, and the injunction was inappropriate absent evidence that J.M. was actually qualified for IDEA benefits. J.M. v. Mont. High School Ass'n, 265 M 230, 875 P2d 1026, 51 St. Rep. 401 (1994), followed in M.H. v. Mont. High School Ass'n, 280 M 123, 929 P2d 239, 53 St. Rep. 1328 (1996).

Factoring of "874" Money Into Equalization Formula: A state may factor Pub. L. No. 81-874 revenue into its school finance equalization system only if the system meets the federal definition of an equalized program, subject to the determination of the Secretary of Education. School District v. St., 236 M 44, 769 P2d 684, 46 St. Rep. 169 (1989).

Public School Funding System Unconstitutional: The guarantee of equality of educational opportunity applies to each person in the state and is binding on all branches of government, whether at the state, local, or school district level. As a result of the failure to adequately fund the foundation program, thereby forcing an excessive reliance on permissive levies, the state failed to provide a system of quality public education granting to each student the equality of educational

opportunity guaranteed under the Montana Constitution. Spending disparities among Montana school districts further resulted in a denial of equality of educational opportunity. Therefore, the 1985-86 system of funding public elementary and secondary schools was a violation of this section. School District v. St., 236 M 44, 769 P2d 684, 46 St. Rep. 169 (1989).

Constitutionality of 2.0 Grade Average Rule — Extracurricular Activities Not Fundamental Right: In determining whether the District Court erred in holding that participation in extracurricular activities is not a fundamental right, the Supreme Court applied the middle-tier level of constitutional analysis recognized in Butte Community Union v. Lewis, 219 M 426, 712 P2d 1309, 43 St. Rep. 65 (1986), and concluded that the 2.0 rule did not violate the Montana Constitution because: (1) the right to extracurricular participation is not enumerated in the constitutional Declaration of Rights; and (2) government interests in developing the full educational potential in each person and providing a basic system of quality public education by enactment of the 2.0 rule outweigh a student's interest in participating in existing extracurricular activities. State ex rel. Bartmess v. Bd. of Trustees, 223 M 269, 726 P2d 801, 43 St. Rep. 1713 (1986), followed in Kaptein v. Conrad School District, 281 M 152, 931 P2d 1311, 54 St. Rep. 106 (1997), holding that a private school student has no right to participate in public school extracurricular activities.

Wrongful Placement of Special Education Child — Duty Owed by School District — Sovereign Immunity No Bar to Claim for Damages: The plaintiff, a minor child, was diagnosed as needing special education and was to be educated in a class with other "normal" children but was later removed to a class of retarded children and as a result regressed in development. The school district's action of placement of the child was subject to judicial review and was not barred from review by the doctrine of sovereign immunity merely because it was discretionary. The school authorities owed the child a duty of reasonable care in testing and placing her in an appropriate special education program, and the District Court therefore erred in dismissing the child's action for damages. B.M. v. St., 200 M 58, 649 P2d 425, 39 St. Rep. 1285 (1982), distinguished in Hayworth v. School District No. 19, 243 M 503, 795 P2d 470, 47 St. Rep. 1361 (1990). B.M. was followed in Parini v. Missoula County High School District No. 1, 284 M 14, 944 P2d 199, 54 St. Rep. 711 (1997).

Determination of Child's Condition and Needs — Necessary Evidence: Once the District Court found from the evidence that child A had not been making substantial progress as a participant in the mildly mentally retarded special education program and might be retrogressing and also found that the child was indeed severely emotionally disturbed, it was necessary that the child be placed in a special out-of-state school. The evidence supported no other choice, and substantial evidence supported the finding. In re the "A" Family, 184 M 145, 602 P2d 157 (1979).

School Funding Through Property Tax: Although the Legislature has traditionally provided for the cost of public instruction from oil and gas royalties, income taxes, or corporation taxes, it is not unconstitutional to provide for such costs through the levy of a statewide property tax. State ex rel. Woodahl v. Straub, 164 M 141, 520 P2d 776 (1974), certiorari denied, 419 US 845, 42 L Ed 2d 73, 95 S Ct 79 (1974).

DECISIONS UNDER 1889 CONSTITUTION

Education Fees: A school district may not assess charges for any course or activity offered during the regular academic year as a part of normal school functions which are reasonably related to a recognized academic and educational goal of the school system. School district's waiver of constitutionally invalid fees for welfare recipients and other cases of economic hardship did not validate the fees. Granger v. School District, 159 M 516, 499 P2d 780 (1972).

Equal Protection — Extracurricular Activities of Married Students: The thorough system of education required by Art. XI, sec. 1, 1889 Mont. Const., included extracurricular activities sponsored by the schools, and the right to engage in such activities is constitutionally protected. School district rule prohibiting extracurricular activities to married students denied them the equal protection of the laws with respect to the right granted by Art. XI, sec. 1, 1889 Mont. Const., and enforcement of the rule would be restrained by preliminary injunction. Moran v. School District, 350 F. Supp. 1180 (D.C. Mont. 1972), distinguished in State ex rel. Bartmess v. Bd. of Trustees, 223 M 269, 726 P2d 801, 43 St. Rep. 1713 (1986).

Age of Entry: A reasonable interpretation of constitutional and statutory provisions specifying that school shall be open to children between the ages of 6 and 21 years, read again in connection with other provisions requiring a thorough education, is that a child must be allowed to enter the first grade sometime during his seventh year, after reaching his sixth birthday. Each school district has the power to admit children into the first grade who are not yet 6 years of age, and

each school district may establish a "cutoff" date governing entry into the first grade. State ex rel. Ronish v. School District, 136 M 453, 348 P2d 797 (1960).

Levy Limitations Applicable: The fact that state tax imposed on foreign corporation's freight cars went into common school income and interest fund did not remove it from the constitutional limitation on levies for state purposes. St. v. N. Am. Car Corp., 118 M 183, 164 P2d 161 (1945).

Purpose: The primary purpose underlying provisions which charge the Legislature with maintaining a general, uniform, and thorough system of free public schools and providing sufficient funds, etc., is the promotion of the general intelligence of the people constituting the body politic and thereby to increase the usefulness and efficiency of the citizens upon which the government of society depends. State ex rel. Lien v. School District, 106 M 223, 76 P2d 330 (1938).

Intent: The clear intent of Art. XI, sec. 1, 1889 Mont. Const., was that adequate facilities for the education of all children shall be furnished. Grant v. Michaels, 94 M 452, 23 P2d 266 (1933).

Rental of Buildings for Public Dances: The Legislature had power to clothe the high school board with authority to provide, to some extent, for the maintenance of the school by authorizing the board to rent school buildings to private persons for public dances. Young v. Bd. of Trustees, 90 M 576, 4 P2d 725 (1931).

"Education" Defined: "Education" in its broadest sense embraces mental, moral, and physical powers or faculties. McNair v. School District, 87 M 423, 288 P 188 (1930).

Mandate to Legislature: Article XI, sec. 1, 1889 Mont. Const., was not exclusive so as to limit the legislative power to the establishment and maintenance of common schools and institutions only. The purpose was to insure a system of common schools, but nothing limits the power of the Legislature to provide for other schools. The section was not a limitation upon the legislative power, but is a mandate to the Legislature. Evers v. Hudson, 36 M 135, 92 P 462 (1907).

Classification of School Districts for Election of Trustees: Article XI, sec. 1, 1889 Mont. Const., did not prohibit the enactment of a law classifying school districts for the purposes of the election of trustees according to population if the law provides for a reasonable classification and is reasonable and uniform in its operation and effect upon all districts within the same classification, although at the time of the passage of the act only a few districts would be included within the law. State ex rel. Bray v. Long, 21 M 26, 52 P 645 (1898), overruled on other grounds in Palatine Ins. Co. v. N. Pac. Ry. Co., 34 M 268, 85 P 1032 (1906).

Uniform Textbooks Not Required: While the Legislature has the power to establish a series of textbooks for use in the public schools, Art. XI, sec. 1, 1889 Mont. Const., did not require the adoption of a uniform series of textbooks. Campana v. Calderhead, 17 M 548, 44 P 83 (1896).

Attorney General's Opinions

Deposit Fees for Course: A school district may not charge deposit fees for any course or activity for which credit may be earned for graduation. 36 A.G. Op. 79 (1976).

Law Review Articles

Montana's Rural Version of the School-To-Prison Pipeline: School Discipline and Tragedy on American Indian Reservations, Healey, 75 Mont. L. Rev. 15 (2014).

Indian Education for All: Montana's Constitution at Work in Our Schools, Juneau & Juneau, 72 Mont. L. Rev. 111 (2011).

Spatial Inequality as Constitutional Infirmity: Equal Protection, Child Poverty and Place, Pruitt, 71 Mont. L. Rev. 1 (2010).

A Battle of Public Goods: Montana's Clean and Healthful Environment Provision and the School Trust Land Question, Sienkiewicz, 67 Mont. L. Rev. 65 (2006).

Will Montana Breathe Life Into Its Positive Constitutional Right to Equal Educational Opportunity?, Wandler, 65 Mont. L. Rev. 343 (2004).

The State of the Montana Constitution (Turkey Feathers on the Constitutional Eagle), Petesch, 64 Mont. L. Rev. 23 (2003).

The Right to a Special Education, Monzie, 57 Mont. L. Rev. 151 (1996).

Classroom v. Courtroom: Is the Right to Education Fundamental?, Harper, 51 Mont. L. Rev. 509 (1990).

Section 2. Public school fund.

Convention Notes

No change except in grammar. Gives constitutional recognition to the public school fund.

Compiler's Comments

Former Constitutional Provision: This section is similar to Art. XI, sec. 2, 1889 Mont. Const.

Case Notes

DECISIONS UNDER 1972 CONSTITUTION

Beds of Navigable Rivers Considered Public Trust Lands, Not School Trust Lands — Administration by Board of Land Commissioners: A question arose as to whether the beds of navigable Montana rivers are school trust lands or public trust lands. The District Court concluded that the riverbeds were public trust lands but then went on to hold that the riverbeds were school trust lands on the theory that the Board of Land Commissioners had authority to classify the riverbeds as school trust lands. The Supreme Court agreed that the beds of navigable rivers are public trust lands pursuant to Art. X, sec. 11, Mont. Const., but reversed the decision that the riverbeds are school trust lands. However, the Board is still required to administer the riverbeds in accordance with the trust obligations imposed by Art. X, sec. 11, Mont. Const. PPL Mont., LLC v. St., 2010 MT 64, 355 Mont. 402, 229 P.3d 421, reversed and remanded on other grounds in PPL Montana, LLC v. Montana, 565 US __, 132 S Ct 1215 (2012). See also Mont. Coalition for Stream Access, Inc. v. Curran, 210 Mont. 38, 682 P.2d 163 (1984).

DECISIONS UNDER 1889 CONSTITUTION

Unclaimed Shares and Dividends: When corporation was voluntarily dissolved, unclaimed shares and their pro rata share of unpaid dividends became abandoned property and subject to escheat to state 2 years after final distribution of assets. Barnes-King Dev. Co. v. Corette, 156 M 202, 478 P2d 868 (1970).

Escheated Estates — Alien Heirs: The provision of section providing for delivery to county general fund of all property of decedent's estate which would have vested in his nonresident alien next of kin but for other provisions of the statute was invalid as violating Art. XI, sec. 2, 1889 Mont. Const., placing in public school fund all escheated estates and escheated interests in estates. In re Nielsen's Estate, 118 M 304, 165 P2d 792 (1945).

Part of Estate Which Escheats to State: Sections prohibiting inheritance by alien heirs whose country does not permit inheritance by residents of this state create an escheat. Article XI, sec. 2, 1889 Mont. Const., required all escheated estates or distributive shares of escheated estates to go to the public school fund of the state, and the Legislature had no power to direct that such property go to either the county general fund or the general fund of the state. If all nonresident alien heirs of a decedent are disqualified from sharing in an escheated estate, the entire estate is taken. If only a part of the heirs are disqualified, only their interests are taken, since Art. XI, sec. 2, 1889 Mont. Const., speaks of "estates, or distributive shares of estates". Bottomly v. Meagher County, 114 M 220, 133 P2d 770 (1943).

Limitation on Power to Dispose of School Land: The provisions of section 7 of ordinance No. 1, with relation to grants of land made by the United States; of Art. XVII, sec. 1, 1889 Mont. Const., providing the manner of disposal of such land; and of Art. XI, sec. 2 and 12, 1889 Mont. Const., providing that the school fund derived from the proceeds of such land shall be guaranteed against loss or diversion, were limitations upon the power of disposal of school land by the Legislature. Newton v. Weiler, 87 M 164, 286 P 133 (1930).

Capacity of State to Acquire Property: Article X, sec. 2, 1889 Mont. Const., did not deal with the subject of the capacity of the state of acquire property. In re Beck's Estate, 44 M 561, 121 P 784 (1912).

Law Review Articles

State School Trust Lands and Oil and Gas Royalty Rates, Woodgerd & McCarthy, 3 Pub. Land L. Rev. 119 (1982).

Section 3. Public school fund inviolate.

Convention Notes

No change except in grammar.

Compiler's Comments

Former Constitutional Provision: This section is similar to Art. XI, sec. 3, 1889 Mont. Const.

Case Notes

DECISIONS UNDER 1972 CONSTITUTION

Payment of Attorney Fees and Costs From Funds: Private organization that won suit seeking to have state barred from denying certain state aid money to high school district was, under the "common fund" doctrine, entitled to recover attorney fees and costs from the common fund, that is, from the state aid money ordered to be paid. Under the common fund doctrine, if a party, through active litigation, creates or increases a fund, others sharing in the fund must bear a

portion of the litigation costs, including reasonable attorney fees. Missoula High School Legal Defense Ass'n v. Supt. of Pub. Instruction, 196 M 106, 637 P2d 1188, 38 St. Rep. 2164 (1981).

DECISIONS UNDER 1889 CONSTITUTION

Investment of Fund Lawful: Article XI, sec. 3, 1889 Mont. Const., did not mean that the state may not invest the public school fund under regulations as may be prescribed by law. Assessments against lands acquired by the state under mortgages for loans made from public school fund were valid. Toole County Irrigation District v. St., 104 M 420, 67 P2d 989 (1937).

Inapplicable to Funds Raised by Levy — Payment on Special Assessment Delinquency: The provision of the Constitution that the public school fund shall forever remain inviolate refers to the permanent school fund and not to funds raised by tax levies. The contention that to hold school districts liable for penalties, interest, and costs on delinquency in payment of special improvement assessments would violate the constitutional guaranty was not sustained. School District v. Helena, 87 M 300, 287 P 164 (1930).

Investment of Funds — Discrimination Against Certain Securities: An act providing for the investment of school funds is not invalid because it discriminates against certain securities. State ex rel. Evans v. Stewart, 53 M 18, 161 P 309 (1916).

Attorney General's Opinions

Deposit Fees for Course: A school district may not charge deposit fees for any course or activity for which credit may be earned for graduation. 36 A.G. Op. 79 (1976).

Section 4. Board of land commissioners.

Convention Notes

Revises 1889 constitution by adding state auditor to board of land commissioners and adding the power to exchange lands.

Compiler's Comments

Former Constitutional Provision: This section revises Art. XI, sec. 4, 1889 Mont. Const.

Case Notes

DECISIONS UNDER 1972 CONSTITUTION

Beds of Navigable Rivers Considered Public Trust Lands, Not School Trust Lands — Administration by Board of Land Commissioners: A question arose as to whether the beds of navigable Montana rivers are school trust lands or public trust lands. The District Court concluded that the riverbeds were public trust lands but then went on to hold that the riverbeds were school trust lands on the theory that the Board of Land Commissioners had authority to classify the riverbeds as school trust lands. The Supreme Court agreed that the beds of navigable rivers are public trust lands pursuant to Art. X, sec. 11, Mont. Const., but reversed the decision that the riverbeds are school trust lands. However, the Board is still required to administer the riverbeds in accordance with the trust obligations imposed by Art. X, sec. 11, Mont. Const. PPL Mont., LLC v. St., 2010 MT 64, 355 Mont. 402, 229 P.3d 421, reversed and remanded on other grounds in PPL Montana, LLC v. Montana, 565 US __, 132 S Ct 1215 (2012). See also Mont. Coalition for Stream Access, Inc. v. Curran, 210 Mont. 38, 682 P.2d 163 (1984).

Proper Application of Profitability Method of Determining Fair Market Value of Hydroelectric Facility's Damages Owed to State for Past Use of State-Owned Riverbeds — Future Lease Terms Left to Board of Land Commissioners: After holding that the state was entitled to compensation for use of state-owned riverbeds by plaintiff hydroelectric utility, the District Court applied a profitability methodology to determine the productive value of the land in order to arrive at a fair market value for plaintiff's use of the riverbeds. Plaintiff contested the methodology, but the Supreme Court affirmed. The state uses productive value of the land in determining lease rates, and nothing in Montana law barred an award of damages based on plaintiff's profits, so income-based leasing was an appropriate method to calculate past damages in this case. Use of the Hydroelectric Resources Act (HRA), Title 77, ch. 4, part 2, was a proper mechanism to assess past damages, and the District Court's findings in support of the award were not clearly erroneous. The District Court also correctly left to the discretion of the Board of Land Commissioners the terms of any future lease with plaintiff and properly held that the Board was not bound by the same method used to calculate past damages in developing future lease terms. PPL Mont., LLC v. St., 2010 MT 64, 355 Mont. 402, 229 P.3d 421, following State ex rel. Thompson v. Babcock, 147 Mont. 46, 409 P.2d 808 (1966).

Following the Montana Supreme Court's decision, PPL appealed to the United States Supreme Court. The United States Supreme Court reversed the Montana court's ruling in part,

holding that the Montana court had not properly considered the rivers in question on a segment-by-segment basis and had not determined whether they were navigable in fact at the time of statehood. The United States Supreme Court remanded the case for proceedings consistent with its opinion. PPL Montana, LLC v. Montana, 565 US __, 132 S Ct 1215 (2012).

Repealed Statute Regarding Sale or Lease of School Trust Lands to School Districts — No Justiciable Controversy or Action Upon Which Relief Could Be Granted: Former 20-6-621(4) allowed the Board of Land Commissioners to sell, for appraised value, or to lease, for $1 a year, school trust lands to a school district. The Department of Natural Resources and Conservation stipulated that the provision was unconstitutional because it made state lands available for less than full market value. The District Court agreed, noting that leasing school trust lands to some school districts would favor only some of the beneficiaries and not the school trust as a whole. The Legislature concurred and repealed the subsection in 1999. Plaintiff subsequently sued the Department, the Board, and the state, contending that the Department unlawfully determined that the provision was unconstitutional and failed to defend the constitutionality of the provision. The state moved to dismiss the complaint on grounds that no justiciable controversy existed and that the complaint alleged no cause of action upon which relief could be granted. The District Court granted summary judgment for the state, and on appeal, the Supreme Court affirmed. Any determination that the Department exceeded its authority would have had no bearing on the existing rights or interests at issue, and a judgment granting the relief sought would not have effectively operated to resolve any issue in the case. Thus, there was no justiciable case or controversy, and the claim was properly dismissed. Advocates for Educ., Inc. v. Dept. of Natural Resources and Conservation, 2004 MT 230, 322 M 429, 97 P3d 553 (2004), following Mont.-Dak. Util. Co. v. Billings, 2003 MT 332, 318 M 862, 80 P3d 1247 (2003).

Failure to Distinguish Between Commercially Valuable and Nonvaluable Timber as Firewood on State Lands Violative of Trust Duty of Undivided Loyalty: Pursuant to 77-5-211, the state discretionarily issued free permits for the gathering of dead, down, or inferior wood from school trust lands for use as firewood. The District Court concluded that 77-5-211 authorizes the Department of Natural Resources and Conservation to act in violation of the school trust by allowing the Department to give away commercially valuable timber, in violation of its trust duty of undivided loyalty. The state argued on appeal that the District Court's conclusions were incorrect because the Department retained discretion to issue permits and because plaintiff failed to show that dead wood had commercial value in all instances. The Supreme Court affirmed, citing Wild W. Motors, Inc. v. Lingle, 224 M 76, 728 P2d 412, 43 St. Rep. 2030 (1986), in considering the state's duty of undivided loyalty as trustee of school trust lands, noting that a trustee must act with the utmost good faith toward the beneficiary and may not act in the trustee's own interest or in the interest of a third party. In failing to distinguish between commercially valuable timber and timber that lacks commercial value, the statute allows the Department to issue permits to third parties without charging them for any commercially valuable wood that they collect, violating both the mandate that full market value be obtained for school trust lands and the state's trust duty of undivided loyalty. Montanans for Responsible Use of School Trust v. State ex rel. Bd. of Land Comm'rs, 1999 MT 263, 296 M 402, 989 P2d 800, 56 St. Rep. 1065 (1999).

Market Value of State Land Rights-of-Way Set by Statute at 1972 Levels — Unconstitutionality: The plain language of 77-1-130 requires that full market valuations of right-of-way acreage for historic deeds on state trust lands be based on the median values for the classifications of land at 1972 levels, leaving the Department of Natural Resources and Conservation no choice but to use those levels instead of current market value. The state argued that pursuant to 40 A.G. Op. 24 (1983), the figures in 77-1-130 are merely a minimum above which the Department may charge full market value. However, the statutory language is mandatory rather than discretionary and violates the provisions of the Montana Constitution and The Enabling Act, which require the state to receive full market value for school trust lands, and thus is unconstitutional. Montanans for Responsible Use of School Trust v. State ex rel. Bd. of Land Comm'rs, 1999 MT 263, 296 M 402, 989 P2d 800, 56 St. Rep. 1065 (1999).

State Land Cabin Site Renewal Policy Not Violative of Obligation to Obtain Full Market Value: Plaintiff contended that 77-1-208 is facially invalid because the use of a cabin site renewal policy that did not employ competitive bidding was calculated to keep cabin site rental rates below full market value. However, nothing in the plain language of 77-1-208 abrogates the mandate that full market value be obtained for school trust lands. Plaintiff failed to show that the statute violates the duty of undivided loyalty or that the preference accorded lessees on cabin site leases on state lands resulted in renewal rates below market value. The statute legislatively establishes a method by which full market value is obtained, which is allowed pursuant to Jerke v. Dept. of

State Lands, 182 M 294, 597 P2d 49 (1979), but the language of 77-1-208 nevertheless requires that full market value be obtained, by whatever method is used, and therefore on its face does not violate the trust. Thus, the District Court correctly held that the renewal preference in 77-1-208 does not violate the school trust requirements of the Montana Constitution or The Enabling Act of 1889. Montanans for Responsible Use of School Trust v. State ex rel. Bd. of Land Comm'rs, 1999 MT 263, 296 M 402, 989 P2d 800, 56 St. Rep. 1065 (1999).

State Land Cabin Site Rental Policy Violative of School Trust Obligation to Obtain Fair Market Value: The policy employed by the Department of Natural Resources and Conservation in renting cabin sites on state lands, in a manner that resulted in below-market rentals, violated the state's school trust obligations under the Montana Constitution and The Enabling Act of 1889, even though 77-1-208 is facially valid because it requires that full market value be obtained. Montanans for Responsible Use of School Trust v. State ex rel. Bd. of Land Comm'rs, 1999 MT 263, 296 M 402, 989 P2d 800, 56 St. Rep. 1065 (1999), following State ex rel. Thompson v. Babcock, 147 M 46, 409 P2d 808 (1966), and Jerke v. Dept. of State Lands, 182 M 294, 597 P2d 49 (1979).

Statute Allowing State Lands to Remain Idle While Lessees Determine Value of Improvements — Unconstitutionality: Under 77-6-305, the value of improvements placed on the leasehold by a former lessee is required to be paid by the new lessee before the new lease may be issued if the former lessee chose not to remove the improvements. The District Court found the provision constitutional even though it might result in less revenue because of delay caused by lease delays, concluding that the Department of Natural Resources and Conservation must have latitude to administer school trust lands. The Supreme Court disagreed, holding that portion of 77-6-305 unconstitutional on its face. The state's discretion to administer the trust is broad, but not unlimited, and must conform to the requirements of the trust. The statute allows trust lands to idle indefinitely while former and new lessees determine the value of the improvements, which is inconsistent with the trust mandate that full market value be received for the lands. Montanans for Responsible Use of School Trust v. State ex rel. Bd. of Land Comm'rs, 1999 MT 263, 296 M 402, 989 P2d 800, 56 St. Rep. 1065 (1999).

Statute Allowing Uncompensated Time for Removing Improvements Violative of Full Benefit of Trust Lands and Trust Duty of Undivided Loyalty: Under 77-6-304, a former state land leaseholder was allowed up to 60 days to remove movable improvements without charge. The state contended that the statute does not violate any fiduciary duty, but merely allows the Department of Natural Resources and Conservation time to inventory improvements on state lands, with no quantifiable impact on the trust fund. Conceding that the policy could reduce potential profits to the trust, the District Court nevertheless found that: (1) nothing in the statute prevents the Department from charging former lessees for storage of improvements after termination of their leases; (2) the statute does not prevent a new lessee from moving onto trust land before the former lessee has removed the improvements; and (3) it was reasonably necessary for the Department to allow former lessees some extra time to remove improvements, especially in winter months when most agricultural leases expire. The Supreme Court disagreed, concluding that 77-6-304 plainly authorizes the Department to allow former lessees to remain free of charge on trust lands while removing improvements, denying the trust beneficiaries the full benefit of the trust lands and violating the duty of undivided loyalty by benefiting third parties to the detriment of the trust beneficiaries. The statute was declared unconstitutional on its face. Montanans for Responsible Use of School Trust v. State ex rel. Bd. of Land Comm'rs, 1999 MT 263, 296 M 402, 989 P2d 800, 56 St. Rep. 1065 (1999). See also Lassen v. Ariz. Highway Dept., 385 US 458, 17 L Ed 2d 515, 87 S Ct 584 (1967).

DECISIONS UNDER 1889 CONSTITUTION

Optional Extension of Grazing Leases: Chapter providing for extension of leases of grazing lands for additional period of 3 years at option of lessees did not violate Art. XI, sec. 4, 1889 Mont. Const., because Board, as part of executive department, was subject to legislative control within restrictions. Leuthold v. Brandjord, 100 M 96, 47 P2d 41 (1935).

Section 5. Public school fund revenue.

Convention Notes

Revises 1889 constitution by replacing specific language requiring distribution to be made "in proportion to the number of children between ages of 6 and 21" with general language that the income be "equitably apportioned" and by allowing distribution of interest and income moneys to high schools as well as elementary schools.

Compiler's Comments

Former Constitutional Provision: This section revises Art. XI, sec. 5, 1889 Mont. Const.

Case Notes

DECISIONS UNDER 1889 CONSTITUTION

Excess Proceeds of Oil and Gas Leases: The amount bid over the minimum of 75 cents per acre as established by statute was considered part of the rental and thus placed in the common school interest and income fund to be apportioned and distributed annually to the several school districts as provided in Art. XI, sec. 5, 1889 Mont. Const. State ex rel. Dickgraber v. Sheridan, 126 M 447, 254 P2d 390 (1953).

Noncontiguous Territory — Indian Children — Apportionment: Territory upon which Indian children resided but which had never been a part of district was not considered in apportionment of school money. State ex rel. Lantz v. Morris, 113 M 187, 126 P2d 1101 (1942).

Section 6. Aid prohibited to sectarian schools.

Convention Notes

Revises 1889 constitution by specifying that federal funds may be distributed to private schools. Proposed section still prohibits state aid to private schools.

Compiler's Comments

Former Constitutional Provision: This section revises Art. XI, sec. 8, 1889 Mont. Const.

Case Notes

DECISIONS UNDER 1889 CONSTITUTION

Services to Indigents: Payment of public funds to persons providing medical, hospitalization, and foster home care to indigent mothers who have sought or received assistance from private rather than public adoptive agencies did not violate Art. XI, sec. 8, 1889 Mont. Const. Welfare Bd. v. Lutheran Social Serv., 156 M 381, 480 P2d 181 (1971).

Parochial Schools: Article XI, sec. 8, 1889 Mont. Const., prohibited school board from either making a levy for or expending funds for employment of teachers to teach secular subjects in parochial schools. State ex rel. Chambers v. School District, 155 M 422, 472 P2d 1013 (1970), distinguished in Welfare Bd. v. Lutheran Social Serv., 156 M 381, 480 P2d 181 (1971).

Attorney General's Opinions

Attendance Unit on Hutterite Colony Premises — Establishment — Closure — Finance: A school district board of trustees may establish a separate attendance unit on the premises of a Hutterite colony located in the district. Closure of an attendance unit on the premises of a Hutterite colony is a matter within the discretion of the board of trustees of the school district involved, and the trustees have no authority to make an agreement to the contrary. The colony may effectively close an attendance unit by failing to renew the lease agreement if no similar space is available for its continued operation. Operational costs of an attendance unit must be budgeted and financed in the manner provided by law. Any agreement between the school district and the colony for private financing would be unenforceable. 38 A.G. Op. 26 (1979).

Alternative Renewable Energy Source Grants to Religious Organizations: Alternative renewable energy source grants may not be awarded to any church or to any school, academy, seminary, college, university, or other literary or scientific institution controlled in whole or in part by any church, sect, or denomination. Other religious organizations may be awarded grants if a substantial portion of their functions are secular and grants will only be used for such functions. 37 A.G. Op. 165 (1978).

Use of School Facilities by Religious Groups — Rental: Religious groups may use public school property on an occasional and short-term basis upon securing the consent of the school district trustees. The trustees should charge a fair rental in order to preclude a "grant" of property under this section. The use may not interfere with the use of the school for school purposes. 36 A.G. Op. 65 (1976).

Entire Student Body of Hutterite Faith: An elementary school district composed entirely of property belonging to North Harlem Hutterite Colony would be eligible to receive public money for school purposes without violating any provision of 1972 Montana Constitution provided the school remains under the authority, control, and operation of the public school system by public school personnel and open to all persons eligible to attend this public school. 36 A.G. Op. 5 (1975).

Law Review Articles

Montana's Constitutional Prohibition on Aid to Sectarian Schools: "Badge of Bigotry" or National Model for the Separation of Church and State?, Dougherty, 77 Mont. L. Rev. 41 (2016).

Section 7. Nondiscrimination in education.

Convention Notes

Last sentence revises 1889 constitution (which merely forbade denying any person entrance to a university because of his or her sex) by broadening the language to include all public educational institutions and to include other kinds of discrimination. Other changes in grammar only.

Compiler's Comments

Former Constitutional Provision: This section revises Art. XI, sec. 9, 1889 Mont. Const. See also Art. XI, sec. 8, 1889 Mont. Const.

Case Notes

Constitutionality of 2.0 Grade Average Rule — Extracurricular Activities Not Fundamental Right: In determining whether the District Court erred in holding that participation in extracurricular activities is not a fundamental right, the Supreme Court applied the middle-tier level of constitutional analysis recognized in Butte Community Union v. Lewis, 219 M 426, 712 P2d 1309, 43 St. Rep. 65 (1986), and concluded that the 2.0 rule did not violate the Montana Constitution because: (1) the right to extracurricular participation is not enumerated in the constitutional Declaration of Rights; and (2) government interests in developing the full educational potential in each person and providing a basic system of quality public education by enactment of the 2.0 rule outweigh a student's interest in participating in existing extracurricular activities. State ex rel. Bartmess v. Bd. of Trustees, 223 M 269, 726 P2d 801, 43 St. Rep. 1713 (1986).

Attorney General's Opinions

Entire Student Body of Hutterite Faith: An elementary school district composed entirely of property belonging to North Harlem Hutterite Colony would be eligible to receive public money for school purposes without violating any provision of 1972 Montana Constitution provided the school remains under the authority, control, and operation of the public school system by public school personnel and open to all persons eligible to attend this public school. 36 A.G. Op. 5 (1975).

Section 8. School district trustees.

Convention Notes

New provision which guarantees control of schools to local boards. Deletes requirement in 1889 constitution that elections for school district officers must be separate from state and county elections.

Compiler's Comments

Former Constitutional Provision: This section revises Art. XI, sec. 10, 1889 Mont. Const.

Case Notes

Voluntary Membership in High School Athletic Association Not Unconstitutional Delegation of Trustee Authority: A Livingston high school student, after being informed by the Montana High School Association (MHSA) that he could not participate in basketball because of the MHSA's rule limiting student participation in MHSA events to eight consecutive semesters, filed an action alleging that the board of trustees' consent to be bound by the MHSA rules violated this section, which vests school board trustees with power to supervise and control schools in their district. The Supreme Court held that the MHSA is merely acting as a neutral arbiter to fill the breach caused by the nonexistence of legislative authority and that becoming a member of the MHSA is not an unconstitutional delegation of the district's authority because membership is voluntary. The court noted that although a district's decision to withdraw from membership in the MHSA would undoubtedly cause the district to have a difficult time in finding other schools against which to compete, membership remains voluntary, and by participating, each district is electing to make the rules of the MHSA its own. Grabow v. Mont. High School Ass'n, 2002 MT 242, 312 M 92, 59 P3d 14 (2002).

Spending Disparities Not Allowed: This section does not require that spending disparities between the school districts of the state be allowed to exist because the disparities cannot be described as the result of local control. School District v. St., 236 M 44, 769 P2d 684, 46 St. Rep. 169 (1989).

Resignation of Tenured Teacher — Formal Board Acceptance Not Required: A tenured teacher was charged with misdemeanor theft and pleaded guilty. The Board of Education of District No. 1 voted to authorize the Superintendent of Schools to request the teacher's immediate resignation and grant 30 days' severance pay. The same day the teacher signed a letter of immediate resignation. The guilty plea was later withdrawn, the theft case was dismissed, and the teacher sought to withdraw her resignation. Withdrawal was denied by the Board, County

and State Superintendents of Schools, and the District Court. The Supreme Court affirmed, holding that the Board did not need to formally accept a resignation which it had already decided to request and that it was not a delegation of authority for the Board to make a decision and direct an employee to carry an offer to a teacher. The resignation was effective and the district's contractual obligation was satisfied upon the teacher's acceptance of the severance pay. Booth v. Argenbright, 225 M 272, 731 P2d 1318, 44 St. Rep. 227 (1987).

Power of School District Trustees Over Teachers: A tenured teacher was not offered a new contract because he cohabited with a female teacher, discussed abortion, and displayed fetuses in the classroom. The decision of the Board of Trustees not to rehire was upheld by the County Superintendent and the State Superintendent. The District Court overturned the decision, and an appeal was taken to the Supreme Court. The Supreme Court found that a Board of Trustees has wide discretion. The court said that Trustees have the power and duty to both employ a teacher and terminate him under the appropriate circumstances. In doing this, the rights of the teacher must also be kept in mind. The tenure of a teacher is clearly both a valuable and substantial right that cannot be taken away except for good cause. In addition, the conduct of a teacher, including a characterization of immorality, must be such as to directly affect the performance by the teacher of his duties as a teacher. Good cause was found in this instance. Yanzick v. School District, 196 M 375, 641 P2d 431, 39 St. Rep. 191 (1982).

Arbitration of Teacher Contract Nonrenewal: Nonrenewal of nontenured teacher's contract was not a "grievance" within a collective bargaining agreement with the school board and subject to arbitration provisions of the agreement when not allowed under former law regarding negotiations for teachers. Wibaux Educ. Ass'n v. Wibaux County High School, 175 M 331, 573 P2d 1162 (1978).

Teacher Dismissal Statutes — Control and Supervision: Article X, sec. 8, Mont. Const., does not grant control and supervision of the schools of each district solely to the boards of trustees, and statutes granting review powers over the dismissal of teachers under contract to County Superintendents of Schools were not unconstitutional. School District v. Hughes, 170 M 267, 552 P2d 328 (1976).

Negotiation of Master Agreement: The professional negotiations act for teachers does not require the board of trustees to reach a settlement but only requires a good faith effort, and the final decision for teachers' contracts must rest with the board. State ex rel. Billings Educ. Ass'n v. District Court, 166 M 1, 531 P2d 685 (1974).

Attorney General's Opinions

Acceptance of Canadian Students — Tuition — Waiver: A school district board of trustees may, in its discretion, accept as elementary and high school students Canadian residents who wish to attend school in Montana. The trustees are also authorized to exercise discretion in granting a waiver of tuition to these and all other out-of-district students. If the trustees choose to charge tuition, 20-5-305 (now repealed) must be referred to in setting the amount of tuition for elementary students and 20-5-312 (now repealed) for high school students. 42 A.G. Op. 103 (1988).

School Boards — Employment of Principals: A school district board of trustees may not delegate its duty to employ or dismiss principals and vice-principals to the school district superintendent. 37 A.G. Op. 133 (1978).

District School Board — Nonprofit Corporation: School board trustees have only those powers expressed or implied by law, and since the general powers and duties of school board trustees neither expressly nor impliedly give school trustees the authority to incorporate, a district school board may not incorporate under the Montana Nonprofit Corporation Act. 35 A.G. Op. 47 (1973).

Law Review Articles

The State of the Montana Constitution (Turkey Feathers on the Constitutional Eagle) Petesch, 64 Mont. L. Rev. 23 (2003).

Section 9. Boards of education.

Convention Notes

Revises 1889 constitution by creating one board (Board of Public Education) to supervise the public school system and a separate board (Board of Regents of Higher Education) to supervise the university system. The two boards together form one board (Board of Education) for considering mutual problems. Under 1889 constitution there is just one board to supervise the entire educational system. Each of the two proposed boards consists of 7 persons appointed by the governor (one less than in 1889 constitution). The governor and superintendent are ex officio, non-voting members (the attorney general is an ex officio member in 1889 constitution).

Compiler's Comments

Former Constitutional Provision: This section revises Art. XI, sec. 11, 1889 Mont. Const.

Case Notes

DECISIONS UNDER 1972 CONSTITUTION

Open Public Meeting Laws Liberally Construed — University System Policy Committee Meetings Open to Public: Plaintiff media organizations sued the Commissioner of Higher Education, alleging that policy meetings between the Commissioner and other University System senior employees were subject to state open meeting laws. The District Court concluded that the meetings should be open to the public, and on appeal, the Supreme Court concurred. The Legislature created open meeting laws with the intent that deliberations of state agencies be conducted openly, and to that end, the open meeting laws are liberally construed. In the context of 2-3-203, public or governmental bodies means a group of individuals organized for a governmental or public purpose. Although the university policy committee was not formally created by a government entity to accomplish a specific function, the committee brought together public officials for an undeniably public purpose. The committee was not merely a staff meeting or factfinding body, nor was it an ad hoc group that came together to consider a specific matter or to gather facts on a particular issue. Rather, the group met to deliberate on matters of substance that were the public's business and thus was considered a public body within the meaning of Art. II, sec. 9, Mont. Const., whose meetings were required to be open to the public. The Commissioner argued that: (1) even if the committee was considered a public body, it did not hold meetings as contemplated in the open meeting laws; (2) because the committee's membership was not fixed, no number of members were required to attend to constitute a quorum; and (3) neither direct action nor votes were taken at committee meetings. The Supreme Court disagreed. A quorum of any body of an indefinite number consists of the members who attend a meeting. All that is required under 2-3-202 is that a quorum of the membership convene to conduct public business, not that the meeting produces some particular result or action or that a vote be taken. The constitution protects the public's right to observe the deliberations of public bodies, and the policy committee meetings were required to be open to the public. Assoc. Press v. Crofts, 2004 MT 120, 321 M 193, 89 P3d 971 (2004).

Statutory Immunity Not Extended to Board of Regents: The Board of Regents of Higher Education is not a local governmental entity within the meaning of 2-9-111, and therefore no immunity from suit is extended to the Board of Regents by 2-9-111. Mitchell v. Univ. of Mont., 240 M 261, 783 P2d 1337, 46 St. Rep. 2109 (1989).

Clarification of Findings Regarding Statewide Accreditation Standards: The Supreme Court amended certain District Court findings and conclusions regarding statewide accreditation standards adopted by the Board of Public Education to clarify that: (1) the minimum standards do not fully define a quality education; (2) the Montana school accreditation standards are minimum standards upon which quality education must be built; and (3) the standards do not fully define either the constitutional rights of students or the constitutional responsibilities of the state for funding its public and elementary schools. School District v. St., 236 M 44, 769 P2d 684, 46 St. Rep. 169 (1989).

Teacher Dismissal Statutes — Control and Supervision: Article X, sec. 8, Mont. Const., does not grant control and supervision of the schools of each district solely to the boards of trustees, and statutes granting review powers over the dismissal of teachers under contract to County Superintendents of Schools were not unconstitutional. School District v. Hughes, 170 M 267, 552 P2d 328 (1976).

Balance of Powers — University Funding: This provision, when construed with Art. III, sec. 1, Art. V, sec. 1, and Art. VIII, sec. 12, Mont. Const., justifies legislative power to appropriate and exercise control over expenditures through itemization. However, appropriation certification over private money and appropriation conditions limiting college president salaries are unconstitutional infringements on the management authority of the Board of Regents. Bd. of Regents v. Judge, 168 M 433, 543 P2d 1323 (1975).

Jurisdiction and Authority of Board of Education: The authority of the State Board of Education is limited to long-range planning, coordination, and evaluation under this section. An act which designated the State Board of Education as the State Board of Vocational Education (now abolished) was unconstitutional as being violative of this section. Bd. of Public Education v. Judge, 167 M 261, 538 P2d 11 (1975).

DECISIONS UNDER 1889 CONSTITUTION

Delegation of Powers: The Legislature in former sections restricted the State Board of Education in delegation of its powers, and this precluded college officials from contracting with teachers and instructors on behalf of the Board. Brown v. St. Bd. of Education, 142 M 547, 385 P2d 643 (1963).

Actions Ex Contractu Against Board: The State Board of Education could be sued for a breach of contract without the consent of the state. Meens v. St. Bd. of Education, 127 M 515, 267 P2d 981 (1954).

Governing Regulation With Force of Law: A regulation of the State Board of Education providing that reappointment of a professor after 3 years of service shall be deemed a permanent appointment, under which the Board had functioned for some 21 years, was valid and clearly within its authority. Reappointment of a professor after those years of service was a permanent appointment and his status not changed by the Board's striking the regulation from its rules printed on the back of the contract. State ex rel. Keeney v. Ayers, 108 M 547, 92 P2d 306 (1939).

Legislature to Define Powers and Duties: Article XI, sec. 11, 1889 Mont. Const., merely vested control over educational institutions in the State Board of Education and authorized the Legislature to define and circumscribe the powers and duties of the Board. State ex rel. Dragstedt v. St. Bd. of Education, 103 M 336, 62 P2d 330 (1936); State ex rel. Veeder v. St. Bd. of Education, 97 M 121, 33 P2d 516 (1934).

Mandamus to Credit Three-Year High School: Granting Writ of Mandate to compel Board of Education to accredit school as 3-year high school before obtaining approval of Superintendent, in the absence of authority of board of trustees or prior legal demand upon Board to accredit the school, was error. State ex rel. School District v. Cooney, 102 M 521, 59 P2d 48 (1936).

Board Part of Executive Branch: The State Board of Education was a part of the executive department and subject to legislative control. State ex rel. P.S.C. v. Brannon, 86 M 200, 283 P 202 (1929).

Appeal to Board: Section authorizing an appeal from a decision of a board of school trustees on an application for transportation of pupils from their homes to a school, etc., to the State Board of Education, was not open to the objection under the 1889 Constitution. State ex rel. Stephens v. Keaster, 82 M 126, 266 P 387 (1928).

Establishment of County High Schools: Article XI, sec. 11, 1889 Mont. Const., did not limit the legislative authority to establish and maintain common schools and institutions and was not offended by law (repealed) authorizing the establishment of county free high schools. Evers v. Hudson, 36 M 135, 92 P 462 (1907).

Board Created: The State Board of Education was created by the Legislature under the authority of Art. XI, sec. 11, 1889 Mont. Const. State ex rel. Koch v. Barret, 26 M 62, 66 P 504 (1901).

Attorney General's Opinions

Legislative Appropriation of University System "Excess" Revenue: The Attorney General concluded in an advisory opinion (in answer to question concerning hypothetical legislative action) that the Legislature may not appropriate revenue generated from sources pledged to cover university system revenue bond requirements when the revenue obtained from these sources exceeds the bond requirements. The law grants the Board of Regents authority to use pledged revenue in a variety of ways to discharge its statutory duties. Any legislative appropriation of those "excess" revenues would interfere with or prevent the discharge of those duties. 40 A.G. Op. 67 (1984).

Line Item Appropriations and Conditions: Because the constitution is a limit on and not a grant of authority to the Legislature, line item appropriations and conditions attached thereto are permissible so long as they do not intrude into areas that distinctly and uniquely belong under the jurisdiction of the Board of Regents. 36 A.G. Op. 2 (1975).

Status of Mandatory Student Fees — Expenditures: Since the authority to impose mandatory student fees is vested in the governing board of the Montana University System, a division of state government, and ultimate control and supervision of these funds rests with the Board of Regents, mandatory student fees are public funds. Whether a student committee can expend these funds to remove an elected public officer requires a decision by the Regents or their delegated agents that such expenditure is a public purpose. Electing a political officeholder would not be an expenditure for a public purpose. 35 A.G. Op. 74 (1974).

Law Review Articles

The State of the Montana Constitution (Turkey Feathers on the Constitutional Eagle), Petesch, 64 Mont. L. Rev. 23 (2003).

Voters Wisely Reject Proposed Constitutional Amendment 30 to Eliminate the Montana Board of Regents, Aronofsky, 58 Mont. L. Rev. 333 (1997).

Section 10. State university funds.

Convention Notes

No change except in grammar. (Section 13 of Article VIII, REVENUE AND FINANCE provides for the investment of university funds.)

Compiler's Comments

Former Constitutional Provision: This section is similar to Art. XI, sec. 12, 1889 Mont. Const.

Case Notes

DECISIONS UNDER 1889 CONSTITUTION

Pledge of Income From Land Grant Fund: The action of the State Board of Education in pledging the income and interest derived from the land grant fund of the university as security for repayment of any loan made to it for the erection of a journalism building at a state university was within its power and not in violation of Art. XI, sec. 12, 1889 Mont. Const. State ex rel. Wilson v. St. Bd. of Education, 102 M 165, 56 P2d 1079 (1936).

Construction of Normal School: Article XI, sec. 12, 1889 Mont. Const., was not violated by the enactment of laws authorizing the State Board of Education to pledge one-half of income to secure repayment of funds obtained from the federal government under the national recovery act, the funds so obtained to be used for the erection of buildings for the normal school. State ex rel. Blume v. St. Bd. of Education, 97 M 371, 34 P2d 515 (1934).

Limitations on Legislative Power: The provisions of section 7 of ordinance No. 1, with relation to grants of land made by the U.S.; of Art. XVII, sec. 1, 1889 Mont. Const., providing the manner of disposal of such land; and of Art. XI, sec. 2 and 12, 1889 Mont. Const., providing that the school fund derived from the proceeds of such land shall be guaranteed against loss or diversion, are limitations upon the power of disposal of school land by the Legislature. Newton v. Weiler, 87 M 164, 286 P 133 (1930).

Bonds Issued by Land Commissioner: Laws authorizing the State Board of Land Commissioners to issue and sell bonds, the proceeds to be applied to the erection, furnishing, and equipment of an addition to the normal school building, and pledging as security for the payment of the principal and interest on such bonds the lands granted by section 17 of The Enabling Act were void as being in violation of Art. XI, sec. 12, 1889 Mont. Const. State ex rel. Haire v. Rice, 33 M 365, 83 P 874 (1906), affirmed 204 US 291, 51 L Ed 490, 27 S Ct 281 (1907).

Regulations Prescribed by Law — Lease of College Lands: Pursuant to the Montana Constitution, the Legislature has enacted regulations under which, in default of sale, all agricultural and grazing lands may be leased under the direction of the State Board of Land Commissioners for terms not exceeding 5 years and requiring the revenues derived therefrom to be paid into the hands of the Treasurer. The lands selected for the use of the agricultural college under the grant by Congress are subject to these regulations. State ex rel. Koch v. Barret, 26 M 62, 66 P 504 (1901).

Attorney General's Opinions

Public University Endowment Funds Not "Public Funds" — Not Required to be Invested Through Unified Investment Program: Article VIII, sec. 13, Mont. Const., does not require that endowments granted to Montana's public universities be invested through the unified investment program. 53 A.G. Op. 6 (2010).

Gift to Private Nonprofit Corporation: Under 20-8-111, the Board of Public Education, in its discretion, may give money that has been donated for the use and benefit of the Montana School for the Deaf and Blind to a private nonprofit corporation created and controlled by the Board and operated for the benefit of that school. However, the Board remains accountable for the money until it is used directly for the general support, maintenance, or improvement of the Montana School for the Deaf and Blind. 38 A.G. Op. 111 (1980).

Fee Waivers for Veterans for Extra Studies: The Board of Regents may not require veterans qualifying under the provisions of 10-2-311 (now repealed) to pay fees for extension or continuing education courses offered by units of the Montana University System. 37 A.G. Op. 167 (1978).

Use of Funds: This section requires that gifts to the Montana School for the Deaf and Blind be used only for the school's benefit and prohibits any diversion, direct or indirect, of the gifts. 36 A.G. Op. 106 (1976).

Carryover Balances: The Montana University System must carry over the balances in nongeneral fund accounts (earmarked revenue, private income, land grant income, etc.) from one biennium to the respective funds in the following biennium. The Board of Regents may expend the funds by approved budget amendment. 36 A.G. Op. 76 (1976).

Section 11. Public land trust, disposition.

Convention Notes

Only changes in subsections (1), (2) and (3) are in grammar. Subsection (4) revises 1889 constitution by deleting the 1889 constitutional classification of property into grazing, timber, agricultural or city lands and by stipulating that public lands may be exchanged.

Compiler's Comments

Former Constitutional Provision: This section is similar to Art. XVII, sec. 1, 2, and 3, 1889 Mont. Const.

Case Notes

DECISIONS UNDER 1972 CONSTITUTION

Accreted Islands in River Held to Be School Trust Lands — Restitution Improper Absent Unjust Enrichment Claim — State Entitled to Costs: The state filed an action to quiet title to three islands in the Missouri River that had formed from sedimentary accretions on the riverbed. The District Court ruled that under the equal footing doctrine, the state held title to the disputed lands as public trust land, which could not be acquired by the defendants through adverse possession. The District Court also ruled, relying on PPL Mont., LLC v. St., 2010 MT 64, 355 Mont. 402, 229 P.3d 421, that these lands were not school trust lands. The District Court then ruled sua sponte that under the doctrine of unjust enrichment, the state was required to reimburse the defendants for all property taxes and improvements made on the land and ordered each party to pay its own costs and fees. The Supreme Court disagreed and held that under 77-1-102, these lands were school trust lands and that because the defendants never asserted an unjust enrichment claim, the state was not on notice and had no opportunity to oppose the reimbursements ordered by the District Court. Finally, the court held that under 25-10-101, the state as the prevailing party was entitled to recover certain costs. The court reversed the District Court's judgment and remanded the case to the District Court to determine and award the appropriate amount for costs. Dept. of Natural Resources and Conservation v. Abbco Investments, LLC, 2012 MT 187, 366 Mont. 120, 285 P.3d 532.

Beds of Navigable Rivers Considered Public Trust Lands, Not School Trust Lands — Administration by Board of Land Commissioners: A question arose as to whether the beds of navigable Montana rivers are school trust lands or public trust lands. The District Court concluded that the riverbeds were public trust lands but then went on to hold that the riverbeds were school trust lands on the theory that the Board of Land Commissioners had authority to classify the riverbeds as school trust lands. The Supreme Court agreed that the beds of navigable rivers are public trust lands pursuant to Art. X, sec. 11, Mont. Const., but reversed the decision that the riverbeds are school trust lands. However, the Board is still required to administer the riverbeds in accordance with the trust obligations imposed by Art. X, sec. 11, Mont. Const. PPL Mont., LLC v. St., 2010 MT 64, 355 Mont. 402, 229 P.3d 421, reversed and remanded on other grounds in PPL Montana, LLC v. Montana, 565 US __, 132 S Ct 1215 (2012). See also Mont. Coalition for Stream Access, Inc. v. Curran, 210 Mont. 38, 682 P.2d 163 (1984).

Proper Application of Profitability Method of Determining Fair Market Value of Hydroelectric Facility's Damages Owed to State for Past Use of State-Owned Riverbeds — Future Lease Terms Left to Board of Land Commissioners: After holding that the state was entitled to compensation for use of state-owned riverbeds by plaintiff hydroelectric utility, the District Court applied a profitability methodology to determine the productive value of the land in order to arrive at a fair market value for plaintiff's use of the riverbeds. Plaintiff contested the methodology, but the Supreme Court affirmed. The state uses productive value of the land in determining lease rates, and nothing in Montana law barred an award of damages based on plaintiff's profits, so income-based leasing was an appropriate method to calculate past damages in this case. Use of the Hydroelectric Resources Act (HRA), Title 77, ch. 4, part 2, was a proper mechanism to assess past damages, and the District Court's findings in support of the award were not clearly erroneous. The District Court also correctly left to the discretion of the Board of Land Commissioners the

terms of any future lease with plaintiff and properly held that the Board was not bound by the same method used to calculate past damages in developing future lease terms. PPL Mont., LLC v. St., 2010 MT 64, 355 Mont. 402, 229 P.3d 421, following State ex rel. Thompson v. Babcock, 147 Mont. 46, 409 P.2d 808 (1966).

Following the Montana Supreme Court's decision, PPL appealed to the United States Supreme Court. The United States Supreme Court reversed the Montana court's ruling in part, holding that the Montana court had not properly considered the rivers in question on a segment-by-segment basis and had not determined whether they were navigable in fact at the time of statehood. The United States Supreme Court remanded the case for proceedings consistent with its opinion. PPL Montana, LLC v. Montana, 565 US __, 132 S Ct 1215 (2012).

State Allowed Compensation for Hydroelectric Use of Riverbeds — No Preemption by Federal Law: Plaintiff PPL sought a declaratory judgment that the state was precluded from seeking compensation for the use of riverbeds at PPL's federally licensed hydroelectric dams on the Missouri, Clark Fork, and Madison Rivers. PPL asserted that the state law regulating the use of riverbeds was preempted by federal law and by the federal navigational servitude, which is the power of the U.S. Congress to ensure that navigable rivers remain open to interstate and foreign commerce. The state denied that federal law or the servitude preempted the state Hydroelectric Resources Act (HRA), Title 77, ch. 4, part 2, and counterclaimed for compensation for PPL's past and ongoing use of state riverbeds, as well as damages under theories of uncompensated use of state land, unjust enrichment, trespass, and negligence. The District Court agreed with the state, holding that the Federal Power Act (FPA) recognized the property rights of parties whose land is affected by federally licensed hydroelectric projects and specifically prohibits the use of private property without compensation, so the state was allowed to seek compensation. The court also concluded that the FPA explicitly permits the operation of state law regarding proprietary rights affected by a federally licensed facility, so the HRA was not preempted by the FPA. PPL Mont., LLC v. St., 2010 MT 64, 355 Mont. 402, 229 P.3d 421.

Following the Montana Supreme Court's decision, PPL appealed to the United States Supreme Court. The United States Supreme Court reversed the Montana court's ruling in part, holding that the Montana court had not properly considered the rivers in question on a segment-by-segment basis and had not determined whether they were navigable in fact at the time of statehood. The United States Supreme Court remanded the case for proceedings consistent with its opinion. PPL Montana, LLC v. Montana, 565 US __, 132 S Ct 1215 (2012).

Harvest-Level Accounting of Timber Sales Not Required: Plaintiff challenged the methodology used by the state Board of Land Commissioners in approving the harvest and sale of timber in state forests, asserting that 77-1-202 required harvest-level accounting. The District Court granted summary judgment to defendants, ruling that the statute did not require the Board to reconcile timber sale costs and benefits at the harvest level. On appeal, the Supreme Court noted that the statute, on its face, does not require accountings at all, but rather requires the Board to secure the largest measure of legitimate and reasonable advantage to the state. The court declined to insert what has been omitted from the statutory language, despite plaintiff's contention that a comprehensive economic evaluation was implicit in the statute. The court held that it could not be concluded that the Board has not secured or could not secure the largest measure of benefit from timber sales without harvest-level accounting, given the multiple purposes that the Board must fulfill with regard to school trust lands, the broad discretion and deference that the law provides to the Board in administering school trust lands, and current statutory accounting requirements. Thus, the Board is not legally required to conduct harvest-level review of timber sales and did not violate 77-1-202 when it decided to forego harvest-level financial reconciliation in a timber sale. Summary judgment was affirmed. Friends of the Wild Swan v. Dept. of Natural Resources and Conservation, 2005 MT 351, 330 M 186, 127 P3d 394 (2005). See also State ex rel. Thompson v. Babcock, 147 M 46, 409 P2d 808 (1966), and Montanans for Responsible Use of School Trust v. State ex rel. Bd. of Land Comm'rs, 1999 MT 263, 296 M 402, 989 P2d 800 (1999).

Accounting System Allowing Commingling of State Trust Revenue Constitutional: Plaintiff challenged the state's alleged improper commingling of state land trust assets, including rental and bonus payments on certain coal leases, into the general fund, asserting that the accounting system violated the state's duty to obtain full market value for school trust lands. The District Court concluded that plaintiff failed to prove financial harm to the school trust beneficiaries, particularly when the Legislature's appropriation to public schools far exceeded the combined money provided by the interest income and the bonus payments. On appeal, the Supreme Court affirmed. The state satisfied its trust obligations by demonstrating that its accounting system was sufficiently accurate and complete to allow plaintiff to ascertain that all trust revenue goes to

benefit public schools, while plaintiff failed to carry its burden of proving that the state withheld either the interest income or the bonus payments or improperly diverted those funds to nontrust purposes. Thus, the state statutory scheme did not breach the state's trustee duty by requiring the deposit of interest income and bonus payments into the general fund. Montanans for Responsible Use of School Trust v. Darkenwald, 2005 MT 190, 328 M 105, 119 P3d 27 (2005), distinguishing Cobell v. Babbit, 52 F. Supp. 2d 11 (D.D.C. (1999). See also Montanans for Responsible Use of School Trust v. State ex rel. Bd. of Land Comm'rs, 1999 MT 263, 296 M 402, 989 P2d 800 (1999).

State Loan in Exchange for Full Market Value of Future Stream of Mineral Royalties Without Appraisal Not Violative of Fiduciary Duty to Preserve State Land Trust — Valuation of Future Stream Affirmed: Senate Bill No. 495 (2001) authorized the Department of Natural Resources and Conservation to borrow up to $75 million from the coal trust severance tax permanent fund for 30 years to buy mineral production royalties owned by the school trust in order to enhance short-term distributable revenue from the permanent fund for the benefit of public schools. Plaintiff asserted that this statutory scheme violated the state's school trust duties by using an arbitrary method of determining the appropriate discount rate and by not requiring an independent appraisal to determine full market value of the future royalty stream. The District Court concluded that the state's method of determining the appropriate discount rate was neither arbitrary nor a breach of the duty to obtain fair market value, and on appeal, the Supreme Court affirmed that the discount rate was reasonable and reflected the full market value of the future stream of mineral royalties. Additionally, an independent appraisal was not necessary because when the state sells only an estate or interest in land, the state has ample power to determine the method by which to ascertain the full market value of the estate or interest. The State Board of Land Commissioners bears the task of ensuring that the trust receives full market value for state land interests, and the Supreme Court declined to substitute its opinion for that of the Land Board unless the Land Board's action is arbitrary. Plaintiff failed to show that the Senate Bill No. 495 financing scheme was unconstitutional beyond a reasonable doubt, and the Supreme Court affirmed that the state, by balancing the interests of present and future beneficiaries of the school trust through Senate Bill No. 495, fully complied with the Montana Constitution, The Enabling Act, and state statutes and thus did not violate its trust duties. Montanans for Responsible Use of School Trust v. Darkenwald, 2005 MT 190, 328 M 105, 119 P3d 27 (2005), following Toomey v. St. Bd. of Land Comm'rs, 106 M 547, 81 P2d 407 (1938), and State ex rel. Hughes v. St. Bd. of Land Comm'rs, 137 M 510, 353 P2d 331 (1960).

Failure to Distinguish Between Commercially Valuable and Nonvaluable Timber as Firewood on State Lands Violative of Trust Duty of Undivided Loyalty: Pursuant to 77-5-211, the state discretionarily issued free permits for the gathering of dead, down, or inferior wood from school trust lands for use as firewood. The District Court concluded that 77-5-211 authorizes the Department of Natural Resources and Conservation to act in violation of the school trust by allowing the Department to give away commercially valuable timber, in violation of its trust duty of undivided loyalty. The state argued on appeal that the District Court's conclusions were incorrect because the Department retained discretion to issue permits and because plaintiff failed to show that dead wood had commercial value in all instances. The Supreme Court affirmed, citing Wild W. Motors, Inc. v. Lingle, 224 M 76, 728 P2d 412, 43 St. Rep. 2030 (1986), in considering the state's duty of undivided loyalty as trustee of school trust lands, noting that a trustee must act with the utmost good faith toward the beneficiary and may not act in the trustee's own interest or in the interest of a third party. In failing to distinguish between commercially valuable timber and timber that lacks commercial value, the statute allows the Department to issue permits to third parties without charging them for any commercially valuable wood that they collect, violating both the mandate that full market value be obtained for school trust lands and the state's trust duty of undivided loyalty. Montanans for Responsible Use of School Trust v. State ex rel. Bd. of Land Comm'rs, 1999 MT 263, 296 M 402, 989 P2d 800, 56 St. Rep. 1065 (1999).

Market Value of State Land Rights-of-Way Set by Statute at 1972 Levels — Unconstitutionality: The plain language of 77-1-130 requires that full market valuations of right-of-way acreage for historic deeds on state trust lands be based on the median values for the classifications of land at 1972 levels, leaving the Department of Natural Resources and Conservation no choice but to use those levels instead of current market value. The state argued that pursuant to 40 A.G. Op. 24 (1983), the figures in 77-1-130 are merely a minimum above which the Department may charge full market value. However, the statutory language is mandatory rather than discretionary and violates the provisions of the Montana Constitution and The Enabling Act, which require the state to receive full market value for school trust lands, and thus is unconstitutional. Montanans

for Responsible Use of School Trust v. State ex rel. Bd. of Land Comm'rs, 1999 MT 263, 296 M 402, 989 P2d 800, 56 St. Rep. 1065 (1999).

State Land Cabin Site Renewal Policy Not Violative of Obligation to Obtain Full Market Value: Plaintiff contended that 77-1-208 is facially invalid because the use of a cabin site renewal policy that did not employ competitive bidding was calculated to keep cabin site rental rates below full market value. However, nothing in the plain language of 77-1-208 abrogates the mandate that full market value be obtained for school trust lands. Plaintiff failed to show that the statute violates the duty of undivided loyalty or that the preference accorded lessees on cabin site leases on state lands resulted in renewal rates below market value. The statute legislatively establishes a method by which full market value is obtained, which is allowed pursuant to Jerke v. Dept. of State Lands, 182 M 294, 597 P2d 49 (1979), but the language of 77-1-208 nevertheless requires that full market value be obtained, by whatever method is used, and therefore on its face does not violate the trust. Thus, the District Court correctly held that the renewal preference in 77-1-208 does not violate the school trust requirements of the Montana Constitution or The Enabling Act of 1889. Montanans for Responsible Use of School Trust v. State ex rel. Bd. of Land Comm'rs, 1999 MT 263, 296 M 402, 989 P2d 800, 56 St. Rep. 1065 (1999).

State Land Cabin Site Rental Policy Violative of School Trust Obligation to Obtain Fair Market Value: The policy employed by the Department of Natural Resources and Conservation in renting cabin sites on state lands, in a manner that resulted in below-market rentals, violated the state's school trust obligations under the Montana Constitution and The Enabling Act of 1889, even though 77-1-208 is facially valid because it requires that full market value be obtained. Montanans for Responsible Use of School Trust v. State ex rel. Bd. of Land Comm'rs, 1999 MT 263, 296 M 402, 989 P2d 800, 56 St. Rep. 1065 (1999), following State ex rel. Thompson v. Babcock, 147 M 46, 409 P2d 808 (1966), and Jerke v. Dept. of State Lands, 182 M 294, 597 P2d 49 (1979).

Statute Allowing State Lands to Remain Idle While Lessees Determine Value of Improvements — Unconstitutionality: Under 77-6-305, the value of improvements placed on the leasehold by a former lessee is required to be paid by the new lessee before the new lease may be issued if the former lessee chose not to remove the improvements. The District Court found the provision constitutional even though it might result in less revenue because of delay caused by lease delays, concluding that the Department of Natural Resources and Conservation must have latitude to administer school trust lands. The Supreme Court disagreed, holding that portion of 77-6-305 unconstitutional on its face. The state's discretion to administer the trust is broad, but not unlimited, and must conform to the requirements of the trust. The statute allows trust lands to idle indefinitely while former and new lessees determine the value of the improvements, which is inconsistent with the trust mandate that full market value be received for the lands. Montanans for Responsible Use of School Trust v. State ex rel. Bd. of Land Comm'rs, 1999 MT 263, 296 M 402, 989 P2d 800, 56 St. Rep. 1065 (1999).

Statute Allowing Uncompensated Time for Removing Improvements Violative of Full Benefit of Trust Lands and Trust Duty of Undivided Loyalty: Under 77-6-304, a former state land leaseholder was allowed up to 60 days to remove movable improvements without charge. The state contended that the statute does not violate any fiduciary duty, but merely allows the Department of Natural Resources and Conservation time to inventory improvements on state lands, with no quantifiable impact on the trust fund. Conceding that the policy could reduce potential profits to the trust, the District Court nevertheless found that: (1) nothing in the statute prevents the Department from charging former lessees for storage of improvements after termination of their leases; (2) the statute does not prevent a new lessee from moving onto trust land before the former lessee has removed the improvements; and (3) it was reasonably necessary for the Department to allow former lessees some extra time to remove improvements, especially in winter months when most agricultural leases expire. The Supreme Court disagreed, concluding that 77-6-304 plainly authorizes the Department to allow former lessees to remain free of charge on trust lands while removing improvements, denying the trust beneficiaries the full benefit of the trust lands and violating the duty of undivided loyalty by benefiting third parties to the detriment of the trust beneficiaries. The statute was declared unconstitutional on its face. Montanans for Responsible Use of School Trust v. State ex rel. Bd. of Land Comm'rs, 1999 MT 263, 296 M 402, 989 P2d 800, 56 St. Rep. 1065 (1999). See also Lassen v. Ariz. Highway Dept., 385 US 458, 17 L Ed 2d 515, 87 S Ct 584 (1967).

Maximization of Income From School Trust Lands Not to Preclude Nonagricultural Uses: Shoberg transferred his grazing permit to Madden, and Madden changed from grazing cattle to grazing sheep. The Department of State Lands (now Department of Natural Resources and

Conservation) allowed the grazing of sheep to continue, notwithstanding that the Department had information indicating that the grazing of sheep would adversely impact upon bighorn sheep reintroduced into the area. The plaintiffs brought an action to require the completion of an environmental impact statement (EIS). The Supreme Court held that an EIS was required and that the Department's duty to maximize income from school trust lands did not exempt the Department from its obligation to comply with state environmental statutes. The Supreme Court also held that maximizing income is "a" consideration but not "the" consideration regarding school trust lands and is not paramount to the exclusion of wildlife or environmental considerations. Ravalli County Fish & Game Ass'n, Inc. v. Dept. of State Lands, 273 M 371, 903 P2d 1362, 52 St. Rep. 996 (1995).

School Trust Land Water Rights Owned by State: In a case involving a dispute over ownership of water rights on state school trust lands, the Supreme Court ruled that title to the surface and ground water rights on school trust lands vests in the state and that the lessee, in making appropriations on and for school trust sections, is acting on behalf of the state. It is only through state action that the lessee is on the land, and Montana law expressly provides that the lessee shall be reimbursed for all capital expenditures made in putting the water to beneficial use. The state is the beneficial user of the water, and its duty as trustee of the school trust lands prohibits it from alienating any interest in the land without receiving full compensation for it or from giving up control over the water rights. Dept. of State Lands v. Pettibone, 216 M 361, 702 P2d 948, 42 St. Rep. 869 (1985).

Sale Without Authority — Deed Void: Because it holds land in public trust and it failed to comply with statutory requirements for land sales, the Department of Highways (now Department of Transportation) was without authority to make the sale of land. The deed derived from the sale without authority was held void. Therefore, the Department of Highways (now Department of Transportation) cannot be estopped from denying the validity of the deed. Norman v. St., 182 M 439, 597 P2d 715 (1979).

Grazing District — Preference Rights Unconstitutional: A preference right under 77-6-205(1) allows a lessee contracting with the Department of State Lands (now Department of Natural Resources and Conservation) to renew his lease by meeting the high bid of other applicants upon expiration of his lease. However, this preference right was held unconstitutionally applied when exercised by a grazing district which did not use the land itself but instead subleased to whomever it wished. The only way full market value can be obtained in such a situation is by pure competitive bidding. Jerke v. Dept. of St. Lands, 182 M 294, 597 P2d 49 (1979).

DECISIONS UNDER 1889 CONSTITUTION

"Market Value" — Test for Lease of Farm Land: The test of "willing buyer-willing seller" has little applicability in awarding a lease to farm land by the state. A more appropriate test is the value of similar leases in the particular community, coupled with the applicant's ability as a farmer and other variables to be considered by the state in securing as large a return as possible on the land, while preserving its productive capacity. State ex rel. Thompson v. Babcock, 147 M 46, 409 P2d 808 (1966), followed in Montanans for Responsible Use of School Trust v. State ex rel. Bd. of Land Comm'rs, 1999 MT 263, 296 M 402, 989 P2d 800, 56 St. Rep. 1065 (1999).

Leasing for Underground Storage: The law authorizing the lease of state lands for underground storage of natural gas did not violate Art. XVII, sec. 1, 1889 Mont. Const. State ex rel. Hughes v. St. Bd. of Land Comm'rs, 137 M 510, 353 P2d 331 (1960).

"Market Value" — Royalties and Bonuses: A bid carrying a higher bonus but lower royalty prevailed over one offering a higher royalty but a lower bonus. State ex rel. Strandberg v. St. Bd. of Land Comm'rs, 131 M 65, 307 P2d 234 (1957).

Conveyance by Armory Board Unconstitutional: Law insofar as permitting the Armory Board to convey an armory and land upon which it is situated to a city was unconstitutional as it violated Art. XVII, sec. 1, 1889 Mont. Const. State ex rel. Olsen v. Armory Bd., 128 M 344, 275 P2d 652 (1954).

Lands as Including Mineral Rights: The word "lands" includes mineral rights although Art. XVII, sec. 1, 1889 Mont. Const., had no mineral classification. Texas Pac. Coal & Oil Co. v. St., 125 M 258, 234 P2d 452 (1951).

Sale Under Wrong Procedure Held Void: The implied powers of the State Board of Land Commissioners under 77-1-202 must not be inconsistent with any part of the Constitution. A sale of a tract of 160 acres of state lands lying within 3 miles of a city or town and falling within class four of Art. XVII, sec. 2, 1889 Mont. Const., which under the following constitutional provision

could only be sold in alternate lots of not more than 5 acres each, was void. State ex rel. Boorman v. St. Bd. of Land Comm'rs, 109 M 127, 94 P2d 201 (1939).

Oil and Gas Pooling on School Lands: Under section 11 of The Enabling Act and Art. XVII, sec. 2, 1889 Mont. Const., the state was authorized to sell or lease its lands and to this end could enter into a "consolidated lease and operating agreement" with private owners of other lands whereby school lands and private lands are pooled for developing and exploiting their oil and gas possibilities. Toomey v. St. Bd. of Land Comm'rs, 106 M 547, 81 P2d 407 (1938).

Public Sale Not Required — Estate in Land Sold: When an estate or interest in state lands is sold, as distinguished from the land itself, there need not be a public sale and advertising unless the Legislature so directs. The Legislature has ample power to determine the method by which to ascertain the full market value of estate or interest sold. Toomey v. St. Bd. of Land Comm'rs, 106 M 547, 81 P2d 407 (1938).

"Market Value" — Value at Time of Lease: The provision of Art. XVII, sec. 1, 1889 Mont. Const., against leasing state lands at less than "the full market value" was met if the board secured such value as existed at the time the lease was issued. Rathbone v. St. Bd. of Land Comm'rs, 100 M 109, 47 P2d 47 (1935).

Optional Renewal of Grazing Lease:

Provision that leases shall at lessee's option be extended for 3 additional years is a valid regulation of the land department and did not violate Art. XVII, sec. 1, 1889 Mont. Const., although a higher rental be offered. Rathbone v. St. Bd. of Land Comm'rs, 100 M 109, 47 P2d 47 (1935).

Laws providing for extension of leases of grazing lands for additional period of 3 years at option of lessees were "general", not "special" law, since it applied to all in class of short-term leasers. Leuthold v. Brandjord, 100 M 96, 47 P2d 41 (1935).

Leasing of Land as Constituting Disposal of Interest: An estate for years is an interest in land, and the alienation of an interest by lease for years is a disposal of such interest. The prohibition of Art. XVII, sec. 1, 1889 Mont. Const., applied to the leasing of grazing lands. Rider v. Cooney, 94 M 295, 23 P2d 261 (1933). See Leuthold v. Brandjord, 100 M 96, 47 P2d 41 (1935).

Limitations on Legislative Power: The provisions with relation to grants of land made by the United States to the state; of Art. XVII, sec. 1, 1889 Mont. Const., providing the manner of disposal of such land; and of Art. XI, sec. 2 and 12, 1889 Mont. Const., providing that the school fund derived from the proceeds of such land shall be guaranteed against loss or diversion, are limitations upon the power of disposal of school land by the Legislature. Rider v. Cooney, 94 M 295, 23 P2d 261 (1933); Newton v. Weiler, 87 M 164, 286 P 133 (1930).

"Market Value" — Actual Value: Full "market value" means actual value. Rider v. Cooney, 94 M 295, 23 P2d 261 (1933).

"Town" Defined — Three-Mile Limit for Sale of Lands in Towns — How Measured: The word "town", within the meaning of Art. XVII, sec. 2, 1889 Mont. Const., is an aggregation of inhabitants and houses used for various purposes so close to one another that the inhabitants may be said to dwell together, upon a regularly platted townsite, whether incorporated or not. The 3-mile distance from the limits of towns within which school lands cannot be sold, under the inhibition of Art. XVII, sec. 2, 1889 Mont. Const., must be measured from the nearest point upon the townsite plat. Davis v. Stewart, 54 M 429, 171 P 281 (1918).

Leasing: State lands are divided into four classes, of which class 4 comprises "lands within the limits of any town or city, or within three miles of such limits". While lands of the first and third class may be sold or leased, the Board of Land Commissioners is commanded to sell lands of the fourth class, and nothing is said about leasing them. If, however, authority to lease such lands be held to be derived from The Enabling Act, the utmost that can be said is that permission was given the state to lease without requiring it to do so. State ex rel. Gibson v. Stewart, 50 M 404, 147 P 276 (1915).

Acquisition of Land — Limitation on Power to Dispose: Neither Art. XVII, sec. 1, nor Art. XI, sec. 2, 1889 Mont. Const., dealt with the subject of the capacity of the state to acquire property. Both are limitations upon the power of disposal by the Legislature. In re Beck's Estate, 44 M 561, 121 P 784 (1912).

Sale or Leasing of Lands Granted by United States: Public lands granted to the state by the United States are subject to public sale. State ex rel. Galen v. District Court, 42 M 105, 112 P 706 (1910).

Inapplicable to Lands Granted to State: The provisions of Art. XVII, 1889 Mont. Const., related to such lands as the state has acquired or may acquire after they are selected under the

laws provided for that purpose and were not applicable to lands granted to the state. State ex rel. Armington v. Wright, 17 M 565, 44 P 89 (1896).

Attorney General's Opinions

Waiver of Federal Restrictions — Effect of State Requirements for Land Transfer: Notwithstanding the waiver of federal restrictions on land, in order for the state to transfer title to state land to a city, all state constitutional and statutory requirements must be fulfilled. 36 A.G. Op. 113 (1976).

Land Acquired by Foreclosure: Real property acquired by the Board of Investments through a foreclosure of a Public Employees' Retirement System mortgage is state land as defined by this section. 36 A.G. Op. 104 (1976).

Law Review Articles

State School Trust Lands and Oil and Gas Royalty Rates, Woodgerd & McCarthy, 3 Pub. Land L. Rev. 119 (1982).

ARTICLE XI

LOCAL GOVERNMENT

Article Compiler's Comments

Former Constitutional Provision: This article is similar to Art. XVI, 1889 Mont. Const.

Article Case Notes

DECISIONS UNDER 1972 CONSTITUTION

Mineral Interest as Distinguished From Royalty Interest — No Unconstitutional Gift: Where a contract for deed contained a reservation of a mineral interest to the county but a later deed reserved only a royalty interest, the District Court held that this amounted to an unconstitutional gift to a private individual. The Supreme Court reversed, saying that the agreed statement of facts did not show the comparative values of royalty and mineral interests in this particular land. McSweyn v. Musselshell County, 193 M 525, 632 P2d 1095, 38 St. Rep. 1260 (1981).

DECISIONS UNDER 1889 CONSTITUTION

Scope — Effect on Cities and Towns: Article XVI, 1889 Mont. Const., dealt with municipal corporations but has special reference to counties. It does not refer to cities or towns, nor does it contain any provisions applicable to them, except that by implication under section 6 thereof, the Legislature was empowered, within the restriction therein stated as to the length of the term, to provide for the election or appointment of such officers to administer the government of cities and towns as circumstances may require. State ex rel. Butte v. Weston, 29 M 125, 74 P 415 (1903).

Article Law Review Articles

Local Government Under the 1972 Montana Constitution, Lopach, 51 Mont. L. Rev. 458 (1990).

Local Government: Old Problems and a New Constitution, Moore, 33 Mont. L. Rev. 154 (1972).

Article Collateral References

Local Government Laws, Interim Report, Montana Legislative Council (1977-78).

Local Government, Interim Report No. 45, Montana Legislative Council (1971-72).

Section 1. Definition.

Convention Notes

New provision defining the term "local government unit" to include counties, cities and towns.

Attorney General's Opinions

What Electors Considered Qualified Voters for County Zoning Initiatives: A zoning regulation is subject to citizen initiative, and nothing in county zoning law limits qualified electors to only voters living in the area affected by the zoning regulations. Thus, in the case of county zoning regulation initiatives effective in all unincorporated areas of a county, all county residents are considered qualified voters, including those residing within incorporated areas of the county. 52 A.G. Op. 6 (2008).

Section 2. Counties.

Convention Notes

Revises 1889 constitution by requiring only majority of those voting to approve county seat or boundary changes. 1889 constitution requires majority of qualified electors.

Compiler's Comments

Former Constitutional Provision: This section revises Art. XVI, sec. 1 and 2, 1889 Mont. Const.

Ratification Date: The Montana Constitution was ratified by the people June 6, 1972.

Case Notes

DECISIONS UNDER 1889 CONSTITUTION

Exclusion of Land by Legislature: Act excluding from Gallatin County land included in Yellowstone Park without including it in other counties, boundaries of which were likewise redefined thereby, was invalid as contravening Constitution which authorized Legislature only to settle disputes concerning or to change common county boundaries, not to destroy them by excluding lands along them from both counties. Yellowstone Park Transp. Co. v. Gallatin County, 27 F2d 410 (9th Cir. 1928), reversed in Yellowstone Park Transp. Co. v. Gallatin County, 31 F2d 644 (9th Cir. 1929).

Removal of County Seat — Political Question: Conceding that the selection or removal of a county seat is a political function, the Constitution, as well as the legislation upon the subject, confides that function not to judges of election or the canvassers of the returns but to a certain proportion of the qualified electors of the county affected. Poe v. Sheridan County, 52 M 279, 157 P 185 (1916).

Removal of County Seat — Legislative Power — Vote Required: The provision of Art. XVI, sec. 2, 1889 Mont. Const., denying power to the Legislature to remove a county seat, insofar as it related to the vote required, was a prohibition and was self-executing. State ex rel. Stringfellow v. Bd. of Comm'rs, 42 M 62, 111 P 144 (1910).

Attorney General's Opinions

Election on Annexation of Portions of Yellowstone Park: Eligible residents of the portion of Yellowstone National Park proposed for annexation into Park County under Ch. 447, L. 1977, must be accorded the opportunity to vote on the question of annexation. A majority vote must be attained both among voters registered in Park County and among voters who reside in the area to be annexed in order to ratify the annexation. 37 A.G. Op. 161 (1978).

Law Review Articles

The State of the Montana Constitution (Turkey Feathers on the Constitutional Eagle), Petesch, 64 Mont. L. Rev. 23 (2003).

Section 3. Forms of government.

Convention Notes

New provision directing legislature to provide alternative forms of city and county or city-county governments, one of which must be the "traditional" form including the elected officials listed. Two or more counties may agree to elect one official to serve a multicounty area. Offices within counties are subject to consolidation.

Compiler's Comments

Former Constitutional Provision: This section revises Art. XVI, sec. 4, 5, 6, 7, and 8, 1889 Mont. Const.

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DECISIONS UNDER 1972 CONSTITUTION

Affidavit — Public Document: The provisions of Art. II, sec. 9, Mont. Const., apply to local government. The Clerk of the District Court is an office of local government. An affidavit filed with the Clerk of a District Court in support of a motion for leave to file a criminal charge or

warrant is a document of a public body or agency of a subdivision of state government. Assoc. Press v. St., 250 M 299, 820 P2d 421, 48 St. Rep. 958 (1991).

Test of Statute's Constitutionality: The constitutionality of a statute is tested by the constitution in effect when the law was enacted. The recodification of a statute does not act as a reenactment of the law but is merely a ministerial and administrative function. Therefore, appellant could not be denied his right to hold the office of County Surveyor because 7-4-2801 was violative of the 1889 Constitution at its inception and was not reenacted under the 1972 Constitution. Gallatin County v. McClue, 222 M 201, 721 P2d 338, 43 St. Rep. 1174 (1986).

Classification of Existing Form of Government: The classification of the existing form of government under 7-3-111 through 7-3-114 is not an imposition of any particular form of government upon a local body but rather complies with the constitutional mandates of Art. XI, Mont. Const. Schuman v. Study Comm'n of Yellowstone County, 176 M 313, 578 P2d 291 (1978).

DECISIONS UNDER 1889 CONSTITUTION

COUNTY OFFICERS

County Officers — Salary: County officers elected or appointed before enactment of the 1969 amendment to the formula salary law (7-4-2503) were not entitled during their then current terms to raises in salaries or emoluments therein provided. Shubat v. St., 157 M 143, 484 P2d 278 (1971).

"Resided": The word "reside" as used in Art. XVI, sec. 4, 1889 Mont. Const., signifies the place where the candidate has actually lived and maintained his home and where he was personally present. Under the rule that mere intention to locate at a place does not establish residence until one is physically there, held, that a candidate for County Commissioner who indicated his intention to locate within the district but took no active step looking to that end until 5 days short of the 2-year period prior to his election there was not qualified to become a candidate and his election void. Snyder v. Boulware, 109 M 427, 96 P2d 913 (1939).

County Commissioners — Vacancy: The power to fill a vacancy in the office of County Commissioner is conferred by Art. XVI, sec. 4, 1889 Mont. Const., upon the District Judge of the district in which the vacancy occurs and the provisions of the statute enacted in pursuance thereof. Although it is vested in a judicial officer, it is not a prerequisite to its exercise that it be invoked by an application in the form of a complaint or petition, nor is the validity of its exercise in a given case made dependent in any measure upon facts judicially ascertained to exist. The appointing officer pronounces no decree, nor does he adjudicate any right. His action is the result of an opinion based upon personal knowledge of the existence of the vacancy or information derived from any source which he deems reliable. State ex rel. Dowen v. District Court, 50 M 249, 146 P 467 (1915).

Appointment of School Superintendent Upon Vacancy: Section providing that in case of a tie vote for a county officer, except County Commissioner, the County Commissioners shall appoint some eligible person to fill the office, as in the case of the other vacancies in such office, was invalid as to County Superintendent of Schools and other officers named in Art. XVI, sec. 5, 1889 Mont. Const. State ex rel. Chenoweth v. Acton, 31 M 37, 77 P 299 (1904).

County Auditor: The office of County Auditor was not expressly provided for in the 1889 Constitution. State ex rel. McGinniss v. Dickinson, 26 M 391, 68 P 468 (1902).

Appointing Commissioners — New County: In an act creating a new county, the Legislative Assembly may provisionally appoint the officers thereof, including the County Commissioners, who are entitled to serve for the full constitutional term, which begins at the first general election succeeding the creation of the county and is not computed quadrennially from the adoption of the Constitution in 1889. State ex rel. Williams v. Mayhew, 21 M 93, 52 P 981 (1898).

TREASURER

Applicability of Primary Election Law: The primary election law applies to all situations where it can be made reasonably operative. Where a County Treasurer, elected in November, 1942, for a 4-year term ending March 1, 1947, died after he had qualified and before commencement of the term for which he was elected, the appointee of the County Commissioners under Art. XVI, sec. 5, 1889 Mont. Const., would hold until next general election on November 7, 1944, and procedure under the primary election law, section 23-901, et seq., R.C.M. 1947 (now repealed), and Art. XVI, sec. 5, 1889 Mont. Const., is controlling. A vacancy occurring after the primary and prior to the general election or at any other inapplicable time authorizes nomination under section 23-801 or 23-804, R.C.M. 1947 (now repealed), section 23-909, R.C.M. 1947 (now repealed), then not applying. LaBorde v. McGrath, 116 M 283, 149 P2d 913 (1944).

Collection of Tax by Withholding: Laws (now repealed) making the operator of a mine or oil well jointly liable with the holder of a royalty interest for the payment of the tax assessed against the royalty and authorizing the operator to withhold from the proceeds of the royalty interest the amount of any tax thereon paid by him were not open to the constitutional objection that the operator is thus made the collector of the tax on the royalty interest, contrary to the Constitution. This method of collecting the tax by the operator at the source of the product is permissible as a certain and expeditious one calculated to prevent the possibility of any of it escaping taxation. Byrne v. Fulton Oil Co., 85 M 329, 278 P 514 (1929).

County Treasurer: Only the County Treasurer has the power to collect taxes. Pohl v. Chicago, Milwaukee & St. Paul Ry., 52 M 572, 160 P 515 (1916); Butte v. Bennetts, 51 M 27, 149 P 92 (1915); Miss. River Power Co. v. Steele, 32 M 433, 80 P 1093 (1905); Mut. Life Ins. Co. v. Martien, 27 M 437, 71 P 470 (1903).

Collection of City Taxes: The provisions authorizing the collection of city taxes by the City Treasurer were not in violation of Art. XVI, sec. 5, 1889 Mont. Const., when construed in connection with Art. XII, sec. 4, 1889 Mont. Const. State ex rel. Butte v. Weston, 29 M 125, 74 P 415 (1903).

MUNICIPALITIES

Counties Not Included in "Municipal Corporations": That the framers of the Montana Constitution did not intend municipal corporations to include counties is clear, for the two terms are used, as in Art. XVI, sec. 6, 1889 Mont. Const., to distinguish different organizations. Hersey v. Neilson, 47 M 132, 131 P 30 (1913).

Term of Police Officer: Since a policeman or police officer does not fall within the class designated as "municipal officers" in Art. XVI, sec. 6, 1889 Mont. Const., the Legislature did not transcend its power in providing that his term of office shall extend during good behavior or until he shall become incapacitated by age or disease. State ex rel. Wynne v. Quinn, 40 M 472, 107 P 506 (1910).

"Municipal" Defined: The word "municipal" found in Art. XVI, sec. 6, 1889 Mont. Const., is used in its restricted sense, meaning "city". State ex rel. Quintin v. Edwards, 38 M 250, 99 P 940 (1908).

"Municipal Officers": Strictly speaking, a policeman is not a "municipal" officer—that is, a "city" officer—as that term is used in Art. XVI, sec. 6, 1889 Mont. Const.; nor is such officer a mere servant or employee of the municipality. State ex rel. Quintin v. Edwards, 38 M 250, 99 P 940 (1908).

CITY-COUNTY GOVERNMENT

City-County Planning Board: A city-county planning board established without reference to the electors was in violation of Art. XVI, sec. 7, 1889 Mont. Const. Plath v. Hi-Ball Contractors, Inc., 139 M 263, 362 P2d 1021 (1961).

City-County Consolidation: Laws authorizing the consolidation of Silver Bow County and Butte into one municipal corporation under Art. XVI, sec. 7, 1889 Mont. Const., were not objectionable as depriving the people of that county and city of the power of local self-government or as denying to a creditor of either the equal protection of the laws guaranteed by the 14th amendment to the federal Constitution. State ex rel. Corry v. Cooney, 70 M 355, 225 P 1007 (1924), overruled, to the extent that a constitutional amendment may be valid under the single subject rule but fail under the separate vote rule, in Marshall v. St., 1999 MT 33, 293 M 274, 975 P2d 325, 56 St. Rep. 142 (1999).

TERM OF OFFICE

Where Amendment by Election Was Self-Executing: Chapter 93, L. 1937, amending Art. XVI, sec. 5, 1889 Mont. Const., by changing the terms of certain county officers from 2 to 4 years, was a self-executing amendment becoming effective on Nov. 8, 1938, the date of the general election, without proclamation of the Governor, regardless of its provision that such proclamation would make it effective, and the officers chosen at the same election were elected for 4 years. State ex rel. O'Connell v. Duncan, 108 M 141, 88 P2d 73 (1939).

Term of Office — Municipal Officers: Under Art. XVI, sec. 6, 1889 Mont. Const., the terms of office of municipal officers must not exceed 2 years. Under 2-16-213, every officer must continue to discharge his duties, although his term has expired, until his successor has qualified. Held, that unless the term of office of such officers as fixed by statute is so plainly at odds with that prescribed by the constitutional provision above as to be wholly inconsistent with it, the statute should be upheld. State ex rel. Sandquist v. Rogers, 93 M 355, 18 P2d 617 (1933).

Commissioners — Staggered Terms: Held, that while the people in amending Art. XVI, sec. 4, 1889 Mont. Const., extending the terms of office of County Commissioners to 6 years and providing that beginning with 1906 one Commissioner should be elected at each general election for 6 years, thus always maintaining a board, two members of which should at all times be experienced men, did not declare that the plan so established should apply in the creation of new counties, it was their clear intention that it should apply and be made effectual in new counties at as early a time as possible. State ex rel. Foot v. Rogge, 80 M 1, 257 P 1029 (1927).

"Term" Defined: The word "term" as used by Art. XVI, sec. 6, 1889 Mont. Const., and 2-16-501, with reference to the election or appointment of municipal officers, applies to the office and not to the person holding it. State ex rel. Morgan v. Knight, 76 M 71, 245 P 267 (1926).

Fixed Term: For the county officers mentioned in Art. XVI, sec. 5, 1889 Mont. Const., who have been elected to their positions, the Constitution plainly contemplates a fixed term of 2 years with a contingent occupancy until their successors are elected and qualified. State ex rel. Dunne v. Smith, 53 M 341, 163 P 784 (1917).

Term of Appointees — Next General Election: The vacancies in county offices referred to in the last clause of Art. XVI, sec. 5, 1889 Mont. Const., the appointees to fill which shall hold until the next succeeding general election, are those occurring after the fixed term has commenced but before a general election, and no appointment holds good beyond the next succeeding general election, whether the interval between it and the fixed term be great or small. State ex rel. Dunne v. Smith, 53 M 341, 163 P 784 (1917).

Term of Office for Appointees: Under section 7-4-2206, declaring that the appointees to vacancies in county offices shall hold until the next general election, the statute which extends the tenure of such appointees "until the first Monday in January next after a general election" was invalid. State ex rel. Rowe v. Kehoe, 49 M 582, 144 P 162 (1914).

Vacancies: The language contained in the last sentence of Art. XVI, sec. 5, 1889 Mont. Const., should be read in connection with the sentence occurring in Art. XVI, sec. 4, 1889 Mont. Const., that "a vacancy in the board of county commissioners shall be filled by appointment by the judge of the judicial district in which the vacancy occurs". The meaning expressed is as follows: vacancies in all county, township, and precinct offices shall be filled by appointment, and the appointee shall hold his office until the next general election; vacancies in the office of County Commissioner shall be filled by appointment by the District Judge of the district in which the vacancy occurs; and vacancies in all other offices shall be filled by appointment by the Board of County Commissioners. State ex rel. Rowe v. Kehoe, 49 M 582, 144 P 162 (1914); State ex rel. McGowan v. Sedgwick, 46 M 187, 127 P 94 (1912).

Terms of County Officers: Article XVI, sec. 5, 1889 Mont. Const., regulates the terms of all county officers. State ex rel. Jones v. Foster, 39 M 583, 104 P 860 (1909).

MISCELLANEOUS

Legal Residence — Actual Residence: Held, that the term "resided" has the same meaning as where used elsewhere in the Constitution when dealing with the right to hold public office, and Art. IX, sec. 2, 3, 7, and 11, 1889 Mont. Const., shed some light upon this question. A "legal residence" may be at a different place from actual residence, under our Constitution and section 23-522, R.C.M. 1947 (now repealed). Under the facts stated, the court was justified in finding the contestee resided in the district wherein he was elected, differentiating the case at bar from one wherein the candidate sought to establish a legal residence where he had never lived or established a home. Wilson v. Hoisington, 110 M 20, 98 P2d 369 (1940).

Judicial Officers Not Included Herein: The offices of Clerk of the District Court, County Attorney, and Justice of the Peace, being enumerated in the Constitution as judicial offices, are to be excluded from the enumeration of the offices referred to in Art. XVI, sec. 5, 1889 Mont. Const. It refers only to the offices of Sheriff, Treasurer, County Clerk, Assessor, Auditor, Superintendent of Common Schools, County Surveyor, Coroner, and Public Administrator. State ex rel. Rowe v. Kehoe, 49 M 582, 144 P 162 (1914).

Drain Commissioner — Provision for Authority: In view of the provisions of Art. XVI, sec. 6, 1889 Mont. Const., the Legislative Assembly had the authority, as expressed in the drainage district law of 1905, to authorize the Commissioners of each county desiring to avail itself of the benefits of the act to appoint a drain commissioner. The commissioner had certain powers, among which was his authority to fix assessments to be paid by those directly benefited by the construction of drains. The assessment was to be collected through the agency of the regular county officers. The Legislature could, for convenience in carrying out the object of the statute,

create new agencies in addition to availing itself of existing ones. Billings Sugar Co. v. Fish, 40 M 256, 106 P 565 (1910).

Attorney General's Opinions

Recommendation of Shorter Terms of Office by Local Government Study Commission: A local government study commission may recommend that terms of office for County Commissioners be less than 6 years if the county has adopted the statutory county "commission form" of government. A local government study commission may not recommend that the terms of office for County Commissioners be less than 6 years if the county has retained the form of government organized under the statutes listed in 7-3-111. 41 A.G. Op. 51 (1986).

Failure to Adopt Alternate Form of Government: A local government which fails in an election to adopt an alternate form of government in the manner provided by Art. XI, sec. 3 and 9, Mont. Const., is bound by the features of the existing form of government. The provisions of 7-3-201 through 7-3-224 allow voters to adopt a mayor-council structure with either partisan or nonpartisan elections. The procedures for recommending such a change are set forth in 7-3-121 through 7-3-161 and 7-3-171 through 7-3-193. If a nonpartisan election structure is not adopted, local elections must be conducted on a partisan basis after May 2, 1977, under the provisions of 7-3-113. 41 A.G. Op. 37 (1985).

Elected County Official's Salary — Established by County: The Montana Constitution grants the Legislature authority to allow counties to establish the salaries of elected county officials. 38 A.G. Op. 91 (1980).

Election on Annexation of Portions of Yellowstone Park: Eligible residents of the portion of Yellowstone National Park proposed for annexation into Park County under Ch. 447, L. 1977, must be accorded the opportunity to vote on the question of annexation. A majority vote must be attained both among voters registered in Park County and among voters who reside in the area to be annexed in order to ratify the annexation. 37 A.G. Op. 161 (1978).

Consolidated Offices — Ballot Listing: It is within the discretion of the Board of County Commissioners to designate how consolidated county offices may be listed on the primary and general election ballots. 37 A.G. Op. 141 (1978).

Consolidation of Offices: The County Commissioners may consolidate the offices of County Treasurer and County Superintendent of Schools into one office. The officeholder of the consolidated offices must meet the minimum qualifications for both offices. 35 A.G. Op. 31 (1973).

Method of Paying County Attorneys' Salaries: Upon implementation of the Constitution of Montana, 1972, July 1, 1973, the salaries of County Attorneys shall be payable monthly, one-half from the general fund of the county and the other half from the state treasury, upon the warrant of the State Auditor. 35 A.G. Op. 15 (1973).

Section 4. General powers.

Convention Notes

New provision allowing legislature to grant legislative, administrative and other powers to local government units.

Case Notes

Repeal of City Resolution Via Referendum Invalid: Plaintiffs challenged a referendum approved by voters in the city of Whitefish, which repealed a city resolution that authorized the city to enter into an interlocal agreement with the county concerning planning and zoning authority over a 2-mile area around the city, arguing that the resolution was not subject to the right of voter initiative and referendum. The District Court determined that the resolution was an administrative act by the city and was therefore not subject to repeal by referendum. On appeal, the Supreme Court applied the guidelines adopted in Whitehall v. Preece, 1998 MT 53, 288 Mont. 55, 956 P.2d 743, to determine whether the action by the city was administrative or legislative in nature and affirmed, concluding that the city's action had significant administrative characteristics, which made it not subject to repeal by referendum. Phillips v. Whitefish, 2014 MT 186, 375 Mont. 456, 330 P.3d 442.

Development and Use Agreement Not Precluding City From Entering Agreement for Construction Project on Public Property — Franchise Agreement Outside Scope of Citizen Group's Agreement With City: A citizen's group entered a franchise agreement with a professional baseball organization to bring a team to Missoula. After two potential sites were rejected, the city of Missoula accepted a gift of property upon which to construct a baseball facility and granted the citizen group the right to finance and construct the stadium on the property and to convey the completed facility to the city. The citizen group moved to enjoin the city from development of the proposed civic baseball stadium because of the city's failure to comply with statutory requirements

for planning, funding, and managing the facility. All claims were dismissed on summary judgment, and the citizen group appealed, but the Supreme Court affirmed. The development and use agreements in this case did not preclude the city from executing an agreement with another entity for the construction of a similar facility on public property or from leasing a city-owned facility for baseball games or any other purpose. Any franchise agreement between the baseball organization and the citizen group was outside the scope of the group's agreement with the city, so the voter-approval provisions of 7-5-4321 did not apply. The citizen group's argument that the city was required to comply with urban renewal laws also failed. The decision whether to proceed with development under the urban renewal statutes was up to the city, and the fact that the city designated the capital improvements associated with the stadium construction as an urban renewal project did not require that the citizen group's building project come under the same purview. Rather, under 7-16-4106, the city is permitted to obtain an athletic field and civic stadium through purchase, donation, or condemnation and to regulate its use, but nothing in the statute prohibits the city from designating a stadium project as an urban renewal project or mandates that the project be designated as an urban renewal project. The District Court properly found that the city appropriately exercised its administrative authority in accepting the gift property and then leasing the site to the citizen group for purposes of constructing a stadium using private financial resources. The citizen group failed to raise a genuine issue of material fact that would preclude summary judgment. Fair Play Missoula, Inc. v. Missoula, 2002 MT 179, 311 M 22, 52 P3d 926 (2002).

Guidelines for Distinguishing Between Legislative and Administrative Acts of Local Government — Initiative and Referendum Power Reserved for Legislative Acts Only: Beginning with Billings v. Nore, 148 M 96, 417 P2d 458 (1966), the Supreme Court recognized a distinction between legislative acts, which are subject to the powers of initiative and referendum, and administrative or quasi-judicial acts, which are not. Because local governments are empowered by this section, to exercise legislative, administrative, and other powers, the question arose as to whether 7-5-131 unconstitutionally limits local government referendum power to resolutions and ordinances within the legislative jurisdiction. In order to clarify the distinction between legislative and administrative acts of a local government, the Supreme Court adopted the following guidelines in Wichita v. Kans. Taxpayers Network, 874 P2d 667 (Kans. 1994): (1) An ordinance that makes new law is legislative, while an ordinance that executes an existing law is administrative. Permanency and generality are key features of a legislative ordinance. (2) Acts that declare public purpose and provide ways and means to accomplish that purpose generally may be classified as legislative. Acts that deal with a small segment of an overall policy question generally are administrative. (3) Decisions that require specialized training and experience in municipal government and intimate knowledge of the fiscal and other affairs of a city in order to make a rational choice may properly be characterized as administrative, even though they may also be said to involve the establishment of a policy. (4) No act of a governing body is likely to be solely administrative or legislative, and the operation of the initiative and referendum statute is restricted to measures that are quite clearly and fully legislative and not principally executive or administrative. In the present case, an ordinance that implemented the use of water meters as part of a town's water system improvement plan was an administrative act that was not subject to referendum. The District Court properly declared a referendum challenging the ordinance invalid. The Supreme Court affirmed the constitutionality of 7-5-131. Whitehall v. Preece, 1998 MT 53, 288 M 55, 956 P2d 743, 55 St. Rep. 219 (1998), followed in Phillips v. Whitefish, 2014 MT 186, 375 Mont. 456, 330 P.3d 442, and overruling Chouteau County v. Grossman, 172 M 373, 563 P2d 1125 (1977), and Dieruf v. Bozeman, 173 M 447, 568 P2d 127 (1977), to the extent that those decisions stand for the rule that a local government's act is administrative based solely on a statutory grant of authority.

Municipal Ordinance Limiting University Students' Parking Rights Not Violation of Equal Protection: A university student association challenged the legality of a city ordinance limiting parking in residential areas near the university to residents of those areas. The Supreme Court held that resident and nonresident classifications do not result in invidious discrimination and that the ordinance had valid objectives, such as limiting congestion and meeting safety concerns, and therefore was legal. Assoc. Students v. Missoula, 261 M 231, 862 P2d 380, 50 St. Rep. 1301 (1993).

Municipality's Authority to Adopt Ordinance Limiting University Students' Rights to Park on City Streets: A university student association challenged the legality of a city ordinance limiting parking in residential areas near the university to residents of those areas. The Supreme Court held that municipalities have the power to regulate parking and that regulating parking to

relieve congestion in certain residential neighborhoods was a reasonable exercise of governmental authority. Assoc. Students v. Missoula, 261 M 231, 862 P2d 380, 50 St. Rep. 1301 (1993).

County May Bring Action for Acquisition by Prescription: The defendant argued that the county did not have legal standing to bring an action on behalf of the public to acquire a road by prescription. The Supreme Court held that the general powers granted to counties must be liberally construed, and in so doing, it was clear that the county could maintain the action. Granite County v. Komberec, 245 M 252, 800 P2d 166, 47 St. Rep. 2061 (1990).

Independent Exercise of Eminent Domain Power by Joint Airport Board Member: Plaintiffs argued that 67-10-205(2)(c) mandates that a proceeding for eminent domain may not be brought by a single municipal member of a joint airport board but rather only as a joint action with the other signatories. The Supreme Court found this to be an overly narrow interpretation in light of other statutory authority in Title 67, ch. 10, parts 1 and 2, which empowers municipalities to act either jointly or independently, and under the broad grant of power to cities under this section. By its terms, 67-10-205(2)(c) requires joint action when an eminent domain proceeding is brought pursuant to the authority of the joint airport board; however, it does not preclude action separate and apart from the board. Lake v. Lake County, 233 M 126, 759 P2d 161, 45 St. Rep. 1354 (1988).

County Commission's Approval Power — Solid Waste — Withdrawal of Approval: A county refuse board contracted with an individual to operate a sanitary landfill. Difficulties arose from the failure of the operator to obtain an operator's license. The County Commissioners sued the operator and prevailed. On appeal, the operator questioned the power of the County Commission to withdraw its contract approval and thereby direct the refuse board to terminate the contract. The Supreme Court held that when a Board of County Commissioners was given an express power of approval, such power was to be complemented by the implied power to withhold approval upon a showing of adequate cause. A logical extension of an implied power to withhold approval was an implied power to withdraw approval. Here, the contract required the operator to satisfy state licensing requirements. The refuse board failed to enforce the provision and allowed the landfill to be operated in violation of law. The Department of Health Solid Waste Management Bureau began refusing to lift sanitary restrictions on subdivisions in the area, exposing the County Commissioners to possible liability. The withdrawal of approval of the defendant's contract was an obvious necessity supported by adequate cause and should be considered proper under the circumstances, which virtually eliminated the propriety of the approval. Ryan v. Bd. of County Comm'rs, 190 M 273, 620 P2d 1203, 37 St. Rep. 1965 (1980).

Attorney General's Opinions

Excess Cash Balance to Be Added to Annual Budget Calculations — Establishment of Trust Fund With Excess Prohibited: A city with general government powers that has a cash balance from previously unbudgeted nontax revenue in excess of outstanding unpaid warrants at the close of the preceding fiscal year in any fund must add the cash balance into the all-purpose general fund to be used in calculating the city's annual operating budget and to set future tax levies. The cash may not be placed in a trust fund, such as a 10-year irrevocable trust fund operated by a third-party trustee. 46 A.G. Op. 15 (1996).

Power of Cemetery District Trustees to Sell Headstones and Grave Markers: Consistent with the liberal construction of powers granted to local government units, the board of trustees of a cemetery district may sell headstones and grave markers at the cemetery for use in the cemetery as long as the profits are used in furtherance of the purposes of the cemetery district. 43 A.G. Op. 31 (1989).

Residential Homestead Property — Lien for Welfare Payments Not Allowed: A county may not execute on a lien for welfare payments against residential property owned by welfare recipients when there has been a homestead declaration recorded on the property. 42 A.G. Op. 112 (1988).

Lack of County Authority to Implement Employee Safety Incentive Bonus Program: A county with general government powers has no inherent authority within its statutory system to implement an employee incentive award program whereby county employees are paid bonuses for maintaining accident-free periods in their departments. 42 A.G. Op. 111 (1988).

County Power to Grant Franchises — Interlocal Agreements Not Precluded: Sections 7-3-144, 7-4-2611, 7-5-2129, and this section, as well as applicable case law, imply that a county vested with general government powers may exercise the power to grant franchises. Under 7-11-104, a city-county interlocal franchise agreement is possible. 42 A.G. Op. 87 (1988).

No County Authority to Provide Housing to Low-Income Elderly: A county with general government powers does not have the authority under Art. XI, sec. 4, Mont. Const., or 7-8-2102 to construct or maintain an apartment complex for elderly low-income citizens that does not otherwise constitute a boarding or nursing home under 7-34-2301 and that does not constitute

a public building under 7-8-2102. Instead, a county or municipal housing authority should be created under Title 7, ch. 15, parts 21 or 44, to provide such housing. 42 A.G. Op. 20 (1987).

State Authority to Regulate Liquor — No Delegation to Municipalities: The authority granted to the state by the 21st amendment to the U.S. Constitution to regulate the sale of liquor has not been delegated to municipalities with general powers. Therefore, a municipality with general powers may not punish a violation of its obscenity ordinance by suspending or revoking the liquor license of the offender. 41 A.G. Op. 75 (1986).

Separate Tax Levy for Air Pollution Program Not Permitted: The County Commissioners may not impose a separate tax levy to fund local air pollution programs. 41 A.G. Op. 28 (1985).

Counties' Legislative Power: It is indisputable that (1)(b) of this section was designed to eliminate any constitutional bar to the grant of legislative or ordinance-enacting authority to counties possessing only general governmental powers. 40 A.G. Op. 51 (1984).

Motor Vehicle Parking Offenses — Civil Penalty: A city with general government powers may not establish a civil penalty and collection system for motor vehicle parking offenses. 40 A.G. Op. 31 (1984).

County Housing Authority — Implicit Power to Finance Rehabilitation of Private Dwellings: A county housing authority has implicit statutory power to administer the Community Development Block Grant (CDBG) program for the rehabilitation of privately owned housing, and a general power county government may therefore administer the CDBG program through a county housing authority. This conclusion is reached because the Legislature recognizes the existence of substandard housing in rural as well as urban areas, and the constitution mandates the resolution of reasonable doubts in favor of local government power. 40 A.G. Op. 17 (1983).

General Government Power County — No Power to Finance Rehabilitation of Private Dwellings: A county with general government powers has no inherent authority to administer a program for the rehabilitation of privately owned housing funded under the Community Development Block Grant program since no statutes expressly confer this power on general power county governments. 40 A.G. Op. 17 (1983).

Elected County Official's Salary — Established by County: The Montana Constitution grants the Legislature authority to allow counties to establish the salaries of elected county officials. 38 A.G. Op. 91 (1980).

Town Council to Designate City Judge From Justices of the Peace of Same County: The statutes concerning the selection of a City Judge for a town stand in stark contrast to those concerning cities. Title 7 has no provision that requires the appointment of a City Judge by a town in order to implement it. Therefore, a town is not authorized by 7-4-4103 to appoint a City Judge who is not a Justice of the Peace. Rather, 3-11-205 provides for the appointment by the town council of a Justice of the Peace of the county in which the town is situated to act as City Judge. The 1975 amendment which changed the statute to read, "the justice of the peace so designated may act as a police judge in all cases arising out of a violation of ordinances in which the town is a party" from "... must act ...", simply provides a designated Justice of the Peace with some discretion in the performance of his or her duty as City Judge for a town, where formerly the duty was mandatory. The statute does not authorize the appointment of a City Judge who is not a Justice of the Peace of the county in which the town is situated. The City Judge must be designated by the town council. 38 A.G. Op. 80 (1980).

Joint Self-Insurance Programs: Montana counties may procure insurance separately or jointly and may use a deductible or self-insurance plan. Therefore, it is permissible for counties to enter into a joint self-insurance program. 38 A.G. Op. 75 (1980).

Rural SIDs — Developer's RSID — Thickly Populated: Section 7-12-2102 allows the Board of County Commissioners to create RSIDs to fund improvements on underdeveloped and unoccupied parcels of land, provided the proposed district lies within an area which is "thickly populated". The Commissioners should exercise great care in assuring that the public interest requires creation of a "developer RSID" since the county taxpayers are exposed to potential financial liability should the developer's business judgment prove faulty. 38 A.G. Op. 23 (1979).

Consolidated Offices — Ballot Listing: It is within the discretion of the Board of County Commissioners to designate how consolidated county offices may be listed on the primary and general election ballots. 37 A.G. Op. 141 (1978).

City Licensing of Real Estate Firms: A city may not require real estate firms to obtain business licenses. 37 A.G. Op. 71 (1977).

Law Review Articles

County Zoning in Montana: A New Look at an Old Constitutional Problem, Lundberg, 33 Mont. L. Rev. 63 (1972).

Section 5. Self-government charters.

Convention Notes

New provision directing legislature to pass laws concerning procedures for local voters to design their own forms of government (self-government charters). The charter provisions concerning structure of local governments would take precedence over general laws on such matters.

Case Notes

Suspension of Firefighters — All Cities Required to Present Charges to City Council for Hearing — Suspension Procedure Not Part of "Structure" of City Government Under Applicable Definitions — Statute Not Superseded by Charter: Elsenpeter, a Billings firefighter, was suspended from duty by the Billings fire chief. The firefighters' union filed a lawsuit in which the union contended that the suspension procedure used by the city was unlawful because the charges against Elsenpeter were not presented to the Billings City Council for hearing pursuant to 7-33-4124. The city contended that the suspension procedure that it used is part of the structure and organization of the city under its charter and that, pursuant to 7-3-701(2) and this section, which allow the structure of a chartered city government to supersede statutory requirements, the city may override the statutory requirements for hearing contained in 7-33-4124 because the definition of "structure" contained in 7-1-4121(24) is the definition that should apply. The Supreme Court held that in as much as the definitions in 7-1-4121 are, by the terms of that section, limited in their application to 7-1-4121 through 7-1-4149, the dictionary definition of "structure" is the definition that applies. Because the dictionary definition of structure was narrower, the Supreme Court held that the disciplinary suspension procedure used by the city was not part of the "structure" of city government. Therefore, the Supreme Court held that the statutory procedure contained in 7-33-4124, requiring presentment of the charges to the City Council, was not superseded by the city charter and had to be followed for the purposes of the suspension of Elsenpeter. Billings Firefighters Local 521 v. Billings, 1999 MT 6, 293 M 41, 973 P2d 222, 56 St. Rep. 23 (1999).

Limitation on Self-Governing Powers: The city of Billings, a self-governing city, adopted an ordinance purporting to supersede all but two sections in Title 7, ch. 33, part 41, relating to municipal fire departments. The firefighters challenged the ordinance. The District Court held that the ordinance was a permissible exercise of a self-government power. On appeal, the Supreme Court held that under the shared sovereignty concept contained in the Montana Constitution, local governments with self-governing powers are limited only by express prohibitions in the constitution, state statute, or the local government charter itself. By statute, a local government may not establish standards or requirements which are lower or less stringent than those imposed by state law. The court held that because the ordinance did not contain standards governing several areas it purported to supersede, the ordinance provisions were lower or less stringent than the statutory provisions and therefore invalid. A local government must provide any service required by state law. State law requires every city to have a fire department. Pursuant to Art. XI, sec. 5(3), Mont. Const., the only statutory provisions which a self-governing charter may control over are those establishing executive, legislative, and administrative structure and organization. The ordinance was invalid. Billings Firefighters Local 521 v. Billings, 214 M 481, 694 P2d 1335, 42 St. Rep. 112 (1985), followed in Billings Firefighters Local 521 v. Billings, 1999 MT 6, 293 M 41, 973 P2d 222, 56 St. Rep. 23 (1999).

Power to Prohibit Door-to-Door Solicitation: The city of Billings enacted an ordinance declaring uninvited door-to-door solicitation a nuisance punishable as a misdemeanor. It was argued that a state statute regulating itinerant vendors did not empower a city to prohibit their activities, therefore precluding the ordinance. The Supreme Court disagreed. Under the expanded powers of local self-government provided by Montana's 1972 Constitution, a city possessing those powers may exercise any power not prohibited by the Constitution or state statute. A city possessing self-government powers may prohibit uninvited door-to-door solicitation by itinerant vendors, and a licensing statute does not legalize an activity otherwise prohibited. Any statements to the contrary contained in DeLong v. Downes, 175 M 152, 573 P2d 160 (1977), are expressly overruled. Tipco Corp. v. Billings, 197 M 339, 642 P2d 1074, 39 St. Rep. 600 (1982).

Attorney General's Opinions

Combination of Legislative and Executive Powers Under Charter County Government: Under 7-3-705, a charter may provide that the executive and administrative functions of the government will be performed by one or more members of the legislative body, which clearly allows the entire legislative body or commission to perform the executive functions. Accordingly, a county charter may provide that the legislative body or commission will perform the executive functions in addition to its legislative duties. The language of the charter determines whether the executive

functions are performed by one or all of the members of the legislative body or commission. 46 A.G. Op. 14 (1996).

Section 6. Self-government powers.

Convention Notes

New provision allowing local government units to share powers with the state and to have all powers not specifically **denied**. At present local governments have only those powers specifically **granted**.

Case Notes

Self-Government Local Governments Not Prohibited From Adopting No-Smoking Ordinances Affecting Gambling Establishments: Former section 7-1-120 (now repealed) provided: "An establishment that has been granted a permit under Title 23, chapter 5, part 6, for the placement of video gambling machines on the premises is exempt from any local government ordinance that is more restrictive than the provisions of Title 50, chapter 40, part 1", which is the Montana Clean Indoor Air Act of 1979. Under this section, "A local government unit adopting a self-government charter may exercise any power not prohibited by this constitution, law, or charter." To exempt is not to prohibit. A prohibition cuts off the power to act in the first instance. An exemption assumes that there is authority or power to act and grants freedom or immunity from that power. Section 7-1-120 did not effect an express prohibition of self-governing powers. Therefore, it did not preempt any no-smoking ordinances adopted by a self-governing entity. The state argued that it had preempted the area of state-licensed video gambling machines and that city ordinances limiting or prohibiting smoking in buildings open to the public, one ordinance of which expressly applied to premises with state licenses for video gambling machines, were inconsistent with that preemption. Section 7-1-112(5) prohibits a local government with self-government powers from exercising the power to regulate any form of gambling. The cities' clean air ordinances are not an attempt to regulate gambling in contravention of the 7-1-112(5) prohibition; the ordinances regulate clean indoor air, and if that regulation incidentally impacts video gambling machine establishments, that fact does not invalidate the ordinances. The ordinances have incidental impacts on all buildings open to the public. Am. Cancer Soc'y v. St., 2004 MT 376, 325 M 70, 103 P3d 1085 (2004).

Local Development Code Regulating Sale of Alcoholic Beverages Not Preempted by State: Montana's statutory framework for the regulation of alcohol clearly contemplates that cities will impose local zoning that regulates the sale of alcohol. The development code of the city of Red Lodge, a self-governing city, being consistent with and stricter than the state's regulations, was not preempted by state law. Town Pump, Inc. v. Bd. of Adjustment of Red Lodge, 1998 MT 294, 292 M 6, 971 P2d 349, 55 St. Rep. 1205 (1998), overruling State ex rel. Libby v. Haswell, 147 M 492, 414 P2d 652 (1966).

Regulation of Nude Dancing by Municipality: Under the broad regulatory powers of the twenty-first amendment, a municipality with self-government powers may enact an ordinance that regulates nude and seminude dancing. Billings v. Laedeke, 247 M 151, 805 P2d 1348, 48 St. Rep. 133 (1991).

System Development Fees Allowable Form of Financing Future Expansion of City Water and Sewer System: When liberally construed, it is within the power of a self-governing municipality, as well as a reasonable extension of a city's express statutory authority, to implement the collection and accumulation of system development fees to fund a portion of the cost of future expansion of municipal water and sewer systems. The fees are proper as long as they are based on reasonably anticipated future costs of the city and the revenue generated from the fees is used solely to fund facility expansion or to pay for bonds sold for that purpose. Lechner v. Billings, 244 M 195, 797 P2d 191, 47 St. Rep. 1512 (1990).

City Ordinance Requiring Developer Surcharge — Valid Exercise of Self-Governing Power: A city ordinance imposing a 5% surcharge on developers of raw land prior to creation of a special improvement district was a valid exercise of the city's self-governing powers. Diefenderfer v. Billings, 223 M 487, 726 P2d 1362, 43 St. Rep. 1934 (1986).

Tax on Sale of Attorney's Services — Invalid: A city ordinance imposing an annual tax on every lawyer or law firm carrying on the practice of law, calculated on the basis of gross revenue generated from attorney-client relationships, was held to be an unconstitutional sales tax. The tax was beyond the scope of self-government powers and in violation of 7-1-112, since it was not related to any regulatory control measure for the health or welfare of the city but was a tax on the sale of attorneys' services. Brueggemann v. Billings, 221 M 375, 719 P2d 768, 43 St. Rep. 905 (1986).

Adoption of Self-Government Charter — Doctrine of Implied Preemption: Appellant garbage haulers contended that the Legislature preempted the field of garbage regulation by enacting 7-2-4736. Prior to the 1972 Constitution, cities had only those powers expressly given to them by the Legislature, and if the Legislature considered a subject to be a matter of statewide concern, it could enact laws on the subject and preempt local governments from the field. However, Art. XI, sec. 6, Mont. Const., states that a local government which adopts a self-government charter may exercise any power not prohibited by the Constitution, law, or the charter. The city of Billings adopted a self-government charter in 1976, and 7-1-102 allows the city to provide services or perform any functions not expressly prohibited. The Supreme Court held in Tipco Corp., Inc. v. Billings, 197 M 339, 642 P2d 1074 (1982), that "the only way the doctrine of pre-emption by the state can co-exist with self-government powers of a municipality is if there is an express prohibition by statute which forbids local governments . . . from acting in a certain area. The doctrine of implied pre-emption, by definition, cannot apply to local governments with self-government powers". Powers specifically denied to local governments are enumerated in 7-1-111 and include the exercise of any power that prohibits the grant or denial of a certificate of public convenience and necessity. Under 69-12-314, garbage haulers are required to get a certificate of public convenience and necessity prior to doing business. The decision by Billings voters that the city should provide garbage services in no way prohibits the grant or denial of a certificate of public necessity. The Supreme Court held that the city was simply exercising its self-government powers to provide a service for its residents and was taxing them for that service. D & F Sanitation Serv. v. Billings, 219 M 437, 713 P2d 977, 43 St. Rep. 74 (1986), overruling Billings v. Weatherwax, 193 M 163, 630 P2d 1216, 38 St. Rep. 1034 (1981).

Limitation on Self-Governing Powers: The city of Billings, a self-governing city, adopted an ordinance purporting to supersede all but two sections in Title 7, ch. 33, part 41, relating to municipal fire departments. The firefighters challenged the ordinance. The District Court held that the ordinance was a permissible exercise of a self-government power. On appeal, the Supreme Court held that under the shared sovereignty concept contained in the Montana Constitution, local governments with self-governing powers are limited only by express prohibitions in the constitution, state statute, or the local government charter itself. By statute, a local government may not establish standards or requirements which are lower or less stringent than those imposed by state law. The court held that because the ordinance did not contain standards governing several areas it purported to supersede, the ordinance provisions were lower or less stringent than the statutory provisions and therefore invalid. A local government must provide any service required by state law. State law requires every city to have a fire department. Pursuant to Art. XI, sec. 5(3), Mont. Const., the only statutory provisions which a self-governing charter may control over are those establishing executive, legislative, and administrative structure and organization. The ordinance was invalid. Billings Firefighters Local 521 v. Billings, 214 M 481, 694 P2d 1335, 42 St. Rep. 112 (1985), followed in Billings Firefighters Local 521 v. Billings, 1999 MT 6, 293 M 41, 973 P2d 222, 56 St. Rep. 23 (1999).

Unconstitutional Regulation of Attorneys — Regulatory Business License Required — Self-Government Powers Municipality: A business license ordinance enacted by a self-governing municipality requiring licensure of attorneys was declared invalid in respect to the attorneys because provisions of the ordinance provided for regulation of the practice of law contrary to the Supreme Court's authority to regulate the bar as provided in Art. III, sec. 2, Mont. Const. The Supreme Court recognized the universe of powers available to self-governing local governments that are not available to general power local governments, but said that such powers are restricted by the Montana Constitution. Harlen v. Helena, 208 M 45, 676 P2d 191, 41 St. Rep. 162 (1984).

Power to Prohibit Door-to-Door Solicitation: The city of Billings enacted an ordinance declaring uninvited door-to-door solicitation a nuisance punishable as a misdemeanor. It was argued that a state statute regulating itinerant vendors did not empower a city to prohibit their activities, therefore precluding the ordinance. The Supreme Court disagreed. Under the expanded powers of local self-government provided by Montana's 1972 Constitution, a city possessing those powers may exercise any power not prohibited by the Constitution or state statute. A city possessing self-government powers may prohibit uninvited door-to-door solicitation by itinerant vendors, and a licensing statute does not legalize an activity otherwise prohibited. Any statements to the contrary contained in DeLong v. Downes, 175 M 152, 573 P2d 160 (1977), are expressly overruled. Tipco Corp. v. Billings, 197 M 339, 642 P2d 1074, 39 St. Rep. 600 (1982).

Powers of Self-Government Charter Counties: Under the 1889 Montana Constitution, legislative control over counties was supreme: counties could exercise only such powers as were expressly granted to them by the state, together with such implied powers as were necessary

for the execution of the powers expressly granted. The 1972 Constitution opened to local government units new vistas of shared sovereignty with the state through the adoption of self-government charters. Article XI, sec. 4, Mont. Const., continues to provide that general local government forms have such powers as are expressly provided or implied by law (to be liberally construed), but Art. XI, sec. 6, Mont. Const., provides that a local government unit may act under a self-government charter with its powers uninhibited except by express prohibitions of the Constitution, law, or charter. The broad expanse of shared sovereignty given to self-governing local units is illustrated by 7-1-103 and 7-1-106. Madison County, having a self-governing charter form of local government, may exercise legislative powers it shares with the state. State ex rel. Swart v. Molitor, 190 M 515, 621 P2d 1100, 38 St. Rep. 71 (1981).

Obscenity "Community Standards" — Statewide as Opposed to Local: A municipal corporation does not have power to enact an ordinance relating to obscenity in excess of limits imposed on city ordinances by the Legislature. Constitutionally adequate community standards to establish whether a work is obscene are not local city standards as opposed to statewide standards but statewide standards as opposed to national standards. The court held that in the face of Art. XI, sec. 6, Mont. Const., a city ordinance in conflict with a prohibitive section of state law cannot stand where the state law is constitutionally valid. U.S. Mfg. & Distrib. Corp. v. Great Falls, 169 M 298, 546 P2d 522 (1976).

Attorney General's Opinions

County Powers Not Inclusive of Legislative Powers — Closing of County Incinerator Considered Administrative Act Not Subject to Initiative and Referendum: Absent a charter granting self-government powers, a county that exercises only general powers is limited to whatever powers that the Legislature expressly or impliedly grants. Even though the Montana Constitution extends initiative and referendum authority to voters of local government entities, that power is limited to the local government's legislative authorization. Beyond basic corporate powers exercised by a Board of County Commissioners, a general government county functions through administrative boards, districts, and commissions created under specific statutory authority. In this case, Park County created an administrative refuse district and subsequently closed the county-owned incinerator. The closing of the incinerator was subject to the powers of initiative and referendum only if it was within the county's legislative jurisdiction. However, the incinerator closing was an administrative rather than legislative act and thus was not subject to initiative and referendum. 50 A.G. Op. 8 (2004).

Authority of City-County Government to Acquire and Operate Electric and Natural Gas Utilities: A consolidated government with self-government powers, such as the city and county of Butte-Silver Bow, has the authority to acquire and operate electric and natural gas utilities both within and outside the boundaries of the local government unit. The Attorney General determined that Butte-Silver Bow was specifically authorized to do so after considering the local government's charter, constitutional ramifications, and whether the exercise of that authority was prohibited by local government law or other statutes applicable to self-government units and was consistent with state provisions in areas affirmatively subjected to state control, as described in 7-1-113. 48 A.G. Op. 14 (2000). See also State ex rel. Swart v. Molitor, 190 M 515, 621 P2d 1100 (1981), D&F Sanitation Serv. v. Billings, 219 M 437, 713 P2d 977 (1986), and Lechner v. Billings, 244 M 195, 797 P2d 191 (1990).

Mandatory Seatbelt Ordinance: Under Montana law and the Montana Constitution, a municipality with self-governing powers may enact a mandatory seatbelt ordinance that provides for a fine or jail sentence for violation of the ordinance as long as the fine or penalty does not exceed $500 and the imprisonment does not exceed 6 months for any one offense, and as long as such an ordinance is not prohibited by the city charter. 41 A.G. Op. 47 (1986).

Self-Government Powers — Professional Licensing — Conflict With State Statutes: The city of Helena, operating under a home rule charter, passed an ordinance requiring a license fee of all city businesses. State statutes that prohibit municipalities from imposing license fees on certain professions did not apply because the statutes were not made specifically applicable to self-government units. Home rule governments have all powers not specifically denied by the Montana Constitution, law, or charter. 39 A.G. Op. 60 (1982).

County Powers — Revenue Funds: Unless a specific mode or manner of action is mandated by statute, counties may contract with individuals or private organizations, including nonprofit service organizations, for the purchase of services or materials the counties are authorized by statute to provide their constituents if the contracts are reasonable and appropriate methods of furnishing services or materials. Counties may use federal revenue-sharing funds to purchase any services or materials they could use county tax revenues to purchase. 37 A.G. Op. 105 (1978).

Self-Government Powers: Under a form of government with local self-government powers, the replacement of former county officers with department supervisors is a legitimate exercise of such local self-government powers. 37 A.G. Op. 68 (1977).

Section 7. Intergovernmental cooperation.

Convention Notes

New provision allowing local governments to share services and functions with other units of government, the state and the United States.

Attorney General's Opinions

Joint Self-Insurance Programs: Montana counties may procure insurance separately or jointly and may use a deductible or self-insurance plan. Therefore, it is permissible for counties to enter into a joint self-insurance program. 38 A.G. Op. 75 (1980).

Law Review Articles

City-County Planning in Montana—Its Status and Prospects, Keefer, 25 Mont. L. Rev. 185 (1964).

Section 8. Initiative and referendum.

Convention Notes

New provision directing legislature to give residents the power to initiate local ordinances by petition or to petition to vote on ordinances passed by local governments.

Case Notes

Repeal of City Resolution Via Referendum Invalid: Plaintiffs challenged a referendum approved by voters in the city of Whitefish, which repealed a city resolution that authorized the city to enter into an interlocal agreement with the county concerning planning and zoning authority over a 2-mile area around the city, arguing that the resolution was not subject to the right of voter initiative and referendum. The District Court determined that the resolution was an administrative act by the city and was therefore not subject to repeal by referendum. On appeal, the Supreme Court applied the guidelines adopted in Whitehall v. Preece, 1998 MT 53, 288 Mont. 55, 956 P.2d 743, to determine whether the action by the city was administrative or legislative in nature and affirmed, concluding that the city's action had significant administrative characteristics, which made it not subject to repeal by referendum. Phillips v. Whitefish, 2014 MT 186, 375 Mont. 456, 330 P.3d 442.

Equitable Tolling and Estoppel Inapplicable to Stay Statutory Deadlines for Collecting Petition Signatures: The Flathead County Board of County Commissioners adopted a resolution approving a developer's amendment to the county master plan that would allow the building of a regional shopping mall. Plaintiff organization was then formed to put the resolution to a vote of the qualified county electors through the initiative and referendum process, but plaintiff failed to gather enough valid signatures within the statutory deadlines. During the signature-gathering period, the Flathead County Attorney determined that only qualified electors in the area covered by the master plan, rather than all qualified county electors, could sign the petition and vote on any resulting referendum. Plaintiff filed suit, seeking a writ of mandamus requiring the County Commissioners to proceed with the process or an alternative writ seeking relief through a declaratory judgment. The alternative writ was issued and then quashed and dismissed. Plaintiff contended that equitable tolling should have tolled the statute of limitations on gathering signatures because the County Commissioners were urged to file suit to determine which voters were eligible to sign the petition and vote on the resulting referendum. However, the County Commissioners declined to file suit, so the period to collect signatures was not tolled, and plaintiff's equitable tolling argument failed. Plaintiff also argued that the County Commissioners should be equitably estopped from using the statutory deadlines to defeat the qualified electors' exercise of their petition rights. The estoppel argument also failed because plaintiff failed to prove the first element of estoppel—that the County Commissioners misrepresented a material fact. The elements of neither equitable tolling nor estoppel having been proved, the District Court's quashing of plaintiff's writ of mandamus was affirmed. Let the People Vote v. Flathead County Bd. of County Comm'rs, 2005 MT 225, 328 M 361, 120 P3d 385 (2005).

Guidelines for Distinguishing Between Legislative and Administrative Acts of Local Government — Initiative and Referendum Power Reserved for Legislative Acts Only: Beginning with Billings v. Nore, 148 M 96, 417 P2d 458 (1966), the Supreme Court recognized a distinction between legislative acts, which are subject to the powers of initiative and referendum, and administrative or quasi-judicial acts, which are not. Because local governments are empowered by section 4 of this article to exercise legislative, administrative, and other powers, the question

arose as to whether 7-5-131 unconstitutionally limits local government referendum power to resolutions and ordinances within the legislative jurisdiction. In order to clarify the distinction between legislative and administrative acts of a local government, the Supreme Court adopted the following guidelines in Wichita v. Kans. Taxpayers Network, 874 P2d 667 (Kans. 1994): (1) An ordinance that makes new law is legislative, while an ordinance that executes an existing law is administrative. Permanency and generality are key features of a legislative ordinance. (2) Acts that declare public purpose and provide ways and means to accomplish that purpose generally may be classified as legislative. Acts that deal with a small segment of an overall policy question generally are administrative. (3) Decisions that require specialized training and experience in municipal government and intimate knowledge of the fiscal and other affairs of a city in order to make a rational choice may properly be characterized as administrative, even though they may also be said to involve the establishment of a policy. (4) No act of a governing body is likely to be solely administrative or legislative, and the operation of the initiative and referendum statute is restricted to measures that are quite clearly and fully legislative and not principally executive or administrative. In the present case, an ordinance that implemented the use of water meters as part of a town's water system improvement plan was an administrative act that was not subject to referendum. The District Court properly declared a referendum challenging the ordinance invalid. The Supreme Court affirmed the constitutionality of 7-5-131. Whitehall v. Preece, 1998 MT 53, 288 M 55, 956 P2d 743, 55 St. Rep. 219 (1998), followed in Phillips v. Whitefish, 2014 MT 186, 375 Mont. 456, 330 P.3d 442, and overruling Chouteau County v. Grossman, 172 M 373, 563 P2d 1125 (1977), and Dieruf v. Bozeman, 173 M 447, 568 P2d 127 (1977), to the extent that those decisions stand for the rule that a local government's act is administrative based solely on a statutory grant of authority.

Rezoning Ordinance Subject to Referendum — No Distinction Between Zoning and Rezoning for Referendum Purposes: A community group filed a petition seeking a referendum to repeal a rezoning ordinance. Plaintiff, the owner of historic land that it wanted to develop, filed a declaratory judgment action against the city, seeking to have the referendum process refused. The community group was allowed to intervene. The motion for summary judgment was denied; the referendum was held; and the voters supported repeal of the ordinance. The Supreme Court held that the District Court correctly interpreted 7-5-131 to mean that referendum by the people is appropriate for both zoning ordinances and rezoning ordinances. The Supreme Court overruled specific language in prior cases that distinguished between zoning and rezoning ordinances. The Greens at Fort Missoula, LLC v. Missoula, 271 M 398, 897 P2d 1078, 52 St. Rep. 501 (1995).

Resolution Creating Special Improvement District — Not Subject to Referendum: A resolution creating a municipal special improvement district that encompasses less area than the municipal limits is not subject to referendum because the resolution affects only the people within the improvement district rather than the people of the municipality as a whole. The Supreme Court further held that the resolution creating a special improvement district is part of an administrative procedure, not a legislative action subject to referendum. Shelby v. Sandholm, 208 M 77, 676 P2d 178, 41 St. Rep. 186 (1984), distinguished in The Greens at Fort Missoula, LLC v. Missoula, 271 M 398, 897 P2d 1078, 52 St. Rep. 501 (1995).

Powers of Local Government to Regulate Gambling: The Legislature intended to grant only discretionary licensing power to local governments concerning gambling; thus, in response to a petition for initiative, local governmental bodies are without the power under the Montana Card Games Act and the Bingo and Raffles Law to limit or prohibit gambling and the approved forms thereof. DeLong v. Downes, 175 M 152, 573 P2d 160 (1977), overruled in Tipco v. Billings, 197 M 339, 642 P2d 1074 (1982).

Administrative Proposal Not Subject to Initiative: In an action to compel a city to submit a proposed ordinance and resolution for a parking lot facility to electors, the Supreme Court held that such a proposal was not subject to initiative or referendum because it was administrative rather than legislative. Dieruf v. Bozeman, 173 M 447, 568 P2d 127 (1977).

Attorney General's Opinions

What Electors Considered Qualified Voters for County Zoning Initiatives: A zoning regulation is subject to citizen initiative, and nothing in county zoning law limits qualified electors to only voters living in the area affected by the zoning regulations. Thus, in the case of county zoning regulation initiatives effective in all unincorporated areas of a county, all county residents are considered qualified voters, including those residing within incorporated areas of the county. 52 A.G. Op. 6 (2008).

Initiative Inappropriate Process for Alteration of Method of Establishment and Collection of County Solid Waste Management District Service Charges: The initiative process may not be used

to amend the resolution creating a county solid waste management district when the district encompasses an area smaller than the entire county and the initiative petition seeks to alter the method of establishing and collecting service charges. Such a proposed action is administrative in character rather than a legislative act subject to initiative or referendum. 45 A.G. Op. 5 (1993).

Scope — No Application to Special Improvement District: The initiative and referendum apply only to matters of general legislation in which all the qualified electors of the city are interested and not to matters of purely local concern, such as the creation of a special improvement district in which only the inhabitants or property owners are interested. 39 A.G. Op. 73 (1982).

Section 9. Voter review of local government.

Convention Notes

New provision. By 1976 the legislature must give local residents the opportunity to vote on whether or not to change their form of government. Laws must be passed requiring local forms of government to be studied and evaluated every ten years. [Note — see compiler's comment.]

Compiler's Comments

1978 Amendment by Referendum: Constitutional Amendment No. 6, proposed by Ch. 70, L. 1977, and approved at the general election held November 7, 1978, in (2) after "require" inserted "an election in each local government to determine whether a local government will undertake" and inserted last two sentences relating to voter approval and election of commission members. Amendment effective July 1, 1979.

Section 2, Ch. 70, L. 1977, further provided: "If not already implemented, the legislature shall implement this amendment with appropriate legislation in 1979, in order that the electors of each local government may indicate their preference 'For' or 'Against' the establishment of a study commission in 1984." (See text of referendum in final volume of 1979 Laws of Montana.)

Case Notes

Form of Government Unchanged by Recodification: The relevant portions of 7-3-102, et seq., contain the same essential characteristics of form of government as were presented under the former codification. Therefore, constitutional mandates were observed and an alternative and the established (whether called "present" or "existing") forms were presented to the electors for their choice. Schuman v. Study Comm'n of Yellowstone County, 176 M 313, 578 P2d 219 (1978).

Validity of Election — Alternative Form of Government: The findings of fact and conclusions of law of the District Court upholding the validity of city and county alternative form of government elections and proceedings leading thereto were supported by substantial evidence. Schuman v. Study Comm'n of Yellowstone County, 176 M 313, 578 P2d 291 (1978).

Attorney General's Opinions

Mill Levy Question Precluded on Study Commission Ballot: A local governing body is required to conduct a decennial election on the question of local government review and establishment of a study commission. Prior to 1999, under 7-3-184, a local government under study was also required to appropriate an amount necessary to conduct the study and local governments were allowed a mill levy to do so. However, the 1999 Legislature eliminated a local government's authority to levy for a study commission in favor of a generic mill levy election procedure. Thus, local governments may now choose whether or not to fund study commissions, but any appropriation for that purpose is subject to the mill levy limitations of 15-10-420. The ballot form in 7-3-175 is limited to the single question of establishing a local government study commission, so a local government may not combine a mill levy question with the study commission question. Rather, the mill levy question may be presented pursuant to the general-purpose mill levy election procedure in 15-10-425. 50 A.G. Op. 5 (2004).

Special Election on Alternative Form of Government — Study Commission to Recommend Adoption: Under 7-3-187, a special election on an alternative form of government is scheduled only if the study commission recommends an alternative. Therefore, a local government study commission may not have an alternative form of local government placed on the ballot unless the study commission recommends adoption of the alternative plan. 41 A.G. Op. 56 (1986).

Failure to Adopt Alternate Form of Government: A local government which fails in an election to adopt an alternate form of government in the manner provided by Art. XI, sec. 3 and 9, Mont. Const., is bound by the features of the existing form of government. The provisions of 7-3-201 through 7-3-224 allow voters to adopt a mayor-council structure with either partisan or nonpartisan elections. The procedures for recommending such a change are set forth in 7-3-121 through 7-3-161 and 7-3-171 through 7-3-193. If a nonpartisan election structure is not adopted, local elections must be conducted on a partisan basis after May 2, 1977, under the provisions of 7-3-113. 41 A.G. Op. 37 (1985).

Election Required in 1984 on Whether to Establish Study Commission — Existing Study Committee: The question of conducting local government review and establishing a study commission must appear on the June 1984 primary election ballot pursuant to 7-3-173, notwithstanding any recommendations made by a study committee now reviewing a county government or the placing of its recommendations on the ballot. 40 A.G. Op. 30 (1984).

ARTICLE XII

DEPARTMENTS AND INSTITUTIONS

Article Collateral References

Institutions, Interim Report, Montana Legislative Council (1974).

Section 1. Agriculture.

Convention Notes

(1) Revises 1889 constitution. Provides that a department of agriculture will be one of the 20 departments in the executive branch. Deletes reference to a commissioner of agriculture. Directs legislature to provide money for agriculture. (2) Revises 1889 constitution by extending the special mill levy on livestock to agriculture to be used for the benefit of both. Deletes reference to maximum levy allowed.

Compiler's Comments

Former Constitutional Provisions: Subsection (1) of this section revises Art. XVIII, sec. 1, 1889 Mont. Const. Subsection (2) of this section revises Art. XII, sec. 9, 1889 Mont. Const.

Case Notes

DECISIONS UNDER 1972 CONSTITUTION

Tax Exemption for Business Inventory While Taxing Livestock Not Violative of State or Federal Equal Protection Laws: The Supreme Court reversed a lower court decision that held that taxing livestock while exempting business inventories was unconstitutional in that the law denied certain individuals equal protection under the federal and state constitutions. The Supreme Court ruled that a middle tier scrutiny was not required; rather the proper test was a rational basis test to determine if there was a basis for treating inventory and livestock differently. Under the rational basis test, it was clear that the Legislature had acted rationally in applying different classifications, and historically the two properties had been treated differently. Mont. Stockgrowers Ass'n v. St., 238 M 113, 777 P2d 285, 46 St. Rep. 1132 (1989), followed in GBN, Inc. v. Dept. of Revenue, 249 M 261, 815 P2d 595, 48 St. Rep. 715 (1991).

DECISIONS UNDER 1889 CONSTITUTION

Appointee — Term of Office: In answer to the contention that for more than 40 years the custom has prevailed in the state that when the term of office of an appointed state officer, whose appointment required confirmation by the Senate, expires during the recess of the Senate, the Governor appoints a successor who immediately enters upon his duties without awaiting confirmation, the Supreme Court held that both the Constitution (Art. XVIII, sec. 1, 1889 Mont. Const.) and the act creating the Department of Agriculture, Labor and Industry, providing that the Commissioner of the Department shall be appointed subject to or by and with the consent of the Senate and that the officer shall hold his office for 4 years and until his successor is appointed and has qualified, are controlling over such custom and that the incumbent has a right to hold over until his successor has been so confirmed and has qualified. State ex rel. Nagle v. Stafford, 97 M 275, 34 P2d 372 (1934).

Section 2. Labor.

Convention Notes

No change except in grammar. Provides that department of labor will be one of the 20 departments in the executive branch.

Compiler's Comments

Former Constitutional Provisions: This section is similar to Art. XVIII, sec. 1 and 4, 1889 Mont. Const.

Case Notes

DECISIONS UNDER 1972 CONSTITUTION

Constitutional Provision Regarding Work Day Not Applicable to Firefighters Under Collective Bargaining Agreement: The provision in Art. XII, sec. 2, Mont. Const., that guarantees an 8-hour workday is not self-executing in that the permissive language in the section allows the Legislature to change the maximum period of 8 hours for certain professions, such as firefighters working pursuant to a collective bargaining agreement. Thus, firefighters in this case ineffectively argued that the constitutional guarantee applied when their collective bargaining agreement was for a 27-day work cycle that included working 24-hour shifts and sometimes more than 40 hours a week. Kuhr v. Billings, 2007 MT 201, 338 M 402, 168 P3d 615 (2007).

DECISIONS UNDER 1889 CONSTITUTION

Overtime Compensation: The cause of action having arisen prior to the adoption of the 1972 Montana Constitution, the Supreme Court noted that under Art. XVIII, sec. 4 and 5, 1889 Mont. Const., and under 39-4-107, there is no right to receive overtime compensation on the part of the appellant. Weston v. Mont. Highway Comm'n, 186 M 46, 606 P2d 150 (1980).

Eight-Hour Workday — Coordination With Federal Fair Labor Standards Act: Although the Fair Labor Standards Act does not define "workweek" for the purpose of determining the amount of overtime owed to an employee, under Art. XVIII, sec. 4, 1889 Mont. Const., and 39-4-107, the amount of hourly wage is to be computed on the basis of a 40-hour workweek. Glick v. Dept. of Institutions, 162 M 82, 509 P2d 1 (1973).

Underground Travel Time Included Within Eight-Hour Limitation: In holding that underground travel by iron ore miners to and from the "working face" of the mines constitutes work, upon the facts of this case as found by both courts below, the court cites Art. XVIII, sec. 4, 1889 Mont. Const., 39-4-103, providing for 8 hours of work per day in underground mines, and the Montana Supreme Court decision in Butte Miners' Union No. 1 v. Anaconda Copper Min. Co., 112 M 418, 118 P2d 148 (1941), construing Art. XVIII, sec. 4, 1889 Mont. Const., and 39-4-103, supra, to include all travel time. (Citing also the Fair Labor Standards Act and report of administrator of wage and hour division.) Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123, 321 US 590, 88 L Ed 949, 64 S Ct 698 (1944).

Attorney General's Opinions

Pay for Holidays — 10-Hour Days — Collective Bargaining for County Employees: A county may collectively bargain that public employees who work 10-hour days for 4 days per week are to be paid for 10 hours on holidays that fall on their regularly scheduled workday. 53 A.G. Op. 4 (2010).

Coal Company Not Subject to Criminal Prosecution for Scheduling Workdays in Excess of Eight Hours: Criminal penalties for hours worked in excess of 8 hours in any day have been repealed by implication through the adoption of Montana's overtime compensation laws. Therefore, a company engaged in the strip mining of coal is not subject to criminal prosecution under 39-4-104 for scheduling its employees for a workweek consisting of 4 10-hour days. 45 A.G. Op. 21 (1994), following 39 A.G. Op. 35 (1981).

Holiday Pay Applicable to County Road Employees Who Work Ten-Hour Days: County road and bridge department employees regularly working 10-hour days 4 days a week are entitled to 8 hours' pay under 2-18-603 for all nonworked holidays. 43 A.G. Op. 14 (1989).

Hours of Labor and Compensation — Overtime: An agency of state government may permit an employee to work more than 8 hours in any workday, but overtime need only be paid for hours worked in excess of 40 hours in any one workweek, and paid days off for annual leave, legal holidays, jury duty, and military leave are not counted as hours worked in computing weekly overtime. 37 A.G. Op. 16 (1977).

Section 3. Institutions and assistance.

Convention Notes

(1) No change except in grammar. (Deletes references to specific types of institutions.) (2) New provision that a person in an institution may exercise all rights except those that are impossible because of the confinement and that all rights are automatically restored when the person is released. (3) Revises 1889 constitution which states that the "several counties" must provide welfare. Revision leaves it up to the legislature to determine whether the state, county or a combination of the two must provide welfare.

Compiler's Comments

1988 Amendment by Referendum: Constitutional Amendment No. 18, proposed by Ch. 343, L. 1987, and approved at the general election held November 8, 1988, in (3) substituted "may" for "shall", after "services" deleted "as may be necessary", after "those" deleted "inhabitants", and at end substituted "are determined by the legislature to be in need" for "may have need for the aid of society"; and inserted (4) authorizing legislative establishment of criteria for eligibility and duration and level of benefits and services. Amendment effective January 1, 1989. (See text of referendum in final volume of 1989 Laws of Montana.)

Preamble: The preamble to Const. Amend. No. 18, approved Nov. 8, 1988, provided: "WHEREAS, the Legislature historically has prescribed the public policy governing the provisions of economic assistance and social and rehabilitation services to those is need; and

WHEREAS, the Legislature is the appropriate body of state government to determine the needs of its residents; and

WHEREAS, THE Montana Supreme Court, in a recent decision, determined that the Montana Constitution requires that statutes relating to such assistance and services are reviewable under a heightened scrutiny test; and

WHEREAS, the Legislature finds that it is in the public interest to restore to the Legislature the power to prescribe the provision of economic assistance and social and rehabilitation services to those in need, subject to review under the rational basis test.

THEREFORE, it is the intent of the Legislature to refer this constitutional amendment to the people of the state in order to restore the historical power of the Legislature to set eligibility level criteria for programs and services, as well as for the duration and level of benefits and services relating to economic assistance and social and rehabilitation services."

Former Constitutional Provisions: Subsection (1) of this section is similar to Art. X, sec. 1, 1889 Mont. Const. Subsection (3) of this section revises Art. X, sec. 5, 1889 Mont. Const.

Case Notes

DECISIONS UNDER 1972 CONSTITUTION

Constitutionality of Statute Governing Community Placement of Developmentally Disabled Individuals: Respondent attacked the constitutionality of 53-20-132 on grounds that District Courts are statutorily not allowed to directly place individuals within community services following expiration of involuntary commitments, in violation of individuals' right of access to courts. The Supreme Court noted that under this section, the Legislature has enacted a statutory scheme, of which 53-20-132 is a part, that designates the forms of available public assistance and that the scheme provides community-based services to the disabled through the administrative process as opposed to a direct judicial order. However, the preference for community placement over institutionalization does not create an absolute right to community placement, nor does 53-20-132 preclude a person who is denied services through the administrative process from administrative appeal or judicial review. Respondent's constitutional challenge failed to recognize that the statute is only one part of the statutory scheme, and given respondent's overly narrow focus, the court concluded that 53-20-132 is facially constitutional. In re T.W., 2005 MT 340, 330 M 84, 126 P3d 491 (2005), followed in In re R.E.A., 2006 MT 12, 330 M 392, 127 P3d 517 (2006).

Limitation on Entitlement to Uninsured Employers' Fund Benefits Not Equal Protection Violation or Restriction on Access to Courts: Zempel was injured while working for an enrolled tribal member on a reservation. Although the tribe carried insurance covering tribal members, Zempel's employer was not covered by workers' compensation insurance, nor was Zempel an enrolled tribal member. Zempel sought benefits from the tribe's insurer through tribal court, but it was determined that the employer was not required to carry insurance. Zempel then sought benefits under the uninsured employers' fund, but the claim was denied because the employer was not an uninsured employer as defined in 39-71-501. Zempel appealed on the grounds that 39-71-501 deprived him of equal protection and violated his constitutional right of access to courts. However, equal protection does not require that all persons be treated alike regardless of whether their circumstances are the same but only that all persons be treated alike under like circumstances. Only injured employees of employers meeting the definition of uninsured employer contained in 39-71-501 are entitled to the substitute workers' compensation benefits that the uninsured employers' fund was created to provide to injured employees of employers who have failed to properly comply with the law. The limitation on entitlement to uninsured employers' fund benefits bears a reasonable relationship to the purpose of that law because it is only those employers subject to the law in the first place upon whom the state can impose the reimbursement and penalty obligations that provide the source of the uninsured employers' fund

benefits. Applying the rational basis test, the Supreme Court found no constitutional violation under 39-71-501 on either issue because Zempel failed to meet the burden of establishing the invalidity of the statute. Zempel was not precluded from pursuing other remedies outside the Workers' Compensation Act. The Supreme Court offered a further observation that when Montana citizens avail themselves of jobs on Indian reservations, they agree to abide by tribal rules. Zempel v. Uninsured Employers' Fund, 282 M 424, 938 P2d 658, 54 St. Rep. 415 (1997).

Sufficiency of Title of 1988 Welfare Referendum — Applicable Standard: The title of a referendum "allowing the legislature greater discretion to determine the eligibility, duration, and level of economic assistance and social services to those in need" was found by the Supreme Court to be legally sufficient after applying the constitutional requirement of clarity of title set out in Art. V, sec. 11, Mont. Const., and employing the rules of construction developed under State ex rel. Wenzel v. Murray, 178 M 441, 585 P2d 633 (1978), and St. v. McKinney, 29 M 375, 74 P 1095 (1904). The court refused to intervene to remove the referendum from the ballot prior to a vote of the people so as not to violate the constitutional rights of popular sovereignty and self-government. Recognizing important distinctions between the processes of referendum and initiative, the standard applied to the referendum was the same applied to examination of the title of other products of the Legislature. The court affirmed the District Court finding of no statutory authority for preelection nullification of a legislative referendum and noted a strong presumption in favor of the constitutionality of legislative enactments. The ballot language was not purposely misleading and sufficiently identified the measure to provide for an informed vote. Harper v. Greely, 234 M 259, 763 P2d 650, 45 St. Rep. 1889 (1988), distinguishing State ex rel. Steen v. Murray, 144 M 61, 394 P2d 761 (1964), and State ex rel. Harper v. Waltermire, 213 M 425, 691 P2d 826, 41 St. Rep. 2212 (1984). See also State ex rel. Boese v. Waltermire, 224 M 230, 730 P2d 375, 43 St. Rep. 2156 (1986), and T&W Chevrolet v. Darvial, 196 M 287, 641 P2d 1368 (1982).

Limitation of Assistance Not to Be Arbitrary Between Classes of Eligible Individuals: The state may legitimately limit its expenditures for public assistance, public education, or any other program evenhandedly applied. It may not limit its expenditures by the expedient of eliminating classes of eligible individuals from public assistance without regard to their constitutionally grounded right to society's aid when needed for the basic necessities of life. While not declaring that inhabitants have a constitutional right to public assistance, the Supreme Court did declare that the Legislature, in performing its duties under Art. XII, sec. 3, Mont. Const., may not act arbitrarily between classes of entitled persons. Butte Community Union v. Lewis, 229 M 212, 745 P2d 1128, 44 St. Rep. 1911 (1987). (See 1988 amendment.)

Eligibility — Date Determined: Petroleum County denied medical assistance benefits to unemployed applicant because his unemployment compensation exceeded the county income limitation. The county failed to reduce the applicant's income by the amount of the medical expenses as allowed for in the "spend-down" provision in the county plan. On judicial review before the District Court, the court remanded the case to the Department of Social and Rehabilitation Services (now Department of Public Health and Human Services) to determine if the applicant was medically indigent. The Department responded that it was without authority to consider the matter further because the applicant at that time had a new job which placed the applicant above the statutory income limitation. The District Court entered a final judgment affirming the denial of benefits. On appeal, the Supreme Court upheld the statutory and county income limitations but held that the Department had used the wrong income in considering the applicant's need on remand from the District Court. The Supreme Court remanded for a determination of whether the applicant was medically needy under 53-3-103 (substantially reenacted as 53-3-206) at the time medical treatment first began. Deaconess Medical Center of Billings, Inc. v. Dept. of Social and Rehabilitation Services, 222 M 127, 720 P2d 1165, 43 St. Rep. 1112 (1986).

Medical Assistance — Income Limitations Constitutional: Provision in 53-3-103(3), MCA (1983) (substantively reenacted as 53-3-206), that denies medical assistance benefits to those with incomes in excess of 300% of the AFDC (now FAIM) standard passes middle-tier scrutiny and is constitutional. The limitation is reasonable, and the state's interest in limiting medical assistance outweighs the interest in obtaining benefits by those whose incomes exceed the limitation. Much lower income limitation in the county plan with a "spend-down" provision, allowing medical expenses to be deducted from the income before comparison with the AFDC (now FAIM) standard, is also constitutional. Denial of medical benefits solely because the applicant's income exceeds the AFDC (now FAIM) standard would be unconstitutional. Deaconess Medical Center of Billings, Inc. v. Dept. of Social and Rehabilitation Services, 222 M 127, 720 P2d 1165, 43 St. Rep. 1112 (1986).

Restriction of Welfare Benefits Based on Age — Constitutionality — Middle-Tier Test — Equal Protection Analysis: Although a right to welfare is not contained in the Declaration of Rights of the Montana Constitution, Art. XII, sec. 3(3), directs the Legislature to provide necessary assistance to the misfortunate. The Supreme Court held that a benefit lodged in the Montana Constitution is an interest whose abridgment requires something more than a rational relationship to a governmental objective and that a classification which abridges welfare benefits is subject to a heightened scrutiny under an equal protection analysis. The court developed its own middle-tier test for determining the constitutionality of HB 843 (Ch. 670, L. 1985), a bill which restricted or denied general assistance benefits to able-bodied persons under the age of 50 who do not have minor dependent children. The court held that a finding that HB 843 is constitutional required the state to demonstrate two factors: (1) that its classification of welfare recipients on the basis of age was reasonable; and (2) that state interest in such classification was more important than the people's interest in obtaining welfare benefits. The state failed to show that misfortunate people under age 50 are more capable of surviving without assistance than people over age 50 or that broad generalizations based on age are reasonable rather than arbitrary. Also, the trial record did not show the state to be in such a financially unsound position that the welfare benefit, granted constitutionally, could be abrogated. Therefore, the Supreme Court found unconstitutional the provisions of HB 843 which denied or restricted welfare benefits based on age. Butte Community Union v. Lewis, 219 M 426, 712 P2d 1309, 43 St. Rep. 65 (1986). (See 1988 amendment.)

Right to Welfare — Not Fundamental Right: The District Court held that Art. XII, sec. 3(3), Mont. Const., established a fundamental right to welfare for the aged, infirm, or misfortunate. The Supreme Court found that in order to be fundamental, a right must be found within the Declaration of Rights in the Montana Constitution or be a right "without which other constitutionally guaranteed rights would have little meaning" (quoting In re C.H., 210 M 184, 683 P2d 931, 41 St. Rep. 997 (1984)). Article XII, sec. 3, is not part of the Declaration of Rights; Art. II, sec. 3, is the only section in the Declaration of Rights which could arguably create a right to welfare. The official committee comment to Art. II, sec. 3, states: "The intent . . . is not to create a substantive right for all the necessities of life to be provided by the public treasury" (vol. II, p. 627, 1972 Con. Con. Committee Reports). The Supreme Court further found that the right to welfare is not a right upon which constitutionally guaranteed rights depend. Therefore, since neither of the above conditions were met, the right to welfare was held not to be a fundamental right under the Montana Constitution. Butte Community Union v. Lewis, 219 M 426, 712 P2d 1309, 43 St. Rep. 65 (1986).

Implementation — Community Homes for Persons With Developmental Disabilities: The Montana Legislature, pursuant to this constitutional mandate, has enacted Title 53, ch. 20, part 3, to provide for the needs of persons with developmental disabilities at "community homes" rather than in institutions to the extent possible. State ex rel. Child & Family Serv., Inc. v. District Court, 187 M 126, 609 P2d 245 (1980).

Community Homes — Effect of City Zoning Laws: When the Legislature determines that the constitutional rights of persons with developmental disabilities are to live and develop within community structure as a family unit, rather than be segregated in isolated institutions, city zoning regulations should be revised to meet legislative requirements, as a city has no power except as conferred by legislative grants which the legislative branch may modify or withdraw at its pleasure. State ex rel. Thelen v. Missoula, 168 M 375, 543 P2d 173 (1975).

DECISIONS UNDER 1889 CONSTITUTION

Statutory Implementation Required: Although Art. X, sec. 5, 1889 Mont. Const., placed the burden of providing for the aged, infirm, and unfortunate upon the counties, in order for the county to be obligated to pay general relief assistance, there must be specific statutory law so directing. Pease v. Hansen, 159 M 43, 494 P2d 925 (1972).

Unreasonable Standard as Applied: Where family of 10 had earnings in excess of county welfare board's standard minimum income for determining indigency, application of the standard to deny medical assistance became unreasonable where the family had considerable medical expense and a history of indebtedness. St. Patrick Hosp. v. Powell County, 156 M 153, 477 P2d 340 (1970).

Proof of Indigency: Under constitutional provision defining indigency and statute imposing duty upon county to pay for medical aid rendered indigents, fact that supposed indigent had never supported herself and apparently never would was proof of medical indigency in spite of the fact that she was employable and notwithstanding absence of evidence of reasons for her

inability to be a productive citizen. Mont. Deaconess Hosp. v. Lewis & Clark County, 149 M 206, 425 P2d 316 (1967).

Armories Not State Institutions: Sections (now repealed) creating the Armory Board did not make armories institutions to be supported by the state under Art. X, sec. 1, 1889 Mont. Const., since that constitutional provision related only to institutions, title to which is held by the state, whereas under the statutes title is held by a public corporation separate from the state. Geboski v. Armory Bd., 110 M 487, 103 P2d 679 (1940).

Aid of Society — Cooperation of State and Federal Governments: The duty of caring for the poor is primarily an obligation of the counties, but federal and state governments may cooperate with the counties in discharging the obligation. State ex rel. Barr v. District Court, 108 M 433, 91 P2d 399 (1939).

Aid of Society — State May Determine How Care Provided: The mandate of Art. X, sec. 5, 1889 Mont. Const., that counties shall provide for their poor "as may be prescribed by law", meant as may be prescribed by act of the Legislature. Legislative control over counties is supreme, except as restricted by the Constitution, and while the duty to care for the poor is primarily an obligation of the counties under Art. X, sec. 5, 1889 Mont. Const., the state may offer cooperation and assistance. The Legislature has the right to enact provisions, binding upon the counties, as to how they shall care for their poor, even though such action may amount to dictation to them concerning expenditures of their own funds. State ex rel. Wilson v. Weir, 106 M 526, 79 P2d 305 (1938).

Aid of Society — Legislative Power: The fact that Art. X, sec. 5, 1889 Mont. Const., made it incumbent upon the counties of state to provide for their aged and infirm did not thereby prohibit the Legislature from passing sections resulting in bringing county action about and assisting in the care of the aged and infirm. State ex rel. Normile v. Cooney, 100 M 391, 47 P2d 637 (1935).

Aid of Society — Use of Income Tax Money: The fact that under Art. X, sec. 5, 1889 Mont. Const., it was made the duty of counties to provide for the support of their indigents did not prohibit the Legislature from making like provision for unfortunates of the state at large. Therefore, directing that 20% of the income tax collected be used for that purpose did not render the income tax law unconstitutional. Mills v. St. Bd. of Equalization, 97 M 13, 33 P2d 563 (1934).

Aid of Society — Broad Construction: The provision of Art. X, sec. 5, 1889 Mont. Const., that the counties of the state shall provide by law for those inhabitants who, by reason of age, infirmity, or misfortune, may have claims upon the sympathy and aid of society, must be given a broad construction consistent with its benevolent purpose. Jones v. Cooney, 81 M 340, 263 P 429 (1928).

Operation of Grain Elevator: There being no constitutional prohibition, the state may, under its police power, lawfully engage in the business of operating a grain elevator or in other similar business for the benefit of the public. State ex rel. Lyman v. Stewart, 58 M 1, 190 P 129 (1920), distinguished in Stoner v. Timmons, 59 M 158, 196 P 520 (1921).

Law Review Articles

Spatial Inequality as Constitutional Infirmity: Equal Protection, Child Poverty and Place, Pruitt, 71 Mont. L. Rev. 1 (2010).

Butte Community Union v. Lewis: A New Constitutional Standard for Evaluating General Assistance Legislation, Wurster, 48 Mont. L. Rev. 163 (1987).

Section 4. Montana tobacco settlement trust fund.

Compiler's Comments

Effective Date: Section 2, Ch. 5, Sp. L. May 2000, provided that this section is effective upon approval by the electorate. Approved November 7, 2000.

ARTICLE XIII

GENERAL PROVISIONS

Section 1. Nonmunicipal corporations.

Convention Notes

(1) No change except in grammar. (2) New provision requiring the legislature to pass consumer protection laws. (3) New provision prohibiting laws which would add liabilities to past contracts.

Compiler's Comments

Former Constitutional Provision: Subsection (1) of this section is similar to Art. XV, sec. 2, 1889 Mont. Const. See also Art. XV, sec. 13 and 20, 1889 Mont. Const.

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DECISIONS UNDER 1972 CONSTITUTION

Retroactivity of New Judicial Rules and Judicial Interpretation — Section 46-23-1012 (1999) Applied Retroactively to Parole Revocations Between April 28, 1999, and May 1, 2001: On April 26, 2001, the Supreme Court held that a probable cause hearing was mandatory only when an offender had been arrested pursuant to a warrant issued by a judge. On May 4, 2001, Goebel petitioned the court to look beyond the plain language of 46-23-1012 and hold that the probable cause hearing was mandatory only when an offender has been arrested by a probation officer rather than pursuant to a warrant issued by a judge. Effective May 1, 2001, the Legislature amended 46-23-1012 to delete the requirement for a probable cause hearing. On May 9, 2001, Giddings filed a petition for rehearing, asking the court to direct the District Court to dismiss the petition to revoke Giddings' suspended sentence on grounds that the District Court lacked jurisdiction to revoke the suspended sentence because of the amendment to 46-23-1012, contending that application of the new statute would violate the constitutional ban on ex post facto legislation. The Supreme Court declined to modify the decision in either Goebel or Giddings because no material fact or question decisive of the cases themselves was overlooked and the decisions did not conflict with any express statute or controlling decision. However, the court did discuss the retroactive application of judicial rules of criminal procedure and the judicial interpretation of a statute, as well as the claim that the retroactive application of 46-23-1012 was a violation of the ex post facto clause. Citing Rivers v. Roadway Express, 511 US 298 (1994), the court held that a court's interpretation of a statute is never new law because the decision declares what the statute meant from the day of its enactment, not from the date of the decision. In determining whether a statute violates the ex post facto clause, the court referred to the test in St. v. Duffy, 2000 MT 186, 300 M 381, 6 P3d 453 (2000), which provided that to be in violation of the clause, a statute must be retrospective and must disadvantage the offender affected by it. In this case, Giddings was not disadvantaged because the statutory change did not alter the definition of or punishment for the probation violation that Giddings was charged with. Further, the error that was the basis for reversal of Giddings' case was jurisdictional, so all proceedings in the District Court were void ab initio, and the state was entitled to proceed anew, following the procedure outlined in the newly amended version of 46-23-1012. The Supreme Court's decisions based on the 1999 version of 46-23-1012 were applicable retroactively to persons whose probation or parole was revoked between April 28, 1999, and May 1, 2001. Thus, if a person was arrested during that period pursuant to a warrant issued by a judge and was not afforded a probable cause hearing within 36 hours of arrest, then the District Court did not have jurisdiction to hold a revocation hearing, so the state could refile the petition to revoke the person's probation pursuant to the 2001 version of 46-23-1012, as long as the probationer was still under the custody or supervision of the Department of Corrections on May 1, 2001. If the person was afforded a probable cause hearing within 36 hours of arrest, then the District Court did have jurisdiction to hold a revocation hearing. St. v. Goebel, 2001 MT 155, 306 M 83, 31 P3d 340 (2001), followed in St. v. Finley, 2003 MT 239, 317 M 268, 77 P3d 193 (2003).

Beneficial Use Tax on Investor-Owned Power Companies Upheld: The power companies argued that a beneficial use tax was a retroactive law and therefore invalid. The Supreme Court stated that the companies' position ignored the ongoing nature of their business and that only when the measuring formula for the tax draws upon such disparate or long past antecedents so as to have little relation to the volume of the current business will a business tax fail on retroactivity grounds. Pac. Power & Light Co. v. Dept. of Revenue, 237 M 77, 773 P2d 1176, 46 St. Rep. 636 (1989).

No Retroactive Application When Amended Statute Applied to Factual Situation Occurring Prior to Amendment: Section 61-8-402 was amended in 1983 to provide for a 1-year revocation

of a driver's license upon the holder's refusal to submit to a chemical test within 5 years of a previous refusal. The court held that application of this provision, when the first refusal had occurred prior to the 1983 amendment, was not a retroactive application of law precluded by 1-2-109. Stiffarm v. Furois, 217 M 335, 704 P2d 75, 42 St. Rep. 1227 (1985).

Retroactive Calculation of Tax — Unconstitutional: Plaintiffs contended that 15-31-114(2)(b)(ii)(C) was unconstitutionally retroactive. Plaintiff, Havre Federal Savings and Loan Association, had incurred a net operating loss in each of the 5 years from 1974 through 1978. The challenged portion of the statute was enacted in 1979. Under 15-31-114(2)(b)(i), plaintiff carried forward its net operating losses and applied them to its 1979 return, which resulted in no net income for that year. The defendant, acting under the authority of the challenged subsection, recalculated plaintiff's net income for the years 1974 through 1978, which resulted in no net operating losses to carry forward. The Supreme Court held that the subsection was retroactive in effect and therefore unconstitutional. The State cannot change a law in 1979 and compel a recalculation of tax returns filed for 1974 through 1978 based on the new law effective for the first time in 1979. First Fed. S & L Ass'n v. Dept. of Revenue, 200 M 358, 654 P2d 496, 39 St. Rep. 1802 (1982).

Substantial Impairment of City's Contractual Obligations — Retrospective Application: On November 25, 1978, a city and a private garbage collection service entered into a contract in which the latter was to provide garbage collection services for the city from November 1, 1978, through June 30, 1979. On June 30, 1979, the city voted to provide its own garbage service. Retroactive application of 7-13-4107, relating to compensation of private garbage carriers, would clearly substantially impair the contractual obligations of the city. Whether it constitutes an unconstitutional impairment of contract was not decided because the contract expired before the effective date of the statute. D & F Sanitation Serv. v. Red Lodge, 196 M 490, 640 P2d 461, 39 St. Rep. 287 (1982).

DECISIONS UNDER 1889 CONSTITUTION

CORPORATIONS

Corporate Property — Eminent Domain: The requirement of subsection 9 of section 11-602, R.C.M. 1947 (since repealed), that a portion of platted subdivisions be dedicated to public park purposes is not an unconstitutional delegation of legislative authority to city and county authorities, nor is the enforcement of this requirement a confiscation of private property without compensation or an invalid extension of the police power under Art. XV, sec. 9, 1889 Mont. Const. Billings Properties, Inc. v. Yellowstone County, 144 M 25, 394 P2d 182 (1964).

Grant of Water Conservation Board Charter: Law was not a special law granting a charter to the Water Conservation Board (now Water Resources Division), in violation of Art. XV, sec. 2, 1889 Mont. Const. State ex rel. Normile v. Cooney, 100 M 391, 47 P2d 637 (1935).

Legislative Power to Change Law — Excise Tax: Since a domestic corporation accepts its charter upon the express condition that the Legislature may at any time amend or repeal the incorporation act and thus destroy the corporation absolutely, it would seem that the major power to destroy includes the minor power to exact an excise as a condition to the corporation's right to continue business. Mid-Northern Oil Co. v. Walker, 65 M 414, 211 P 353 (1922). See Lewis v. N. Pac. Ry., 36 M 207, 92 P 469 (1907).

Legislative Power to Change Law — Limitations: The Legislature may alter the charter of an existing corporation by imposing greater burdens thereafter to be assumed by the stockholders than were imposed at the time it was granted. The alteration must not involve a confiscation of the rights of individuals, deprive them of their property without due process of law, or violate the elementary principles of natural justice. Barth v. Pock, 51 M 418, 155 P 282 (1915).

Legislative Power to Change Law — Impairment of Contract Obligations: When a corporation was organized there was not any law under which nonassessable stock could be made assessable. Its certificate of incorporation and every stock certificate issued recited that the stock was nonassessable, and in 1901 the requisite number of shares of stock were voted in favor of making the stock assessable by taking advantage of the provisions authorizing the procedure. The statute in question was not unconstitutional as impairing the obligation of contracts. The reserved power of the state allowed it to amend the laws under which a corporation is created. Somerville v. St. Louis Min. & Milling Co., 46 M 268, 127 P 464 (1912).

Legislative Power to Change Law — Adoption of Statute in Charter: When a mining company was organized there existed and was read into and made a part of its charter the then-existing statute which gave notice to all concerned that the Legislature, acting under Art. XV, sec. 2, 1889 Mont. Const., might at any time alter, amend, or repeal the law under which it existed. Allen v.

Ajax Min. Co., 30 M 490, 77 P 47 (1904). See Somerville v. St. Louis Min. & Milling Co., 46 M 268, 127 P 464 (1912).

Curative Statute: The purpose of section 1034 of the Civil Code of 1895, providing that "any foreign corporation that has heretofore engaged in business, performed acts, or made contracts in this state, may, within ninety days from the date this act goes into effect, comply with the provisions hereof, and thereupon all its acts and contracts done and made before this act goes into effect shall be valid and enforceable, any statute of this state heretofore enacted to the contrary notwithstanding," being merely to make valid and enforceable contracts made by foreign corporations which were voidable because of a failure to file certain statements and certificates by law required and not referring to or making valid contracts of such corporations which are void for other reasons, is not in conflict with Art XV, sec. 13, 1889 Mont. Const. The section of the code in question is a curative statute and not retrospective in its operation, as it does not interfere with any vested right or impair the obligation of any contract. Mut. Benefit Life Ins. Co. v. Winne, 20 M 20, 49 P 446 (1897).

RETROSPECTIVE LAWS

Retrospective Laws — Lease of State Lands: The law authorizing the lease of state lands for underground storage of natural gas did not violate Art. XV, sec. 13, 1889 Mont. Const. State ex rel. Hughes v. St. Bd. of Land Comm'rs, 137 M 510, 353 P2d 331 (1960).

Extension of Grazing Leases: The Supreme Court held that Ch. 61, L. 1935 (omitted), providing for extension of leases of state grazing lands for additional period of 3 years at option of lessees, was not retrospective in the sense prohibited by Art. XV, sec. 13, 1889 Mont. Const., and if creating new liability on passed transaction, this section protects only a county or municipal subdivision of state and not state itself. Leuthold v. Brandjord, 100 M 96, 47 P2d 41 (1935).

No Retroactivity Unless Express: Chapter 37, L. 1919 (section 15-407, R.C.M. 1947, now repealed), in relieving directors of a corporation of the penalty imposed by section 3837, Revised Codes of 1907, held not objectionable as in contravention of Art. XV, sec. 13, 1889 Mont. Const., prohibiting the passing of laws for the benefit of a corporation or an individual, retrospective in its operation or violative of 1-2-109, in providing that no law is retroactive unless expressly so declared. Cont. Oil Co. v. Mont. Concrete Co., 63 M 223, 207 P 116 (1922), overruled on other grounds in Cont. Supply Co. v. Abell, 95 M 148, 24 P2d 133 (1933).

Escheated Property: Chapter 132, L. 1913 (section 91-518, R.C.M. 1947, not codified in the MCA), providing for the recovery of escheated property, is not retrospective within the meaning of that term as used in Art. XV, sec. 13, 1889 Mont. Const. In re Pomeroy, 51 M 119, 151 P 33 (1915).

"Retrospective in Operation": A statute which provides for the payment of advances to a school district for the erection of school buildings in reliance upon a bond issue declared invalid by the subsequent issue of bonds is not retrospective in operation under Art. XV, sec. 13, 1889 Mont. Const. State ex rel. NW. Nat'l Bank of Great Falls v. Dickerman, 16 M 278, 40 P 698 (1895).

NEW LIABILITY

Special Taxes — Funding Bonds: Chapter 199, L. 1939 (39-4-111), authorizing County Commissioners to provide for the payment of floating indebtedness by levying of special taxes or the issuance of funding bonds to pay such indebtedness when the same exceeds a certain amount, held not in violation of Art. XV, sec. 13, 1889 Mont. Const., as imposing on the people of the city a new liability in respect to transactions already passed. State ex rel. Siegfriedt v. Carbon County, 108 M 510, 92 P2d 301 (1939).

Liability Assumption — Option to Public: A legislative act which extends an option to the people of a municipal subdivision of the state under which by a vote of the taxpayers they may decide for or against assuming a liability in respect to a past transaction does not offend against Art. XV, sec. 13, 1889 Mont. Const., prohibiting the Assembly from passing any law for the benefit of a corporation or individuals imposing upon them a new liability for a past transaction. Stanley v. Jeffries, 86 M 114, 284 P 134 (1929).

Inhibition Not Applicable to State: While the state was forbidden by Art. XV, sec. 13, 1889 Mont. Const., from imposing upon its municipal subdivisions a liability in respect to a transaction or consideration already passed, it could impose such a liability upon itself. In re Pomeroy, 51 M 119, 151 P 333 (1915).

Water Supply — Private Contract: As applied to municipalities having contracts with private persons for water supply at the time of the enactment of the statute, subdivision 64 of section 4800 of the Political Code of 1895 (section 5639, R.C.M. 1935, omitted), providing that no municipality having a water supply furnished by private persons shall erect any water plant to be operated

by itself, but that if it desires to acquire such a plant, it shall purchase or condemn such supply, is in violation of Art. XV, sec. 13, 1889 Mont. Const. Helena Consol. Water Co. v. Steele, 20 M 1, 49 P 382 (1897).

PROTECTION OF THE PUBLIC

Police Power — Unrelated: The activity proscribed by Art. XV, sec. 20, 1889 Mont. Const., had no relation to police power. Mont. Milk Control Bd. v. Rehberg, 141 M 149, 376 P2d 508 (1962).

Monopolies: Article XV, sec. 20, 1889 Mont. Const., was not only aimed at monopolies but also invalidated all price-fixing contracts, even in situations where there was open competition and no danger of monopoly. Union Carbide & Carbon Corp. v. Skaggs Drug Center, Inc., 139 M 15, 359 P2d 644 (1961).

Prohibition Against Price Fixing on Production Regulation: The Fair Trade Act (now repealed) permitted price fixing in violation of Art. XV, sec. 20, 1889 Mont. Const., and was therefore invalid. Union Carbide & Carbon Crop. v. Skaggs Drug Center, Inc., 139 M 15, 359 P2d 644 (1961), distinguished in Mont. Milk Control Bd. v. Rehberg, 141 M 149, 376 P2d 508 (1962).

Cumulative Voting — Assenting Stockholders: Under Art. XV, sec. 4, 1889 Mont. Const., stockholders could contract among themselves with respect to voting their stock, and a contract to refrain from cumulative voting was valid. However, an invalid bylaw that attempted to dispense with cumulative voting was not enforceable as a contract, even among those stockholders assenting to it. Under Art. XV, sec. 4, 1889 Mont. Const., a corporation could not deprive a stockholder of the right of cumulative voting by any act on its part. Sensabaugh v. Polson Plywood Co., 135 M 562, 342 P2d 1064 (1959).

Diseased Animals — Preservation of Health: Under the guise of police power the state and municipal subdivisions thereof have the power and the duty to do all things necessary to protect the public in matters of the preservation, among other things, of the health and well-being of the community. Under police power the state can provide for the destruction of diseased animals even though provision for compensation to the owner has not been made. Ruona v. Billings, 136 M 554, 323 P2d 29 (1958).

Public Utilities Act: Held, that the public utilities act empowering the commission thereby created, among other things, to fix not only maximum but also minimum or precise rates does not prevent competition or offend against the provisions of Art. XV, sec. 20, 1889 Mont. Const., prohibiting every form of combination or contract for the purpose of fixing the price of any article of commerce for consumption by the people, the purpose of the act being to determine a price which shall be just and reasonable to all concerned, while the purpose of the constitutional provision is to prohibit combinations or contracts having for their object a taking advantage of the public in an unlawful way. Great N. Util. Co. v. P.S.C., 88 M 180, 293 P 294 (1930).

Corporate Liability for Damages Sustained by Employee: Laws relative to the liability of railway corporations for damages sustained by an employee by reason of the negligence of his coemployees are a valid exercise of legislative power under this section. Lewis v. N. Pac. Ry., 36 M 207, 92 P 469 (1907).

Trusts — Price Fixing: Section 321 of the Penal Code of 1895 (now repealed), prohibiting the formation of combinations or trusts for the purpose of fixing the price or regulating the production of articles of commerce, and section 325 of the same code (now repealed), to the effect that such prohibition shall not apply to persons engaged in agriculture and horticulture, are dependent upon each other and void. These provisions are the result of an effort to carry out the mandate of Art. XV, sec. 20, 1889 Mont. Const. St. v. Cudahy Packing Co., 33 M 179, 82 P 833 (1905).

MISCELLANEOUS

Remission of Interest: Chapter 88, L. 1935 (omitted), authorizing remission of interest and penalties held not violative of Art. XV, sec. 13, 1889 Mont. Const. State ex rel. Sparling v. Hitsman, 99 M 521, 44 P2d 747 (1935).

Tax Deposit: Held, under this case, and in view of the fact that the statutory proceedings for a sale of property for delinquent taxes are primarily designed as a means for collecting the tax against it, Ch. 85, L. 1927 (15-18-401, 15-18-402, 15-18-403, all three sections now repealed), requiring a deposit of taxes, etc., preliminary to action to set aside a tax deed, may not be held invalid under Art. XV, sec. 13, 1889 Mont. Const., as destructive of vested rights, in that it imposes obligations with respect to a past transaction which were not required at the time the property was sold for taxes. State ex rel. Souders v. District Court, 92 M 272, 12 P2d 852 (1932).

Irrigation Districts: The statutes (section 4024, R.C.M. 1921, since repealed, and 85-7-2201) curing defects in the creation of irrigation districts, held not open to constitutional objections based on the provisions of Art. XV, sec. 13, Art. III, sec. 27, Art. V, sec. 23, and Art. VIII, sec. 1,

1889 Mont. Const., or the 14th amendment to the Constitution of the United States. State ex rel. Malott v. Bd. of County Comm'rs, 86 M 595, 285 P 932 (1930).

Section 2. Consumer counsel.

Convention Notes

New provision requiring legislature to create a state office to represent customers at hearings before the public service commission. Utility companies would be taxed to support the office.

Case Notes

Suspension Period — Effect on Public Participation: The resultant effect of the 180-day period of suspension in 69-12-505 is not to deprive the Consumer Counsel or any other interested member of the public a vehicle for challenging the reasonableness of a motor carrier's proposed intrastate rate increase. State ex rel. Chem. Trans. v. Bollinger, 173 M 535, 568 P2d 172 (1977).

Section 4. Code of ethics.

Convention Notes

New provision. The legislature must enact laws concerning conflict of interest involving legislators and other public officials.

Case Notes

State Auditor as Member of Hail Board — No Conflict of Interest: The State Auditor as ex officio Commissioner of Insurance is required to approve the form of all hail insurance policies issued in Montana and at the same time is required by law to sit as a member of the Board of Hail Insurance (Hail Board). The State Auditor is not compensated for service on the Hail Board, nor is there any compensation from any source for such duties. Thus, the Supreme Court held that the State Auditor as ex officio Commissioner of Insurance is not financially interested in the Hail Board within the meaning of 2-2-102. Mtn. States Ins. Co. v. St., 218 M 365, 708 P2d 564, 42 St. Rep. 1657 (1985).

Attorney General's Opinions

Acceptance of Severance Pay by Public Service Commissioner Not Breach of Ethics: Severance pay negotiated as part of a negotiated union contract agreement and supported by consideration, such as surrender of accrued seniority and entitlement to reemployment, does not constitute a gift within the meaning of 2-2-104, nor does the termination of employment and acceptance of severance pay constitute a substantial financial transaction for private business purposes within the meaning of 2-2-121. Therefore, a Public Service Commissioner did not violate the code of ethics for public officials and employees by temporarily reactivating and then terminating his employment with a railroad company in order to become eligible to receive severance pay negotiated between the railroad and the collective bargaining unit to which the Commissioner belonged. Notice to the other Commissioners was adequate to meet the terms of 2-2-121(2)(f). The action did not constitute the kind of private relationship contemplated by the code of ethics that would threaten the integrity of the position because the situation presented no opportunity to use the influence of the official position to further personal gain. 45 A.G. Op. 10 (1993).

Section 5. Exemption laws.

Convention Notes

Identical to 1889 constitution.

Compiler's Comments

Former Constitutional Provision: This section is similar to Art. XIX, sec. 4, 1889 Mont. Const.

Case Notes

DECISIONS UNDER 1972 CONSTITUTION

Inherited IRAs Not Exempt From Bankruptcy Estate: Although Montana exemption laws are intended to be liberally construed, the construction cannot disregard the plain language of a statute. As a result, a debtor may not claim an exemption in an inherited IRA from a bankruptcy estate pursuant to 25-13-608. In re Golz, 2015 MT 318, 381 Mont. 385, 360 P.3d 1142.

Four-Wheel All-Terrain Vehicle Not a Sporting Good: On a certified question from federal Bankruptcy Court, the Supreme Court concluded that under state law, debtors may not claim a four-wheel all-terrain vehicle (ATV) as an exempted sporting good under 25-13-609(1). Rather, an ATV falls within the motor vehicle exemption provided in 25-13-609(2). In re Holzapfel, 2011 MT 257, 362 Mont. 251, 262 P.3d 1114.

DECISIONS UNDER 1889 CONSTITUTION

Exemption — Waiver: Article XIX, sec. 4, 1889 Mont. Const., established public policy in favor of liberal exemption laws, and the enforcement of a clause in an executory contract waiving statutory exemptions is against public policy, even without a statute expressly invalidating such waivers. Credit Union v. West, 157 M 175, 483 P2d 909 (1971).

Exemptions — Liberal Construction:

Exemption statutes have a humanitarian purpose, and their provisions must be liberally construed. De Fontenay v. Childs, 93 M 480, 19 P2d 650 (1933); Oreg. Mtg. Co. v. Dunbar, 87 M 603, 289 P 559 (1930); Esterly v. Broadway Garage Co., 87 M 64, 285 P 172 (1930).

Sections, relating to exempt property of debtors, were enacted in obedience to the injunction contained in Art. XIX, sec. 4, 1889 Mont. Const., and must be liberally construed. Mennell v. Wells, 51 M 141, 149 P 954 (1915).

The laws enacted under Art. XIX, sec. 4, 1889 Mont. Const., must receive a liberal construction in favor of the debtor. Dayton v. Ewart, 28 M 153, 72 P 420 (1903); Ferguson v. Speith, 13 M 487, 34 P 1020 (1893).

Exemption — Mode, Amount, and Character Left to Legislature: The mode of obtaining the exemption and the amount and character of it are left for the Legislature to provide. Yerrick v. Higgins, 22 M 502, 57 P 95 (1899).

Section 6. Perpetuities.

Convention Notes

Identical to 1889 Constitution.

Compiler's Comments

Former Constitutional Provision: This section is similar to Art. XIX, sec. 5, 1889 Mont. Const.

Case Notes

DECISIONS UNDER 1889 CONSTITUTION

Hotel Not Charitable Purpose: The erection and maintenance of a hotel as a memorial to executrix was not a charitable purpose, and therefore such provision in will was not exempt from the rule against perpetuities. In re Swayze's Estate, 120 M 546, 191 P2d 322 (1948).

Water Marketing Agreement: Contract between the Water Conservation Board (now Water Resources Division) and a water users' association and individuals relating to a water marketing agreement did not offend against Art. XIX, sec. 5, 1889 Mont. Const. State ex rel. Normile v. Cooney, 100 M 391, 47 P2d 637 (1935).

Section 7. Marriage.

Compiler's Comments

Effective Date: Section 2, Const. Initiative No. 96, provided: "This amendment is effective upon approval by the electorate." Approved November 2, 2004.

Case Notes

Prohibition on Same-Sex Marriage Unconstitutional: Under the due process and equal protection clauses of the 14th amendment to the United States Constitution, same-sex couples have a fundamental right to marry. A state is required to license a marriage between same-sex couples and to recognize a same-sex marriage validly performed out of state. A state law that provides otherwise is unconstitutional. Obergefell v. Hodges, 576 US __, 135 S. Ct. 2584 (2015).

Same-Sex Couples Seeking Declaratory and Injunctive Relief for Rights Afforded Married Couples — Relief Exceeds Bounds of Justiciable Controversy — Remanded to Allow Plaintiffs to Amend Complaint: Six same-sex couples filed suit against the state seeking declaratory and injunctive relief in order to receive protections and benefits equal to those provided to married couples under state law. Although they claimed that Montana's statutory scheme denied them several rights under Article II of the Montana Constitution — among them, the rights to equal protection, due process, and dignity — the plaintiffs did not seek a declaration that particular statutes were unconstitutional. The District Court granted the state's motion to dismiss, concluding that the matter exceeded the bounds of a justiciable controversy and that to grant the plaintiffs the broad injunction and declaratory judgment they sought would not terminate the controversy giving rise to the proceeding. On appeal, the Supreme Court affirmed the dismissal but remanded the matter to the District Court to allow the plaintiffs the opportunity to amend their complaint to identify the statutes they claim violate their constitutional rights. Donaldson v. St., 2012 MT 288, 367 Mont. 228, 292 P.3d 364.

Law Review Articles

Montana's Marriage Amendment: Unconstitutionally Denying a Fundamental Right, Polk, 66 Mont. L. Rev. 405 (2005).

ARTICLE XIV

CONSTITUTIONAL REVISION

Article Law Review Articles

The Constitutional Initiative in Montana, Johnstone, 71 Mont. L. Rev. 325 (2010).

The Role of the Montana Supreme Court in Constitutional Revision, Waldron, 35 Mont. L. Rev. 227 (1974).

Section 1. Constitutional convention.

Convention Notes

Adds word "unlimited" to 1889 constitution. Makes it clear that the legislature cannot call a constitutional convention for limited purpose.

Compiler's Comments

Former Constitutional Provision: This section is similar to Art. XIX, sec. 8, 1889 Mont. Const.

Case Notes

DECISIONS UNDER 1889 CONSTITUTION

Majority of Electors: Under Art. XIX, sec. 8, 1889 Mont. Const., "approval by a majority of the electors voting at the election" meant approval by a majority of a total number of electors casting valid ballots on the question of approval or rejection of a new Constitution and did not refer to or include those electors who failed to express an opinion by a vote on that issue. State ex rel. Cashmore v. Anderson, 160 M 175, 500 P2d 921 (1972), certiorari denied, 410 US 931 (1973).

Voter Education: Article XIX, sec. 8, 1889 Mont. Const., did not grant to a constitutional convention the power to expend public funds for voter education with respect to the convention's proposals. State ex rel. Kvaalen v. Graybill, 159 M 190, 496 P2d 1127 (1972).

Delegates to Convention: Legislators and other officers of the state are ineligible to serve as delegates to a constitutional convention during their term of office. Legislative Assembly v. Lennon, 156 M 416, 481 P2d 330 (1971), distinguished in Mahoney v. Murray, 159 M 176, 496 P2d 1120 (1972).

Initiative Measure — Not Amendatory of Constitution: Proposed Initiative Measure No. 63, which would legalize lotteries and repeal 23-5-201 through 23-5-211 (now repealed), could not be considered as an amendment to the Montana Constitution where it did not comply with Art. XIX, sec. 8 or 9, 1889 Mont. Const. State ex rel. Steen v. Murray, 144 M 61, 394 P2d 761 (1964).

Revision and Amendment Distinguished: Section authorizing the consolidation of county and city governments was not an attempted revision under Art. XIX, sec. 8, 1889 Mont. Const., but was an amendment under section 9 thereof. State ex rel. Corry v. Cooney, 70 M 355, 225 P 1007 (1924), overruled, to the extent that a constitutional amendment may be valid under the single subject rule but fail under the separate vote rule, in Marshall v. St., 1999 MT 33, 293 M 274, 975 P2d 325, 56 St. Rep. 142 (1999).

Section 2. Initiative for constitutional convention.

Convention Notes

New provision. Enables people to petition to call a constitutional convention.

Section 3. Periodic submission.

Convention Notes

New provision. The question of holding a constitutional convention must be submitted to vote of the people at least once every 20 years.

Section 4. Call of convention.

Convention Notes

Revises 1889 constitution. Legislature shall determine whether constitutional convention delegates be elected on partisan or non-partisan basis. (1889 constitution not explicit on this point. Montana Supreme Court held convention delegates must run on partisan basis.)

Compiler's Comments

Former Constitutional Provision: This section revises Art. XIX, sec. 8, 1889 Mont. Const.

Case Notes

DECISIONS UNDER 1889 CONSTITUTION

Majority of Electors: Under Art. XIX, sec. 8, 1889 Mont. Const., "approval by a majority of the electors voting at the election" meant approval by a majority of a total number of electors casting valid ballots on the question of approval or rejection of a new Constitution and did not refer to or include those electors who failed to express an opinion by a vote on that issue. State ex rel. Cashmore v. Anderson, 160 M 175, 500 P2d 921 (1972), certiorari denied 410 US 931 (1973).

Delegates to Convention — Election:

Delegates to the Constitutional Convention must be elected from districts apportioned according to the 1970 census and to be used for the election of legislators in 1972. Forty-Second Legislative Assembly v. Lennon, 156 M 416, 481 P2d 330 (1971).

Delegates to the Constitutional Convention must be elected in the same manner as legislators, including the provisions for partisan elections. Forty-Second Legislative Assembly v. Lennon, 156 M 416, 481 P2d 330 (1971).

Delegates to Convention — Eligibility of Legislators: Legislators and other officers of the state are ineligible to serve as delegates to a constitutional convention during their term of office. Forty-Second Legislative Assembly v. Lennon, 156 M 416, 481 P2d 330 (1971), distinguished in Mahoney v. Murray, 159 M 176, 496 P2d 1120 (1972).

Section 5. Convention expenses.

Convention Notes

No change except in grammar.

Compiler's Comments

Former Constitutional Provision: This section is similar to Art. XIX, sec. 8, 1889 Mont. Const.

Case Notes

DECISIONS UNDER 1889 CONSTITUTION

Voter Education: Article XIX, sec. 8, 1889 Mont. Const., did not grant to a constitutional convention the power to expend public funds for voter education with respect to the convention's proposals. State ex rel. Kvaalen v. Graybill, 159 M 190, 496 P2d 1127 (1972).

Section 6. Oath, vacancies.

Convention Notes

No change except in grammar.

Compiler's Comments

Former Constitutional Provision: This section is similar to Art. XIX, sec. 8, 1889 Mont. Const.

Section 7. Convention duties.

Convention Notes

Only change is removal of requirements in 1889 constitution that a convention meet within a certain time after election and that the election on the proposed constitution be held within six months.

Compiler's Comments

Former Constitutional Provision: This section is similar to Art. XIX, sec. 8, 1889 Mont. Const.

Section 8. Amendment by legislative referendum.

Convention Notes

Revises 1889 constitution. Legislature may propose constitutional amendment by a vote of two-thirds of total membership rather than two-thirds of each house. Provides for July effective date for amendments.

Compiler's Comments

Former Constitutional Provision: This section revises Art. XIX, sec. 9, 1889 Mont. Const.

Case Notes

DECISIONS UNDER 1972 CONSTITUTION

Preelection Challenge to Legislative Referendum — Constitutional Amendments by Statutory Referendum — Justiciable Where Proposed Law Facially Defective: The Legislature passed a bill

to put a referendum on the ballot to change elections for Supreme Court justices from statewide to regional. Prior to the election, citizens from each of the seven proposed regions filed an action against the Secretary of State, seeking a declaratory judgment that the proposed referendum was unconstitutional as well as an injunction to bar the Secretary of State from putting the measure on the ballot. The District Court granted the plaintiffs summary judgment and the state appealed. The Supreme Court agreed with the District Court that the matter was justiciable even though the voters had not yet passed the referendum. Nevertheless, the Supreme Court concluded that preelection consideration of the appeal was appropriate because the proposed law was facially unconstitutional. The measure sought to amend the Montana Constitution by means of a statutory referendum, in clear violation of constitutional provisions. Therefore, the Supreme Court agreed the matter was justiciable and affirmed the District Court's granting of summary judgment. Reichert v. St., 2012 MT 111, 365 Mont. 92, 278 P.3d 455.

Sufficiency of Title of 1988 Welfare Referendum — Applicable Standard: The title of a referendum "allowing the legislature greater discretion to determine the eligibility, duration, and level of economic assistance and social services to those in need" was found by the Supreme Court to be legally sufficient after applying the constitutional requirement of clarity of title set out in Art. V, sec. 11, Mont. Const., and employing the rules of construction developed under State ex rel. Wenzel v. Murray, 178 M 441, 585 P2d 633 (1978), and St. v. McKinney, 29 M 375, 74 P 1095 (1904). The court refused to intervene to remove the referendum from the ballot prior to a vote of the people so as not to violate the constitutional rights of popular sovereignty and self-government. Recognizing important distinctions between the processes of referendum and initiative, the standard applied to the referendum was the same applied to examination of the title of other products of the Legislature. The court affirmed the District Court finding of no statutory authority for preelection nullification of a legislative referendum and noted a strong presumption in favor of the constitutionality of legislative enactments. The ballot language was not purposely misleading and sufficiently identified the measure to provide for an informed vote. Harper v. Greely, 234 M 259, 763 P2d 650, 45 St. Rep. 1889 (1988), distinguishing State ex rel. Steen v. Murray, 144 M 61, 394 P2d 761 (1964), and State ex rel. Harper v. Waltermire, 213 M 425, 691 P2d 826, 41 St. Rep. 2212 (1984). See also State ex rel. Boese v. Waltermire, 224 M 230, 730 P2d 375, 43 St. Rep. 2156 (1986), and T&W Chevrolet v. Darvial, 196 M 287, 641 P2d 1368 (1982).

DECISIONS UNDER 1889 CONSTITUTION

Presentation to Governor Required: It was a fatal error for the Legislature to ignore the Governor by neglecting and refusing to present proposed constitutional amendments to him. State ex rel. Livingstone v. Murray, 137 M 557, 354 P2d 552 (1960).

Length of Terms of Constitutional Officers: Public offices may be created, abolished, and the terms thereof shortened or lengthened by constitutional amendment at any time the people choose to express their will to that effect in the manner provided by Art. XIX, sec. 9, 1889 Mont. Const. State ex rel. O'Connell v. Duncan, 108 M 141, 88 P2d 73 (1939).

Proposal Fails if Question Raised Before Election: Unless the requirements of Art. XIX, sec. 9, 1889 Mont. Const., prescribing the steps to be taken by the Legislative Assembly in the submission of constitutional amendments are followed without substantial deviation—nothing important being omitted—the proposal must fail if attack thereon be made before the election. Held, that the requirement of Art. XIX, sec. 9, 1889 Mont. Const., that "proposed amendments (to the constitution), together with the ayes and nays of each house thereon, shall be entered in full on their respective journals", was mandatory. Tipton v. Mitchell, 97 M 420, 35 P2d 110 (1934).

Revision and Amendment Distinguished: Section authorizing the consolidation of county and city governments was not an attempted revision under Art. XIX, sec. 8, 1889 Mont. Const., but was an amendment under section 9 thereof. State ex rel. Corry v. Cooney, 70 M 355, 225 P 1007 (1924), overruled, to the extent that a constitutional amendment may be valid under the single subject rule but fail under the separate vote rule, in Marshall v. St., 1999 MT 33, 293 M 274, 975 P2d 325, 56 St. Rep. 142 (1999).

Substantial Compliance: Article XIX, sec. 9, 1889 Mont. Const., provides inter alia that a proposed amendment thereto shall be entered in full on the Journals of both houses. A bill proposing an amendment to Art. XII, sec. 15, 1889 Mont. Const., creating the State Board of Equalization (now State Tax Appeal Board), was properly passed by both houses, but while it was entered in full on the Journal of the House, it was not so entered in the Senate Journal. The bill acted upon in both houses was in identically the same language, identifying reference to it having been made in the Senate Journal, and as passed was published by the Secretary of

State and ratified by the people. Held, that the course pursued, though not literal compliance with the constitutional provision, was in substantial compliance therewith, the object of the requirement—certainly as to the proposed amendment—having been clearly established by the Journals. Martien v. Porter, 68 M 450, 219 P 817 (1923).

Publication — Sufficiency of: The provision of Art. XIX, sec. 9, 1889 Mont. Const., requiring publication of a proposed constitutional amendment in full in at least one newspaper in each county for 3 months previous to the next general election, was satisfied by publication in a weekly or once a week in a daily or semiweekly paper, in the absence of a provision indicating the number of issues in which the proposed amendment must appear or designating the character of the paper as monthly, weekly, or daily. State ex rel. Hay v. Alderson, 49 M 387, 142 P 210 (1914).

Purpose: Article XIX, sec. 9, 1889 Mont. Const., deals with but one subject—amendments to the Constitution. In its adoption it was not the purpose of the people to render their fundamental law incapable of change, but on the contrary, to provide a plain, simple, and easily executed method of amendment. State ex rel. Hay v. Alderson, 49 M 387, 142 P 210 (1914).

Unity of Subject: The fact that an amendment to the state Constitution may be separated into two or more propositions is not alone decisive of its unconstitutionality under the clause of Art. XIX, sec. 9, 1889 Mont. Const., requiring unity of subject in the submission of an amendment. The rule is that if, in the light of common sense, the propositions have to do with different subjects so essentially unrelated that their association is artificial, they are not one, but if they may be logically viewed as parts or aspects of a single plan, the above constitutional requirement is met in their submission as one amendment. State ex rel. Hay v. Alderson, 49 M 387, 142 P 210 (1914), overruled, to the extent that a constitutional amendment may be valid under the single subject rule but fail under the separate vote rule, in Marshall v. St., 1999 MT 33, 293 M 274, 975 P2d 325, 56 St. Rep. 142 (1999).

Amendments to Be Separate and Separately Voted Upon: The amendment to Art. XVI, sec. 4, 1889 Mont. Const., changing the term of County Commissioners from 4 years to 6 years, extending the tenure of the then incumbents, and giving District Judges power to fill vacancies on the Board, approved February 26, 1901, is not violative of Art. XIX, sec. 9, 1889 Mont. Const., but must be considered as one scheme, with the single purpose of establishing and maintaining in existence a Board, two members of which should at all times be experienced men. State ex rel. Teague v. Bd. of Comm'rs, 34 M 426, 87 P 450 (1906), overruled, to the extent that a constitutional amendment may be valid under the single subject rule but fail under the separate vote rule, in Marshall v. St., 1999 MT 33, 293 M 274, 975 P2d 325, 56 St. Rep. 142 (1999).

Entering Upon Journal of Each House — Essential: A proposed amendment to the Constitution, which provided for calling in a District Judge when a Supreme Court Judge was disqualified, was void for failure to enter on the Journals of both branches of the Legislature a full copy of said amendment, before its submission to the people, as required by Art. XIX, sec. 9, 1889 Mont. Const. Durfee v. Harper, 22 M 354, 56 P 582 (1899).

Publication of Proposed Amendments — Mandatory: The provision of Art. XIX, sec. 9, 1889 Mont. Const., requiring that the Secretary of State shall publish a proposed constitutional amendment for 3 months prior to the next general election, is not only mandatory by its express terms but is also mandatory by virtue of Art. III, sec. 29, 1889 Mont. Const., declaring that the provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise, and a noncompliance with such requirement for publication renders the adoption of a proposed amendment nugatory. State ex rel. Woods v. Tooker, 15 M 8, 37 P 840 (1894). See also State ex rel. Lloyd v. Rotwitt, 15 M 29, 37 P 845 (1894).

Attorney General's Opinions

Vote of Two-Thirds of Combined Membership: A two-thirds majority vote of the combined membership of both houses of the Legislature is sufficient to submit a proposed constitutional amendment to the Legislature. 35 A.G. Op. 100 (1974).

Law Review Articles

The Constitutional Initiative in Montana, Johnstone, 71 Mont. L. Rev. 325 (2010).

Implementation and Amendment of the 1972 Constitution, Dowling, 51 Mont. L. Rev. 282 (1990).

Section 9. Amendment by initiative.

Convention Notes

New provision. Ten percent of voters may propose constitutional amendments by petition.

Compiler's Comments

2002 Amendment by Referendum: Constitutional Amendment No. 37, proposed by Ch. 329, L. 2001, and approved at the general election held November 5, 2002, at end of first sentence of (1) substituted "each of at least one-half of the counties" for "each of two-fifths of the legislative districts". Amendment effective July 1, 2003. (See text of referendum in final volume of 2003 Laws of Montana.)

Case Notes

DECISIONS UNDER 1972 CONSTITUTION

Attorney General Statements on Initiative Considered True and Impartial — Judicial Deference to Statements That Meet Statutory Requirements: Plaintiffs challenged the Attorney General's statements of purpose and implication on a ballot initiative that concerned the recall of elected justices and judges when voters determined that appropriate cause existed. The District Court held that the Attorney General's statements satisfied statutory requirements, and plaintiffs appealed, requesting the Supreme Court to rewrite the ballot statements. The Supreme Court applied the standard in Stop Over Spending Mont. v. St., 2006 MT 178, 333 M 42, 139 P3d 788 (2006), that courts will defer to Attorney General statements on ballot initiatives provided the statements meet statutory requirements, noting that 13-27-312 does not grant proponents or opponents the right to a ballot statement of their choosing. Rather, a statement that explains the ballot measure in ordinary plain language and that is true and impartial and not argumentative or likely to create prejudice for or against the measure is in compliance with the statute. In this case, the statement of purpose was true, and the Attorney General's decision to omit what plaintiffs characterized as salient provisions from the statement of purpose did not prevent voters from casting an intelligent and informed ballot. The Attorney General's statement of implication was true, impartial, and a plainly written explanation of a vote for and against the initiative. Thus, the Supreme Court declined to rewrite the Attorney General's statements and affirmed the District Court. Citizens Right to Recall v. St., 2006 MT 192, 333 M 153, 142 P3d 764 (2006), followed in Mont. Consumer Fin. Ass'n v. St., 2010 MT 185, 357 Mont. 237, 238 P.3d 765. See also State ex rel. Wenzel v. Murray, 178 M 441, 585 P2d 633 (1978).

District Court's Rewriting of Attorney General's Statements Explaining Initiative Proposal Reversed When Statements Accurate: Plaintiff group sought an initiative petition to include an additional constitutional limit on legislative appropriations to an amount to be determined by applying a formula based on population growth and inflation unless an increase was approved by the electorate. As required, the Attorney General prepared statements explaining the purpose of the measure, the implications of a vote for and against the measure, and a fiscal statement. Plaintiffs were dissatisfied with the statements and filed a complaint. The District Court determined that all the statements were inaccurate, rewrote the statements, and ordered that the court's statements rather than the Attorney General's be placed on the ballot should the measure qualify. The Attorney General appealed, and the Supreme Court reversed. Employing the rules of construction developed under State ex rel. Wenzel v. Murray, 178 M 441, 585 P2d 633 (1978), the Supreme Court held that the District Court was incorrect in determining that the statement of purpose was inaccurate and omitted salient provisions of the measure. It is not the job of a court to add to the requirements of 13-27-312 that to be accurate, a statement of the purpose of an initiative must include a description of how it can be enforced or a statement of when it will become effective. Without engaging in a comparison of the statements, the Supreme Court held that the Attorney General's statement of purpose was adequate to meet the statutory requirements to provide a true and impartial explanation of the proposed ballot issue in plain, easily understood language. Likewise, the statement of implication and the fiscal statement were adequate, if not perfect, satisfied statutory requirements, and were not confusing or misleading, and the Supreme Court ordered that the issue be placed on the ballot containing the statements prepared by the Attorney General. Stop Over Spending Mont. v. St., 2006 MT 178, 333 M 42, 139 P3d 788 (2006).

Signature Distribution Invalid: The 2002 amendment to this section requiring that signatures be gathered on a county basis rather than on a legislative district basis was unconstitutional on its face under the 14th amendment's equal protection clause and therefore invalid. Mont. PIRG v. Johnson, CV 03-183-M-DWM (D.C. Mont. 2005).

Severance of Constitutional Amendment Language Not Curative of Defect When Initiative Improperly Submitted to Voters: Constitutional Initiative No. 75 (CI-75) expressly amended three parts of the Montana Constitution without allowing a separate vote on each amendment and thus was unconstitutional under Art. XIV, sec. 11, Mont. Const. Language in the initiative that would

have severed the invalid parts from the valid parts could not cure the constitutional defect in CI-75 because the defect was in the submission of CI-75 to voters with more than one constitutional amendment. Marshall v. St., 1999 MT 33, 293 M 274, 975 P2d 325, 56 St. Rep. 142 (1999).

Submission of Constitutional Initiative Amending Three Parts of Constitution Violative of Separate Vote Requirement: Plaintiffs filed an original application for declaration of judgment and injunctive relief, challenging the validity of Constitutional Initiative No. 75 (CI-75), which was passed by the voters and stated that no new tax or tax increase could be enacted unless approved by a majority of the electorate. The initiative amended Art. VIII, Mont. Const., revising state revenue and finance provisions; amended Art. II, sec. 18, Mont. Const., providing that sovereign immunity did not shield public officials or employees from appropriate civil liability for violating CI-75; and provided that notwithstanding the referendum provisions of Art. VI, sec. 10, Mont. Const., before a bill imposing new or increased taxes is referred to the people, the Governor had veto power. The dispositive issue was that CI-75 had two or more constitutional amendments, in violation of Art. XIV, sec. 11, Mont. Const., which is a cogent constitutional recognition of the circumstances under which Montana voters receive constitutional initiatives, namely that a separate vote is required for each proposed constitutional amendment. Citing Armatta v. Kitzhaber, 959 P2d 49 (Oreg. 1998), the Supreme Court held that the separate vote requirement is distinguishable as different and narrower than the single subject requirement in Art. V, sec. 11, Mont. Const., and that to the extent that a constitutional amendment may be valid under the single subject rule but fail under the separate vote rule, holdings to the contrary in State ex rel. Teague v. Bd. of Comm'rs, 34 M 426, 87 P 450 (1906), State ex rel. Hay v. Alderson, 49 M 387, 142 P 210 (1914), and State ex rel. Corry v. Cooney, 70 M 355, 225 P 1007 (1924), were overruled. Because CI-75 expressly amended three parts of the Montana Constitution without allowing a separate vote on each amendment, CI-75 was unconstitutional under Art. XIV, sec. 11, Mont. Const. Marshall v. St., 1999 MT 33, 293 M 274, 975 P2d 325, 56 St. Rep. 142 (1999), following State ex rel. Hinz v. Moody, 71 M 473, 230 P 575 (1924), and Sawyer Stores, Inc. v. Mitchell, 103 M 148, 62 P2d 342 (1936).

Sufficiency of Title of 1988 Welfare Referendum — Applicable Standard: The title of a referendum "allowing the legislature greater discretion to determine the eligibility, duration, and level of economic assistance and social services to those in need" was found by the Supreme Court to be legally sufficient after applying the constitutional requirement of clarity of title set out in Art. V, sec. 11, Mont. Const., and employing the rules of construction developed under State ex rel. Wenzel v. Murray, 178 M 441, 585 P2d 633 (1978), and St. v. McKinney, 29 M 375, 74 P 1095 (1904). The court refused to intervene to remove the referendum from the ballot prior to a vote of the people so as not to violate the constitutional rights of popular sovereignty and self-government. Recognizing important distinctions between the processes of referendum and initiative, the standard applied to the referendum was the same applied to examination of the title of other products of the Legislature. The court affirmed the District Court finding of no statutory authority for preelection nullification of a legislative referendum and noted a strong presumption in favor of the constitutionality of legislative enactments. The ballot language was not purposely misleading and sufficiently identified the measure to provide for an informed vote. Harper v. Greely, 234 M 259, 763 P2d 650, 45 St. Rep. 1889 (1988), distinguishing State ex rel. Steen v. Murray, 144 M 61, 394 P2d 761 (1964), and State ex rel. Harper v. Waltermire, 213 M 425, 691 P2d 826, 41 St. Rep. 2212 (1984). See also State ex rel. Boese v. Waltermire, 224 M 230, 730 P2d 375, 43 St. Rep. 2156 (1986), and T&W Chevrolet v. Darvial, 196 M 287, 641 P2d 1368 (1982).

Resubmission of Voided Constitutional Initiative Improper: When procedural defects of constitutional proportions cause the first election result on an approved or defeated constitutional initiative to be voided, the initiative may not be resubmitted to the electorate at the next regular statewide election. State ex rel. Montanans for the Preservation of Citizens' Rights v. Waltermire, 231 M 406, 757 P2d 746, 45 St. Rep. 719 (1988).

Initiative Amendment Void — Material Language Difference — Improper Publication Procedures: The language of an amendment to Art. II, sec. 16, Mont. Const., as filed and certified by the Secretary of State, was not the same language submitted to the voters at the election. Because the difference in language was material and because publication of the proposed initiative prior to election did not follow constitutional mandates, the purported amendment was held to be void. State ex rel. Mont. Citizens for the Preservation of Citizens' Rights v. Waltermire, 227 M 85, 738 P2d 1255, 44 St. Rep. 913 (1987). Petitions for rehearing, reconsideration, and clarification denied, 44 St. Rep. 929A (1987).

Summary of Constitutional Amendment Insufficient: Article XIV, sec. 9, Mont. Const., requires "the amendment" in a constitutional initiative to be published as provided by law. The provision in 13-27-311 that "[a] summary of the amendment" would suffice itself constitutes an amendment to the constitution insofar as initiatives are concerned and should not be allowed. Any initiative amendment adopted in this statutory manner is void. State ex rel. Mont. Citizens for the Preservation of Citizens' Rights v. Waltermire, 227 M 85, 738 P2d 1255, 44 St. Rep. 913 (1987). Petitions for rehearing, reconsideration, and clarification denied, 44 St. Rep. 929A (1987).

No Constitutional Conflict in Initiative Absent Enactment — Time for Objections: In considering the question of a constitutional conflict in an initiative measure that, if enacted, would abolish property taxes, the Supreme Court declined to intervene in the initiative process prior to a vote absent extraordinary causes, finding that it would be an unjustified infringement of the people's initiative rights to remove the measure from the ballot. The court noted that no constitutional conflict existed until and unless the measure passed by popular vote and that the time period until the effective date would allow sufficient time to raise objections to the measure. State ex rel. Mont. School Bd. Ass'n v. Waltermire, 224 M 296, 729 P2d 1297, 43 St. Rep. 2198 (1986).

Extent of Court Consideration of Constitutional Amendment Initiative: Unless it appears to be absolutely essential, the Supreme Court will not interfere with the right retained by the people to change the Montana Constitution by initiative, and an initiative will not be removed from the ballot prior to vote unless it is clearly unconstitutional on its face or has been improperly submitted. The court will not accept jurisdiction to decide if the statement of purpose and statement of implication are untrue unless the challenge procedure in 13-27-316 is followed. State ex rel. Mont. Citizens for the Preservation of Citizens' Rights v. Waltermire, 224 M 273, 729 P2d 1283, 43 St. Rep. 2192 (1986).

Challenge of Multiplicitous Initiative Subjects — Procedural Review Requirements to Be Met: An opponent who challenges an initiative on the grounds that the title contains more than one subject, in violation of Art. V, sec. 11, Mont. Const., must meet the procedural review requirements of 13-27-316. State ex rel. Boese v. Waltermire, 224 M 230, 730 P2d 375, 43 St. Rep. 2156 (1986). See also State ex rel. Mont. Citizens for the Preservation of Citizens' Rights v. Waltermire, 224 M 273, 729 P2d 1283, 43 St. Rep. 2192 (1986).

Legislative Resolution in Excess of Initiative Power: In this original proceeding for a Writ of Injunction, plaintiffs sought an order declaring a constitutional initiative void and unconstitutional. The initiative, if adopted by the voters, would have amended the Montana Constitution to direct the 1985 Legislature to adopt a resolution requesting Congress to call a constitutional convention for the sole purpose of adopting a balanced budget amendment. It also would have required that if the resolution was not adopted within 90 legislative days, the Legislature would remain in session without pay until the resolution was adopted. The Supreme Court, in granting injunctive relief, held that although the initiative was in form a constitutional amendment, it was in substance a legislative resolution. The initiative power conferred by the Montana Constitution does not include the power to enact a legislative resolution. The electorate cannot circumvent the constitution by indirectly doing that which can be done directly. State ex rel. Harper v. Waltermire, 213 M 425, 691 P2d 826, 41 St. Rep. 2212 (1984).

DECISIONS UNDER 1889 CONSTITUTION

Initiative Measure Not Amendatory of Constitution — Contrary to Constitution — Invalid: Proposed Initiative Measure No. 63, which would legalize lotteries and repeal 23-5-201 through 23-5-211 (now repealed), could not be considered as an amendment to the Montana Constitution where it did not comply with Art. XIX, sec. 8 or 9, 1889 Mont. Const. Therefore, the measure in violation of the 1889 Constitution was invalid. State ex rel. Steen v. Murray, 144 M 61, 394 P2d 761 (1964).

Length of Terms of Constitutional Officers: Public offices could be created, abolished, and the terms thereof shortened or lengthened by constitutional amendment at any time the people choose to express their will to that effect in the manner provided by Art. XIX, sec. 9, 1889 Mont. Const. State ex rel. O'Connell v. Duncan, 108 M 141, 88 P2d 73 (1939).

Substantial Compliance Required — Challenge Prior to Election: Unless the requirements of Art. XIX, sec. 9, 1889 Mont. Const., prescribing the steps to be taken by the Legislative Assembly in the submission of constitutional amendments, are followed without substantial deviation, the proposal must fail if attack thereon be made before the election. Tipton v. Mitchell, 97 M 420, 35 P2d 110 (1934).

Amendment and Revision Distinguished: Section of the state Constitution, authorizing the consolidation of county and city governments, was not an attempted revision under Art. XIX, sec. 8, 1889 Mont. Const., but was an amendment under section 9 thereof. State ex rel. Corry v. Cooney, 70 M 355, 225 P 1007 (1924), overruled, to the extent that a constitutional amendment may be valid under the single subject rule but fail under the separate vote rule, in Marshall v. St., 1999 MT 33, 293 M 274, 975 P2d 325, 56 St. Rep. 142 (1999).

Attorney General's Opinions

Judicial Decision Invalidating Constitutional Amendments — Constitutional Language and Statutory Implementation Language Restored: In 2002, Montana voters approved Constitutional Amendment Nos. 37 and 38, along with statutory implementing provisions, to modify county distribution requirements for signatures to qualify an initiative petition for the ballot. In Mont. PIRG v. Johnson, CV 03-183-M-DWM (D.C. Mont. 2005), a federal District Court held that the amended distribution requirements resulted in an unequal treatment of qualified electors in different counties and were unconstitutional on their face and invalid. The Attorney General cited State ex rel. Woodahl v. District Court, 162 M 283, 511 P2d 318 (1973), in concluding that the nullification of the constitutional amendments by the judicial decision invalidating the county distribution requirements restored the language of the constitution and implementing statutes as they existed before the approval of the invalid amendments. 51 A.G. Op. 2 (2005).

Submission of Constitutional Initiative at Statewide Primary Election Allowable: Citing numerous cases affirming the rationale that a primary election cannot be distinguished from any other regular or general election prescribed by law and distinguishing a primary election from a special election, which is an election called for a special purpose and not one fixed by law to occur at regular intervals, the Attorney General held that a constitutional amendment proposed by initiative pursuant to this section may be submitted to the voters at a regular statewide primary election. 44 A.G. Op. 20 (1991). See also 19 A.G. Op. 412 (1942).

Petitions — Qualified Signers: A petition for a proposed constitutional amendment must be signed by 10% of the qualified electors of the state, and that number must include at least 10% of the qualified electors in each of two-fifths of the house districts throughout the state. 35 A.G. Op. 80 (1974).

Law Review Articles

The Constitutional Initiative in Montana, Johnstone, 71 Mont. L. Rev. 325 (2010).

Implementation and Amendment of the 1972 Constitution, Dowling, 51 Mont. L. Rev. 282 (1990).

Section 10. Petition signers.

Convention Notes

New provision. Self-explanatory.

Attorney General's Opinions

Petitions — Qualified Signers: A petition for a proposed constitutional amendment must be signed by 10% of the qualified electors of the state, and that number must include at least 10% of the qualified electors in each of two-fifths of the house districts throughout the state. 35 A.G. Op. 80 (1974).

Section 11. Submission.

Convention Notes

No change except in grammar.

Compiler's Comments

Former Constitutional Provision: This section is similar to Art. XIX, sec. 9, 1889 Mont. Const.

Case Notes

Severance of Constitutional Amendment Language Not Curative of Defect When Initiative Improperly Submitted to Voters: Constitutional Initiative No. 75 (CI-75) expressly amended three parts of the Montana Constitution without allowing a separate vote on each amendment and thus was unconstitutional under this section. Language in the initiative that would have severed the invalid parts from the valid parts could not cure the constitutional defect in CI-75 because the defect was in the submission of CI-75 to voters with more than one constitutional amendment. Marshall v. St., 1999 MT 33, 293 M 274, 975 P2d 325, 56 St. Rep. 142 (1999).

Submission of Constitutional Initiative Amending Three Parts of Constitution Violative of Separate Vote Requirement: Plaintiffs filed an original application for declaration of judgment and injunctive relief, challenging the validity of Constitutional Initiative No. 75 (CI-75), which was

passed by the voters and stated that no new tax or tax increase could be enacted unless approved by a majority of the electorate. The initiative amended Art. VIII, Mont. Const., revising state revenue and finance provisions; amended Art. II, sec. 18, Mont. Const., providing that sovereign immunity did not shield public officials or employees from appropriate civil liability for violating CI-75; and provided that notwithstanding the referendum provisions of Art. VI, sec. 10, Mont. Const., before a bill imposing new or increased taxes is referred to the people, the Governor had veto power. The dispositive issue was that CI-75 had two or more constitutional amendments, in violation of this section, which is a cogent constitutional recognition of the circumstances under which Montana voters receive constitutional initiatives, namely that a separate vote is required for each proposed constitutional amendment. Citing Armatta v. Kitzhaber, 959 P2d 49 (Oreg. 1998), the Supreme Court held that the separate vote requirement is distinguishable as different and narrower than the single subject requirement in Art. V, sec. 11, Mont. Const., and that to the extent that a constitutional amendment may be valid under the single subject rule but fail under the separate vote rule, holdings to the contrary in State ex rel. Teague v. Bd. of Comm'rs, 34 M 426, 87 P 450 (1906), State ex rel. Hay v. Alderson, 49 M 387, 142 P 210 (1914), and State ex rel. Corry v. Cooney, 70 M 355, 225 P 1007 (1924), were overruled. Because CI-75 expressly amended three parts of the Montana Constitution without allowing a separate vote on each amendment, CI-75 was unconstitutional under this section. Marshall v. St., 1999 MT 33, 293 M 274, 975 P2d 325, 56 St. Rep. 142 (1999), following State ex rel. Hinz v. Moody, 71 M 473, 230 P 575 (1924), and Sawyer Stores, Inc. v. Mitchell, 103 M 148, 62 P2d 342 (1936).

TRANSITION SCHEDULE

Transition Convention Notes

Provides for an orderly change from the 1889 constitution to the 1972 constitution.

Transition Compiler's Comments

Adoption Schedule: The adoption schedule for implementing the 1972 Montana Constitution read as follows:

"ADOPTION SCHEDULE

These Schedule provisions are part of this Constitution only for the limited purposes of determining whether this Constitution has been adopted, determining what changes result from the vote on each of the separately submitted issues, and establishing the general effective date of this Constitution. No provision of this Schedule shall be published unless it becomes part of the Constitution as the result of the adoption of a separately submitted provision.

Section 1. This Constitution, if approved by a majority of those voting at the election as provided by the Constitution of 1889, shall take effect on July 1, 1973, except as otherwise provided in sections 1 and 2 of the Transition Schedule. The Constitution of 1889, as amended, shall thereafter be of no effect.

Section 2. (1) If separate issue 2A concerning the unicameral form of the legislature is approved by a majority of those voting at the election and if the proposed Constitution is approved by the electors, then:

(a) ARTICLE V, THE LEGISLATURE, shall be deleted and the following substituted therefor:

ARTICLE V

THE LEGISLATURE

Section 1. Power and Structure. The legislative power is vested in a legislature of one chamber whose members are designated senators. The people reserve to themselves the powers of initiative and referendum.

Section 2. Size. The number of senators shall be provided by law, but it shall not be smaller than 90 nor larger than 105.

Section 3. Election and Terms. A senator shall be elected for a term of four years to begin on a date provided by law. One-half of the senators shall be elected every two years.

Section 4. Qualifications. A candidate for the legislature shall be a resident of the state for at least one year next preceding the general election. For six months next preceding the general election he shall be a resident of the county if it contains one or more districts or of the district if it contains all or parts of more than one county.

Section 5. Compensation. Each member of the legislature shall receive compensation for his services and allowances provided by law. No legislature may fix its own compensation.

Section 6. Sessions. The legislature shall be a continuous body for two-year periods beginning when newly elected members take office. Any business, bill, or resolution pending at adjournment of a session shall carry over with the same status to any other session of the legislature during the biennium. The legislature shall meet at least once a year in regular sessions of not more than 60 legislative days. Any legislature may increase the limit on the length of any subsequent session. The legislature may be convened in special sessions by the governor or at the written request of a majority of the members.

Section 7. Vacancies. A vacancy in the legislature shall be filled by special election for the unexpired term unless otherwise provided by law.

Section 8. Immunity. A member of the legislature is privileged from arrest during attendance at sessions of the legislature and in going to and returning therefrom, unless apprehended in the commission of a felony or a breach of the peace. He shall not be questioned in any other place for any speech or debate in the legislature.

Section 9. Disqualification. No member of the legislature shall, during the term for which he shall have been elected, be appointed to any civil office under the state; and no member of congress, or other person holding an office (except notary public, or the militia) under the United States or this state, shall be a member of the legislature during his continuance in office.

Section 10. Organization and Procedure. (1) The legislature shall judge the election and qualifications of senators. It may by law vest in the courts the power to try and determine contested elections. It shall choose its officers from among its members, keep a journal, and make rules for its proceedings. It may expel or punish a senator for good cause shown with the concurrence of two-thirds of all the senators.

(2) A majority of the senators constitutes a quorum. A smaller number may adjourn from day to day and compel attendance of absent members.

(3) The sessions of the legislature and of the committee of the whole, all committee meetings, and all hearings shall be open to the public.

(4) The legislature may establish a legislative council and other interim committees. The legislature shall establish a legislative post-audit committee which shall supervise post-auditing duties provided by law.

Section 11. Bills. (1) A law shall be passed by bill which shall not be so altered or amended on its passage through the legislature as to change its original purpose. No bill shall become law except by a vote of the majority of all members present and voting.

(2) Every vote of each member on each substantive question in the legislature, in any committee, or in committee of the whole shall be recorded and made public. On final passage, the vote shall be taken by ayes and noes and the names entered on the journal.

(3) Each bill, except general appropriation bills and bills for the codification and general revision of the laws, shall contain only one subject, clearly expressed in its title. If any subject is embraced in any act and is not expressed in the title, only so much of the act not so expressed is void.

(4) A general appropriation bill shall contain only appropriations for the ordinary expenses of the legislative, executive, and judicial branches, for interest on the public debt, and for public schools. Every other appropriation shall be made by a separate bill containing but one subject.

(5) No appropriation shall be made for religious, charitable, industrial, educational, or benevolent purposes to any private individual, private association, or private corporation not under control of the state.

(6) A law may be challenged on the ground of non-compliance with this section only within two years after its effective date.

Section 12. Local and Special Legislation. The legislature shall not pass a special or local act when a general act is, or can be made, applicable.

Section 13. Impeachment. (1) The governor, executive officers, heads of state departments, judicial officers, and such other officers as may be provided by law are subject to impeachment, and upon conviction shall be removed from office. Other proceedings for removal from public office for cause may be provided by law.

(2) The legislature shall provide for the manner, procedure, and causes for impeachment and shall provide for a tribunal.

(3) Impeachment can be brought only by a two-thirds vote of the legislature. The tribunal hearing the charges shall convict only by a vote of two-thirds or more of its members.

(4) Conviction shall extend only to removal from office, but the party, whether convicted or acquitted, shall also be liable to prosecution according to law.

Section 14. Districting and Apportionment. (1) The state shall be divided into as many districts as there are senators and each district shall elect one senator. Each district shall consist of compact and contiguous territory. All districts shall be as nearly equal in population as is practicable.

(2) In the legislative session following ratification of this constitution and thereafter in each session preceding each federal population census, a commission of five citizens, none of whom may be public officials, shall be selected to prepare a plan for redistricting and reapportioning the state into legislative and congressional districts. The majority and minority leaders of the legislature shall each select two commissioners. Within 20 days after their designation, the four commissioners shall select the fifth member, who shall serve as chairman of the commission. If the four members fail to select the fifth member within the time provided, a majority of the supreme court shall select him.

(3) The commission shall submit its plan to the legislature at the first regular session after its appointment or after the census figures are available. Within 30 days after submission, the legislature shall return the plan to the commission with its recommendations. Within 30 days thereafter, the commission shall file its final plan with the secretary of state and it shall become law. The commission is then dissolved.

Section 15. Referendum of Unicameral Legislature. (1) In 1980 the secretary of state shall place upon the ballot at the general election the question: "Shall the unicameral legislature form be continued?"

(2) If a majority of the qualified electors voting on the question answer in the affirmative, the form shall be continued, and this section shall be of no further effect.

(3) If a majority of the qualified electors voting on the question answer in the negative, Article V of this Constitution is amended by deleting sections 1, 2, 3, 10, 13, and 14, and inserting in lieu thereof the following:

(a) "Section 1. Power and Structure. The legislative power is vested in a legislature consisting of a senate and a house of representatives. The people reserve to themselves the powers of initiative and referendum."

(b) "Section 2. Size. The size of the legislature shall be provided by law, but the senate shall not have more than 50 or fewer than 40 members and the house shall not have more than 100 or fewer than 80 members."

(c) "Section 3. Election and Terms. A member of the house of representatives shall be elected for a term of two years and a member of the senate for a term of four years, each to begin on a date provided by law. One-half of the senators shall be elected every two years."

(d) "Section 10. Organization and Procedure. (1) Each house shall judge the election and qualifications of its members. It may by law vest in the courts the power to try and determine contested elections. Each house shall choose its officers from among its members, keep a journal, and make rules for its proceedings. Each house may expel or punish a member for good cause shown with the concurrence of two-thirds of all its members.

"(2) A majority of each house constitutes a quorum. A smaller number may adjourn from day to day and compel attendance of absent members.

"(3) The sessions of the legislature and of the committee of the whole, all committee meetings, and all hearings shall be open to the public.

"(4) The legislature may establish a legislative council and other interim committees. The legislature shall establish a legislative post-audit committee which shall supervise post-auditing duties provided by law.

"(5) Neither house shall, without consent of the other, adjourn or recess for more than three days or to any place other than that in which the two houses are sitting."

(e) "Section 13. Impeachment. (1) The governor, executive officers, heads of state departments, judicial officers, and such other officers as may be provided by law are subject to impeachment, and upon conviction shall be removed from office. Other proceedings for removal from public office for cause may be provided by law.

"(2) The legislature shall provide for the manner, procedure and causes for impeachment and may select the senate as tribunal.

"(3) Impeachment shall be brought only by a two-thirds vote of the house. The tribunal hearing the charges shall convict only by a vote of two-thirds or more of its members.

"(4) Conviction shall extend only to removal from office, but the party, whether convicted or acquitted, shall also be liable to prosecution according to law."

(f) "Section 14. Districting and Apportionment. (1) The state shall be divided into as many districts as there are members of the house, and each district shall elect one representative. Each

senate district shall be composed of two adjoining house districts, and shall elect one senator. Each district shall consist of compact and contiguous territory. All districts shall be as nearly equal in population as is practicable.

"(2) In the legislative session following this amendment and thereafter in each session preceding each federal population census, a commission of five citizens, none of whom may be public officials, shall be selected to prepare a plan for redistricting and reapportioning the state into legislative and congressional districts. The majority and minority leaders of each house shall each designate one commissioner. Within 20 days after their designation, the four commissioners shall select the fifth member, who shall serve as chairman of the commission. If the four members fail to select the fifth member within the time provided, a majority of the supreme court shall select him.

"(3) The commission shall submit its plan to the legislature at the first regular session after its appointment or after the census figures are available. Within 30 days after submission, the legislature shall return the plan to the commission with its recommendations. Within 30 days thereafter, the commission shall file its final plan with the secretary of state and it shall become law. The commission is then dissolved."

(4) The members of the unicameral legislature shall remain in office and their authority to act shall continue until the members of a bicameral body are elected and qualified.

(5) The Senate chamber existing upon the date of adoption of this Article shall remain intact until the election provided for in this section has determined whether the unicameral legislature is to continue.

(6) When the provisions of this section have been carried out, it shall be of no further effect.

(b) The words "of each house" are deleted from subsection (2) of section 6 and from section 8, ARTICLE VIII, REVENUE AND FINANCE.

(c) The word "legislature" is substituted for "senate" in subsections (1), (2), and (4) of section 8, ARTICLE VI, THE EXECUTIVE, in subsections (1) and (2) of section 8, ARTICLE VII, THE JUDICIARY, and in subsection (1) of section 2, ARTICLE XII, DEPARTMENTS AND INSTITUTIONS.

(2) If separate issue 2A concerning the unicameral form of the legislature is not approved by the electors and if the proposed Constitution is approved by the electors, then ARTICLE V, THE LEGISLATURE, shall be retained.

Section 3. (1) If separate issue 3A is not approved by a majority of those voting at the election and if the proposed Constitution is approved by the electors, then section 9 of ARTICLE III, GENERAL GOVERNMENT shall be retained.

(2) If separate issue 3A is approved by the electors and if the proposed Constitution is approved by the electors, then section 9 shall be deleted from ARTICLE III, GENERAL GOVERNMENT and the following substituted therefor: "Section 9. Gambling. All forms of gambling, lotteries, and gift enterprises are prohibited unless authorized by acts of the legislature or by the people through initiative or referendum."

Section 4. If separate issue 4B is approved by a majority of those voting at the election and if the proposed Constitution is approved by the electors, then there shall be added to section 28, ARTICLE II, DECLARATION OF RIGHTS, the following sentence: "Death shall not be prescribed as a penalty for any crime against the state." And there shall be deleted from section 21 of the same ARTICLE the following: "except for capital offenses, when the proof is evident or the presumption great.""

Deletions From 1889 Montana Constitution: As listed in the official publication of the 1972 Constitution required by Ch. 296, L. 1971, as amended, the following provisions appearing in the 1889 Constitution were not included in the proposed 1972 Constitution:

PREAMBLE—The Preamble was completely rewritten.

ARTICLE I—BOUNDARIES

Boundaries of all states are determined by the United States Congress.

ARTICLE II—MILITARY RESERVATIONS

Concerns military posts now abandoned.

ARTICLE III—A DECLARATION OF RIGHTS

Section 25. Provides that aliens have the same rights as citizens to own mines.

Section 28. Prohibition against slavery.

Section 29. Declaration that constitutional provisions are mandatory.

ARTICLE V—LEGISLATIVE DEPARTMENT

Section 3. References to age requirements of 21 for representatives and 24 for senators. (Article IV of the proposed constitution makes 18-year olds eligible to run for the legislature.)

Section 5. Obsolete provision on pay of legislators.
Section 20. Prescribes enacting clause of bills.
Section 21. Introduction of bill deadline.
Section 22. Requires that bills be considered by committee and be printed.
Section 25. Requires that an amendatory bill set out entire law being amended.
Section 27. Requires presiding officer sign bills in presence of legislative members.
Section 28. Requires number, duties and compensation of legislative officers and employees be set by law.
Section 29. Prohibits extra compensation by bill.
Section 30. Legislative printing requirements.
Section 31. Prohibits laws changing salaries or extending terms of public officials.
Section 32. Requires all revenue bills to be introduced in house.
Section 36. Prohibits delegating municipal functions to private organizations.
Section 37. Prohibits investing trust funds in corporate bonds or stock.
Section 38. Prohibits state aid to railroads.
Section 39. Prohibits laws diminishing or extinguishing debts owed the state.
Section 41. Bribery of legislators.
Section 42. Bribery of state officials.
Section 43. Corrupt solicitation of legislators.
Section 44. Prohibits legislator from voting on bill in which he has private interest.
ARTICLE VI—APPORTIONMENT AND REPRESENTATION
Section 1. Election of representative to Congress—this is provided for in U.S. Constitution.
ARTICLE VII—EXECUTIVE DEPARTMENT
Section 8. State Examiner.
Section 18. Requires all grants and commissions be sealed and signed by governor and secretary of state.
Section 19. Accounting by executive officers and institutions.
Section 20. Board of State Prison Commissioners.
ARTICLE VIII—JUDICIAL DEPARTMENTS
Section 3. Provision for Supreme Court Jury.
Section 4. Requiring 3 terms of Supreme Court each year.
Section 8. First election of Justices.
Section 9. Clerk of the Supreme Court.
Section 13. Sets up 8 judicial districts.
Section 17. Requires district courts to be open at all times and to hold four terms a year.
Section 18. Clerk of District Court.
Section 19. County Attorney.
Section 21. Types of cases JP's cannot handle.
Section 22. Requires JP courts to be open at all times.
Section 24. Police and municipal courts.
Section 25. Courts of Record.
Section 26. Uniform laws and organization of courts.
Section 27. Style of process.
Section 28. Law and equity same form of civil action.
Section 32. Publication of Supreme Court decisions.
Section 34. Filling vacancies in offices of county attorney, clerk of district court and JP's.
Section 36. Judges pro tempore of district court.
ARTICLE IX—RIGHTS OF SUFFRAGE AND QUALIFICATIONS TO HOLD OFFICE
Section 3. Change of residence because of job or status.
Section 5. Electors exempt from military duty on election day.
Section 6. Military residence not voting residence.
Section 10. Eligibility for school offices.
Section 12. Equal rights for women voters.
ARTICLE X—STATE INSTITUTIONS AND PUBLIC BUILDINGS
Section 2. Provision for vote on first location of capital.
Section 3. 2/3 vote to change location of capital.
Section 4. No money for building until capital first located.
ARTICLE XII—REVENUE AND TAXATION
Section 1. Requires all property to be taxed.
Section 1a. Allows taxing incomes.

Section 3. Taxation of mines and proceeds.
Section 4. Prohibits state aid to local governments.
Section 8. Prohibits taking private property for corporate debts. (This prohibition is covered by the U.S. Constitution.)
Section 9. Two-mill limitation on property taxes.
Section 11. Uniformity clause.
Section 13. Details of State accounting.
Section 14. State Depository Board.
Section 15. County and State boards of equalization.
Section 16. Specifies assessment and apportionment of railroad property.
Section 17. Defines the word "property."
Section 18. Gives legislature power to pass laws.
ARTICLE XIII—PUBLIC INDEBTEDNESS
Section 1. Lending of state's credit.
Section 2. $100,000 debt limit for state.
Section 4. Prohibits state from assuming debt of local governments.
Section 5. $10,000 county debt limit.
Section 6. Local government debt limit.
ARTICLE XIV—MILITARY AFFAIRS
Section 2. Requires laws concerning the militia.
Section 3. Requires appropriations for the militia.
Section 4. Requires safekeeping of public arms and military records.
Section 5. Governor commander-in-chief even when out of state.
ARTICLE XV—CORPORATIONS OTHER THAN MUNICIPAL
Section 1. Invalidates corporate charters not in effect at adoption of 1889 constitution.
Section 3. Power to revoke corporate charters.
Section 4. Cumulative voting for corporate directors.
Section 5. Regulation of railroads.
Section 6. Prohibits consolidation of railroads.
Section 7. Discrimination in rail rates.
Section 8. Railroads must file acceptance of constitution.
Section 9. Right of eminent domain over public corporations.
Section 10. Restrictions on issuance of corporate stock.
Section 11. Authorized agent of foreign corporations—equal privileges for foreign corporations.
Section 12. Consent needed to construct street railroads.
Section 13. Prohibits retrospective laws benefiting railroads or individuals.
Section 14. Permission to build telegraph and telephone lines—Prohibits consolidation of such lines.
Section 15. State retains jurisdiction of corporate property in state when there is consolidation with foreign corporation.
Section 16. Prohibits requiring release-from-liability contracts from employees.
Section 17. Prohibits releasing property from liabilities of a lessor or grantor.
Section 18. Defines the word "corporation."
Section 19. Dues of private corporations.
Section 20. Prohibits price fixing.
ARTICLE XVI—COUNTIES—MUNICIPAL CORPORATION AND OFFICES
Section 3. Provision for payment of debts when new county is formed.
Section 4. Detailed provision on dividing counties into commission districts.
ARTICLE XVIII—LABOR
Section 2. Prohibits contracting for convict labor.
Section 3. Prohibits employing children under 16 in underground mines.
Section 5. Requires legislation to enforce Article.
ARTICLE XIX—MISCELLANEOUS SUBJECTS AND FUTURE AMENDMENTS
Section 3. Directs legislature to pass laws for prevention of grass and forest fires.
Section 6. Requires county officers to keep offices at county seat.
Section 7. Settlers preferred in disposition of public lands.
Section 9. Limit of 3 amendments to Constitution at one election.
ARTICLE XX—SCHEDULE
Sections 1-17. Provides for transition from territorial to state government.

ARTICLE XXI—MONTANA TRUST AND LEGACY FUND

Sections 1-18. Provides for investment of various state funds some of which never existed. (Investment of public funds covered in Article VIII of proposed Constitution.)

Section 1. Accelerated effective date.

Convention Notes

Proposed section on annual legislative sessions and reapportionment of the legislature would be effective January 1, 1973. The reapportionment commission could then be appointed by the 1973 legislature and report its plan to the 1974 legislature.

Compiler's Comments

Section Executed: Section 1 of the Transition Schedule provided:

"Section 1. Accelerated effective date. Section 6 (SESSIONS) and section 14 (DISTRICTING AND APPORTIONMENT) of Article V, THE LEGISLATURE, shall be effective January 1, 1973."

By letter of December 4, 1974, the Attorney General certified to the Secretary of State that section 1 of the Transition Schedule had been executed:

"Section 6 (SESSIONS) of Article V, Constitution of Montana (1972), has been fully executed. However, a proposed amendment to Section 6, Article V, was submitted to the electorate during the general election held on November 5, 1974, which received a majority vote in favor of its adoption. The passage of this amendment will return the Montana legislature to biennial sessions.

Section 14 (DISTRICTING AND APPORTIONMENT) of Article V, Constitution of Montana (1972), has also been fully executed. The reapportionment commission referred to in Section 14 filed its plan with the Secretary of State on February 27, 1974, after receiving recommendations from both houses of the legislature."

Section 2. Delayed effective date.

Convention Notes

Sections on size of legislature, election and terms of its members would become effective when the reapportionment plan becomes law. If this is in 1974 then elections would be held in November 1974 for new members of the legislature to take office January 1, 1975.

Compiler's Comments

Section Executed: Section 2 of the Transition Schedule provided:

"Section 2. Delayed effective date. The provisions of sections 1, 2, and 3 of Article V, THE LEGISLATURE, shall not become effective until the date the first redistricting and reapportionment plan becomes law."

By letter of December 4, 1974, the Attorney General certified to the Secretary of State that section 2 of the Transition Schedule had been executed:

"The first redistricting and reapportionment plan was filed with the Secretary of State on February 27, 1974, and pursuant to Section 43-117, Revised Codes of Montana 1947, became law as of that date. Therefore, the provisions of Sections 1, 2 and 3, Article V, Constitution of Montana (1972), are now in effect."

Section 3. Prospective operation of declaration of rights.

Convention Notes

Any new rights created in Article II take effect only after July 1, 1973. It does not create any right for past events.

Case Notes

Divorce Decree: In action to modify a divorce decree entered before the effective date of the 1972 Montana Constitution, husband could not attack an award of alimony on the ground that it violated Art. II, sec. 4, Mont. Const.; by virtue of section 3 of the Transition Schedule, the rights created by Art. II, sec. 4, Mont. Const., apply prospectively only and do not serve to invalidate the award if it was proper when made. Rogers v. Rogers, 169 M 403, 548 P2d 141 (1976).

Action Against Employer: Right of injured workman to seek redress against statutory employer (prime contractor) was effective prospectively from the effective date of the 1972 Montana Constitution (July 1, 1973), and thus complaint that was filed 3 months before the effective date was dismissed. Poulson v. Walsh-Groves, 166 M 163, 531 P2d 1335 (1975).

Section 4. Terms of judiciary.

Convention Notes

Since the proposed constitution changes the length of terms of office of judges this provision makes it clear that all judges may serve to the end of the term for which they were elected.

Compiler's Comments

Section Executed: Section 4 of the Transition Schedule provided:

"Section 4. Terms of judiciary. Supreme court justices, district court judges, and justices of the peace holding office when this Constitution becomes effective shall serve the terms for which they were elected or appointed."

By letter of December 20, 1978, the Attorney General certified to the Secretary of State that section 4 of the Transition Schedule had been executed:

"Section 4 of the Schedule, "terms of Judiciary" has been executed. All Supreme Court justices, District Court judges and Justices of the Peace holding office on July 1, 1973, have served the terms for which they had been elected or appointed."

Section 5. Terms of legislators.

Convention Notes

(1) If the reapportionment and redistricting plan becomes effective after the 1974 legislative session, the terms of legislators serving in that session would end December 31, 1974.

(2) Section 3, Article V provides that senators have four year terms but that one-half are elected every two years. This section provides that one-half of the senators first elected will have only two year terms.

Compiler's Comments

Section Executed: Section 5 of the Transition Schedule provided:

"Section 5. Terms of legislators. (1) The terms of all legislators elected before the effective date of this Constitution shall end on December 31 of the year in which the first redistricting and reapportionment plan becomes law.

(2) The senators first elected under this Constitution shall draw lots to establish a term of two years for one-half of their number."

By letter of March 24, 1977, the Attorney General certified to the Secretary of State that section 5 of the Transition Schedule had been fully executed:

"Subsection (1) of Section 5 has been fully executed. Under that subsection, the first redistricting and reapportionment plan was filed with the Secretary of State and became effective on February 27, 1974. Therefore, the terms of all legislators elected prior to the effective date of the 1972 Constitution on July 1, 1973, ended on December 31, 1974.

Subsection (2) of Section 5 of the Transition Schedule has been fully executed."

Section 6. General transition.

Convention Notes

Unless the proposed constitution specifically changes a law it will not affect any rights or duties or the validity of contracts, bonds, etc. All elected officials serve out their present terms.

Compiler's Comments

Section Executed: Section 6(3) of the Transition Schedule provided:

"(3) All officers filling any office by election or appointment shall continue the duties thereof, until the end of the terms to which they were appointed or elected, and until their offices shall have been abolished or their successors selected and qualified in accordance with this Constitution or laws enacted pursuant thereto."

By letter of February 22, 1977, the Attorney General certified to the Secretary of State that section 6(3) had been fully executed:

"Section 6, subsection (3) of the Transition Schedule has been fully executed."

Case Notes

Preservation of Existing Water Rights: Plaintiff who had filed petition for water appropriation before repeal of the former water law had an existing right in the priority of his application, which was preserved by subsection (1) of Art. IX, sec. 3, Mont. Const., and by section 6(2) of the Transition Schedule of the 1972 Constitution. Gen. Agriculture Corp. v. Moore, 166 M 510, 534 P2d 859 (1975).

TITLE 1
GENERAL LAWS AND DEFINITIONS

CHAPTER 1
GENERAL PROVISIONS

Part 1
Meaning of Law

1-1-102. How expressed.

Case Notes

Written Law Supreme: The written law of this state is contained in its Constitution and statutes and the Constitution and statutes of the United States, and it prevails as against the declaration or promulgation by this court of an opposing rule at variance with and contrary to such written law. State ex rel. Burns v. Lacklen, 129 M 243, 284 P2d 998 (1955).

1-1-107. Unwritten law defined.

Compiler's Comments

2007 Amendment: Chapter 61 made minor changes in style. Amendment effective October 1, 2007.

Case Notes

Purpose of Choice of Law Rule — Public Policy Subsumed: Addressing the question of whether, in a personal injury and wrongful death action, Montana recognized a public policy exception that would require application of Montana law even when Montana's choice of law rules dictate application of the laws of another state, the Supreme Court noted that for choice of law purposes, the public policy of a state is simply the rules, as expressed in its legislative enactments and judicial decisions, that it uses to decide controversies. The purpose of choice of law rules is to resolve conflicts between competing policies. In this case, considerations of public policy were accounted for, being expressly subsumed within the "most significant relationship" approach in Restatement (Second) of Conflict of Laws 6(2)(b) and (2)(c) (1971), which mandate consideration of the relevant policies of all the interested states, so a public policy exception to the most significant relationship test would have been redundant. Phillips v. Gen. Motors Corp., 2000 MT 55, 298 M 438, 995 P2d 1002, 57 St. Rep. 259 (2000). See also Casarotto v. Lombardi, 268 M 369, 886 P2d 931, 51 St. Rep. 1350 (1994), and Rothwell v. Allstate Ins. Co., 1999 MT 50, 293 M 393, 976 P2d 512, 56 St. Rep. 203 (1999).

1-1-108. Common law — applicability of.

Case Notes

Common-Law Action Not Usurped by Statutory Scheme for Environmental Remediation and Cleanup: Plaintiffs brought a common-law action against defendant for restoration damages related to environmental damage caused by defendant's refinery. Defendant asserted that the action would interfere with the statutory plan in the Comprehensive Environmental Cleanup and Responsibility Act (CECRA), Title 75, ch. 10, part 7, and contended that the common-law action was preempted by the statutory provisions. The Supreme Court disagreed. As set out in Brewington v. Employers Fire Ins. Co., 1999 MT 312, 297 M 243, 992 P2d 237 (1999), statutory preemption of common-law claims is limited to situations in which there are a direct conflict between statutes and a common-law claim. However, nothing in CECRA preempts a common-law claim that seeks to recover restoration damages beyond the statutes' health-based standards, and the court declined to add to CECRA a prohibition against common-law claims when the Legislature declined to do so. Sunburst School District No. 2 v. Texaco, Inc., 2007 MT 183, 338 M 259, 165 P3d 1079 (2007).

State Law Tort Claims Not Protected or Prohibited by FELA — Dismissal for Failure to State Claim Improper: Reidelbach worked for the railroad for about 20 years but was forced to stop working because of job-related disabling cumulative spinal injuries. Reidelbach reached an agreement with the railroad's claim representatives under which he would forego pursuing a claim under the Federal Employers' Liability Act (FELA) and the railroad would propose a fair settlement for the injuries. After 2 years, no settlement was offered, and ultimately the parties

exchanged counteroffers, but no agreement on an amount was reached. Reidelbach then filed a timely FELA claim and also brought several state claims, alleging that the railroad had engaged in unfair, dilatory, and fraudulent claims practices. The District Court concluded that all the postinjury state claims were preempted by FELA and dismissed them pursuant to former Rule 12(b), M.R.Civ.P. (now superseded), so Reidelbach appealed. Following an extensive analysis of federal law related to preemption in its various forms, the Supreme Court held that Reidelbach's state claims were neither expressly nor impliedly preempted by FELA and did not conflict with or stand as an obstacle to the accomplishment and execution of FELA. Therefore, the District Court erred in dismissing Reidelbach's state claims on grounds of FELA preemption, and the case was reversed and remanded for trial in state court. Reidelbach v. Burlington N. & Santa Fe Ry. Co., 2002 MT 289, 312 M 498, 60 P3d 418 (2002).

Findings Required as Prerequisite for Involuntary Medication Order — Due Process and Right to Privacy — Common Law Superseded: S.C. was ordered by the District Court to undergo involuntary medication to treat her schizophrenia and appealed to the Supreme Court, claiming that the District Court violated her common-law right to refuse medication and her right to privacy and due process. S.C. also claimed that the District Court did not make the statutorily required finding stating the reason why involuntary medication was chosen by the District Court from among other alternatives available. The Supreme Court affirmed the District Court, holding that: (1) because there was a statutory scheme for ordering involuntary medication, there was no common-law right in Montana to refuse medication; (2) S.C.'s premise, that she had been unlawfully declared incompetent, was a false premise in that the statutory scheme required a finding of a mental disorder rather than incompetency and that S.C. had not particularly shown how the Montana commitment statutes were unconstitutional; and (3) it was clear from the detailed findings of the District Court that the court believed that involuntary medication was the most appropriate and least restrictive alternative. The Supreme Court also relied on the doctrine of implied findings to hold that the District Court had made all of the findings necessary to invoke the remedy of involuntary medication. In re Mental Health of S.C., 2000 MT 370, 303 M 444, 15 P3d 861, 57 St. Rep. 1584 (2000).

Claim for Common-Law Tort of Bad Faith by Third Party Not Preempted by Statute — General Statute of Limitations Applicable: The District Court dismissed Brewington's complaint against two insurance companies based on the conclusion that the complaint failed to state a claim for which relief could be granted because the claim was barred by the statute of limitations in 33-18-242 regarding third-party claimants. Brewington contended that the claim was based on the common-law tort of bad faith, not on 33-18-242. The Supreme Court construed the plain language of the statute in determining that by its terms, 33-18-242 does not prohibit a third-party claimant from bringing an action for bad faith. Both Vigue v. Evans Prod. Co., 187 M 1, 608 P2d 488 (1980), and Hayes v. Aetna Fire Underwriters, 187 M 148, 609 P2d 257 (1980), establish a common-law cause of action for bad faith that was not affected by the passage of 33-18-242. When the common law is not in conflict with a statute, the common law applies. Thus, the District Court's conclusion that 33-18-242 prohibited Brewington from pleading the common-law tort of bad faith was reversible error. Further, because the claim was brought for bad faith and not pursuant to 33-18-242, the 3-year statute of limitations in 27-2-204, not the 1-year statute of limitations in 33-18-242, applied. Brewington v. Employers Fire Ins. Co., 1999 MT 312, 297 M 243, 992 P2d 237, 56 St. Rep. 1257 (1999), distinguishing Grenz v. Orion Group, Inc., 243 M 486, 795 P2d 444, 47 St. Rep. 1346 (1990).

Common-Law Plain Error: Despite the clear language of this section precluding application of the common law in cases in which the law is declared by statute, the doctrine of common-law plain error review by the Montana Supreme Court continues to exist to allow correction of errors not objected to at trial but that affect the fairness, integrity, and public reputation of judicial proceedings. The doctrine continues in spite of the passage of 46-20-701, Montana's plain error statute restricting the review of errors not objected to at trial. Although failing to address the applicability of this section, the Supreme Court nevertheless retained the inherent power and obligation to interpret the constitution, protect individual rights, prevent manifest injustice, and correspondingly review lower court decisions and actions for error on a selective case-by-case basis, as inherent in the appellate process, despite the statutory restrictions and legislative intent of 46-20-701. St. v. Finley, 276 M 126, 915 P2d 208, 53 St. Rep. 310 (1996), followed in St. v. Harris, 1999 MT 115, 294 M 397, 983 P2d 881, 56 St. Rep. 481 (1999), St. v. Pizzichiello, 1999 MT 123, 294 M 436, 983 P2d 888, 56 St. Rep. 499 (1999), and St. v. Hanson, 1999 MT 226, 296 M 82, 988 P2d 299, 56 St. Rep. 891 (1999).

Prior Consent Judgment Not Conclusive as to Damages Against Liquidated Insurer — Res Judicata Inapplicable Under Statutory Scheme: When Dr. Lubin performed surgery on claimant in 1980, he was insured against professional malpractice by Glacier General Assurance Company. In 1984, Kowalski filed a suit against Dr. Lubin for medical malpractice. In 1985, Glacier General was declared insolvent and ordered into liquidation under the auspices of Bennett, the Montana Insurance Commissioner. In 1986, Bennett received a claim from Kowalski against Glacier General in compliance with 33-2-1365. In 1988, Kowalski concluded her litigation against Lubin by a settlement for $35,000. However, no release in favor of Lubin or Glacier General was executed. The insurer who insured Lubin prior to 1980 was to pay one-half of the settlement and Lubin the other half. The claim was referred to a referee of the District Court, who recommended that Bennett pay the entire claim of $35,000. Bennett objected to payment of more than one-half the claim, arguing that the issue was res judicata, based upon Kowalski's settlement with Lubin, but the District Court ordered Bennett to pay the entire $35,000. The Supreme Court held that while the doctrine of res judicata would normally apply, the doctrine did not apply under these circumstances because 33-2-1365 is inconsistent with the common law. Under 33-2-1365, the prior judgment did not conclusively establish the amount of Kowalski's damages caused by Glacier General, and payment of the entire amount of Kowalski's claim was therefore not barred by the consent judgment. In re Claim of Kowalski, 260 M 269, 860 P2d 104, 50 St. Rep. 1038 (1993).

Individuals as Well as Insurers Liable for Unfair Trade Practices: The defendant in a personal injury case filed a counterclaim against the plaintiffs, alleging that their negligence was the cause of the automobile accident involving the parties. Subsequently, in his deposition, the defendant admitted that he had been intoxicated at the time of the accident, that he had been driving negligently, and that the plaintiffs had not been negligent. The plaintiffs sought summary judgment to dismiss the defendant's counterclaims, but prior to the hearing, the defendant voluntarily dismissed his counterclaims. The plaintiffs then sought damages from the insurer and the agent for bad faith in violation of the insurer's statutory duty to settle a claim when liability becomes reasonably clear. The agent argued that 33-18-242 limits liability for unfair trade practices to insurers. The Supreme Court held that that portion of Klaudt v. Flink, 202 M 247, 658 P2d 1065 (1983), holding that 33-18-201 did afford a plaintiff a common-law cause of action against individuals, had never been reversed or modified. The Supreme Court further held that the statutory cause of action provided for in 33-18-242 and the different standard of proof provided for by the statute apply only to insurers, while the common-law cause of action and standard of proof provided for by 33-18-201 apply to insurers and individuals. O'Fallon v. Farmers Ins. Exch., 260 M 233, 859 P2d 1008, 50 St. Rep. 1022 (1993).

Quasi-Judicial Immunity as Common Law: The doctrine of quasi-judicial immunity is not a subject of statutory law, and the question of its applicability was therefore decided under the common-law rule as reviewed in Butz v. Economou, 438 US 478, 57 L Ed 2d 895, 98 S Ct 2894 (1978). The grant of judicial immunity in 2-9-112 is not in derogation of the right to sue the state, granted by Art. II, sec. 18, Mont. Const., and quasi-judicial immunity is therefore extended to state boards and to the state itself. Koppen v. Bd. of Medical Examiners, 233 M 214, 759 P2d 173, 45 St. Rep. 1433 (1988), distinguished in State ex rel. Div. of Workers' Comp. v. District Court, 246 M 225, 805 P2d 1272, 47 St. Rep. 1911 (1990), discussed in Newville v. St., 267 M 237, 883 P2d 793, 51 St. Rep. 758 (1994), and followed in Rahrer v. Bd. of Psychologists, 2000 MT 9, 298 M 28, 993 P2d 680, 57 St. Rep. 53 (2000).

Noncompliance With Annexation Procedure — Property Not Subject to Municipal Tax: The city of Forsyth failed to substantially comply with the statutory annexation procedure, which supplanted common-law methods. Therefore, the disputed property taxed by the municipality was outside its jurisdiction and the plaintiffs' action for refund of taxes was remanded for consideration in conformity with such holding and the holding that under 27-2-203, the Statute of Limitations did not begin to run until plaintiffs discovered that the city map was in error. Gregory v. Forsyth, 187 M 132, 609 P2d 248 (1980).

Deannexation: Montana's deannexation statutes, 7-2-4801 through 7-2-4810, provide the exclusive means for excluding property from municipalities. The common-law doctrine of acquiescence cannot be applied to supersede the annexation statutes where the boundaries are clear. Balock v. Melstone, 186 M 303, 607 P2d 545 (1980).

Common-Law Action — Consortium: Wife can maintain action for loss of consortium when such loss is result of negligent injury to her husband because it is a mutual right which arises in husband and wife upon marriage. Duffy v. Lipsman-Fulkerson & Co., 200 F. Supp. 71 (D.C.

Mont. 1961), explained in Dutton v. Hightower & Lubrecht Constr. Co., 214 F. Supp. 298 (D.C. Mont. 1963), distinguished in Hall v. U.S., 266 F. Supp. 671 (D.C. Mont. 1967).

Implied Reservations and Implied Grants Based on Necessity — Outmoded by Statute: The effect of this section is that the common-law rules have been supplanted by statutory law in all fields covered by statute. Simonson v. McDonald, 131 M 494, 311 P2d 982 (1957).

Remedy Under Common Law and Statute: An occupying claimant may recoup the value of improvements placed on the land of another against the owner's claim for use and occupation under the common law as well as under 70-28-110. Pritchard Petroleum Co. v. Farmers Co-op Oil & Supply Co., 121 M 1, 190 P2d 55 (1948).

Meaning Not to Be Extended Far Beyond Its Remedial Purpose: To argue that the state by enacting 25-13-613 relating to property exempt from execution actually intended to exempt property used by the counties, cities, and towns from foreclosure of liens and to permit foreclosure upon property belonging to the state or used by the sovereign authority of the state for public purposes would be extending the meaning of this section far beyond any possible remedial purpose sought to be effected by its enactment. No such construction was ever intended, and the Legislature was laboring under some misapprehension that the sovereign power did not extend to counties, cities, and towns. Ackroyd v. Winston Bros. Co., 113 F2d 657 (9th Cir. 1940).

Construing a Statutory Departure From the Common Law Under This and Other Sections on Construction: The court held a contract void because the impossibility preventing performance was due to the nature of the thing the contracting company undertook to do, i.e., to obtain a yield of gasoline which could not by any means be done. The court rejected appellee's contention that under 1-1-109 the common-law rule that the promise was enforceable because the company knew or had reason to know the facts disclosing the impossibility applied. On the contrary, 28-2-603, voiding the contract for impossibility and declaring the law and departing from the common-law rule (section 10704, R.C.M. 1935, since repealed), is the only section that could apply. Smith Eng'r Co. v. Rice, 102 F2d 492 (9th Cir. 1938).

Statutes Construed as Continuation of Common Law: Statutes are but continuations of basic common law and are not presumed to make any alterations in it further than is expressly declared, and a statute made in the affirmative to define a right, without any negative implications expressed or implied, does not detract from the common law, the rules of which are not to be overturned except by clear and unambiguous language. State ex rel. La Point v. District Court, 69 M 29, 220 P 88 (1923).

Elements of Common-Law Marriage Modified by Codes: Montana's codes have modified the common law with respect to marriage by requiring in the absence of solemnization a mutual and public assumption of the marital relation. St. v. Newman, 66 M 180, 213 P 805 (1923).

Interference With Contractual Rights — Unknown at Common Law: When a right sought to be asserted was not known to the common law at the time it became part of the jurisprudence of the state, authority for the right must be found in the acts of the Legislature. Court found a cause of action for interference with contractual rights based in part on the doctrine that "for every wrong there is a remedy". Simonsen v. Barth, 64 M 95, 208 P 938 (1922).

Public Debts — Priority: By adopting the common law, the state adopted the crown's prerogative with respect to public debts, and the state as sovereign is entitled to priority of payment over private creditors of the same debtor. Am. Bonding Co. v. Reynolds, 203 F 356 (D.C. Mont. 1913).

Legislature's Power to Alter or Repeal the Common Law: The Legislature may alter or repeal the common law, and many of its rules have been abolished by the Codes. Cunningham v. NW. Improvement Co., 44 M 180, 119 P 554 (1911).

Common Counts: There is in this state no action for money had and received as such, and there is no common law in any case where the law is declared by the Code. Truro v. Passmore, 38 M 544, 100 P 966 (1909).

Attorney General's Opinions

Writs of Attachment to Be Issued Under Judicial Supervision: Montana recognizes the existence of common law but only insofar as it does not conflict with specific statutory enactments. Montana has established statutory procedures for attaching property. The petition must be supported by an affidavit of the person seeking attachment. The petitioner must furnish a written undertaking to be approved by a court. Finally, a judge, not the petitioner, issues the Writ of Attachment. Prejudgment common-law Writs of Attachment are not issued under judicial supervision. This directly conflicts with the statutory requirements of Montana's prejudgment attachment laws. Thus, common-law Writs of Attachment, issued without judicial supervision, are of no effect in Montana. 38 A.G. Op. 115 (1980).

No Duty for County Clerk and Recorder to Accept Common-Law Liens for Filing: Although a County Clerk and Recorder has a statutory duty to accept for filing any instrument, paper, or notice authorized by law to be recorded, there is no apparent authority in Montana law for allowing the filing of a common-law lien. It is unclear whether Montana even recognizes common-law liens. Because a common-law lien is not authorized by law to be received, County Clerk and Recorders may refuse to accept for filing written instruments purporting to be liens when the writing does not qualify as a statutory lien or lien created by contract. 38 A.G. Op. 114 (1980).

Irrigation Ditch as a "Natural Stream": An irrigation ditch established prior to the existence of a public street that intersects the ditch is considered a natural stream as to that street under common law. Consequently, such a ditch must also be considered a natural stream within the meaning of 7-14-2204(1). 38 A.G. Op. 39 (1979).

1-1-109. Common law of England — when rule of decision.

Case Notes

Action for Damages Allowed Against Local Peace Officers Violating Person's Self-Executing State Constitutional Rights to Privacy, Due Process, and Freedom From Unreasonable Searches and Seizures: Plaintiffs filed a civil action against the Sheriff and two deputies for damages for violation of plaintiffs' Montana constitutional rights to privacy, due process, and freedom from unreasonable searches and seizures. The court held that those three rights are self-executing. The court also held that plaintiffs were entitled to damages. The court based the right to recover damages on: (1) federal cases allowing damage suits for violation of rights under the U.S. Constitution; (2) Restatement (Second) of Torts 874A (1979), which follows the principle in those federal cases by stating that when a constitutional provision protects a class of persons and does not provide a remedy for a violation of the provision, the court may, if appropriate, allow an action under an existing tort or a new cause of action similar to an existing tort; (3) this section providing that the common law of England is the rule of decision in Montana courts to the extent that it is not repugnant to or inconsistent with the U.S. or Montana Constitution or Montana statutes, and cases from other states using the English common law as a basis for granting a remedy for a state official's violation of a person's state constitutional rights; (4) 27-1-202 allowing recovery of damages by a person who suffers detriment from the unlawful act or omission of another; and (5) the Montana Constitution, Art. II, sec. 16, right to a remedy for every injury. The court stated that there is a great distinction between wrongs, such as assault, conversion, and trespass, by a private individual against another private individual and wrongs against a private individual by a person acting under authority of the state in violation of a person's constitutional rights and stated that common-law causes of action remedying the former are not adequate to remedy the latter. Dorwart v. Caraway, 2002 MT 240, 312 M 1, 58 P3d 128 (2002).

Writs of Execution Used to Enter, Search, and Seize — Damages for Violation of Constitutional Rights — Immunity of Peace Officers: Two brothers sued the Sheriff and two deputies for violating their Montana constitutional rights to privacy, due process, and freedom from unreasonable searches and seizures. Neither writs of execution issued to enforce default judgments against one brother nor the postjudgment statutes under which they were issued expressly directed or authorized local peace officers to enter the other brother's house and search for and seize property of the brother against whom the writs were issued and who lived in the house. Therefore, 2-9-103 did not give the peace officers immunity from suit on the basis that they acted "under the authority of law". However, to the extent that any claim for damages for violation of due process is based on failure to provide the brother against whom the writs were issued with notice of property that is exempt from execution and a timely hearing, the claim results from the execution statutes' constitutional inadequacy, and recovery for those procedural inadequacies is barred by the provision in 2-9-103 for immunity for an action under authority of a law subsequently found unconstitutional. The District Court's dismissal, based on statutory immunity, of the brothers' other claims was reversed. Dorwart v. Caraway, 2002 MT 240, 312 M 1, 58 P3d 128 (2002).

Legislative Power to Alter Common Law: No one has a vested interest in any rule of common law. The Legislature may alter common-law causes of action to promote legitimate state interests and may alter or abrogate causes of action sounding in tort. Meech v. Hillhaven W., Inc., 238 M 21, 776 P2d 488, 46 St. Rep. 1058 (1989).

Common-Law Duties — Attorney General: The common law has been a part of our system of jurisprudence from the organization of Montana territory to the present day, and in absence of express restrictions, the common-law duties attach themselves to the office of Attorney General so far as they are applicable and in harmony with our system of government. State ex rel. Ford v. Young, 54 M 401, 170 P 947 (1918).

Definition of "Common Law of England": The common law of England means that body of jurisprudence as applied and modified by the courts of this country up to the time it became a rule of decision in this commonwealth. Aetna Accident & Liab. Co. v. Miller, 54 M 377, 170 P 760 (1918).

Common-Law Rule of Contempt of Court — Relation to Freedom of the Press: When publication of an article in newspaper charged a judge with wrongdoing in connection with his decision in a case 6 months prior, contempt of court for publication of article will not lie. When a case is finished, courts are subject to the same criticism as other people. State ex rel. Metcalf v. District Court, 52 M 46, 155 P 278 (1916).

Publication on Sunday: Although the common-law rule held that Sunday was not a judicial day, it had no application whatever to ministerial acts. Therefore publication of notice in a newspaper is not vitiated because it was done in a Sunday paper. State ex rel. Hays v. Alderson, 49 M 387, 142 P 210 (1914).

State Preferred Creditor: By adopting the common law, the state adopted the crown's prerogative with respect to public debts, and the state as sovereign is entitled to priority of payment over private creditors of the same debtor. Am. Bonding Co. v. Reynolds, 203 F 356 (D.C. Mont. 1913).

Common-Law Determination of Floodwaters as Part of Surface Water: Whenever floodwater becomes severed from main current or leaves never to return and spreads out over lower ground, it becomes surface water. However, if it forms a continuous body with the water flowing in the ordinary channel or if it departs from such channel presently to return, it is to be regarded as still a part of the stream and may not be obstructed by a railroad company by a fill along its right-of-way without openings. Fordham v. N. Pac. Ry., 30 M 421, 76 P 1040 (1904).

Burden of Proof: In the absence of a statute fixing the burden of proof, the common-law rule prevails. Finlen v. Heinze, 28 M 548, 73 P 123 (1903).

Part 2
General Definitions of Terms Used in Code

1-1-201. Terms of wide applicability.

Compiler's Comments

2007 Amendment: Chapter 61 made minor changes in style. Amendment effective October 1, 2007.

Case Notes

State as a Person: The state was properly held to be a "person" where such construction of the statute was beneficial to the state and general public by permitting recovery of limited amounts paid through ADC for the support and necessaries of children. Dept. of Social & Rehabilitation Services v. Hultgren, 168 M 257, 541 P2d 1211 (1975).

Logging Corporation Not a Person: A logging corporation acting in the capacity of an independent contractor is not a "person" as set forth in 71-3-601 and is not entitled to a loggers' lien thereunder. Jack Long Logging Co. v. Pyramid Mtn. Lumber, Inc., 143 M 87, 387 P 712 (1963).

Corporation as a Person: Though the term "person" ordinarily refers to a living human being—a natural person—the definition given it by this section and other sections of the Codes includes corporations as well as natural persons. In re Beck's Estate, 44 M 561, 121 P 784 (1912).

Attorney General's Opinions

"United States": As used in this section, "United States" includes the District of Columbia, Puerto Rico, and the Virgin Islands. 28 A.G. Op. 35 (1959).

1-1-202. Terms relating to procedure and the judiciary.

Compiler's Comments

2007 Amendment: Chapter 61 made minor changes in style. Amendment effective October 1, 2007.

1991 Amendment: Deleted definition of magistrate that read: ""Magistrate" means any officer described in 46-1-201(6)"; and made minor changes in style.

1-1-203. Terms relating to instruments and other writings.

Compiler's Comments

2011 Amendment: Chapter 238 inserted definition of affidavit; and made minor changes in style. Amendment effective October 1, 2011.

Saving Clause: Section 11, Ch. 238, L. 2011, was a saving clause.

2007 Amendment: Chapter 61 made minor changes in style. Amendment effective October 1, 2007.

Case Notes

"Fees" Defined: The term "fees", as used in this section, refers to costs of publications. St. v. Story, 53 M 573, 165 P 748 (1917).

Attorney General's Opinions

Definition of Printing — List of Registered Voters — Test: The reproduction of the list of registered voters required by election statute is "printing", which is determined on a case-by-case basis, and reproduction must be done by the county printing contractor. 36 A.G. Op. 82 (1976).

1-1-204. Terms denoting state of mind.

Compiler's Comments

2007 Amendment: Chapter 61 made minor changes in style. Amendment effective October 1, 2007.

Case Notes

Adequate Definition of "Security" for Jury — Willful Conduct Standard Applicable to Securities Act Violations — Omission of Investment Prospectus Not Fraudulent at Time — Securities Restitution Properly Awarded: The defendant, a pastor, was approached by the plaintiff, a member of his congregation, about investing money. The defendant convinced the plaintiff to purchase stock in the defendant's Mexico-domiciled company. Ultimately, the investment promises never materialized and the defendant was convicted of failure to register as a securities salesperson, failure to register a security, and fraudulent practices under the Securities Act of Montana. On appeal, the defendant argued that the term "security" was not adequately or specifically defined for the jury, that the "willful" standard was inappropriate to attach to the charges, that the conviction of fraudulent practices was improper because neither the statute nor administrative rule required an investment prospectus at the time of the violation, and that the award of restitution was improper. The Supreme Court held that the evidence showed that the jury reasonably concluded that the defendant had sold a security because the shares in the company constituted a stock, that the Legislature specifically included a willful standard for Securities Act violations, that the fraudulent practices conviction was improper because failure to provide a prospectus was not part of the statute at the time, and that the award of restitution was proper because the loss stemmed directly from the defendant's conduct. St. v. Himes, 2015 MT 91, 378 Mont. 419, 345 P.3d 297.

Student Not Subject to Restraint on Liberty — No Custodial or Special Relationship: A high school student was caught on campus with a tin of chewing tobacco and was disciplined by being suspended from all extracurricular activities. The student became distraught upon realizing the suspension would bar him from the state wrestling tournament; he went home and committed suicide that afternoon. The student's mother sued the school board and the superintendent, alleging that her son's death was the direct and proximate result of the school board's negligence. The District Court granted summary judgment to the board. On appeal, the Supreme Court held that because suicide is generally considered a deliberate intervening act, the board was entitled to summary judgment. Because the student had no history of mental health problems, the suicide was unforeseeable, and therefore the board owed no legal duty to the student. Additionally, the mother could not show a special relationship between the student and the school board because the board had no obligation to exercise custodial care over the student, who was not in the custody of the board and was in his own home when he committed suicide. Gourneau v. Hamill, 2013 MT 300, 372 Mont. 182, 311 P.3d 760.

No Malice in Cooperating With Insurance Fraud Investigation — Summary Judgment Proper: Sherner was charged with felony theft by common scheme for defrauding an insurer. Sherner subsequently sued the insurer for malicious prosecution. The District Court concluded that the insurer was immune from civil liability pursuant to 33-1-1210 and summarily dismissed the claim, and on appeal, the Supreme Court affirmed. The court applied the definition of malice in this section to 33-1-1210, concluding that the insurer did not act with malice in investigating the claim against Sherner. Absent a showing of malice, the insurer was not subject to liability for cooperating with an investigation of insurance fraud, so summary judgment for defendants was proper. Sherner v. Nat'l Loss Control Serv. Corp., 2005 MT 284, 329 M 247, 124 P3d 150 (2005).

Sufficient Evidence of City's Willful or Wanton Misconduct to Preclude Summary Judgment — Negligence Claim Against City Barred by Recreational Use Statute: Plaintiff was injured on June

20, 2001, after falling through a damaged plank on the Polson city dock, and filed suit against the city for negligently maintaining the premises and for failing to warn of the unsafe condition. The District Court granted summary judgment for the city on grounds that plaintiff failed to present evidence in support of the claim that the city was aware of the defective plank before June 20 or that the city acted willfully or wantonly. The court also concluded that plaintiff's negligence claim was precluded by 70-16-302, the recreational use statute. On appeal, the Supreme Court concluded that the facts, when considered in a light most favorable to plaintiff, were sufficient to raise a genuine issue as to whether the city's failure to timely repair the damaged plank or warn plaintiff of the danger constituted willful or wanton misconduct, precluding summary judgment and warranting a trial on the issue. However, the Supreme Court agreed that the recreational use statute barred plaintiff's negligence claim. Jobe v. Polson, 2004 MT 183, 322 M 157, 94 P3d 743 (2004).

No Showing of Malicious Act or Omission by Coworker in Death of Employee — Workers' Compensation Exclusivity Doctrine Applicable under 1999 Statute: Under the 1999 version of 39-71-413 and Sherner v. Conoco, Inc., 2000 MT 50, 298 M 401, 995 P2d 990 (2000), a plaintiff was required to show both an intentional and malicious act or omission in order to avoid the workers' compensation exclusivity doctrine (revised in 2001 to require only the showing of an intentional act or omission). Here Everhard, a mine worker, was killed by a train driven by Aafedt after signaling that Aafedt could proceed. Everhard's estate sued Aafedt and the mining company. The District Court concluded that Aafedt's conduct was intentional when he moved the train without seeing Everhard, but there was no showing that Everhard suffered an injury caused by actual malice by Aafedt or the company, so summary judgment was granted to defendants. The Supreme Court affirmed. As a matter of law, it could not be said that Aafedt deliberately proceeded to act in conscious or intentional disregard or even indifference to the high probability of injury to Everhard under the definition of actual malice, so the estate failed to overcome the workers' compensation exclusive remedy rule, and summary judgment was proper. Blain v. Stillwater Min. Co., 2004 MT 141, 321 M 403, 92 P3d 4 (2004).

State Not Liable for Unforeseeable Accident — Intervening Criminal Act of Third Person — Expert Testimony on Foreseeability Proper: Samson's son was killed by Bercier, a youth who walked away from a nonsecure, supervised licensed youth group home. Samson sued the state for negligence. The jury returned a verdict for the state, and Samson appealed. Rather than retry the case and evaluate the facts to determine whether the state was negligent, the Supreme Court reviewed the verdict to determine if there was substantial evidence to support it and determined that there was. In order to sustain a negligence action, plaintiff must establish a legal duty on the part of defendant, a breach of that duty, causation, and damages. In cases involving a dispute over the intervening criminal act of a third party, foreseeability must be analyzed twice—first with regard to the existence of a legal duty and second with regard to proximate causation. Samson contended that the District Court erred in allowing the state to present evidence in the form of expert testimony and to argue that the shooting was an unforeseeable accident. The state argued that the expert testimony was relevant and aided the jury. Given the need to determine the foreseeability of Bercier's actions, the expert testimony was properly allowed. Further, in cases alleging an intervening cause, juries must be instructed that the specific injury to plaintiff need not have been foreseen. Samson v. St., 2003 MT 133, 316 M 90, 69 P3d 1154 (2003), affirming Lacock v. 4B's Restaurants, Inc., 277 M 17, 919 P2d 373 (1996). See also Lopez v. Great Falls Pre-Release Serv., Inc., 1999 MT 199, 295 M 416, 986 P2d 1081 (1999), and St. v. LaTray, 2000 MT 262, 302 M 11, 11 P3d 116 (2000).

Erroneous Conclusion That Elements of Malicious Prosecution by State Not Established — Judgment as Matter of Law Improper: Plaintiffs were cited by the state for various water quality violations related to their public swimming pools, drinking water, and discharge from a sewage lagoon. The charges were ultimately dropped, and both plaintiffs filed separate actions that were settled, except for plaintiffs' malicious prosecution claims against the state, which were joined for trial by jury. At the close of plaintiffs' case, the state's motion for judgment as a matter of law was granted, so plaintiffs appealed. As set out in Orser v. St., 178 M 126, 582 P2d 1227 (1978), in a civil action for malicious prosecution, plaintiff must introduce sufficient proof of the following elements: (1) a judicial proceeding has been commenced and prosecuted against the plaintiff; (2) the defendant was responsible for litigating, prosecuting, or continuing the proceeding; (3) there is lack of probable cause for the defendant's acts; (4) the defendant was actuated by malice; (5) the proceeding terminated in favor of the plaintiff; and (6) the plaintiff suffered damages. Here, the District Court found that plaintiffs had not met their burden of proof regarding elements three, four, and five. The Supreme Court examined each of those elements—lack of probable cause,

malice, and favorable termination of the underlying suit—and concluded that the elements were met, warranting reversal for trial on the merits. Judgment as a matter of law averts trial by jury and is proper only in rare cases when undisputed evidence admits of only one conclusion. Although the proceedings to date in this case did not demonstrate guilt or innocence, plaintiffs nevertheless made out a prima facie case that warranted jury determination. Plouffe v. Dept. of Public Health and Human Services, 2002 MT 64, 309 M 184, 45 P3d 10 (2002), following McGuire v. Armitage, 184 M 407, 603 P2d 253 (1979), Miller v. Watkins, 200 M 455, 653 P2d 126 (1982), and Sacco v. High Country Independent Press, Inc., 271 M 209, 896 P2d 411 (1995), and followed in Seipel v. Olympic Coast Investments, 2008 MT 237, 344 M 415, 188 P3d 1027 (2008).

Double Analysis of Foreseeability in Dispute Over Intervening Act of Third Party — Duty of Police to Protect Hospital Worker From Intoxicated Person in Voluntary Custody: Havre police received a report of two girls fighting downtown. They responded and found two intoxicated women fighting, one of whom appeared to require medical treatment. LaTray was working as a nurse at a hospital emergency room when police officers delivered the woman for treatment, accompanied by her sister. The injured woman was placed in protective custody, but neither woman was arrested. When attempting to administer medical care to the injured woman, LaTray was intentionally assaulted and injured by the sister, and LaTray filed an action against the city police officers for negligently failing to exercise proper control over the sister. The District Court found that because the intentional assault was not reasonably foreseeable as a matter of law, there was no duty owed LaTray by the city, and summary judgment was granted to the city. The Supreme Court held that intervening criminal acts of third persons are not automatically unforeseeable as a matter of law, but rather must be addressed in the foreseeability context on a case-by-case basis (see Starkenburg v. St., 282 M 1, 934 P2d 1018 (1997)). Although foreseeability is ordinarily analyzed only under the duty element of negligence, in a dispute over intervening criminal acts of a third party, foreseeability must be analyzed twice: first with regard to the existence of a legal duty and, second, with regard to proximate causation (see Lopez v. Great Falls Pre-Release Serv., Inc., 1999 MT 199, 295 M 416, 986 P2d 1081 (1999)). The city relied on Phillips v. Billings, 233 M 249, 758 P2d 772 (1988), arguing that because LaTray did not claim the existence of a special relationship or otherwise show that the officers owed LaTray a greater duty of care than that owed to the general public, the city owed LaTray no duty of care. The Supreme Court noted that Phillips has been clarified in Nelson v. Driscoll, 1999 MT 193, 295 M 363, 983 P2d 972 (1999), which stated that a duty to protect third persons arises only when a police officer actually makes an arrest or otherwise takes possession or custody of an individual. Although the officers did not actually arrest the sister or otherwise have a basis for taking her into custody in this case, the officers voluntarily undertook possession or custody in transporting her to the hospital and consequently harbored the ability to control her actions and prevent an unreasonable risk of harm to third persons like LaTray, who falls within the scope of the risk that negligent supervision would foreseeably entail. Thus, the Supreme Court held that, as a matter of law, the city owed a duty of reasonable care to adequately supervise the sister so as to prevent harm to a third person who would foreseeably be placed within the scope of risk arising from negligent supervision. Whether the city breached that duty is an issue for the jury because the causal issue of intervening acts of third parties normally involves questions of fact. Viewed in the light most favorable to LaTray, there was sufficient evidence of the sister's irascible conduct to raise a jury question as to whether she posed a danger to those around her on the day in question, and reasonable jurors could differ as to whether she presented a foreseeable risk of injury to persons in her immediate vicinity. These contested issues of material fact precluded a grant of summary judgment as a matter of law, and the case was reversed and remanded for a new trial. LaTray v. Havre, 2000 MT 119, 299 M 449, 999 P2d 1010, 57 St. Rep. 497 (2000), followed, with regard to appropriateness of summary judgment on issues of negligence, in Prindel v. Ravalli County, 2006 MT 62, 331 M 338, 133 P3d 165 (2006). See also Morrow v. FBS Ins. Montana-Hoiness LaBar, Inc., 230 M 262, 749 P2d 1073 (1988), and Estate of Strever v. Cline, 278 M 165, 924 P2d 666 (1996).

No Duty Constituting Negligence When Danger or Risk Unforeseeable — Summary Judgment Proper Absent Material Fact Regarding Legal Duty: The father could not reasonably foresee that, by giving his child permission to go to a friend's house to play, the child would go to the house of a different friend, participate along with other children in burning a photograph using gasoline, and be burned when another friend accidentally kicked the container of flaming gasoline onto his child. The duty element of negligence turns primarily on foreseeability, and if a reasonably prudent defendant can foresee neither any danger of direct injury nor any risk from an intervening cause, there is no negligence. Ordinarily, negligence actions involve questions of fact and are not

susceptible to summary judgment, but in this case, reasonable minds could not differ regarding the absence of material fact regarding any duty owed by the father, so summary judgment was proper as a matter of law. Poole v. Poole, 2000 MT 117, 299 M 435, 1 P3d 936, 57 St. Rep. 489 (2000), following Busta v. Columbus Hosp. Corp., 276 M 342, 916 P2d 122 (1996). See also Lopez v. Great Falls Pre-Release Serv., Inc., 1999 MT 199, 295 M 416, 986 P2d 1081 (1999), and Gourneau v. Hamill, 2013 MT 300, 372 Mont. 182, 311 P.3d 760.

New Standard for Determining Whether Intentional or Malicious Act by Employer Constitutes Tortious Conduct — Summary Judgment Improper: Sherner was injured on the job and sued his employer, Conoco, Inc. (Conoco), for damages on grounds that Conoco was guilty of malicious acts or omissions that caused the injuries. The District Court ruled that the tort claim against Conoco was barred by the exclusivity provision in 39-71-411. Citing Calcaterra v. Mont. Resources, 1998 MT 187, 289 M 424, 962 P2d 590 (1998), the court concluded that Sherner was required to allege and establish that Conoco had actual knowledge that Sherner was being harmed in order to establish that Conoco's acts were malicious and, absent sufficient facts to raise a genuine issue of material fact that Conoco directed intentional harm at Sherner, granted summary judgment for Conoco. In District Court, Sherner sufficiently raised the issue of the proper standard for determining whether Conoco's act was malicious to allow the Supreme Court to address the issue on appeal, so the court proceeded to create a new standard, applying the plain meaning of the statutory definitions, by which to judge whether an act or omission is intentional or malicious. Applying common definitions of "intentional" and "act" and the appropriate definition of "malice" for use in 39-71-413—the one provided in 27-1-221, rather than the one in this section—the Supreme Court reversed, finding that genuine issues of material facts existed, regarding whether Conoco acted maliciously, as to preclude summary judgment. A worker need show only that an employer's act or omission, which caused the injury, was intentional or malicious to bring a tort action against the employer under 39-71-413. Sherner v. Conoco, Inc., 2000 MT 50, 298 M 401, 995 P2d 990, 57 St. Rep. 241 (2000), following Sitzman v. Schumaker, 221 M 304, 718 P2d 657, 43 St. Rep. 831 (1986). See also Enberg v. Anaconda Co., 158 M 135, 489 P2d 1036 (1971), and Olszewski v. BMC W. Corp., 2004 MT 187, 322 M 192, 94 P3d 739 (2004), in which summary judgment was held to be proper under the Sherner standard absent evidence that an employer knew that an employee would actually be injured by a routine that was usually performed without incident.

Reckless Driving — No Requirement for Evidence of Serious Injury — Jury Instruction Properly Refused: Stanko was charged with two counts of reckless driving, one for driving 117 miles an hour on U.S. 87 and the other for driving 121 miles an hour on the same highway, over the crest of a hill. At the conclusion of his trial, Stanko submitted a jury instruction that read: ""Willful or Wanton Disregard" means that the defendant had an intentional lack of regard concerning the safety of others, or that he intentionally did something with knowledge that serious injury is a probable result." The District Court refused Stanko's instruction in favor of the state's instruction, which did not mention serious injury. The Supreme Court noted that it reviews jury instructions to see whether the instructions, as a whole, fully and fairly instruct the jury on the law applicable to the case and also pointed out that the District Court has broad discretion when it instructs the jury. Using these standards, the Supreme Court held that the District Court properly refused Stanko's instruction. St. v. Stanko, 1998 MT 323, 292 M 214, 974 P2d 1139, 55 St. Rep. 1313 (1998).

Parole Officer Duty of Care to Supervise Parolees — Jury Instruction Properly Given: Corliss was paroled, after serving time for an execution-style slaying with a handgun, under the condition that he not possess a firearm. While on a visit, with the approval of his parole officer, to Washington state to look for work, Corliss failed to return to Montana within the established time, failed to see a parole officer in Washington, had a temporary restraining order obtained against him by a girlfriend because of threats made to her and her family, and had an altercation with his wife involving a handgun. In neither instance of violence did Corliss's parole officer investigate the circumstances of the violence. Later, Corliss shot and killed one friend of his girlfriend and injured another. Both the estates of the deceased woman and the wounded woman brought actions against the state for negligent supervision of Corliss's parole. The state objected to an instruction given by the District Court concerning a parole officer's duty of care, claiming that there must be some special relationship between the parole officer and the person injured by a parolee in order for a duty of care to arise. The Supreme Court reviewed statutes defining negligence, statutes describing the general duty of one individual toward another, and statutes concerning parole and concluded that Robbins had a general duty to exercise reasonable care in the supervision of Corliss and had a duty to the killed and injured women in particular.

Starkenburg v. St., 282 M 1, 934 P2d 1018, 54 St. Rep. 214 (1997). See also Lopez v. Great Falls Pre-Release Serv., Inc., 1999 MT 199, 295 M 416, 986 P2d 1081, 56 St. Rep. 771 (1999).

Duty of Care of Firearm Owner — Independent Intervening Criminal and Negligent Acts as Superseding Firearm Owner's Negligent Breach of Duty: An 11-year-old boy died as the result of a gunshot wound inflicted with a handgun stolen by the boy and three friends from under the seat of Susanj's vehicle. The boy's mother brought a negligence action against Susanj, claiming that his act of leaving the vehicle unattended and unlocked in a public thoroughfare contributed to the boy's death. The District Court summarily dismissed the action after determining that Susanj owed no legal duty to the boy because: (1) Susanj was unaware of previous thefts in the area that would compel him to lock his vehicle; (2) Susanj did not allow entry into the vehicle; (3) Susanj did not have an open display of the firearm that would lure the boys into the vehicle to steal the weapon; and (4) the boy was not an innocent party, but rather a participant in the burglary. However, the Supreme Court held that given the foreseeability of the risk involved in the improper and unsafe use and storage of a firearm and the strong policy considerations favoring safe and prudent use and storage, as a matter of law, a firearm owner has a duty to the general public to use and store a firearm in a safe and prudent manner, taking into consideration the type of firearm, whether it is loaded or unloaded, whether the ammunition is in close proximity or easily attainable, and the location and circumstances of its use and storage. Susanj's failure to exercise ordinary care in storing a dangerous instrumentality like a loaded handgun and ammunition under the seat of his unlocked vehicle constituted a breach of the duty of care. However, the boys' two intervening criminal acts of theft from the vehicle and the intervening grossly negligent act of one boy waving the gun around with his finger on the trigger and trying to unload the gun while high on marijuana were reasonably unforeseeable and cut off all liability on Susanj's part for the boy's death. Summary dismissal of the negligence action was proper based on the independent superseding criminal and grossly negligent acts. Estate of Strever v. Cline, 278 M 165, 924 P2d 666, 53 St. Rep. 576 (1996), citing Prosser and Keaton on Torts 33, 34, and 44 and Restatement (Second) of Torts (1965) 298 and 302B, following Mang v. Eliasson, 153 M 431, 458 P2d 777 (1969), Limberhand v. Big Ditch Co., 218 M 132, 706 P2d 491 (1985), Phillips v. Billings, 233 M 249, 758 P2d 772 (1988), Maguire v. St., 254 M 178, 835 P2d 755 (1992), and Busta v. Columbus Hosp. Corp., 276 M 342, 916 P2d 122 (1996), overruling Lencioni v. Long, 139 M 135, 361 P2d 455 (1961), Brown v. First Fed. S&L Ass'n of Great Falls, 154 M 79, 460 P2d 97 (1969), and Schafer v. St., 181 M 102, 592 P2d 493 (1979), to the extent that those cases hold that no recovery can be allowed for an injury that results from an intervening act of a third party, overruling that portion of King v. St., 259 M 393, 856 P2d 954 (1993), stating that if a plaintiff's injury is caused by the intervening acts of a third party, the defendant's actions cannot be viewed as the proximate cause of the injury, and distinguished in Cusenbary v. Mortensen, 1999 MT 221, 296 M 25, 987 P2d 351, 56 St. Rep. 864 (1999).

Foreseeability to Be Considered Part of Analysis of Duty: The trial court refused to give Columbus Hospital's proposed jury instruction on proximate cause and also did not instruct the jury on foreseeability even though the hospital contended that the Supreme Court had included foreseeability as an element of proximate cause in Kitchen Krafters, Inc. v. Eastside Bank of Mont., 242 M 155, 789 P2d 567 (1990). The Supreme Court, after a lengthy discussion of duty, proximate cause, and foreseeability and after examining the statutory definitions of duty and proximate cause, held that foreseeability is to be considered as part of the analysis of duty rather than proximate cause. The Supreme Court further held that it was reversing that part of Kitchen Krafters that requires a two-tiered analysis of causation that includes consideration of foreseeability in cases other than those cases in which there has been an allegation that the chain of causation is severed by an independent, intervening cause. Busta v. Columbus Hosp. Corp., 276 M 342, 916 P2d 122, 53 St. Rep. 428 (1996), followed in Lopez v. Great Falls Pre-Release Serv., Inc., 1999 MT 199, 295 M 416, 986 P2d 1081, 56 St. Rep. 771 (1999), Poole v. Poole, 2000 MT 117, 299 M 435, 1 P3d 936, 57 St. Rep. 489 (2000), and Gourneau v. Hamill, 2013 MT 300, 372 Mont. 182, 311 P.3d 760.

Malice as Applied to Intentional Injury: The definition of actual malice in 27-1-221, adopted in 1987 for purposes of punitive damages, did not change the standard used to determine whether an injury was intentional for purposes of the exclusivity provision of the Workers' Compensation Act. The definition of malice in this section is still applicable to workers' compensation cases. Blythe v. Radiometer America, Inc., 262 M 464, 866 P2d 218, 50 St. Rep. 1640 (1993).

Negligence Action for Failure to Prevent Suicide — General Rule — Exceptions: Plaintiff brought a wrongful death action founded on negligence for failure of defendant to prevent the suicide of plaintiff's uncle. Regarding civil liability for suicide, the Supreme Court expressly

adopted the general rule set out in 41 ALR 4th 353 that negligence actions for the suicide of another will generally not lie because the act of suicide is considered a deliberate intervening act exonerating the defendant from legal responsibility. The two narrow exceptions deal with: (1) causing another to commit suicide; and (2) allowing the imposition of a duty to prevent suicide but only in a custodial situation where suicide is foreseeable. A landlord-tenant relationship did not meet the criteria for establishing a custodial relationship. Krieg v. Massey, 239 M 469, 781 P2d 277, 46 St. Rep. 1839 (1989). See also Gourneau v. Hamill, 2013 MT 300, 372 Mont. 182, 311 P.3d 760.

Creation of Snow Cloud Not Negligence: A claim was properly dismissed for failure to state a cause of action when parties involved in an automobile accident, occurring when their vision was obscured while following a snowplow, attempted to sue the unknown snowplow driver for negligence. The Supreme Court cited Merithew v. Hill, 167 F. Supp. 320 (D.C. Mont. 1958), in holding that creation of a snow cloud, in itself, did not constitute negligence. Wilson v. Doe, 228 M 42, 740 P2d 687, 44 St. Rep. 1326 (1987), followed in Hatch v. Dept. of Highways, 269 M 188, 887 P2d 729, 51 St. Rep. 1512 (1994).

No Comparison Between Negligence and Willful or Wanton Misconduct: Defendant and plaintiff, who was 16, were drinking and driving at a high rate of speed in Anaconda. Defendant was driving plaintiff's car when he lost control and hit a house. Plaintiff was severely injured. The District Court instructed the jury that plaintiff's recovery could not be reduced by his contributory negligence if defendant was guilty of willful or wanton misconduct. The Supreme Court upheld the giving of the instruction, saying that willful and wanton misconduct differs in quality rather than degree from ordinary lack of care. The term "negligence" in the comparative negligence statutes does not encompass willful or wanton misconduct, and in an action based on such conduct the comparative negligence statute is inapplicable and the plaintiff's own contributory negligence should not reduce his recovery. Derenberger v. Lutey, 207 M 1, 674 P2d 485, 40 St. Rep. 902 (1983).

Trailer Swinging Into Wrong Lane When Driver Swerves to Avoid Collision — No Negligence — No New Trial: Undisputed evidence showed plaintiff was partly in defendant's lane on two-lane road while driving through a curve and that the defendant responded by swerving to the right to avoid a head-on collision. The swerve caused a trailer that defendant was hauling behind his tractor-trailer truck to swing into plaintiff's lane and collide with plaintiff. There was no evidence that defendant was driving unsafely prior to that or that he was in any way negligent. Defendant acted reasonably and prudently, and plaintiff's actions supported a finding that he was the proximate cause of his injuries. The jury verdict found defendant was not negligent. It was an abuse of discretion and reversible error for the court to grant plaintiff a new trial, for there was sufficient evidence to support the verdict. Shannon v. Hulett, 205 M 345, 668 P2d 228, 40 St. Rep. 1349 (1983).

Negligence in Performing Contractual Duty — No Privity Required: A prime contractor contracted separately with a steel supplier to supply steel and with a subcontractor to erect the steel. Because the supplier was delayed in delivering the steel, the subcontractor suffered financial losses. The subcontractor could properly maintain an action against the supplier for negligence in the performance of its duties arising out of the steel supply contract with the prime contractor. Privity of contract was not required. Hawthorne v. Kober Constr. Co., 196 M 519, 640 P2d 467, 39 St. Rep. 294 (1982), followed in Tynes v. Bankers Life Co., 224 M 350, 730 P2d 1115, 43 St. Rep. 2243 (1986), and Jim's Excavating Serv., Inc. v. HKM Associates, 265 M 494, 878 P2d 248, 51 St. Rep. 623 (1994), in which it was held that a third-party contractor may successfully recover for purely economic loss against a project engineer or architect when the design professional knew or should have foreseen that the particular plaintiff or an identifiable class of plaintiffs was at risk in relying on the information supplied.

Duty of Jailer to Prisoner — Negligence: A jailer owes a duty to the prisoner to keep him safe and to protect him from unnecessary harm. Reasonable and ordinary care must be exercised for the life and health of the prisoner. A jailer is not liable to a prisoner in his keeping for injuries resulting from the prisoner's own intentional conduct. Absent special circumstances, a jailer is under no duty to prevent the prisoner from taking his own life. Once the jailer knows or should know of the suicidal tendencies of a prisoner, a duty arises to provide reasonable care necessary to prevent the prisoner from committing suicide. This rule applies whether the prisoner is mentally anguished, helplessly intoxicated, or temporarily insane because of conditions forced upon him by the jailer. Without a showing of "special circumstances" that would elevate the jailer's duty of care and thereby create the possibility that his acts were a proximate cause of the prisoner's death, the District Court was required to follow the general rule that suicide is an intentional

act, and the jailer was not liable for the death. Pretty On Top v. Hardin, 182 M 311, 597 P2d 58 (1979), followed in Moralli v. Lake County, 255 M 23, 839 P2d 1287, 49 St. Rep. 872 (1992).

Elements of Negligence: In tort law, actionable negligence arises only from a breach of legal duty, and to sustain an action for damages resulting from negligence, the complaint must allege the duty, its break, the damages, and that the breach of duty was a proximate cause of the injury. Pretty On Top v. Hardin, 182 M 311, 597 P2d 58 (1979).

Foreseeability of Injury in Negligence: A defendant who could not reasonably foresee any danger of direct injury resulting from his conduct or any risk from an intervening force is not negligent. Pretty On Top v. Hardin, 182 M 311, 597 P2d 58 (1979).

Duty Owed to Invitee or Employee: A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness. Although the invitee or employee may be under a duty to avoid harm likely to result to him from open and obvious dangers, he may not be in a position to fully appreciate the risk or to avoid danger even though aware of it. Shannon v. Howard S. Wright Constr. Co., 181 M 269, 593 P2d 438 (1979).

Foreseeability in Negligence: Foreseeability is a limit on liability for acts that might under other circumstances be negligent. A defendant who could not reasonably foresee any danger of injury from his conduct or any risk from an intervening force is not negligent. Schafer v. St., 181 M 102, 592 P2d 493 (1979), overruled, to the extent that this case holds that no recovery can be allowed for an injury that results from an intervening act of a third party, in Estate of Strever v. Cline, 278 M 165, 924 P2d 666, 53 St. Rep. 576 (1996).

Doctor Not Guarantor of Result: Without express and proved warranty, a doctor is not a guarantor and must only possess the skill and learning possessed by the average member of his profession in the community and to use those skills and learning in a reasonable and prudent manner. Llera v. Wisner, 171 M 254, 557 P2d 805 (1976).

Willfulness: For an act to be "willful", malicious motive or intent is not necessary. Erickson v. Fisher, 170 M 491, 554 P2d 1336 (1976).

Negligence — Powerline Clearance: Although powerline clearance above a mobile home was in violation of minimum standards for clearance under the National Safety Code, the plaintiff knew of the height of the wires and in coming into contact with them failed in his duty to use his faculties to observe and avoid obvious danger, and that negligence was the proximate cause of his injuries. Turley v. Mont. Power Co., 167 M 39, 534 P2d 1254 (1975).

Negligence:

Negligence imports a want of such attention to the nature or probable consequences of the act or omission as a prudent man ordinarily bestows in acting in his own concerns, and where a woman permitted a person who held himself out as a repairman to write a check which she signed in such a way as the amount could be raised and the woman's husband knew that the woman had permitted others to write checks but he did not do anything to stop that practice, both the woman and her husband were negligent. Williams v. Mont. Nat'l Bank of Bozeman, 167 M 24, 534 P2d 1247 (1975).

"Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person under the existing circumstances would not have done", and where plaintiff's property was damaged by the dropping of fire retardant from airplanes and at the trial he failed to show the lack of due care under the circumstances, the trial court properly nonsuited plaintiff upon defendant's motion. Stocking v. Johnson Flying Serv., 143 M 61, 387 P2d 312 (1963).

Breach of a Duty — Negligence: In action to recover damages for reduced yield of dryland alfalfa seed allegedly caused by negligence of defendant in allowing weeds from defendant's field to blow across fields of plaintiff during windstorm, trial court erred by not directing verdict for defendant since evidence failed to show breach of duty by defendant and therefore did not establish prima facie case of negligence. Mang v. Eliasson, 153 M 431, 458 P2d 777 (1969), explained in Ekwortzel v. Parker, 156 M 477, 482 P2d 559 (1971), and followed in Estate of Strever v. Cline, 278 M 165, 924 P2d 666, 53 St. Rep. 576 (1996).

Malice:

Where defendant's workmen in digging ditch negligently struck sewerline and left it open overnight so that sewage seeped into the basement of plaintiff's motel, but when notified of the damage workmen did everything they could to help clear out basement, there was not sufficient evidence of willful conduct to warrant an instruction to the jury under 27-1-221 on exemplary damages. Spackman v. Ralph M. Parsons Co., 147 M 500, 414 P2d 918 (1966).

The institution of a criminal proceeding for passing a fraudulent check, which was in fact good, in order to collect on the check, was a malicious act. Rickman v. Safeway Stores, Inc., 124 M 451, 227 P2d 607 (1951).

Res Ipsa Loquitur: Res ipsa loquitur does not relieve the plaintiff of the burden of proving actionable negligence, nor is it sufficient that he show that he was injured and that the instrumentality which caused his injury was in the control of the defendant. He must also show that the accident would not have occurred in the ordinary course of events if the defendant had exercised due care. Stocking v. Johnson Flying Serv., 143 M 61, 387 P2d 312 (1963).

1-1-205. Terms relating to property and decedents' estates.

Case Notes

Invested Money Not Considered Article of Personal Property in Probate: In his will, Bjerke listed items of personal property and the persons to whom they were bequeathed and provided that any item of personal property not listed was determined to be a household item bequeathed to plaintiff. Plaintiff maintained that money was personal property and that because Bjerke's money was not on the list, all money should go to plaintiff as contents of the house. The District Court found that the ordinary words of the will indicated that Bjerke did not intend to include money invested outside the home as personal property and that plaintiff was thus entitled only to cash found in the home. Plaintiff appealed. The Supreme Court noted that under this section, personal property includes money, but that the doctrine of ejusdem generis should be applied in interpreting the will. Under the doctrine, general words may be limited in their application to items of a similar class, as exemplified by the more specific and particular words preceding in the general phrase, focusing on what is specifically listed and not on what is omitted. In reading Bjerke's will as a whole, it was clear that he was contemplating that only tangible goods pass to plaintiff. The District Court correctly determined that cash was an item of personal property, but that invested money was not. Hanson v. Estate of Bjerke, 2004 MT 200, 322 M 280, 95 P3d 704 (2004). See also In re Estate of Donovan, 169 M 278, 546 P2d 512 (1976).

No Standing to Recover Damages by Party Not Owner of Property — Fax Not Considered Valid Assignment of Damage Claim: Koelzer owned an inn by a mining and power generation site near Colstrip. Koelzer discovered that mining activity had damaged the inn and filed a complaint in 1994 against the mining and power generation companies, but did not pursue the damage claim. In 1996, Dale and Shawonda Lewis approached Koelzer about purchasing the inn, and the issue of the damages and Koelzer's claim came up. The Lewises inspected the inn and discovered additional damages, which led Koelzer to reassert the damage claim, but the claim was again unresolved. Nevertheless, the Lewises offered to buy the inn, and title was eventually conveyed to Dale's parents, who were able to secure financing. Koelzer notified the companies by fax that the inn had been sold and requested that the companies work with Dale on the structural damage discussed in the past. About 1 year later, Dale received an estimate of $91,000 to repair the damages and filed a complaint seeking compensation from the companies. Dale's parents eventually filed for bankruptcy, and the Lewises finally became the owners of record in 1998. When the companies discovered that the Lewises were not the owners of the inn at the time that the suit was filed, they moved for summary judgment, which was granted by the District Court on grounds that the Lewises had no standing to assert a claim for damages arising before they acquired title. On appeal, the Supreme Court cited the general rule that persons cannot recover for damages to property that they do not own. Further, even though property damage claims have long been recognized as assignable, the fax did not meet the statutory requirements of a valid assignment and was unenforceable. Thus, on the issue of prepurchase damages, no material question of fact existed regarding ownership or assignment, so the Lewises had no standing to bring a claim for damages prior to their ownership of the inn. Summary judgment was affirmed. Lewis v. Puget Sound Power & Light Co., 2001 MT 145, 306 M 37, 29 P3d 1028 (2001).

"Any Property Owned": It was reversible error for District Court to limit the meaning of the term "any property", as used in 69-5-107, which grants electricity suppliers the right to supply electric service to "any property" they own, to commercial or industrial property, for the term's meaning is not ambiguous and is plain and certain. By this section, the word "property" means real and personal property wherever used in this Code. Tongue River Elec. Co-op, Inc., v. Mont. Power Co., 195 M 511, 636 P2d 862, 38 St. Rep. 2032 (1981).

Property: Under this section, "property", as used in 70-16-302, includes both real and personal property. State ex rel. Tucker v. District Court, 155 M 202, 468 P2d 773 (1970).

Prescription and Adverse Possession: The doctrine of prescription pertains to acquisition of a nonpossessory interest while the doctrine of adverse possession pertains to the acquisition of a

possessory interest. The two terms are entirely different, but the interests are determined in a similar manner. Brannon v. Lewis & Clark County, 143 M 200, 387 P2d 706 (1963).

Real Property: The Legislature has classed an unpatented quartz lode mining claim as real estate and has provided the same remedies for the protection and enforcement of rights pertaining to it, with the same forms of procedure, as it has provided for the protection and enforcement of rights pertaining to other real estate. State ex rel. Baker v. District Court, 24 M 330, 61 P 882 (1900).

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"Property" to Include Real and Personal Property: The term "property" as used in 7-33-2109 applies to all forms of real and personal property ordinarily subject to ad valorem taxation by counties. 42 A.G. Op. 109 (1988).

1-1-207. Miscellaneous terms.

Compiler's Comments

1999 Amendment: Chapter 491 deleted definition of Montana state prison that read: ""Montana state prison" means the Montana state prison as defined in 53-30-101(3)(b)"; deleted definition of state prison that read: ""State prison" or "prison" means:

(i) the Montana state prison as described in 53-30-101(1);

(ii) the Montana women's prison as defined in 53-30-101(3)(c);

(iii) a Montana regional correctional facility;

(iv) a detention center in another jurisdiction detaining inmates from Montana pursuant to 53-30-106; or

(v) a combination of the facilities listed in this subsection (1)(d)"; deleted former (2) that read "(2) Subsections (1)(b) and (1)(d) do not authorize a court to sentence a person to a correctional facility listed in those subsections"; and made minor changes in style. Amendment effective April 27, 1999.

Saving Clause: Section 24, Ch. 491, L. 1999, was a saving clause.

1997 Amendment: Chapter 189 inserted definitions of Montana State Prison and state prison or prison; inserted (2) clarifying that the new definitions do not authorize a court to sentence a person to the defined institutions; and made minor changes in style.

1991 Amendment: In definition of peace officer substituted "has the meaning as defined in 46-1-202" for "means any person described in 46-1-201(8)"; and made minor change in style.

1-1-208. Terms relating to legislature.

Compiler's Comments

Effective Date: Section 21, Ch. 4, Sp. L. May 2007, provided that this section is effective on passage and approval. Approved May 25, 2007.

Retroactive Applicability: Section 22, Ch. 4, Sp. L. May 2007, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to appointments made for members of the 60th legislature."

1-1-215. Residence — rules for determining.

Compiler's Comments

2011 Amendment: Chapter 211 in (4)(c) after "residence of the" substituted current text for "parent with whom the minor customarily resides"; in (4)(d) substituted "the residence of the caretaker relative" for "the last-known residence of the parent with whom the minor normally resided immediately prior to residing with the caretaker relative"; in (5) substituted "has jurisdiction over which residence" for "may declare which parental residence"; in (6) after "part 5" inserted "and this section"; and made minor changes in style. Amendment effective July 1, 2011.

2007 Amendment: Chapter 442 inserted (4)(d) providing that the residence of an unmarried minor is the last-known residence of the parent with whom the minor normally resided immediately prior to residing with the caretaker relative if the conditions in 20-5-502 are met; in (6) at beginning inserted exception clause; and made minor changes in style. Amendment effective July 1, 2007.

Applicability: Section 11, Ch. 442, L. 2007, provided: "[This act] applies to a caretaker relative to whom a minor is given by a parent on or after July 1, 2007, for care by the relative."

1997 Amendment: Chapter 367 in (2) inserted second sentence providing that a claim of residence within Montana for any purpose establishes a person's residence for all purposes; and made minor changes in style.

Case Notes

Venue for Parenting Plan Proper Where Filed — Transfer of Venue Improper: The grandmother filed a petition for a parenting plan in Flathead County, where she and the child resided. The mother filed a motion for a change of venue to Hill County, where she resided. The District Court granted the change of venue, believing that 1-1-215 required the change in venue. On appeal, the Supreme Court reversed the change of venue, ruling that under 40-4-211 venue was proper in either county. In re S.C.B., 2015 MT 19, 378 Mont. 89, 342 P.3d 46.

Jurisdiction of Montana Courts Over Wrongful Discharge Case Involving Montana Citizen When Montana Law Applies — Dismissal for Lack of Jurisdiction Reversed: Plaintiff was a Montana resident hired by a Florida corporation, which was operated out of Oklahoma, to lay fiber optic cable throughout the country. While working in Indiana, plaintiff had a dispute with a supervisor and was fired. Plaintiff brought an action in Montana, claiming a violation of the Wrongful Discharge From Employment Act. The District Court held that under 39-2-912, the Montana courts lacked subject matter jurisdiction and dismissed the claim. On appeal, the Supreme Court reversed. Even though plaintiff never signed a written employment contract, the court held that a contract provision may be broad enough to indicate that an entire contract be governed by the laws of the state governing the particular provision. The fact that the defendant corporation paid income taxes, unemployment insurance premiums, and wages in Montana indicated an intent to be governed by Montana law. The court also concluded that under sections 187 and 188 of Restatement (Second) of Conflict of Laws (1971), the local law of the state with the most significant relationship to the transaction applies to questions of contract interpretation absent an effective choice of law by the parties. Plaintiff was considered a Montana resident despite the fact that employment required travel to other states, and the court concluded that it was appropriate to apply the Wrongful Discharge From Employment Act to the case even though the Act does not expressly provide for extraterritorial jurisdiction. Montana courts have subject matter jurisdiction in cases involving a Montana resident when Montana law applies, so plaintiff's case should not have been dismissed for lack of subject matter jurisdiction. Burchett v. MasTec N. America, Inc., 2004 MT 177, 322 M 93, 93 P3d 1247 (2004). See also Dailey v. Transitron Electronic Corp., 475 F2d 12 (5th Cir. 1973), and Harrington v. Energy West, Inc., 2015 MT 233, 380 Mont. 298, 356 P.3d 441.

No Dual Residency in Montana Despite Joint Custody Provisions — Affidavit Indicating Future Residency Intent Irrelevant: When the parties were divorced in Nevada, physical custody of their child was granted to the mother, who continued to reside with the child in Nevada, and Umland moved to Montana, having been granted visitation rights. When the child died in an automobile accident, Umland attempted to collect a settlement under his insurance policy, which provided coverage for relatives who were residents of the insured's household. As proof that the child was a resident of Montana, Umland submitted an affidavit asserting that the child had indicated an intent to reside with Umland. The District Court disallowed the affidavit and held that the policy did not apply because the child was not a resident. On appeal, Umland argued that because this section establishes a minor's residence as the residence of the parent having legal custody and because Montana allows for joint custody, it naturally followed that Montana allows dual residency. The Supreme Court disagreed. Montana law provides that there may be only one residence. The child customarily resided with the mother and thus was a Nevada resident. Further, the affidavit indicating the child's intent to reside in Montana in the future was irrelevant because the child was a Nevada resident at the time of death. Umland v. Nat'l Cas. Co., 2003 MT 356, 319 M 16, 81 P3d 500 (2003).

Person Not in Residence on Mortgaged Property Not Entitled to Possession During Statutory Redemption Period: Halseth defaulted on several promissory notes, so Independence Bank filed a foreclosure action on Halseth's property in Blaine County. At trial, Halseth contended that because he was currently residing on the property, he was entitled to possession of the property during the 1-year redemption period following the foreclosure sale. Although Halseth maintained a residence in Harlem, he testified that he had moved a camper trailer to the Blaine County property for the sole purpose of establishing his right to retain the property during the redemption period. The District Court applied the definition of residence in this section, and determined that Halseth resided in Harlem, not on the Blaine County property, and that he was therefore not entitled to retain possession during the redemption period. Halseth appealed. The Supreme Court agreed with the District Court's findings. Even though he moved the camper trailer to Blaine County, Halseth retained ties to the Harlem residence and did not intend to relinquish it. Absent a demonstration of the union of act and intent necessary to change permanent residence from Harlem to Blaine County, Halseth could not be said to reside at the Blaine County property and

was not entitled to retain possession of the property during the redemption period. Independence Bank v. Halseth, 2002 MT 100, 309 M 398, 46 P3d 657 (2002).

Residency Requirements for Obtaining Hunting or Fishing License Not Unconstitutionally Vague: Britton was charged in Justice's Court with various hunting license-related crimes, but moved for dismissal on grounds that Montana's residency laws are so vague as to violate due process. The motion was denied. Following conviction, Britton asserted in District Court that 87-2-102, defining residency for hunting and fishing license purposes, is vague because other statutes define residency differently for purposes such as voting, dissolution of marriage, college attendance, and taxation. The District Court held that fish and game residency requirements are neither vague nor ambiguous and affirmed the Justice's Court conviction. On appeal, Britton asserted that the various statutory definitions of residency might confuse a person of ordinary intelligence and operate as a trap for the innocent. However, the Supreme Court affirmed, noting that the other statutory residency provisions to which Britton referred clearly provide that those provisions are for specific acts or purposes other than obtaining a hunting license and that it strained credulity to suggest that a person of ordinary intelligence would be confused into thinking that any of those statutes define residency for the purpose of obtaining a hunting license. Britton failed to establish that the residency requirements for obtaining a hunting or fishing license are facially unconstitutional on vagueness grounds. St. v. Britton, 2001 MT 141, 306 M 24, 30 P3d 337 (2001).

Burden of Proof on Moving Party Seeking Change of Venue — Error in Shifting Burden of Proof Regarding Residency to Nonmoving Party: Lockhead and Weinstein were involved in an altercation in Missoula. Lockhead subsequently filed a motion in Silver Bow County seeking damages from Weinstein for defamation, negligent and intentional infliction of emotional distress, and malicious prosecution. In the complaint, Lockhead alleged that he resided in Butte. Weinstein then moved for a change of venue to Missoula, contending that Lockhead was actually a resident of Missoula rather than Silver Bow County and that the trial should be moved for the convenience of witnesses and the promotion of justice. At a hearing on the motion, Weinstein submitted an affidavit stating that Silver Bow County homeless shelters, the police department, and the post office had been searched for proof of Lockhead's residency, and none could be found. Lockhead also filed an affidavit stating that he resided in Butte at the time that the complaint was filed and that he had no intention of moving. The District Court concluded that Lockhead had failed to establish that he was a resident of Butte and granted Weinstein's motion for a change of venue. Although a District Court may consider affidavits related to a motion to change venue, the averments of a complaint will be taken as true in considering the motion. As movant, Weinstein bore the burden of proof in support of the motion, but failed to carry the burden of proving that Lockhead did not reside in Butte at the time that the complaint was filed or that Lockhead actually resided elsewhere. Thus, the District Court erred by shifting the burden of proving residency to Lockhead, and the change of venue motion was reversed. Lockhead v. Weinstein, 2001 MT 132, 305 M 438, 28 P3d 1081 (2001).

Indians — Subject Matter Jurisdiction Over Dissolution of Marriage — Different Residences of Parties — Factors to Be Considered — Bertelson Followed: Stacey, an enrolled member of the Fort Peck Tribes, married Shane, a non-Indian. After the marriage ceremony, Stacey returned to the Fort Peck Indian Reservation and Shane went to Forsyth, where his parents lived and where he worked. Some time later, Stacey had a child who also became an enrolled member and lived with Stacey on the Fort Peck Indian Reservation. Still later, Shane filed a dissolution action in a state District Court. The District Court ordered joint custody and ordered that Shane would be the primary residential custodian. Approximately 1 month later, the Fort Peck Tribal Court awarded temporary custody to Stacey. She then filed a motion in District Court under former Rules 12(h) and 60, M.R.Civ.P. (now superseded), to dismiss Shane's dissolution action for lack of subject matter jurisdiction. The District Court held that it had subject matter jurisdiction over the case and issued a final decree of dissolution. In that decree, the District Court held that the parties' child had significant contacts both off and on the reservation, held that the District Court shared concurrent jurisdiction with the tribal court, and therefore denied Stacey's motion to dismiss. The Supreme Court reviewed its previous holdings regarding tribal jurisdiction and child custody jurisdiction under the Uniform Child Custody Jurisdiction Act. The Supreme Court also reviewed the purposes of the Indian Child Welfare Act, which, while not strictly applicable to the case before it, cautions that state courts should be careful not to erode the sovereignty of tribes and tribal courts. In reliance upon In re Bertelson, 189 M 524, 617 P2d 121 (1980), the Supreme Court held that the best interests of the child should be determined and followed in deciding whether a state or tribal court has jurisdiction for the purposes of awarding custody but that

when an Indian child resides off the reservation, state courts and tribal courts share concurrent jurisdiction. The Supreme Court then held, in further reliance upon Bertelson, that even when jurisdiction is concurrent, it does not mean that states courts should exercise jurisdiction and that in deciding whether to exercise concurrent jurisdiction, the state courts should consider: (1) 40-4-102, 40-4-107, 40-4-211, and 40-7-108; (2) certain policy issues; and (3) the residence of the parties pursuant to this section. For this reason, the Supreme Court remanded the case to the District Court for a determination of the residence of Stacey and her child, saying that if the District Court determines that both reside on the reservation, the District Court must dismiss the case. However, if the District Court finds that Stacey's child is not a resident of the reservation and that the District Court shares jurisdiction with the tribal court, the District Court must then consider factors from Bertelson, previously discussed by the Supreme Court, to determine whether the District Court or the tribal court is better able to determine the best interests of the child. In re Marriage of Skillen, 1998 MT 43, 287 M 399, 956 P2d 1, 55 St. Rep. 147 (1998).

Temporary Absences From Residence — No Change in Place of Residence: After Rosemary petitioned for a dissolution of her marriage, her husband Timothy discovered that she had been away from her home in Billings for a 6-week period to attend classes at MSU. During that time, she had lived in Pray in Park County. Upon discovery of these facts, Timothy asked for reconsideration of an earlier motion to change venue to Park County. Citing School District No. 12 v. Simonsen, 210 M 100, 683 P2d 471 (1984), the Supreme Court held that the District Court properly denied the motion for a change of venue because temporary absences from one's residence do not change an individual's place of residence. In re Marriage of Bernethy, 260 M 402, 860 P2d 157, 50 St. Rep. 1144 (1993).

"Legal Residence" for Determining Eligibility for School District Transportation Contract: The meaning of "legal residence" for the purposes of 20-10-101(2) is to be determined in accordance with the rules set forth in 1-1-215. School District v. Simonsen, 210 M 100, 683 P2d 471, 41 St. Rep. 944 (1984).

Substantial Evidence of Residency: When respondents left their ranch within the county for the purpose of earning an income and educating their children, returned to the property each summer, intended to maintain the ranch as their residence, and paid county property taxes, there was substantial evidence from which the District Court could conclude that respondents were residents of the county and that therefore their children were "eligible transportees" within the meaning of 20-10-101. School District v. Simonsen, 210 M 100, 683 P2d 471, 41 St. Rep. 944 (1984).

Indigent Student's Right to County Medical Assistance — Residence Question: A college student born and raised in Cascade County was injured far from home. During recuperation at her parents' residence in Cascade County, she applied for medical assistance. She was denied. The Supreme Court of Montana found her to be a resident of Cascade County for purposes of county medical assistance, noting that she gives the county as her permanent address and intends to reside there after she finishes school and citing the rule that it is customary to look to the parents' residence in order to determine the residence of the student. Michels v. Dept. of Social and Rehabilitation Services, 187 M 173, 609 P2d 271 (1980).

Guides for Interpretation — Not a Definition: The rules set forth in this section are guides for interpretation of the meaning of "residence" which must be applied to each case in the light of the facts of that case; they are not a definition. McCarthy v. Mont. Power Co., 143 M 134, 387 P2d 438 (1963).

Wandering Child — Incapable of Establishing Residence: A wandering 13-year-old child from another state was incapable of establishing residence in Montana where she had no means of support and roamed from place to place for approximately 1 month. State ex rel. Lewis & Clark County v. St. Bd. of Pub. Welfare, 141 M 209, 376 P2d 1002 (1962).

Resident Freeholder: A freeholder becomes a resident under this section upon union of act and intent. If the intention to establish a permanent residence is ascertained, the recency of the establishment is immaterial. Kunesh v. Great Falls, 132 M 285, 317 P2d 297 (1957).

Occupant of Rest Home: Where the decedent had been a lifelong resident of one county but went to an adjoining county to a rest home because no similar care could be given him in his home county and while there he bought and paid for funeral services and a cemetery lot in his home county and voted in an election in his home county but died while at the rest home, it was obvious that he had no intention of changing his residence and his presence in the adjoining county was for a special purpose as intended by this section. In re Ingersol's Estate, 128 M 230, 272 P2d 1003 (1954).

"Residence" Synonymous With "Domicile": Where statutes refer only to residence and not to domicile, as does this section, the courts have generally held that the word "residence" will be construed to mean practically the same as "domicile". State ex rel. Duckworth v. District Court, 107 M 97, 80 P2d 367 (1938).

Attorney General's Opinions

Residency of Special Education Student Following Termination of Parental Rights But Before Permanent Placement: For special education purposes, the school district of residence of a child for whom the Department of Family Services (now Department of Public Health and Human Services) has legal custody following termination of parental rights and before a permanent placement is accomplished is the same as that of the physical location of the District Court that ordered the termination. 43 A.G. Op. 36 (1989), overruling 40 A.G. Op. 69 (1984).

Residency of Special Education Student in Temporary Custody of Department: For special education purposes, the school district of residence of a child for whom the Department of Family Services (now Department of Public Health and Human Services) has temporary legal custody is the district of residence of the child's parents, regardless of whether the child is placed in a foster home in a separate school district. 43 A.G. Op. 36 (1989).

Residency of Special Education Student When Custodial Parent Imprisoned — District of Residence Responsible for Tuition: The school district of residence of a special education student whose custodial parent is imprisoned is the school district where the custodial parent resided prior to imprisonment. If a special education student is admitted to a school district that is not his district of residence, his district of residence is responsible for the student's tuition. 43 A.G. Op. 35 (1989).

Servicepersons — Registration to Vote — Tax Liability: The fact that a member of the military service has registered to vote in Montana is evidence, though not conclusive proof, that he is a Montana resident and is thus not exempt, under the federal Soldiers' and Sailors' Civil Relief Act of 1940, from property and income taxation by Montana. Montana's election law requires one to be a resident of Montana before voting in the state's elections, so a serviceperson who has registered to vote in Montana (thereby claiming to be a resident) may not claim tax exemption under the federal Act without offering convincing evidence that he is in fact not a Montana resident after all. However, to claim he is not in fact a resident after having registered to vote in Montana would subject him to prosecution for the misdemeanor of fraudulent registration. 41 A.G. Op. 2 (1985).

Residency Determination — Nursing Home Residents on General Relief: Under 53-3-306, which prior to its repeal in 1985 provided that general relief be paid by the county in which one resided, a county could not automatically disclaim financial responsibility for new applicants for general relief who moved to that county in order to receive medical care in a nursing home. The county of financial responsibility was the county where the applicant resided. Residence was determined by factors such as whether the placement in the nursing home was permanent or temporary, in which county the applicant was registered to vote, owned property, payed property taxes, or registered a vehicle, and in which county the applicant intended to remain. The original county remained financially responsible unless a court decree declared under 53-2-610 (now repealed) that the recipient's residence had changed. 40 A.G. Op. 8 (1983).

Special Education — Funding and Services: A school district may not establish a special education policy wholly independent of state funding. A special education program established by a district is not required to serve children in group homes within the district who are not legal residents but may do so cooperatively or by contract. 37 A.G. Op. 98 (1977).

1-1-216. Legal holidays and business days.

Compiler's Comments

2013 Amendment: Chapter 131 in (2)(a) near beginning substituted "holidays in subsection (1)(b) through (1)(l)" for "above-enumerated holidays (except Sunday)"; inserted (2)(b) concerning what constitutes a holiday if a legal holiday falls on a Saturday; and made minor changes in style. Amendment effective October 1, 2013.

1991 Amendment: Inserted (1)(c) making Martin Luther King Jr. Day a state holiday; and deleted former (1)(l) designating Heritage Day as a state holiday.

1987 Amendment: In (1) deleted former (c) that read: "(c) Lincoln's Birthday, February 12"; combined Lincoln's and Washington's Birthdays on the third Monday in February; and inserted provision concerning Heritage Day. Amendment effective January 1, 1988.

Case Notes

Calculating Time for Service of Motion — Days Before Saturday Christmas and New Year's Day Not Holidays: Burlington Northern alleged that it had timely served its motion for a new trial, thereby tolling the 30-day period for appealing the jury verdict in favor of Dunkelberger. The railroad argued that Christmas and New Year's Day had fallen on Saturday and, since the courts were closed on the preceding Fridays, those Fridays were holidays and were not to be counted in determining whether the motion for new trial had been served within the required 10 days. The Supreme Court held that the fact that those Fridays were holidays for state workers did not make them statutory holidays and that those Fridays counted as part of the 10-day period. (See 2013 amendment.) Dunkelberger v. Burlington N. RR Co., 265 M 243, 876 P2d 218, 51 St. Rep. 499 (1994).

Attorney General's Opinions

Pay for Holidays — 10-Hour Days — Collective Bargaining for County Employees: A county may collectively bargain that public employees who work 10-hour days for 4 days per week are to be paid for 10 hours on holidays that fall on their regularly scheduled workday. 53 A.G. Op. 4 (2010).

Conduct of Criminal Trial — Never on Sunday: Montana law does not permit criminal trials to be conducted on Sundays except to conclude a trial already initiated as specified in 3-1-302. The exercise of power on Sunday by a magistrate with regard to proceedings of a criminal nature, as outlined in 3-1-302(1)(c), is limited to the issuance of arrest warrants. 43 A.G. Op. 27 (1989).

Heritage Day — Single Calendar Day Only: The governing body of a political subdivision must schedule the Heritage Day legal holiday on a single calendar day each year. 42 A.G. Op. 22 (1987).

Collective Bargaining Agreement — Days of Leave in Addition to Legal Holidays: The Board of County Commissioners may enter into an agreement with county employees that grants a day of paid leave in addition to the enumerated legal holidays. The collective bargaining provision in question merely provides an additional paid day off to attend the county fair for those employees covered by the contract. The provision does not make "fair day" a "legal holiday", nor does it suggest that an employee may accumulate "fair days" as vacation. The provision contravenes no statutory determination of employee benefits. The provision falls within the area that is a proper subject for collective bargaining. 38 A.G. Op. 116 (1980).

Holidays and Vacations: Section 2-18-603, which generally entitles each state, city, and county employee to a day off on the day preceding or following a holiday which falls on the employee's regular day off, is applicable to full-time salaried employees of a county hospital district. Vacation and holiday leave time for public employees are cumulative. If a holiday or its complement under 2-18-603 falls during a public employee's annual vacation, that day should not be counted against leave time. If counted against leave time, the employee must be given a paid day off at a later time to make up for the lost holiday. A public employee may be required to work on a holiday or its complement under 2-18-603. However, a public employee who works a holiday or its complement must be either compensated for the lost holiday or given an opportunity to take a paid day off at a later time. The holiday provisions of 2-18-603 apply to full-time, salaried public employees. They do not apply to part-time, temporary, or seasonal employees who are paid on an hourly or per diem basis for work actually performed. 38 A.G. Op. 16 (1979).

"School Holidays" and "Legal Holidays": School district employees, nonteaching and teaching alike, throughout the state of Montana, are entitled to days off on those holidays enumerated in 20-1-305, rather than the holidays of 1-1-216. School district employees are therefore entitled only to days off on New Year's Day, Memorial Day, Independence Day, Labor Day, Thanksgiving Day, Christmas Day, and state and national election days when the school building is a polling place and school functions will interfere with the election process. 37 A.G. Op. 150 (1978).

Nonteaching School Employees — Public Employees: Nonteaching school district employees are public employees and thus entitled to the legal holidays enumerated in 1-1-216 just as are all other public employees. They are not entitled to the school holidays enumerated in 20-1-305. 37 A.G. Op. 96 (1977), overruling in part 36 A.G. Op. 105 (1976).

Constitutional Convention Delegates — Election Day: Montana law (13-1-101) distinguishes between primary and general elections. The primary election for Constitutional Convention delegates is not a legal holiday because this section makes only state general election days holidays. The election for the delegates fits the 13-1-101 definition of general election, and that day is therefore a legal holiday under this section. 34 A.G. Op. 20 (1971).

1-1-217. Notice — actual and constructive.

Compiler's Comments

2007 Amendment: Chapter 61 made minor changes in style. Amendment effective October 1, 2007.

Case Notes

Receipt, Not Mailing, of Certified Letter Constituting Effective Notice: A lease provided that if the lessee defaulted and did not cure the default within 10 days after written notice from the lessor, then the lessor could retake possession of the property. The method for providing written notice was not described in the lease. When Anderson defaulted on rent, Grenfell sent a default notice by certified mail to Anderson's address as listed in the lease, but Anderson never picked up the letter, and it was returned to Grenfell as unclaimed. Nevertheless, after 11 days, Grenfell retook possession of the leased property, changed the locks, and filed suit, alleging breach of the lease agreement, unlawful detainer, and violation of the implied covenant of good faith and fair dealing. The District Court held in favor of Grenfell, and Anderson appealed. The Supreme Court reversed, finding that Anderson never received proper notice. Citing 58 Am. Jur. 2d Notice § 35 (1989), the court applied the common-law rule that when a statute or rule merely states that written notice must be given without stating how it is to be given, it is not enough that the notice is mailed—it must also be received. The same rule applies to contracts in the absence of express provisions to the contrary. Thus, Grenfell's decision to enforce the 10-day default cure period was effective only upon actual receipt of a written notice by Anderson, whether hand-delivered, mailed, or otherwise. The District Court's conclusion that Anderson had actual notice, effective by certified mailing alone, was in error. Grenfell v. Anderson, 1999 MT 272, 296 M 474, 989 P2d 818, 56 St. Rep. 1101 (1999), following Hill v. Zuckerman, 138 M 230, 355 P2d 521 (1960).

Unclaimed Notice Not Considered Constructive Notice: Grenfell sent a certified letter to Anderson regarding default on a lease, but Anderson never picked up the letter and it was returned to Grenfell as unclaimed. The District Court held that Anderson had constructive notice of the default. The Supreme Court disagreed. Although a party may not escape the effect of the giving of a written notice by refusing to receive it when it is presented in person as a notice, thereby profiting from a wrongful act, in the context of giving notice by certified mail, this rule requires an actual refusal to accept. In this case, there was no indication that the address to which the letter was sent was ever contemplated as a proper place of serving notice, yet Grenfell inexplicably served the default letter in a manner that Grenfell himself acknowledged would not be effective, even though Anderson had previously accepted all manner of lease-related business matters in person at Anderson's place of business. Although the District Court correctly found that Anderson did not claim the letter, the court incorrectly deduced that Anderson had refused the letter. Failure to claim the letter, of itself, was insufficient to impute Anderson's constructive notice absent evidence that receipt of the letter was refused. Grenfell v. Anderson, 1999 MT 272, 296 M 474, 989 P2d 818, 56 St. Rep. 1101 (1999), following Long v. Crum, 267 NW 2d 407 (Iowa 1978). See also Hill v. Zuckerman, 138 M 230, 355 P2d 521 (1960).

Notice of Contract That Is Unrecorded by Purchaser: A contract for deed between appellants and a life estate contracted for therein are effective and enforceable as against the parties and also against subsequent purchasers who have notice of the contract under 70-21-102. Notice to a subsequent purchaser can be constructive notice through a duly authorized, trained real estate agent who acts for the purchaser throughout the purchase transactions. A misapprehension on the part of the purchaser as to the contract provisions is not to be confused with lack of knowledge or notice. Harbeck v. Orr, 192 M 243, 627 P2d 1217, 38 St. Rep. 668 (1981).

Unrecorded Instrument:

In action for reformation of deed, objection to introduction in evidence of contract which was not recorded prior to purchase of land by defendant on ground that no evidence had been introduced to show lack of good faith or notice on part of defendant was properly overruled when such evidence was offered later. Strack v. Fed. Land Bank of Spokane, 124 M 19, 218 P2d 1052 (1950).

In an action to foreclose a second mortgage on real property and to have it declared superior to a prior one, unrecorded at the time plaintiff placed his mortgage of record, plaintiff having been advised by language in his mortgage to the effect that it was "subject to a first mortgage heretofore made" on the property, he had actual notice of the prior lien. He was chargeable with notice of all material facts which an inquiry suggested by the recital would have disclosed, and with such notice he proceeded at his peril, even though the former instrument was not yet

acknowledged or could be considered imperfect when he placed his mortgage on record. Angus v. Mariner, 85 M 365, 278 P 996 (1929).

Evidence was held insufficient to establish constructive notice in defendant city of an unrecorded grant of a portion of a water right made prior to its purchase of the entire right by defendant. Custer Consol. Mines Co. v. Helena, 52 M 35, 156 P 1090 (1916).

Excavation of City Street: Where plumber obtained license from city for the excavation and installation of a service pipe from street to residence, the city had notice of such excavation at time of granting such permission, and further notice to city of existence of such excavation was unnecessary to charge city with liability for damage resulting from unguarded excavation. Ledbetter v. Great Falls, 123 M 270, 213 P2d 246 (1949).

Knowledge by Agent of Facts Puts Principal on Inquiry:

Where prospective mortgagees were informed by their agent that prospective mortgagor owed numerous debts and that such mortgagor had acquired the branded cattle involved under contract, though the contract was unrecorded, mortgagees were required in exercise of ordinary prudence to make inquiry from some source other than mortgagor as to ownership of the cattle brand and of the cattle. Merrion v. Humphreys, 119 M 495, 176 P2d 665 (1947).

Where agent of insurance company issuing indemnity policy specifying plaintiff as sole tenant of a building in fact knew the premises to be occupied by more than one tenant, this was sufficient to impute notice to the company under this section that the premises were not wholly in the care and custody of a single tenant. Curtis v. Zurich Gen. Accident & Liab. Ins. Co., 108 M 275, 89 P2d 1038 (1939).

Rule of Chancery: This section embodies an old rule of chancery. Yale Oil Corp. v. Sedlacek, 99 M 411, 43 P2d 887 (1935); Trerise v. Bottego, 32 M 244, 79 P 1057 (1905).

Constructive Notice: Constructive notice, notice implied by law, is analogous to a summons and serves the same purpose. Oliveri v. Maroncelli, 94 M 476, 22 P2d 1054 (1933).

Failure to Make Inquiry — Foreclosure Sale: Defendant, in an action to quiet title, who relied upon an assignment of a certificate of sale and subsequent Sheriff's deed to real property sold on foreclosure, had sufficient notice of the facts and circumstances which subsequently resulted in a judgment setting aside the mortgage as fraudulent to put him upon inquiry before taking the assignment and to make applicable the rule that failure to make inquiry which, if pursued, would have led to actual knowledge, will deprive one of the character of a bona fide purchaser. Teisinger v. Hardy, 91 M 9, 5 P2d 219 (1931).

Ownership of Property: A bank, holding money as bailee or pledgeholder, which receives notice that one other than the bailor or pledgor is the true owner thereof but notwithstanding such notice delivers it to a person other than the claimant, may be held liable for the amount thereof. Maser v. Farmers' & Merchants' Bank of Winnett, 90 M 33, 300 P 207 (1931).

Judgment Record: The record of a money judgment against Mrs. C. J. E. cannot be held to have imparted constructive notice to a purchaser of real property from Anna E., the record titleholder, that the property was impressed with a lien of the judgment, unless the purchaser had actual knowledge that Mrs. C. J. E. and Anna E. were the same person. Poulos v. Lyman Bros. Co., 63 M 561, 208 P 598 (1922).

1-1-218. Words giving joint authority.

Case Notes

Appeal by Trustee Against Wishes of Cotrustees: One of five statutory trustees in charge of the affairs of a dissolved corporation may not prosecute an appeal to the Supreme Court from an order appointing a receiver for the corporation against the wishes of his cotrustees, irrespective of whether unit or majority rule of action controls under certain statutes. Union Bank & Trust Co. v. Penwell, 99 M 255, 42 P2d 457 (1935).

1-1-219. Relationship by affinity.

Compiler's Comments

2007 Amendment: Chapter 61 made minor changes in style. Amendment effective October 1, 2007.

1-1-224. Observance of right to keep and bear arms.

Compiler's Comments

2007 Amendment: Chapter 61 made minor changes in style. Amendment effective October 1, 2007.

1-1-225. Arbor Day as official day of observance.

Compiler's Comments

Effective Date: Section 2, Ch. 16, L. 1989, provided that this section is effective February 15, 1989.

1-1-226. Official observance of Montana's hunting heritage.

Compiler's Comments

2007 Amendment: Chapter 61 made minor changes in style. Amendment effective October 1, 2007.

1-1-227. Bill of rights day.

Compiler's Comments

Preamble: The preamble attached to Ch. 477, L. 2007, provided: "WHEREAS, the Bill of Rights, the first 10 amendments to the U.S. Constitution, limits the powers of the federal government and reserves the remaining powers to the states and the people, and also protects the rights of all citizens to freedom of speech, freedom of the press, freedom of assembly, freedom of religious worship, freedom of petition, and freedom to keep and bear arms; and

WHEREAS, the Bill of Rights furthermore provides equal security to all who carry the noble title of citizen through protection from unreasonable search and seizure, cruel and unusual punishment, and self-incrimination and guarantees a trial by jury and due process in a court of law; and

WHEREAS, all Montanans know and cherish these liberties and understand them to be the foundation of the social contract and the correlating responsibilities inherent as members of the citizenry."

Effective Date: This section is effective October 1, 2007.

1-1-228. American Indian heritage day.

Compiler's Comments

Preamble: The preamble attached to Ch. 93, L. 2009, provided: "WHEREAS, Article IX, section 4, of the Montana Constitution requires the Legislature to provide for, among other things, the enhancement and preservation of scenic, historic, archeologic, scientific, and cultural areas, sites, records, and objects and for their use and enjoyment by the people; and

WHEREAS, Article X, section 1, of the Montana Constitution recognizes the distinct and unique cultural heritage of the American Indians and commits, through educational goals, to the preservation of their cultural integrity; and

WHEREAS, section 2-1-305, MCA, specifically protects Indian culture; and

WHEREAS, all Montanans respect American Indian culture and recognize the educational and cultural value of designating one day each year on which American Indians should celebrate their heritage and on which American Indians' heritage should be celebrated by all Montanans."

Effective Date: This section is effective October 1, 2009.

1-1-229. State teen driver safety day.

Compiler's Comments

Preamble: The preamble attached to Ch. 333, L. 2009, provided: "WHEREAS, Congressman Charlie Dent (R-PA) and Senator Bob Casey (D-PA) introduced a resolution creating a National Teen Driver Safety Week in response to several tragic crashes involving Pennsylvania high school students and the first annual National Teen Driver Safety Week was held October 15 through 20, 2007; and

WHEREAS, many people, especially teenagers, do not realize the consequences of driving while distracted and education is needed in order for teenagers to become more aware of the dangers they face while driving; and

WHEREAS, a national survey shows that two out of three teenagers use cell phone text messaging while driving, which has been found to increase the chances of a car accident by 50%; and

WHEREAS, other distractions while driving include talking on a cell phone, eating, dealing with personal hygiene, and adjusting music and, according to the federal government, more than 30% of all car crashes in the United States involve a distracted driver; and

WHEREAS, because 77% of fatal crashes involving 16-year-olds behind the wheel are caused by driver error, it is apparent that education could significantly lower the number of fatal car accidents; and

WHEREAS, car crashes are the leading cause of death for teenagers in the United States, about 10 teenagers between 16 and 19 years of age die in teen driver car accidents every day, and teens make up only 6.7% of all motorists even though they account for 14% of fatal car crashes in the United States; and

WHEREAS, officials say that teens' inexperience and recklessness on the road have a lot to do with the deadly statistics; and

WHEREAS, 18 states, not including Montana, have focused on the specific problem of teen driving and cell phone text messaging while driving and have made text messaging while driving illegal; and

WHEREAS, since 2007, approximately 21 states have recognized National Teen Driver Safety Week and planned specific activities targeting teen drivers; and

WHEREAS, establishing a state Teen Driver Safety Day is an important tool for raising awareness about the tragedy of teen driver car crashes, will spark communication among teenagers, their parents, and civic leaders about the causes of and solutions to teen driver car crashes, and will encourage self-reflection by teen drivers."

Effective Date: This section is effective October 1, 2009.

1-1-230. Welcome home Vietnam veterans day.

Compiler's Comments

Preamble: The preamble attached to Ch. 89, L. 2011, provided: "WHEREAS, the United States became involved in a war in the former Republic of South Vietnam to stop the spread of communism to that country; and

WHEREAS, by 1969, a peak of approximately 543,000 members of the armed forces of the United States were serving in the former South Vietnam; and

WHEREAS, more than 58,000 members of the armed forces lost their lives in Vietnam and more than 300,000 members were wounded; and

WHEREAS, by March 30, 1973, combat and combat support units had left Vietnam; and

WHEREAS, the Vietnam War was an extremely divisive issue among the people of the United States and caused a generation of veterans to be criticized for participation in a war that was the official policy of four presidential administrations in the United States government, a policy that Vietnam veterans themselves could not control; and

WHEREAS, the establishment of a Welcome Home Vietnam Veterans Day would provide an appreciation that Vietnam veterans deserve for their service but did not receive at the time of their homecoming; and

WHEREAS, establishment of a Welcome Home Vietnam Veterans Day would also promote awareness of the faithful service of Vietnam veterans, promote awareness of their contributions to the country, and recognize the assistance that veterans of the war in Vietnam are providing to the returning veterans of the wars in Iraq and Afghanistan in recovering from their wounds, both seen and unseen, and in supporting the reintegration of these new veterans back into civilian life."

Effective Date: This section is effective October 1, 2011.

Part 3
Rules Concerning Time

1-1-301. Definitions.

Case Notes

Statute of Limitations Calculated as Ending One Day Prior to Start Day in Next Calendar Year: Plaintiff was injured on December 24, 1999, and plaintiff filed a complaint on December 26, 2002, contending that because December 25, 2002, was a holiday, the 3-year statute of limitations in 27-2-204 extended to December 26, 2002, so the complaint was timely filed. The District Court held that the complaint was time-barred and granted defendant summary judgment on the pleadings. On appeal, the Supreme Court affirmed. Generally, a statute of limitations begins to run when a claim or cause of action accrues. Plaintiff's cause of action accrued on December 24, 1999, the date of injury. Under former Rule 6(a), M.R.Civ.P. (now superseded), the day of the event is not included in computing any period of time, so the statute of limitations was counted from December 25, 1999. A year is defined as a calendar year, which is a 365-day period starting on a given day and ending on the date 1 day prior to the start day in the next calendar year. Thus, plaintiff's cause of action began on December 25, 1999, and ended on December 24, 2002, which was neither a weekend day nor a legal holiday. The statute of limitations was properly

calculated, and summary judgment was proper because plaintiff's complaint was not timely filed. Bosch v. Town Pump, Inc., 2004 MT 330, 324 M 138, 102 P3d 32 (2004).

Faxed Return of Service of Summons Received on Evening of Final Day of Filing Considered Timely — Courts Always Open: White filed a complaint September 8, 1995, and summons was served on Klosterman September 8, 1998. The Sheriff's dispatcher faxed the return of service to the Clerk of Court at 8:23 p.m. the same day. The District Court held that the return of service was late because it was not filed with the Clerk of Court by 5 p.m. on the last day that filing was permitted. However, the Supreme Court found nothing in the plain language of the judicial rules of procedure or any Montana authority that provides those requirements. Rather, former Rule 41(e), M.R.Civ.P. (now superseded), requires that return of service be filed within 3 years; Rule former 5(e), M.R.Civ.P. (now superseded), allows filing by facsimile or other electronic means; 25-3-501 gives faxed documents the same force and effect as an original; Rule former 77(a), M.R.Civ.P. (now superseded), requires that District Courts always be open for filing; and this section provides that each day ends at midnight. The District Court's decision was reversed on grounds that filing was timely. White v. Klosterman, 1999 MT 316, 297 M 259, 990 P2d 1249, 56 St. Rep. 1265 (1999).

Publication on Sunday: Under this section, Sunday is a part of the week, and publication of a summons on four successive Sundays is publication "once a week for four successive weeks" as specified in section 93-3014, R.C.M. 1947 (since repealed). Such publication is therefore valid, it not being forbidden by any general common-law, constitutional, or statutory prohibition. State ex rel. Fisher v. District Court, 110 M 61, 99 P2d 211 (1935).

1-1-305. Computation of time — when fractions of a day disregarded.

Case Notes

No Shortage in Postnotice Payment: The plaintiff filed an action in District Court to quiet title in real property on the basis that a tax deed was void because the defendant paid the back taxes 2 hours and 45 minutes short of the 2-week period provided in the assignment notice. The District Court concluded the 2-week notice requirement under the 2007 version of 15-17-212 was satisfied. The Supreme Court affirmed. The 3-day mailing rule in former Rule 6(e), M.R.Civ.P. (now superseded), does not apply to the mailing of a notice of intent under 15-17-212(3). In addition, the District Court properly disregarded the deficiency of 2 hours and 45 minutes in this case because, pursuant to 1-1-305, the law regards the day as an indivisible unit and discards fractional days in most time computations. Tacke v. Mont. Lakeshore Properties, LLC, 2011 MT 197, 361 Mont. 390, 260 P.3d 128.

Breathalyzer Tested Twelve Minutes After Mandated Seven-Day Period Between Tests — Breath Test Admissible: ARM 23.4.213 requires Breathalyzers to be tested and certified for accuracy every 7 days. The Breathalyzer used on the defendant on August 23 had been tested that day at 8:59 a.m. and on August 16 at 8:47 a.m., a time difference of 7 days and 12 minutes. This section provides that fractions of a day are disregarded in computations that include more than a day and involve no questions of priority. For most purposes, the law regards a day as an indivisible unit. Neither the administrative rule nor other law supported defendant's argument that the test results were inadmissible because more than 7 days had passed between the two tests. St. v. Fitzgerald, 283 M 162, 940 P2d 108, 54 St. Rep. 545 (1997).

1-1-306. Computation of time — which days counted.

Case Notes

Statute of Limitations Calculated as Ending One Day Prior to Start Day in Next Calendar Year: Plaintiff was injured on December 24, 1999, and plaintiff filed a complaint on December 26, 2002, contending that because December 25, 2002, was a holiday, the 3-year statute of limitations in 27-2-204 extended to December 26, 2002, so the complaint was timely filed. The District Court held that the complaint was time-barred and granted defendant summary judgment on the pleadings. On appeal, the Supreme Court affirmed. Generally, a statute of limitations begins to run when a claim or cause of action accrues. Plaintiff's cause of action accrued on December 24, 1999, the date of injury. Under former Rule 6(a), M.R.Civ.P. (now superseded), the day of the event is not included in computing any period of time, so the statute of limitations was counted from December 25, 1999. A year is defined as a calendar year, which is a 365-day period starting on a given day and ending on the date 1 day prior to the start day in the next calendar year. Thus, plaintiff's cause of action began on December 25, 1999, and ended on December 24, 2002, which was neither a weekend day nor a legal holiday. The statute of limitations was properly calculated, and summary judgment was proper because plaintiff's complaint was not timely filed. Bosch v. Town Pump, Inc., 2004 MT 330, 324 M 138, 102 P3d 32 (2004).

Cost Bill: Where verdict was filed on June 8, 1961, and memorandum of costs was postmarked June 13, 1961, service on June 13, 1961, the fifth day, met the time requirement of 25-10-502. Herdegen v. Oxarart, 141 M 464, 378 P2d 655 (1963).

Construction: In 1864, the First Legislative Assembly of the Territory of Montana, by the enactment of section 430 of the Bannack Statutes at page 130, incorporated into the law of this jurisdiction the common-law rule and formula for computing time by excluding the first day and including the last, which at all times since has been and now is the written law of this jurisdiction. State ex rel. Burns v. Lacklen, 129 M 243, 284 P2d 998 (1955), overruling State ex rel. St. George v. Justice Court, 80 M 53, 257 P 1034 (1927), State ex rel. Bevan v. Mountjoy, 82 M 594, 268 P 558 (1928), Novack v. Pericich, 90 M 91, 300 P 240 (1931), and State ex rel. Sullivan v. District Court, 122 M 1, 196 P2d 452 (1948).

Application — Libel: The rule prescribed by this section is applicable to computations under the statute in all cases, whether the actions be ex contractu or ex delicto; it therefore applies to an action for libel. Kelly v. Independent Publishing Co., 45 M 127, 122 P 735 (1912).

Day — Indivisible Unit: For most purposes, the law regards the day as an indivisible unit. It is only when it becomes necessary to inquire into the order of sequence of two or more events occurring on the same day, for the purpose of determining a question of priority of right, or when the computation includes only 1 day or less, that departure from this rule is permitted. Kelly v. Independent Publishing Co., 45 M 127, 122 P 735 (1912); Harmon v. Comstock Horse & Cattle Co., 9 M 243, 23 P 470 (1890).

Double Holidays Both Excluded: Where the limitation of time in which an act may be done falls upon the first of two consecutive holidays, both days are excluded, and the words "any act provided by law" applies to acts which may be done within a specified time and not to acts which the law provides shall be done. Kelly v. Independent Publishing Co., 45 M 127, 122 P 735 (1912).

1-1-307. Postponement of day appointed for an action when it falls on a holiday or Saturday.

Compiler's Comments

1987 Amendment: Near middle inserted "or a Saturday" after "holiday".

Case Notes

Payment of State Lease Authorized on Day After Holiday: Johansen's rental payment on a state agricultural lease was due on or before December 31. Johansen placed the payment in his rural mailbox on December 29, but for various reasons, the carrier left the payment in the mailbox on the 29th and 30th. There was no mail service on Sunday the 31st, and the post office was closed January 1 for the holiday. On January 2, Johansen took the letter to the post office for mailing, as evidenced by affidavit of the postmaster, but it did not receive a postmark until January 3. The Department canceled the lease for nonpayment. Although the letter did not receive a postmark until January 3, the Department had uncontroverted evidence that Johansen had timely mailed the rental payment. The Department's decision to cancel the lease was arbitrary and capricious, and the District Court's holding that the payment was timely made was affirmed. Johansen v. St., 1999 MT 187, 295 M 339, 983 P2d 962, 56 St. Rep. 731 (1999).

Construction of Section: Instead of embodying a prohibition, this section merely provides an extra day of grace. Any of the enumerated acts may be done lawfully on a holiday but are in time if not done until the next business day. State ex rel. Hay v. Alderson, 49 M 387, 142 P 210 (1914), distinguished in Miller v. Emerson, 120 M 380, 186 P2d 220 (1947).

Part 4
Citizenship

1-1-402. Citizens defined.

Case Notes

Intent to Reside in State: Where it appeared that the architects for the state capitol building were citizens of the United States, and before the contract for furnishing plans, specifications, and detail drawings for said building was made, left their former residence without intending to return and with the intention of residing in this state, they were citizens of the same under this section. Donovan v. St. Capitol Comm'n, 21 M 344, 53 P 1133 (1898).

1-1-411. Certain state services denied to illegal aliens.

Compiler's Comments

2015 Amendment: Chapter 285 in (1) substituted "except as provided in 44-4-1502" for "notwithstanding any other state law". Amendment effective July 1, 2015.

Severability: Section 4, Ch. 308, L. 2011, was a severability clause.

Effective Date: Section 5, Ch. 308, L. 2011, provided: "If approved by the electorate, [this act] is effective January 1, 2013." Approved November 6, 2012.

Applicability: Section 6, Ch. 308, L. 2011, provided: "[This act] applies to the provision of a state service, as defined in [section 1] [1-1-411], applied for or intended to be made on or after January 1, 2013."

Part 5
State Symbols — Official Designations

Part Compiler's Comments

Montana Folk Dance: Senate Joint Resolution No. 17, L. 1991, provided: "WHEREAS, square dancing has been a popular tradition in America since colonial days and has attained a revered status as part of the folklore of this country; and

WHEREAS, square dancing is a joyful expression of the vibrant spirit of people of the United States, and the American people value the display of the etiquette among men and women, which is a major element of square dancing; and

WHEREAS, square dancing is a traditional form of family recreation that symbolizes a basic strength of this country, namely the unity of the family, which epitomizes democracy because it dissolves arbitrary social distinctions; and

WHEREAS, square dancing is the American folk dance that is called, cued, or prompted to the dancers; includes squares, rounds, contra, clogging, line, and heritage dances; and is a fitting symbol of our national character and pride.

NOW, THEREFORE, BE IT RESOLVED BY THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA:

That the square dance is designated the Montana folk dance."

1-1-502. State flag.

Compiler's Comments

1985 Amendment: In final clause, after "MONTANA", substituted "in helvetica bold" for "in Roman".

1981 Amendment: Following "U.S.V." added the final clause relating to the word "MONTANA".

1-1-509. State fossil.

Compiler's Comments

Preamble: The preamble to Ch. 57, L. 1985, read: "WHEREAS, Montana is the home of one of the world's most important dinosaur discoveries, specifically the duck-billed dinosaur Maiasaura peeblesorum, which is found nowhere else in the world; and

WHEREAS, the duck-billed dinosaur, when newly hatched, was less than 14 inches long and weighed about 1 1/2 pounds but grew to over 30 feet in length and weighed about 3 tons; and

WHEREAS, dinosaur sites in Montana contain fossilized eggs, embryonic bone, babies, juveniles, and adults of several different types of dinosaurs; provide valuable evidence that duck-billed dinosaurs nested in extensive colonies and had nests 6 feet in diameter that contained as many as 20 eggs; and demonstrate for the first time parental care of dinosaur young; and

WHEREAS, the Montana discoveries have tremendous scientific value and will continue to receive widespread publicity in national and international journals, as well as in popular literature and television and radio programs; and

WHEREAS, naming a dinosaur as the state fossil will increase awareness that Montana is one of the best places in the world for the occurrence of important dinosaur discoveries and will have real economic value in terms of tourist promotion; and

WHEREAS, the name Maiasaura peeblesorum means "good mother lizard" (Maiasaura) and honors the Peebles family (peeblesorum), a Montana ranch family from the Choteau area where the discoveries were made."

1-1-511. State ballad.

Compiler's Comments

Preamble: The preamble to Ch. 56, L. 1983, read: "WHEREAS, in 1945, House Joint Resolution No. 5 adopted the music and lyrics of the song "Montana" as the official state song of the State of Montana; and

WHEREAS, the song "Montana Melody", written by Carleen and LeGrande Harvey, is representative of the interests and feelings of the children and adults of the state and the

philosophy and aims of the state government and adequately captures the essence of Montana, its people, their aspirations, and their love of recreation and the great Montana outdoors; and

WHEREAS, the song "Montana Melody" was written after much thought and research into the meaning of this great state to its people.

THEREFORE, it is the intent of this act that the song "Montana Melody" become the official state ballad."

1-1-512. State Vietnam veterans' memorial.

Compiler's Comments

2007 Amendment: Chapter 61 made minor changes in style. Amendment effective October 1, 2007.

1-1-513. State arboretum.

Compiler's Comments

Name Change — Directions to Code Commissioner: Pursuant to sec. 36, Ch. 308, L. 1995, in this section the Code Commissioner changed "university of Montana" to "university of Montana-Missoula".

Effective Date: Section 2, Ch. 332, L. 1991, provided: "[This act] is effective on the date that the board of regents certifies acceptance of the designation contained in [section 1] [1-1-513] to the governor." The acceptance of the designation was made by the Board of Regents on May 7, 1991.

1-1-514. State butterfly.

Compiler's Comments

Effective Date: This section is effective October 1, 2001.

1-1-515. Montana medal of valor established.

Compiler's Comments

2007 Amendment: Chapter 61 made minor changes in style. Amendment effective October 1, 2007.

1-1-516. State Korean war veterans' memorial — Butte.

Compiler's Comments

2007 Amendment: Chapter 61 made minor changes in style. Amendment effective October 1, 2007.

2005 Amendment: Chapter 130 in (1) in two places and in (2) after "Korean" inserted "war". Amendment effective October 1, 2005.

1-1-517. State Korean war veterans' memorial — Missoula.

Compiler's Comments

2001 Amendment: Chapter 7 in (1) and (2) after "Korean" substituted "war" for "conflict [war]". Amendment effective October 1, 2001.

Code Commissioner Correction: The code commissioner inserted the bracketed reference to war to reflect the change contained in the National Defense Authorization Act for Fiscal Year 1999 signed into law on September 22, 1998.

Preamble: The preamble attached to Ch. 296, L. 1999, provided: "WHEREAS, a memorial rose garden was officially established on November 12, 1944, in Missoula, Montana; and

WHEREAS, on that date, six Missoula members of the American Rose Society suggested the garden as a means of honoring the memory of American service members killed in World War II; and

WHEREAS, in 1946, the first rose bushes were planted in the garden; and

WHEREAS, in 1968, the garden's name was changed from Sunset Memorial Rose Garden to Missoula Memorial Rose Garden because of confusion with the Sunset Memorial Garden Cemetery; and

WHEREAS, the Missoula Memorial Rose Garden borders a Blue Star Memorial Highway commemorating American veterans who served during World War II; and

WHEREAS, the Missoula Memorial Rose Garden has since served as the site for memorials commemorating the American combatants of Korea, Vietnam, Grenada, Panama, and the Persian Gulf; and

WHEREAS, the Missoula Memorial Rose Garden has become a living tribute to the veterans and casualties of America's 20th century conflicts."

Effective Date: This section is effective October 1, 1999.

1-1-518. State veterans' memorial rose garden.

Compiler's Comments

Preamble: The preamble attached to Ch. 296, L. 1999, provided: "WHEREAS, a memorial rose garden was officially established on November 12, 1944, in Missoula, Montana; and

WHEREAS, on that date, six Missoula members of the American Rose Society suggested the garden as a means of honoring the memory of American service members killed in World War II; and

WHEREAS, in 1946, the first rose bushes were planted in the garden; and

WHEREAS, in 1968, the garden's name was changed from Sunset Memorial Rose Garden to Missoula Memorial Rose Garden because of confusion with the Sunset Memorial Garden Cemetery; and

WHEREAS, the Missoula Memorial Rose Garden borders a Blue Star Memorial Highway commemorating American veterans who served during World War II; and

WHEREAS, the Missoula Memorial Rose Garden has since served as the site for memorials commemorating the American combatants of Korea, Vietnam, Grenada, Panama, and the Persian Gulf; and

WHEREAS, the Missoula Memorial Rose Garden has become a living tribute to the veterans and casualties of America's 20th century conflicts."

Effective Date: This section is effective October 1, 1999.

1-1-519. Montana state firefighters' memorial.

Compiler's Comments

Preamble: The preamble attached to Ch. 70, L. 2003, provided: "WHEREAS, firefighters in the State of Montana have put themselves in dangerous situations to protect lives and property; and

WHEREAS, some firefighters have paid the ultimate sacrifice in the line of duty; and

WHEREAS, the Legislature wants to honor those who have died in the line of duty and recognize those deceased firefighters in the State of Montana who dedicated 20 or more years of their lives in service as firefighters; and

WHEREAS, the Laurel Volunteer Fire Company initiated the planning and logistics for construction of a Montana State Firefighters' Memorial; and

WHEREAS, the City of Laurel has adopted City Resolution R01-24 that dedicates the property at the corner of West First Street and Second Avenue East of the Fire, Ambulance, and Police Building in the City of Laurel and has renamed the property "Firefighters' Memorial Park"; and

WHEREAS, the Laurel Volunteer Fire Company has received unanimous backing from the Montana State Volunteer Firefighters Association and the Montana Fire Alliance for the construction of the firefighters' memorial in the City of Laurel; and

WHEREAS, Governor Judy Martz has presented a Governor's Citation to the Laurel Volunteer Fire Company, dedicating the park as the future home of the Montana State Firefighters' Memorial."

Effective Date: This section is effective October 1, 2003.

1-1-521. State Iraq and Afghanistan veterans' memorial.

Compiler's Comments

Effective Date: This section is effective October 1, 2013.

Preamble: The preamble attached to Ch. 91, L. 2013, provided: "WHEREAS, Grateful Nation Montana was established in 2007 by David A. Bell, John F. McCarrick, and Gale R. Gustafson to provide an opportunity for tutoring, mentoring, and acquiring a full college scholarship for children of Montana soldiers who have paid the ultimate price for our country in Iraq and Afghanistan; and

WHEREAS, Grateful Nation Montana is a program sanctioned by the Montana University System Board of Regents; and

WHEREAS, the Grateful Nation Montana Memorial at the University of Montana was officially established on November 4, 2011, in Missoula, Montana, on the main campus of the University of Montana, and on that date, nearly 800 people from around Montana gathered at the University of Montana for the Grateful Nation Montana Memorial dedication; and

WHEREAS, the Grateful Nation Montana Memorial at the University of Montana incorporates five larger-than-life-size bronze statues, including the traditional "fallen soldier" battle cross, a young boy representing the child of the fallen soldier, a teacher representing the Grateful Nation Montana mission of educating the children of our Montana fallen soldiers, a grandmother, and a grandfather; and

WHEREAS, the Grateful Nation Montana Memorial contains 12-inch by 24-inch granite tablets recessed in the ground surrounding the Memorial, and each tablet contains the name, branch, rank, years lived, and Montana home town of one of the 42 Montana soldiers who have died in Iraq and Afghanistan, and there are 50 tablets in total so that, if required, additional names can be added; and

WHEREAS, the Grateful Nation Montana Memorial at the University of Montana has become a living tribute to the veterans and casualties of America's conflicts."

1-1-522. Montana award of valorous service to honor Montana's fallen heroes — administration by department of military affairs.

Compiler's Comments

Preamble: The preamble attached to Ch. 290, L. 2013, provided: "WHEREAS, whenever there are threats to our national security, the United States armed forces stand ready to protect our nation; and

WHEREAS, the United States armed forces also protect the lives and freedoms of individuals from other nations who cannot fight for themselves; and

WHEREAS, the United States armed forces are known for their skill, patriotism, compassion, and bravery in answering the call to serve in countries around the world; and

WHEREAS, the state of Montana has sent many of its own citizens to serve in the regular, national guard, and reserve forces of the United States Army, Air Force, Navy, Marine Corps, and Coast Guard to protect us all against foreign and domestic threats to our national security; and

WHEREAS, many who have been called to serve have been killed in action, courageously sacrificing their lives to protect the lives of others; and

WHEREAS, the people of the state of Montana are grateful to these fallen heroes and wish to support and stand with surviving family members to honor and forever remember these brave servicemen and servicewomen who have given their lives so that others might live."

Authorization of Other Funding Source: Section 2, Ch. 290, L. 2013, provided: "The department of military affairs is authorized to accept and expend up to $20,000 in funds from donations to purchase and mail medals to surviving family members."

Effective Date: Section 4, Ch. 290, L. 2013, provided: "[This act] is effective on passage and approval." Approved April 24, 2013.

1-1-523. Montana veterans' memorial.

Compiler's Comments

Effective Date: This section is effective October 1, 2015.

1-1-524. Northeast Montana veterans memorial park.

Compiler's Comments

Preamble: The preamble attached to Ch. 243, L. 2015, provided: "WHEREAS, Montanans have a long history of uncommon patriotism and have always been ready and willing to come to the defense of the United States of America; and

WHEREAS, had it not been for the selfless sacrifice of these brave men and women, we would likely be living under an oppressive form of government, and we all owe them a debt of gratitude; and

WHEREAS, the Northeast Montana Veterans Memorial Park memorializes the service and sacrifice of all military veterans, particularly those from Northeast Montana, including Phillips, Valley, Roosevelt, Daniels, McCone, Garfield, Dawson, Sheridan, and Richland counties."

Effective Date: This section is effective October 1, 2015.

1-1-525. Montana cowboy hall of fame.

Compiler's Comments

2011 Amendment: Chapter 165 in (1) at beginning substituted "There is a" for "The city of Wolf Point is designated as the site of the" and inserted second sentence regarding notification of the departments of commerce and transportation of the site of the Montana cowboy hall of fame; in (2) inserted "Once notified that the location of the Montana cowboy hall of fame is determined", after "identify" substituted "the site" for "the city of Wolf Point", and inserted second sentence regarding road signs to recognize the site; and made minor changes in style. Amendment effective October 1, 2011.

Preamble: The preamble attached to Ch. 2, L. 2003, provided: "WHEREAS, Wolf Point has the oldest continually held rodeo in Montana; and

WHEREAS, Montana Professional Rodeo Cowboys Association (PRCA) yearend winners and Montana PRCA Circuit Finals contestants have chosen the Wolf Point Wild Horse Stampede Committee 12 times in the last 13 years as the Montana Pro Rodeo Committee of the Year; and

WHEREAS, Wolf Point is home of rodeo legend stock contractor, Marvin Brookman, who is currently the oldest active PRCA cardholder in the United States; and

WHEREAS, according to local history that is provided in Marvin Presser's book Wolf Point: A City of Destiny, it was during the midteens of the 1900s that "local Cowboys and Indians would hold an impromptu gathering and stage a little afternoon rodeo on the downtown dirt streets on a summer afternoon"; and

WHEREAS, Wolf Point is located on the stretch of U.S. Highway 2, a coast-to-coast artery of the United States, that was originally part of the Theodore Roosevelt International Highway when it was first constructed in 1919; and

WHEREAS, local history reflects traditions of the Indian horsemen, along with some of the largest cattle and horse ranches in Montana; and

WHEREAS, Wolf Point is the birthplace of renowned Hollywood movie star, trick-rope performer, and American cowboy hero Montie Montana; and

WHEREAS, the hall of fame would be housed in conjunction with a museum facility currently in development along U.S. Highway 2 in Wolf Point."

Effective Date: This section is effective October 1, 2003.

1-1-526. Official home of Evelyn Cameron gallery — Terry.

Compiler's Comments

Preamble: The preamble attached to Ch. 274, L. 2005, provided: "WHEREAS, the photography and writing of Evelyn Cameron captured the spirit and history of early Montana in her more than 1,800 photographs and 35 volumes of diaries; and

WHEREAS, Cameron rejected an aristocratic lifestyle offered by her upbringing in favor of the work of ranching in early Prairie County; and

WHEREAS, from 1892 until her death in 1928, Cameron spent her life living, working, and photographing Eastern Montana while living in the Terry area; and

WHEREAS, Cameron's exceptional images of the rugged and austere Montana landscape and early lifestyle preserve a cherished history of frontier life on the prairie, garnering national attention; and

WHEREAS, the town of Terry, Montana, maintains the only permanent exhibit of Cameron's photographs and personal effects in the Evelyn Cameron Gallery.

THEREFORE, be it enacted by the Legislature of the State of Montana that the town of Terry, Montana, be designated the "Official Home of the Evelyn Cameron Gallery"."

Effective Date: This section is effective October 1, 2005.

1-1-530. State lullaby.

Compiler's Comments

Effective Date: This section is effective October 1, 2007.

1-1-531. State soil.

Compiler's Comments

Preamble: The preamble attached to Ch. 321, L. 2015, provided: "WHEREAS, Montana's official state symbols recognize the state's natural treasures; and

WHEREAS, the bitterroot, bluebunch wheatgrass, the western meadowlark, the sapphire, the blackspotted cutthroat trout, and the grizzly bear are all designated as state symbols; and

WHEREAS, Montana schoolchildren have initiated the designation of many state symbols, which has provided a valuable education about the symbol itself as well as about the legislative process; and

WHEREAS, agriculture is Montana's largest industry, generating in the state's economy more than $4.7 billion in services and products; and

WHEREAS, soil has been called the Earth's "living skin", sustaining not only Montana's agricultural industry but all of the state's plants, animals, and people; and

WHEREAS, legislatures in 21 states have designated a state soil to recognize the important role soil plays in their economies and environments; and

WHEREAS, Scobey soils are unique to Montana and occur on 1,261,000 acres mostly in the Golden Triangle and Hi line areas of the state, producing high quality wheat without irrigation, and are among the most productive of the 1,358 soils named and mapped in the state; and

WHEREAS, Scobey soils are scientifically and internationally recognized as fine, smectitic, frigid Aridic Argiustolls, representing the world's cool, semiarid grasslands; and

WHEREAS, Scobey soils from Montana are represented in the World Soil Museum and in a traveling exhibit developed by the Smithsonian Institution; and

WHEREAS, the Scobey soil series was named for the town of Scobey and was prominent in the first soil survey of the northern plains of Montana in 1929; and

WHEREAS, the 68th United Nations General Assembly declared 2015 the International Year of Soils; and

WHEREAS, 4th grade students from Longfellow Elementary School in Bozeman have researched the geological history, characteristics, and attributes of Scobey soils and their importance to Montana and believe them to be worthy of designation as a state symbol of Montana; and

WHEREAS, the Longfellow Elementary School students have shared their research and have solicited support for this designation from students who live in the Golden Triangle and Hi line areas of the state."

Effective Date: This section is effective October 1, 2015.

1-1-540. Display of historical writings or documents in or on public buildings or on state land — definitions.

Compiler's Comments

Effective Date: Section 3, Ch. 372, L. 2005, provided: "[This act] is effective on passage and approval." Approved April 25, 2005.

1-1-541. Display of POW/MIA flag.

Compiler's Comments

Effective Date: Section 3, Ch. 411, L. 2015, provided: "[This act] is effective May 25, 2015."

CHAPTER 2
STATUTORY CONSTRUCTION

Chapter Case Notes

Modification of Custody Order Required by Substantial Change in Circumstances — Application of In re Marriage of Johnson Required — Jurisdictional Prerequisites — Absurd Application of Statute Avoided: After making an agreement for child custody as part of the dissolution of her marriage, Kimberly determined to attend college and moved from Lewistown to Billings with her children. On a remand from the Supreme Court, the District Court held that In re Marriage of Johnson, 266 M 158, 879 P2d 689 (1994), did not apply because custody was not being transferred from the primary custodian to the secondary custodian. The Supreme Court held that contrary to the District Court's interpretation, Johnson did apply to the case and that Johnson applied to any case in which a custody modification would have the effect of substantially changing the children's primary residence, requiring that the District Court must first meet the jurisdictional requirements of 40-4-219. However, the Supreme Court found that a literal application of that statute would cause an absurd result by its application only to movement of a child to another state and not to instances in which the child is moved from one end of the state to another or to another country. For this reason, the Supreme Court held that if a change has occurred in the circumstances of the child or the child's custodian, causing the children to move from one location to another in a manner that would hinder the effectiveness of the custody arrangement, then the jurisdictional requirements of 40-4-219 have been met and the District Court may modify the custody arrangement pursuant to 40-4-212. The Supreme Court then applied the rule to the case before it and concluded that the modification of the custody arrangement changing the custody of Kimberly's ex-husband from 160 days to 75 days annually was in the best interests of the children, as demonstrated in the record. In re Marriage of Syverson, 281 M 1, 931 P2d 691, 54 St. Rep. 32 (1997), followed in In re Marriage of Oehlke, 2002 MT 79, 309 M 254, 46 P3d 49 (2002).

Repeal by Implication Not Favored: The Supreme Court looks with disfavor upon repeal by implication. Without an express declaration by the Legislature that an enactment repeals an existing law, a later statute will not repeal an earlier law unless the two are plainly and irreconcilably repugnant to or in conflict with each other. W.R. Grace & Co. v. Dept. of Revenue, 238 M 439, 779 P2d 470, 46 St. Rep. 1399 (1989), followed in Ross v. Great Falls, 1998 MT 276,

291 M 377, 967 P2d 1103, 55 St. Rep. 1127 (1998). See also Ritchie v. Ennis, 2004 MT 43, 320 M 94, 86 P3d 11 (2004).

Mandatory Teacher Retirement Impliedly Repealed: Plaintiff was a tenured elementary school principal in Anaconda. In March 1977, she received notification that because she was 65 years of age her contract would not be renewed. This termination was accomplished by a majority vote of the board of trustees for the school district in accordance with 20-4-203(2) and board policy. Plaintiff sought a redetermination by the board and also appealed to the School District Superintendent. No action was taken. Plaintiff then filed a discrimination complaint with the Human Rights Commission. The Commission found 20-4-203(2) to be a statutory exception to the antidiscrimination provisions of Title 49, ch. 2 and 3. The District Court held that 20-4-203(2) was impliedly repealed by the adoption of 49-2-303(1) and 49-3-201. The Supreme Court affirmed, saying that while repeal by implication is not favored, the application of the rule that the latest enactment of the Legislature prevails best effectuates the intent of the Legislature in this instance. The Supreme Court said that the manner in which the Legislature enacted Title 49 clearly depicted the legislative intent that there be no discrimination in the lives of Montana citizens in certain areas, including employment. Section 20-4-203(2) permits discrimination based solely on age with no qualifications or justifications bringing it within the limited exceptions of Title 49. Because the mandatory retirement provision bore no relationship to job performance, it was held impliedly repealed. Dolan v. School District, 195 M 340, 636 P2d 825, 38 St. Rep. 1903 (1981), distinguished in Ross v. Great Falls, 1998 MT 276, 291 M 377, 967 P2d 1103, 55 St. Rep. 1127 (1998).

Statutory Construction — Initiatives: The rules applicable to judicial interpretation of initiatives are the same as those applying to legislation enacted by the Legislature. St. Bar of Mont. v. Krivec, 193 M 477, 632 P2d 707, 38 St. Rep. 1322 (1981), followed in State ex rel. Palmer v. Hart, 201 M 526, 655 P2d 965, 39 St. Rep. 2277 (1982).

Questions of Statutory Construction — Court Determination: All questions of law, including the construction of statutes, are to be decided by the court and not by the jury. Therefore, it was not error for the court to refuse plaintiff's instruction regarding statutory construction. Stenberg v. Neel, 188 M 333, 613 P2d 1007 (1980).

Interpretation of Constitution: To determine the meaning of Art. II, sec. 20, Mont. Const., the Supreme Court employs the same rules of construction employed to construe statutes. The intent of the framers should be determined from the plain meaning of the words used. If that is possible, we apply no other means of interpretation. St. v. Cardwell, 187 M 370, 609 P2d 1230 (1980). See also, as to the intent of the framers, Woirhaye v. District Court, 1998 MT 320, 292 M 185, 972 P2d 800, 55 St. Rep. 1298 (1998).

Part 1
General Provisions

Part Case Notes

Preclusion of Wrongful Discharge Suit by Collective Bargaining Agreement Not Unconstitutional Impediment to Access to Courts: When plaintiff filed a wrongful discharge claim, defendant pointed out that the employment was covered by a union collective bargaining agreement (CBA) and that 39-2-912(2) precludes an employee covered by a CBA from seeking relief under the Wrongful Discharge From Employment Act. Plaintiff argued that if she was precluded from bring a wrongful discharge claim solely because her employment was covered by a CBA, then 39-2-912 unconstitutionally violated her access to courts, full redress, and a jury trial. However, constitutionality of a statute is presumed unless the person challenging it proves unconstitutionality beyond a reasonable doubt. Here, plaintiff presented nothing to overcome the presumption of constitutionality. Plaintiff's argument concerning lack of legal redress also failed because a possible action against the union was still available. LaFournaise v. Mont. Developmental Center, 2003 MT 240, 317 M 283, 77 P3d 202 (2003).

Applicability of Act When Unconstitutional Part Eliminated: If, when an unconstitutional part of an act is eliminated, the remainder is complete in itself and capable of being executed in accordance with the apparent legislative intent, the remainder of the act must be sustained. Tax Lien Serv. v. Hall, 277 M 126, 919 P2d 396, 53 St. Rep. 614 (1996).

Severability Clause in Bill — Provisions Held Severable: The Supreme Court held that the retirement adjustment payment provisions contained in Ch. 823, L. 1991, were void because they were in violation of 4 U.S.C 111. Citing Mont. Auto. Ass'n v. Greely, 193 M 378, 632 P2d 300 (1981), the Supreme Court held that the income tax portions of Ch. 823 were not affected by striking the adjustment provisions contained in sections 4 and 5 of that chapter. Those sections were

segregable from the remainder of the act from an administrative and operational perspective. The inclusion of a severability clause raised a presumption that the Legislature would have enacted the law without the portion held invalid, and nothing else in the act contradicted that presumption. Sheehy v. Pub. Employees Retirement Div., 262 M 129, 864 P2d 762, 50 St. Rep. 1477 (1993).

Severability Clause in Bill — Entire Act Void: A legislative act is void in its entirety despite the presence of a severability clause when core provisions of the act are unconstitutional. White v. St., 233 M 81, 759 P2d 971, 45 St. Rep. 1310 (1988).

When One Must Look to Other Statutes to Determine Prohibited Conduct — Statute Establishing Jurisdiction and Penalty Not Deficient: District Court dismissed a charge of driving under the influence of alcohol, third offense, because defendant's first offense was a violation of 61-12-601 (now repealed and replaced by 61-5-217 and 61-8-723) when he was a minor and the court found he had only one prior conviction as an adult under 61-8-401. The court held that the current charge was DUI, second offense, and that it lacked jurisdiction to hear the charge. On appeal, the state argued that 61-12-601 (now repealed and replaced by 61-5-217 and 61-8-723) was unconstitutionally vague because it (1) did not establish a crime but merely provided a forum where other traffic crimes were to be prosecuted if a juvenile driver was involved; and (2) established penalties the court may impose. The Supreme Court affirmed the dismissal, holding that a statute is not deficient merely because one must look to other statutes to determine prohibited conduct, in this case whether the minor had unlawfully operated a motor vehicle. St. v. Gee, 222 M 498, 723 P2d 934, 43 St. Rep. 1452 (1986).

Administrative Interpretation of Statute: In determining the meaning of a statute, deference must be given to the interpretations given the statute by the officers and agencies charged with its administration. St. v. Midland Materials Co., 204 M 65, 662 P2d 1322, 40 St. Rep. 666 (1983).

Administrative Rule Void When Contrary to Longstanding Administrative Interpretation: The Department of Revenue's longstanding administrative interpretation of the meaning of "on the same street" as used in 16-3-306 has the force and effect of law due to the repeated reenactment of that section by the Legislature without change in the operative language that no license be issued to a business "on the same street" and within 600 feet of a church or school. Thus, the interpretation could not be changed, and an administrative rule making a change is invalid. Hovey v. Dept. of Revenue, 203 M 27, 659 P2d 280, 40 St. Rep. 272 (1983).

Penal Statutes — Grounds for Declaring Void: Statutes imposing penalties, either civil or criminal, must be clear and explicit, and if they are so vague and uncertain in their terms as to convey no meaning or if the means of carrying them out are not adequate or effective, the courts must declare them void. Missoula High School Legal Defense Ass'n v. Supt. of Pub. Instruction, 196 M 106, 637 P2d 1188, 38 St. Rep. 2164 (1981).

Penal Statutes — Education Funds: Section 20-1-301, providing that if a school district does not provide 180 days of instruction it is not entitled to state interest and income funds and the forfeited funds will be apportioned to the other districts in the county, is a penal statute and must thus be strictly construed. Missoula High School Legal Defense Ass'n v. Supt. of Pub. Instruction, 196 M 106, 637 P2d 1188, 38 St. Rep. 2164 (1981).

Legislative Intent — Implied Repeal of General Statutes by Later Comprehensive Act: While implied repeals are not favored where an irreconcilable conflict exists between earlier and later statutes, the courts do not hesitate to declare the earlier statute repealed, especially if the later act is a comprehensive act establishing elaborate inclusions and exclusions of persons, things, and relationships ordinarily associated with the subject. In re Estate of Holmes, 183 M 290, 599 P2d 344 (1979).

Part Law Review Articles

Reconstructing the Plain Language Rule of Statutory Construction: How and Why, Goodman, 65 Mont. L. Rev. 229 (2004).

1-2-101. Role of the judge — preference to construction giving each provision meaning.

Case Notes

Attached Smoking Shelters Subject to Montana Clean Indoor Air Act: Although the smoking structures attached to the casinos had two small vents near the top of the exterior walls, the structures constituted more than mere roofed shelters and were "places of work" within the meaning of the Montana Clean Indoor Air Act. The smoking structures had four walls, multiple large glass windows, inside entrances, roofs, carpeting, heating, air conditioning, electricity, and gaming machines. MC, Inc. v. Cascade City-County Bd. of Health, 2015 MT 52, 378 Mont. 267, 343 P.3d 1208.

Coal Contract Sales Price Includes Certain Additives — Plain Language of Statute and Legislative History Confirm Taxation of Coal Additives Prior to Shipment: Following audits of the plaintiff coal mine operator for 2005-2007, the Department of Revenue assessed additional coal severance taxes and penalties. In addition to a valuation issue, the assessment included recovery of taxes on two items that were added to coal before it was shipped on a train. The additives included a freeze-proofing agent and dust suppressants. The plaintiff responded by filing a declaratory relief action in District Court, alleging that the additives should not be part of the sales price, and that legislative enactments were being applied retroactively. The District Court held that the additives were subject to coal taxes based on both the plain language of the definition "contract sales price" in 15-35-102 and the legislative history. On appeal, the Supreme Court affirmed, reasoning that the statute was broad enough to assess taxes based upon the costs associated with the preparation of coal for shipment, and that later legislative amendments provided further explanation of this practice. Cloud Peak Energy Resources, LLC v. St., 2015 MT 10, 378 Mont. 54, 340 P.3d 1258.

Hashish Not Marijuana — Definitions Harmonized: A medical marijuana card that was issued pursuant to the former Medical Marijuana Act as set forth in 50-46-101 through 50-46-210 (now repealed) did not entitle the defendant to possess hashish, which is specifically differentiated in 50-32-101. The Act was clear and unambiguous on its face, and the District Court's interpretation appropriately harmonized the statutes. St. v. Pirello, 2012 MT 155, 365 Mont. 399, 282 P.3d 662.

Failure to Consult With Subdivider Not Error When Plat Application Denied — Plain Meaning Rule: When the Gallatin County Board of County Commissioners denied an application for approval of a subdivision, it was not error for the Board to refuse to consult with the subdivider regarding mitigation. Under the language of 76-3-608, and in accordance with the plain meaning rule of interpreting statutes, consultation with the subdivider is required only when mitigation is required. MM&I, LLC v. Bd. of County Comm'rs, 2010 MT 274, 358 Mont. 420, 246 P.3d 1029.

District Court Not Required to Impose Mandatory Requirement When Statute Is Now Discretionary: The District Court did not err in failing to give credit for pretrial detention time against a fine when, before the defendant's arrest, the statute had been amended to read that the credit "may" be allowed as opposed to "must" be allowed. St. v. Hafner, 2010 MT 233, 358 Mont. 137, 243 P.3d 435.

No Exception to Sixty-Day Rule for Prosecutor's Filing of Notice to Seek Death Penalty — Lack of Prejudice to Defendants Irrelevant: The defendants petitioned the Supreme Court to take supervisory control and reverse the trial court's decision that the prosecutor's failure to file the notice to seek the death penalty within the 60 days required by rule was acceptable because the late filing did not prejudice the defendants. The defendants argued that the late filing was a violation of their rights to due process under the federal and state constitutions. The Supreme Court held that it did not have to resort to a due process analysis but that the issue could be decided on the basis of Art. VII, sec. 2(3), Mont. Const., granting the Supreme Court its rulemaking authority. The Supreme Court noted that it had amended Standard 1.1.a. in 2002 to include the 60-day notice rule and that the Legislature had not exercised its right to disapprove the rule in the two following legislative sessions. The state argued that the 60-day rule was subject to exceptions, stating that in the present case, the defendants and their counsel were well aware that the death penalty was a potential punishment and that the notice was filed sufficiently in advance of the trial to afford the defendants ample opportunity to defend against a capital case. The Supreme Court stated that the state's reliance on St. v. Sol, 282 M 69, 936 P2d 307 (1997), for the proposition that the defendants were entitled only to adequate notice was misplaced. The Supreme Court held that even if the defendants' rights to due process were met by adequate notice, that did not nullify their argument that the 60-day notice rule is a mandate. The defendants argued that the plain language of the 60-day rule was clear and left no room for the trial court to inject the concept of allowing a late notice if a defendant is not prejudiced by the delay. The Supreme Court agreed and held that the court rules were subject to the same rules of interpretation as statutory law and the notice rule was clear on its face that a prosecutor has only 60 days after arraignment to file the notice of intent to seek the death penalty. The Supreme Court pointed out that the rule states that the prosecutor "shall" not "should" or "may" file the notice within 60 days and that the use of shall creates a mandate for when the notice must be filed. Miller v. District Court., 2007 MT 149, 337 M 488, 162 P3d 121 (2007).

Harvest-Level Accounting of Timber Sales Not Required: Plaintiff challenged the methodology used by the state Board of Land Commissioners in approving the harvest and sale of timber in state forests, asserting that 77-1-202 required harvest-level accounting. The District Court

granted summary judgment to defendants, ruling that the statute did not require the Board to reconcile timber sale costs and benefits at the harvest level. On appeal, the Supreme Court noted that the statute, on its face, does not require accountings at all, but rather requires the Board to secure the largest measure of legitimate and reasonable advantage to the state. The court declined to insert what has been omitted from the statutory language, despite plaintiff's contention that a comprehensive economic evaluation was implicit in the statute. The court held that it could not be concluded that the Board has not secured or could not secure the largest measure of benefit from timber sales without harvest-level accounting, given the multiple purposes that the Board must fulfill with regard to school trust lands, the broad discretion and deference that the law provides to the Board in administering school trust lands, and current statutory accounting requirements. Thus, the Board is not legally required to conduct harvest-level review of timber sales and did not violate 77-1-202 when it decided to forego harvest-level financial reconciliation in a timber sale. Summary judgment was affirmed. Friends of the Wild Swan v. Dept. of Natural Resources and Conservation, 2005 MT 351, 330 M 186, 127 P3d 394 (2005). See also State ex rel. Thompson v. Babcock, 147 M 46, 409 P2d 808 (1966), and Montanans for Responsible Use of School Trust v. State ex rel. Bd. of Land Comm'rs, 1999 MT 263, 296 M 402, 989 P2d 800 (1999).

City Resolution Allowing Implied Consent to Annexation Upon Continued Use of Utility Services Affirmed: The city of Whitefish adopted a municipal resolution requiring that property owners consent to annexation in order to continue to receive city utility services and allowing the city to imply consent to annexation from property owners that continued to receive the services after they received notice requiring them to disconnect from the utilities. Property owners contended that the resolution was invalid, but the District Court held the resolution valid, and the Supreme Court affirmed. The Attorney General held in 46 A.G. Op. 12 (1995), that a municipality may establish a rule requiring consent to annexation as a condition for continued receipt of services, and that opinion is in accord with 69-7-201. Further, the utility rule in this case put the burden on the property owner to arrange to disconnect from services if protesting annexation, so once proper notice was given, under 7-2-4710 and 28-2-503 the city's procedure to imply consent was a proper method to determine if a property owner wished to continue to receive city services or to protest annexation. Gregg v. Whitefish City Council, 2004 MT 262, 323 M 109, 99 P3d 151 (2004).

Charge of Assault With Weapon Limited to Intended Victim: After threatening to shoot his estranged wife's boyfriend during a telephone call, Smith was charged with one count of assault with a weapon for causing reasonable apprehension in the wife that the boyfriend would be shot and a second count for causing reasonable apprehension in the boyfriend that he would be shot. As part of a plea agreement, the second count was dismissed. Smith then moved to dismiss the first count on grounds that use of the word "another" in the statute meant that reasonable apprehension of serious bodily injury was apprehension experienced by the intended victim, not by a third-party victim who suffers apprehension of reasonable harm to the intended victim. The Supreme Court agreed. Thus, to convict Smith of assault with a weapon required that Smith caused reasonable apprehension of serious bodily injury in the boyfriend. Although that crime was properly charged in the second count, that count was dismissed. The first count was not a proper charge and should have been dismissed, and the District Court erred in not doing so. St. v. Smith, 2004 MT 191, 322 M 206, 95 P3d 137 (2004).

Order for Restitution Upon Imposition of Deferred or Suspended Sentence — 1999 Amendments to Sentencing Statute Clarified: Heath was convicted of theft and possession of burglary tools and sentenced to 10 years in prison with 2 years suspended upon conditions, including payment of restitution. Heath appealed on grounds that the 1999 amendments to 46-18-201 no longer allowed a sentencing court to impose restitution as a condition of a suspended or deferred sentence. Upon amendment in 1999, an internal reference in 46-18-201(5) was not changed to reflect the renumbering of the other subsections, which resulted in an ambiguity in the plain language of the 46-18-201, potentially rendered 46-18-237 and 46-18-251(2) meaningless, created uncertain directives for payment of restitution for all victims in 46-18-241(1) and 46-18-244(2), and created a potentially absurd application of 46-18-201(1). Because of the potentially absurd consequences of the 1999 amendment, the Supreme Court looked beyond the words of the statute and inquired whether the Legislature intended to make any change in the substance and effect of 46-18-201. The court concluded that the 1999 amendment was a simple codification error that resulted in a cross-reference problem that was completely inconsistent with legislative intent to authorize sentencing courts to impose restitution when necessary for rehabilitation or for the protection of the victim or society if there is an appropriate correlation to the offense committed. Heath's argument failed, and the imposition of restitution as a condition of Heath's suspended sentence

was affirmed. (Note: The erroneous internal reference in 46-18-201(5) was deleted in 2003.) St. v. Heath, 2004 MT 126, 321 M 280, 90 P3d 426 (2004), followed in St. v. McDanold, 2004 MT 167, 322 M 31, 97 P3d 1076 (2004), and St. v. McIntire, 2004 MT 238, 322 M 496, 97 P3d 576 (2004).

Oil Well Not Considered Mine to Which Right-of-Way May Be Obtained Through Eminent Domain — No Condemnation Power of Private Individuals and Corporation Except Through Legislative Grant — Condemnation Statutes Strictly Construed: Plaintiff filed a federal action seeking to condemn an access easement and right-of-way across defendant's ranch land for access to drill and operate oil wells. The federal District Court certified two questions to the Montana Supreme Court regarding whether: (1) exploration and development of a federal oil and gas lease are considered a mine that constitutes a public use under 70-30-102; and (2) 82-2-201 grants the owner of a federal oil and gas lease the power, as the owner of a "mining claim", to condemn a right-of-way across land of another for access to explore and develop the lease. The Supreme Court answered both questions in the negative. Private individuals and corporations, like state agencies, have no inherent power of eminent domain, so their authority to condemn derives only from a legislative grant. Public uses for which the power of eminent domain are granted must be interpreted pursuant to the plain language set forth by the Legislature and may not be implied. Because eminent domain interferes with the fundamental constitutional right to the private ownership of real property, any statute that allows condemnation of private property must be strictly construed, giving the statute its plain interpretation but favoring the person's fundamental rights. Under the plain meaning of 70-30-102, oil wells are not considered mines to which rights-of-way for roads may be obtained through eminent domain proceedings. Further, exploration and development of a federal oil and gas lease are not a mine that constitutes a public use, so the owner of an oil and gas lease has no power under 82-2-201 to condemn a right-of-way. McCabe Petroleum Corp. v. N Bar Ranch, LLC, 2004 MT 73, 320 M 384, 87 P3d 995 (2004), following St. v. Aitchison, 96 M 335, 30 P2d 805 (1934), and Bozeman v. Vaniman, 264 M 76, 869 P2d 790 (1994), and distinguishing Mid-Northern Oil Co. v. Walker, 65 M 414, 211 P 353 (1922), Rice Oil Co. v. Toole County, 86 M 427, 284 P 145 (1930), and Mont. Talc Co. v. Cyprus Mines Corp., 229 M 491, 748 P2d 444 (1987).

Dial-Up Internet Service Allowed Under Rural Electric and Telephone Cooperative Act: Plaintiffs, who were members of a rural telephone cooperative, provided dial-up Internet services. When the cooperative entered the market to provide similar competitive services, plaintiffs sued on grounds that the Rural Electric and Telephone Cooperative Act prohibited the cooperative from engaging in Internet services. The District Court held for the cooperative, plaintiffs appealed, and the Supreme Court affirmed. Although the Legislature did not foresee the Internet when the Act was adopted, the plain language of the Act was to be construed liberally in allowing rural telephone cooperatives to provide adequate telephone service as technology advanced. Internet dial-up service, although not specifically enumerated in 35-18-105, is sufficiently similar to telephone service to be allowed under the Act. Weber v. Interbel Tel. Co-op, Inc., 2003 MT 320, 318 M 295, 80 P3d 88 (2003).

No Power of Guardian to Bring Dissolution Proceeding on Behalf of Incapacitated Person: When George's health began to fail, his daughter Judy was appointed temporary guardian. George subsequently filed for divorce from Agnes, but the District Court ultimately found that George lacked the capacity to bring a dissolution action. Judy requested and was granted permanent guardianship and conservatorship over George and filed an amended dissolution petition on George's behalf. The petition was granted, and Agnes appealed. The Supreme Court noted that under 72-5-321, a guardian of an incapacitated person has the same powers, rights, and duties respecting the ward that a parent has respecting an unemancipated child. The court also cited former Rule 17(c), M.R.Civ.P. (now superseded), as authority for a guardian to litigate on the behalf of a ward. However, the specific provisions of 72-5-321 control over the general provisions of former Rule 17(c), so the only proceedings that the guardian of an incapacitated person may bring on behalf of the ward are those types of proceedings that a parent may bring on behalf of an unemancipated minor child, and this does not include the right to bring a dissolution proceeding. Therefore, because nothing in 72-5-321 grants a guardian of an incapacitated person the authority to bring a dissolution action on behalf of a ward, the District Court committed reversible error in holding otherwise. In re Marriage of Denowh, 2003 MT 244, 317 M 314, 78 P3d 63 (2003).

No Requirement That Private Property Be Available for Public Use Before Landowner Liability Shield Applies — Landowner Immune From Suit Absent Consideration or Evidence of Misconduct: Saari went inner tube sledding with a church group on a hill at a ski resort after the resort was closed for the day. The group paid no fees to use the hill and did not rent

or purchase equipment from the resort operator. During that evening, Saari lost control and crashed in a creek bed, suffering injuries which subsequently caused Saari's death. Saari's estate sued the resort operator on six negligence counts, including survival action, wrongful death, negligence, premises liability, attractive nuisance, and infliction of emotional distress. The District Court held that 70-16-302 precluded liability by the operator because there was no duty of care owed to Saari and granted summary judgment to the operator on all counts. The estate appealed, but the Supreme Court affirmed. By its terms, 70-16-302 provides for landowner liability when a recreational user gives valuable consideration to the landowner in exchange for using the property or when the landowner acts with willful or wanton misconduct. While conceding that Saari paid no consideration for use of the ski hill, the estate nevertheless argued that the operator generally benefited from after-hours sledders, which constituted consideration. However, no legal authority was advanced for the proposition that economic benefits received at a different point in time constituted valuable consideration given by Saari on the night in question, and these speculative statements did not give rise to a genuine issue of material fact. Moreover, the operator's failure to prevent or supervise after-hours sledding did not constitute willful or wanton misconduct. An absence of evidence cannot establish the existence of a genuine issue of material fact. Finally, the estate cited Simchuk v. Angel Island Community Ass'n, 253 M 221, 833 P2d 158 (1992), for the proposition that a question of fact existed regarding whether the property was open to the public. Under Simchuk, if the land upon which an injury occurs is not available for public use, the landowner does not enjoy the limited liability afforded by 70-16-302. However, a public use requirement would essentially negate the "without permission" language of the statute and exceed the parameters of the statute, and because the statute contains no express language that property be open for public use before the liability shield applies, the Supreme Court overruled Simchuk to that extent. Summary judgment on all counts was proper. Saari v. Winter Sports, Inc., 2003 MT 31, 314 M 212, 64 P3d 1038 (2003).

Display of License Plate in Windshield Rather Than on Bumper in Compliance With Law — Suppression of Evidence Proper Based on Illegal Investigatory Stop: A Deputy Sheriff observed a truck that appeared to have no front license plate pulling onto the highway, and the officer performed an investigatory stop based on a suspected violation of 61-3-301, which requires that license plates be conspicuously displayed and securely fastened on the front and rear of a vehicle. Lacasella's front license plate was secured with duct tape to the inside lower driver's side corner of the windshield, rather than fastened to the bumper. As a result of the stop, Lacasella was arrested for DUI and for driving with a suspended or revoked license. Lacasella pleaded guilty, but reserved the right to appeal the denial of his motion to suppress evidence based on the allegation that the arresting officer had no particularized suspicion to make the stop. The District Court held that the inside of the front windshield did not constitute the front of the vehicle and that the license plate was not unobstructed from plain view when displayed in the window because glare could prevent the license plate from being viewed at night. The court also concluded that even if the officer had seen the license plate in the window, the officer was still permitted to make an investigatory stop to ensure that the license plate was securely fastened to the vehicle. The Supreme Court considered the issue and reversed. Under the plain language of 61-3-301, Lacasella's license plate was clearly and conspicuously displayed and unobstructed from plain view. In believing that the license plate must be secured to the bumper, the officer misconstrued 61-3-301, and observations made by an officer who does not understand the law are not objectively grounded in law and cannot be the basis of a particularized suspicion. Thus, the officer did not have the objective data necessary to justify the investigatory stop, and the evidence obtained subsequent to the illegal stop should have been suppressed. Further, the District Court's conclusion that even if the officer had seen the license plate in the window, the officer was still permitted to make an investigatory stop to ensure that the license plate was securely fastened to the vehicle was also erroneous. Such a holding would justify an investigatory stop of every vehicle in Montana. Law enforcement is not permitted to make an investigatory stop unless an officer observes objective data that gives rise to an inference that an individual is engaged in wrongdoing, and that objective data did not exist in this case. St. v. Lacasella, 2002 MT 326, 313 M 185, 60 P3d 975 (2002).

Board of County Commissioners Compelled to Follow Clear Statutory Language and Allow Gravel Pit in Nonresidential Area: Plaintiff owned agricultural property adjacent to a school and sought to develop a gravel pit on the property. Plaintiff applied for the appropriate special review with the Board of County Commissioners. The Board determined that a gravel pit would interfere with surrounding property uses and would violate the rights of people who lived and attended school nearby to a clean and healthful environment, citing 82-4-431 and 82-4-432 as authority for

the Board's right to deny the special review. Plaintiff argued that under 76-1-113 and 76-2-209, local planning boards may not prevent the operation of a gravel pit in a nonresidential area. The District Court concluded that plaintiff accurately construed the statutes and that the Board could not deny a gravel pit in a nonresidential area. The Supreme Court affirmed. The Board ruled as if either 76-2-209 did not exist or the statute unconstitutionally deprived residents of a clean and healthful environment, but as an Executive Branch agency, the Board violated the separation of powers doctrine by ruling on the constitutionality of the statute. The statutory language was clear and unambiguous, and the Board was compelled to follow the legal mandate and allow the gravel pit. Further, because the statutes were clear, the District Court was not required to reach the constitutional question and did not err in failing to address the constitutionality of the statute. Merlin Myers Revocable Trust v. Yellowstone County, 2002 MT 201, 311 M 194, 53 P3d 1268 (2002). See also St. v. Still, 273 M 261, 902 P2d 546 (1995), and Goldman Sachs v. District Court, 2002 MT 83, 309 M 289, 46 P3d 606 (2002).

Standard of Review for Statutes Applicable to Administrative Rules — Rules of Statutory Construction Inapplicable Absent Ambiguity in Statute or Rule — Deference Afforded Longstanding Agency Interpretation of Administrative Rule: The Supreme Court generally applies the same principles in construing administrative rules as it applies to statutes. If the plain meaning of a statute or rule can be determined from the language used, the court is not at liberty to add or detract from the language, and absent ambiguity in the language, the court may not consider legislative history or other means of statutory construction. When an agency's interpretation of an administrative rule or statute has stood unchallenged for a considerable length of time, it will be regarded as having great importance in arriving at the proper construction. However, even when a particular meaning has been ascribed to a statute by an agency through a long and continuous course of consistent interpretation, that interpretation will be afforded respectful consideration but is still not binding on the courts. Glendive Medical Center, Inc. v. Dept. of Public Health and Human Services, 2002 MT 131, 310 M 156, 49 P3d 560 (2002).

Requirement That Officer Provide Certain Information to Person Lawfully Stopped for Investigation or Stop and Frisk: Prior to a hearing on his petition for reinstatement of his driver's license, which was revoked after his refusal to take a Breathalyzer test, Krause moved to suppress various statements made to the arresting officer. Krause argued that under Montana's stop and frisk statute, before asking where Krause had been and whether he had been drinking, the officer was required pursuant to 46-5-402(4) (now repealed) to inform Krause that he was a peace officer, that the stop was not an arrest but rather a temporary detention for investigative purposes, and that, unless arrested, Krause would be released upon completion of the investigation. The motion to suppress was denied, and Krause appealed. The state argued that 46-5-402(4) (now repealed) applied only if the officer had reason to suspect that Krause was armed and dangerous, as provided by 46-5-402(1) (now repealed), asserting that this was an investigative stop governed by 46-5-401 rather than a stop and frisk governed by 46-5-402 (now repealed), and that because 46-5-401 does not contain the same information requirement as 46-5-402 (now repealed), it was not necessary that the officer inform Krause as required in 46-5-402(4) (now repealed). The Supreme Court agreed with Krause. By it terms, the stop and frisk statute clearly and unambiguously applies to the investigative stop statute as well. Therefore, a peace officer is also required to give the warning contemplated in 46-5-402(4) (now repealed) when a person is stopped for a DUI investigation, even when there is no intention to frisk, and the District Court erred when it did not suppress statements made by Krause prior to the officer giving the warning. (See 2003 amendment.) St. v. Krause, 2002 MT 63, 309 M 174, 44 P3d 493 (2002).

Whistle Statute Applicable to Any Railroad Crossing, Not Just Public Railroad Crossing: Langemo was injured in a collision with a Montana Rail Link train at a private railroad crossing. Langemo contended that the railroad was liable for negligence per se under 69-14-562 (now repealed) because no whistle post was ever installed at the crossing, nor did the engineer sound the train whistle when approaching the crossing, in accordance with a longstanding railroad policy of not sounding the whistle at private crossings. The District Court applied the definition of road in 60-1-103, in which the word denotes a public way, and concluded that the whistle statute required bells and whistles to be sounded only at public crossings and granted summary judgment for the railroad. The Supreme Court disagreed and reversed. The District Court's interpretation violated basic rules of statutory construction and misinterpreted the applicable statutes. The whistle statute's use of the phrase "any highway, road, or railroad crossing", in its ordinary and usual meaning, meant every railroad crossing, not just public crossings. The whistle statute was not expressly repealed by the highway code, nor did the general highway code enacted in 1965 impliedly repeal the specific whistle statute of 1873. (However, note that

2001 amendments to 69-14-562 (now repealed) now explicitly require that railroad bells and whistles be sounded only at public crossings.) Langemo v. Mont. Rail Link, Inc., 2001 MT 273, 307 M 293, 38 P3d 782 (2001).

Right of Defendant to Plead Guilty Over State's Objection — Erroneous Refusal to Accept Guilty Plea: Peplow was charged with and convicted of DUI, driving with a suspended or revoked license, driving without insurance, failing to report an accident, and tampering with evidence. Prior to trial, Peplow tried to enter guilty pleas to the driving with a suspended or revoked license and driving without insurance counts, but the trial court ruled that it was not required to accept the pleas because Peplow's actions giving rise to the counts were part of the res gestae and probative of the issue of impairment; the trial court proceeded to trial on all counts. Peplow appealed on grounds that the trial court erred in refusing the guilty pleas. In a case of first impression, the Supreme Court considered a defendant's right to plead guilty over the state's objection. The court noted the numerous statutory procedural safeguards in place to ensure that: (1) a guilty plea is made knowingly, voluntarily, and intelligently; (2) there is a factual basis for the plea; (3) the court is not bound by any plea agreements; and (4) a defendant may not withdraw a guilty plea if the plea agreement is not accepted. The Supreme Court cited Lamb v. Missoula Imports, 230 M 183, 748 P2d 965 (1988), for the proposition that when the word "may" is used to confer power upon an officer, court, or tribunal and the public or a third person has an interest in the exercise of power, then the exercise of power becomes imperative. Under 46-16-105, a plea of guilty "may" be accepted before or during trial. The Supreme Court construed this language to mandate the acceptance of a guilty plea as long as the statutory requirements are met. Further, under 46-12-204, a defendant may plead guilty or not guilty without limitation on the right to plead. St. v. Peplow, 2001 MT 253, 307 M 172, 36 P3d 922 (2001).

Requirement That Parole Board Member With Knowledge of Native American Affairs Participate in Proceedings Regarding Native Americans: George, a Native American, contended that he was entitled to have the member of the Board of Pardons and Parole with knowledge in Native American affairs participate in his parole review. The state contended otherwise, pursuant to a plain reading of 2-15-2302, and asserted that had the Legislature intended to require participation by the particular Board member with knowledge in Native American affairs, it could have stated so directly or at least have required that the member with that knowledge be appointed as a regular Board member. The Supreme Court agreed with George. Cognizant of the role of the judge to examine the substance of statutes without inserting what has been omitted or omitting what has been inserted, the court agreed with the state that at least at first blush, 2-15-2302 does not appear to require that the member of the Board of Pardons and Parole with knowledge in Native American affairs participate in parole applications by Native Americans. However, the court could think of no other plausible reason for requiring such a member on the Board, so the court ruled that the Board member with knowledge in Native American affairs is required to participate in parole applications by Native Americans and remanded George's case for de novo review with the full participation by that Board member. George v. Bd. of Pardons, 2001 MT 163, 306 M 115, 30 P3d 1065 (2001).

Erroneous Dismissal of Petition to Revoke Sentence Based on Failure to Hold Timely Hearing: Under 46-23-1012, there are two ways that an offender can come into custody for allegations of a probation violation. The first is when a judge issues a warrant for the offender's arrest, and the second is when the offender is arrested by a probation or parole officer or when a probation or parole officer authorizes a law enforcement officer to make the arrest. In this case, Goebel was arrested by a probation and parole officer. The second sentence of 46-23-1012(4) read: "After the arrest of the defendant *pursuant to this subsection*, a hearings officer for the probation and parole bureau shall hold a hearing within 36 hours of the defendant's arrest" (emphasis added). Goebel contended before the District Court that the petition to revoke his suspended sentence should be dismissed because the state did not hold a hearing within 36 hours of his arrest. The court agreed and dismissed the petition. On appeal, the state argued that the 1999 amendments to 46-23-1012(4) mandated a hearing only in the case of violators who are arrested pursuant to a warrant and that the Legislature left to the discretion of the Probation and Parole Bureau the decision of whether to hold a hearing for every other violator, while Goebel maintained that the phrase "pursuant to this subsection" required the Bureau to hold a hearing in every case of alleged parole violation before proceeding under 46-23-1013. The Supreme Court found the statutory language in subsection (4) to be clear and unambiguous and contrary to the assertions of both parties. Because a defendant may be arrested only under the provisions of subsections (1) and (2), the phrase "after the arrest of the defendant pursuant to this subsection" could not refer to the entirety of 46-23-1012, as Goebel contended, nor could it refer only to subsection (4),

as the state contended. Rather, the court held that "this subsection" related back to the reference in the previous sentence to subsection (1), which allows a judge to issue a warrant or notice to appear, so a probable cause hearing by the Probation and Parole Bureau is mandatory only when an offender has been arrested pursuant to a warrant issued by a judge. Because Goebel was not arrested pursuant to a warrant, the 36-hour rule did not apply. Despite the fact that the Supreme Court found the statute clear and unambiguous, it pointed out that this interpretation rendered the statute illogical because probable cause must be shown before a warrant is issued. It makes little sense to require a second probable cause hearing, while common sense would dictate that there should be a reasonably prompt probable cause hearing when an arrest is made without a warrant. Rather than examine the legislative history to discern the Legislature's intent in using the particular language, the court ascribed the confusion to a legislative drafting error and left correction of the language to the Legislature. St. v. Goebel, 2001 MT 73, 305 M 53, 31 P3d 335 (2001), clarified in Gundrum v. Mahoney, 2001 MT 246, 307 M 96, 36 P3d 890 (2001), in which it was held that the 36-hour requirement for a probable cause hearing applies only to probation revocation proceedings under 46-23-1012 and not to parole revocation proceedings under 46-23-1023, and followed in St. v. Johnson, 2001 MT 277, 307 M 317, 37 P3d 701 (2001).

Accident Involving Multiple Liable Insureds — Maximum Insurance Coverage Limited to Policy Amount: In a case of first impression, the Supreme Court was asked to determine whether persons insured under one policy, who are both found legally liable for causing one accident, must each be covered by the mandatory limits in 61-6-103. The District Court found that Montana's vehicle insurance omnibus statutes do not require separate, full coverage for multiple insureds when each insured is liable for independent acts of negligence arising from one accident. The court reasoned that 61-6-103 refers to each accident, not each separate act of negligence that may have contributed to causing the accident, and held that as a matter of law, once the injured person's damages resulting from the one accident exhaust the $50,000 policy limit, the insurer's obligation to cover any further claims ceases. The Supreme Court noted that if the Legislature ever intended to allow a double recovery system, it never expressly provided the language necessary for such an interpretation, but also noted that the language of 61-6-103 does not expressly prohibit double recovery. Rather, the clear statutory language provides that an owner's policy must provide a base amount of coverage, subject to limits exclusive of interest and costs, with respect to each motor vehicle, not each insured, in the event that the vehicle causes damage to persons or property, regardless of who is behind the wheel. The legislative history provided no evidence that the Legislature ever contemplated or wished to require that the minimum amounts of liability could or should be increased depending on the number of insureds found liable for causing one accident, and the Supreme Court, declining to construe the statute in any way that would insert a particular and precise meaning that had been omitted, affirmed the District Court's conclusion that the insurer was obligated under these circumstances to pay the policy limit on behalf of its insureds, and no more. Infinity Ins. Co. v. Dodson, 2000 MT 287, 302 M 209, 14 P3d 487, 57 St. Rep. 1196 (2000).

Unmarked Crosswalk at Every Intersection: Hanson was struck by Edwards's car while crossing an intersection that had no sidewalks, curbs, or painted lines delineating a crosswalk. Hanson moved for a directed verdict on grounds that because he was in an unmarked crosswalk, which gave him the right-of-way, Edwards was negligent as a matter of law. The motion was denied, and the trial court refused to instruct the jury that an unmarked crosswalk exists at every intersection pursuant to 61-1-209 (now repealed). The Supreme Court examined legislative intent and, reading 61-1-209 (now repealed) in pari materia with 61-8-502, concluded that Montana law provides for a crosswalk on any portion of a roadway at an intersection. The jury should have been so instructed, and failure to do so was reversible error. Hanson v. Edwards, 2000 MT 221, 301 M 185, 7 P3d 419, 57 St. Rep. 907 (2000).

Statute Prohibiting Impersonation of Public Servant Not Unconstitutionally Vague: In connection with his activities with the Montana "Freemen", Clay Taylor held himself out to be a Garfield County Justice of the Peace, signing numerous documents with that title, and was charged with impersonating a public servant. His wife, Karen, aided Clay in the offense, and she was charged with impersonating a public servant by accountability. Both were convicted and appealed on grounds that 45-7-209 requires proof that an actual person was impersonated or that the section is unconstitutionally vague. Presuming pursuant to this section that the statute is constitutional, the Supreme Court disagreed, affirming the conviction. The statute clearly sets forth that anyone who pretends to hold a position in public service with the purpose to induce others to submit to the pretended official authority or act in reliance on that pretense is within the proscribed conduct. It is not necessary that a person falsely pretend to hold a specific position

in public service. The statutory language is sufficient to give a person of ordinary intelligence fair notice of the conduct that is forbidden and is not unconstitutionally vague. The Taylors failed to meet the burden of proving vagueness or unconstitutionality beyond a reasonable doubt, so any doubt was resolved in favor of the statute. St. v. Taylor, 2000 MT 202, 300 M 499, 5 P3d 1019, 57 St. Rep. 794 (2000).

Sufficient Evidence to Prove Accountability in Aiding Impersonation of a Public Servant: In connection with his activities with the Montana "Freemen", Clay Taylor held himself out to be a Garfield County Justice of the Peace, signing numerous documents with that title, and was charged with impersonating a public servant. His wife, Karen, aided Clay in the offense, also signing several documents as "Jurat in Law", including a document purporting to set forth Clay's appointment as Justice of the Peace, another purporting to remove the Garfield Board of County Commissioners, and another purporting to be a summons. She was charged with and convicted of impersonating a public servant by accountability. Karen contended on appeal that evidence was insufficient to prove her accountability. The Supreme Court affirmed, citing her signature on the documents and her presence during public Freemen activities as sufficient proof of her purpose to facilitate Clay's impersonation of a Justice of the Peace. St. v. Taylor, 2000 MT 202, 300 M 499, 5 P3d 1019, 57 St. Rep. 794 (2000).

No Due Process Right to Sentence Review — Actual Incarceration Required Before Sentence Subject to Review — Suspended Sentences Precluded From Review: Holt pleaded guilty to sexual assault, received a 10-year suspended sentence, and subsequently applied for sentence review. The Sentence Review Division denied the application on grounds that Holt did not qualify for sentence review because his sentence was suspended in its entirety and involved no actual incarceration. Holt appealed, alleging violation of his due process rights. After granting Holt's writ of supervisory control pursuant to Art. VII, sec. 2(2), Mont. Const., and former Rule 17(a), M.R.App.P. (now superseded), the Supreme Court held that sentence review is not a constitutional right, but rather a system that the Legislature voluntarily created. Thus, the discretion to determine the circumstances and conditions under which sentence review will be allowed lies with the Legislature, and the state's discretion is not subject to due process concerns unless it offends some principle of justice so deeply rooted in the traditions and conscience of the people as to be ranked fundamental (see Mont. v. Egelhoff, 518 US 37, 135 L Ed 2d 361, 116 S Ct 2013 (1996)). The Sentence Review Division's interpretation of 46-18-903(1), excluding a person who is not incarcerated from sentence review, comports with the rules of statutory construction, is consistent with the sentence review statutes as a whole, reflects the intent of the Legislature, avoids absurd or unduly harsh results, and is entitled to deference because the Division is charged with administration of the sentence review statutes. Because sentence review is a statutory right of relatively recent origin, the due process clauses of the U.S. and Montana Constitutions do not demand that sentence review be available at all, nor do they limit the Legislature's restriction of sentence review to defendants who are actually incarcerated. State ex rel. Holt v. District Court, 2000 MT 142, 300 M 35, 3 P3d 608, 57 St. Rep. 560 (2000).

Claim for Common-Law Tort of Bad Faith by Third Party Not Preempted by Statute — General Statute of Limitations Applicable: The District Court dismissed Brewington's complaint against two insurance companies based on the conclusion that the complaint failed to state a claim for which relief could be granted because the claim was barred by the statute of limitations in 33-18-242 regarding third-party claimants. Brewington contended that the claim was based on the common-law tort of bad faith, not on 33-18-242. The Supreme Court construed the plain language of the statute in determining that by its terms, 33-18-242 does not prohibit a third-party claimant from bringing an action for bad faith. Both Vigue v. Evans Prod. Co., 187 M 1, 608 P2d 488 (1980), and Hayes v. Aetna Fire Underwriters, 187 M 148, 609 P2d 257 (1980), establish a common-law cause of action for bad faith that was not affected by the passage of 33-18-242. When the common law is not in conflict with a statute, the common law applies. Thus, the District Court's conclusion that 33-18-242 prohibited Brewington from pleading the common-law tort of bad faith was reversible error. Further, because the claim was brought for bad faith and not pursuant to 33-18-242, the 3-year statute of limitations in 27-2-204, not the 1-year statute of limitations in 33-18-242, applied. Brewington v. Employers Fire Ins. Co., 1999 MT 312, 297 M 243, 992 P2d 237, 56 St. Rep. 1257 (1999), distinguishing Grenz v. Orion Group, Inc., 243 M 486, 795 P2d 444, 47 St. Rep. 1346 (1990).

No Reciprocal Right to Attorney Fees: The Valeos sued Tabish for damage to the Valeos' road allegedly caused by Tabish's trucks. Tabish answered, alleging contributory negligence and requesting attorney fees pursuant to 25-10-303. The Valeos moved for partial summary judgment on the issue of fees, and the District Court denied the motion. The jury returned a verdict for

Tabish, and the District Court awarded Tabish attorney fees. The Supreme Court held that there is no reciprocal right to attorney fees under 25-10-303 because that statute grants only a plaintiff the right to attorney fees. Granting fees to a defendant pursuant to 25-10-303 would require the Supreme Court to insert language into that statute that isn't there, an act prohibited by this section. The Supreme Court dismissed Tabish's argument that fees are authorized by 25-10-101 and 25-10-102, pointing out that those statutes authorize the payment of only costs, not attorney fees. The Supreme Court also analyzed numerous cases cited by Tabish as authority for his claim that the payment of fees is reciprocal, holding that in each previous Supreme Court opinion cited by Tabish, the Supreme Court relied upon a different statute other than 25-10-303. For that reason, those cases were inapplicable to the issue before the Supreme Court. The Supreme Court therefore reversed the District Court and denied the defendant payment of his attorney fees. Valeo v. Tabish, 1999 MT 146, 295 M 34, 983 P2d 334, 56 St. Rep. 579 (1999).

Authority of District Court to Order New Criminal Trial Sua Sponte: Absent a lawful enactment by the Legislature withholding a trial court's inherent power to grant a new trial sua sponte, the court's authority to do so stands. Addressing the ambiguity in the statutory language while giving effect to all provisions of 46-16-702, the Supreme Court held that the right of a defendant to move for a new trial does not affect the court's inherent power to order a new trial sua sponte when required in the interests of justice. Given the circumstances of the court's concern for the state's "selective prosecution", the violation of the court's pretrial order precluding the giving of instructions on lesser included offenses unless presented prior to trial, the overwhelmingly contradictory witness testimony, and the court's fear that the jury was deprived of an option more supportable by the facts, the interests of justice demanded a new trial and the District Court did not err in ordering one sua sponte. St. v. Brummer, 1998 MT 11, 287 M 168, 953 P2d 250, 55 St. Rep. 30 (1998). See also St. v. Baker, 2013 MT 113, 370 Mont. 43, 300 P.3d 696, in which the Supreme Court clarified that Brummer does not excuse a defendant from filing a motion for a new trial within the timeframe required under 46-16-702, and St. v. Morse, 2015 MT 51, 378 Mont. 249, 343 P.3d 1196, in which the Supreme Court determined that an untimely motion for a new trial did not prohibit the District Court from providing a remedy when the facts warranting a new trial came from posttrial statements made by the victim after the expiration of the 30-day time limit.

Mining Held to Be Precondition for Permit Renewal — Two-Year Extension Provision Applicable to Three-Year Term for Mining — Construction and Purpose of Statute: In 1984, the Department of State Lands (now Department of Natural Resources and Conservation) issued Montco a 5-year mining permit. Montco performed no site preparation or other work during the first 3 years after the permit was issued, but Montco applied for and was granted a 2-year extension of the mining deadline. During the first 4 years of the permit, the permit was under challenge in administrative and judicial proceedings. As the 5-year term came to an end, Montco applied for a 5-year renewal, and renewal was granted by the Department. When 3 years of that 5-year period came to an end with Montco having accomplished no work at the site, Montco applied for and was granted another 2-year extension, although throughout this second 5-year period, there were no formal administrative or judicial proceedings challenging the permit. After Montco asked for another 5-year extension of the permit, it was denied by the Department, but the District Court granted summary judgment for Montco and against intervenors, requiring that another 5-year extension be granted. The Supreme Court followed the rules of statutory construction preventing part of a statute from having no effect, prohibiting a court from inserting omitted language, and prohibiting absurd results and held that: (1) the period for a 2-year renewal applies only to the first 3-year period for commencement of mining; (2) the 3-year period for commencement of mining must be renewed for 2 years if the permittee proves that mining was not commenced because the permit was being litigated; (3) renewal of the 5-year permit term may be accomplished only by an "operator", who is defined in 82-4-203 as a person "engaged in mining"; and (4) once a permit has expired after the initial 3-year period (if no extension of the time for commencement of mining is granted) or after the 2-year extension for the permittee to commence mining, the permit may not again be renewed because, in the words of 82-4-221(1), the permittee is no longer in compliance with the requirements of "this part" and the permit has therefore expired. The Supreme Court also held that an administrative rule adopted by the Department could not be construed to require a result contrary to the Supreme Court's interpretation of the statutes and that the District Court's interpretation, automatically granting a 3-year extension of the permit itself, not only made the "must expire" language of the statute meaningless but was also contrary to the purpose of the Montana Strip and Underground Mine Reclamation Act, which seeks an orderly development of coal resources while protecting a wide

range of other interests and values. The Supreme Court reversed the District Court and ordered that summary judgment be granted against Montco and denied renewal of the permit. Montco v. Simonich, 285 M 280, 947 P2d 1047, 54 St. Rep. 1150 (1997).

Applicability of Act When Unconstitutional Part Eliminated: If, when an unconstitutional part of an act is eliminated, the remainder is complete in itself and capable of being executed in accordance with the apparent legislative intent, the remainder of the act must be sustained. Tax Lien Serv. v. Hall, 277 M 126, 919 P2d 396, 53 St. Rep. 614 (1996).

Privacy Interest of Witness Held Sufficient for Closure of City Council Meeting — "Generally Known" Incident: Goyen, the Chief of Police of Troy, was not notified of a meeting of the Troy City Council on May 10 at which an incident involving Goyen and a city gravel pile ("gravel-gate") was discussed. That meeting was closed at the request of the Mayor of Troy and at the request of a witness, Denton, who testified regarding indiscretions with Goyen in a patrol car. Later, after Goyen was discharged, he brought an action arguing that Denton's privacy interest was not at issue and that, in any event, the facts of her indiscretions with him were well known in the community, so much so that the demands of Denton's privacy could not outweigh the merits of public disclosure. The Supreme Court held that the plain meaning of 2-3-203 clearly allows a witness to assert the witness's privacy interest. Citing Missoulian v. Bd. of Regents of Higher Educ., 207 M 513, 675 P2d 962 (1984), the Supreme Court held that even harmless or generally known information is subject to constitutional protection and that Denton's relationship with Goyen, while known by others, was private in nature and Denton therefore had a reasonable expectation of privacy that society would recognize. Goyen v. Troy, 276 M 213, 915 P2d 824, 53 St. Rep. 353 (1996).

Tort Claim Against Political Subdivision — No Requirement for Filing of Administrative Claim — Statute Clear and Unambiguous: Lincoln County Deputy Sheriff Stratemeyer filed a tort action against Lincoln County for failing to properly train, debrief, and counsel him to cure his posttraumatic stress disorder incurred from observing a suicide victim. The Supreme Court held that there is no requirement under 2-9-301(3) similar to the requirement under 2-9-301(1) that a tort claim against a political subdivision first be presented for administrative settlement. To the extent that such a requirement was implied in Rouse v. Anaconda-Deer Lodge County, 250 M 1, 817 P2d 690 (1991), the Supreme Court expressly overruled that case. The Supreme Court also held that 2-9-301(3) is clear and unambiguous in its lack of requirement of an administrative claim and that Stratemeyer therefore filed his tort action within the 3-year statute of limitations contained in 27-2-204. Stratemeyer v. Lincoln County, 276 M 67, 915 P2d 175, 53 St. Rep. 245 (1996).

Social Security Benefits Offset Indexed to Date of Eligibility — Statute Not Ambiguous — Rule of Liberal Construction Inapplicable: Broeker was injured in the course of his employment when a soft drink machine fell on him. In determining Social Security benefits to be offset against Broeker's workers' compensation benefits, the Workers' Compensation Court held that the state payments were to be indexed to the date on which Broeker became eligible for those payments. The Supreme Court held that Broeker was incorrect when he argued that the words "for such week" in statute were ambiguous. The Supreme Court held that the language clearly referred to the week in which benefits are paid and that a rule of liberal construction in effect at the time of Broeker's injury was inapplicable because statute was unambiguous. For these reasons, the Supreme Court held that indexing the offset to the date on which Broeker became eligible for benefits was correct. Broeker v. Great Falls Coca-Cola Bottling Co., 275 M 502, 914 P2d 967, 53 St. Rep. 235 (1996).

Failure to Accept or Deny Claim Within Thirty Days Is Acceptance as Matter of Law — Solheim Reversed — Options for Insurer: After Haag injured his shoulder while working for a school district, he filed a timely claim with the district's workers' compensation insurer. More than 2 months later, the claims adjuster for the district's insurer denied the claim. The Workers' Compensation Court, relying upon Solheim v. Ranch, 208 M 265, 677 P2d 1034 (1984), held that the insurer's failure to respond within the 30-day time period provided in 39-71-606(1) was not an automatic acceptance of the claim. The Supreme Court reversed, overruling Solheim. The Supreme Court held that in deciding Solheim, it had exceeded its proper role as a court, that 39-71-608 provides an insurer with an alternative to admitting liability, and that 39-71-609 and 39-71-610 provide an insurer with a means to subsequently deny liability after accepting liability under 39-71-606 or beginning payments with a reservation of rights under 39-71-608. The Supreme Court also noted that in this case, the insurer could not later contest the claim on the basis of fraud because the issue of fraud was not properly before the Workers' Compensation

Court. Haag v. Mont. Schools Group Ins. Authority, 274 M 109, 906 P2d 693, 52 St. Rep. 1146 (1995).

Certificate of Survey Filed Before Monuments Set Not Properly Filed Within Meaning of Subdivision Act: Stanchfield Cattle Company sought to subdivide land by dividing it into 20-acre parcels and having it surveyed. After completion of the survey, the surveyor had the certificate of survey filed, with a note on the face of the certificate stating that the monuments had not been set because of winter conditions but would be set before July 1. NFC, which held a right of first refusal on the property, sued to prevent the transfer of any property to prospective buyers, claiming that the certificate of survey had not been filed in accordance with the Montana Subdivision and Platting Act. The Supreme Court reversed the District Court decision, holding that despite whatever practices might be common among surveyors, 76-3-404(3) and an administrative rule of the Department of Commerce (now Department of Labor and Industry), ARM 8.94.3002, require that the monuments be set at the time that the certificate of survey is filed. The Supreme Court noted that it could not change the requirements of the Act and the Department rule. NFC Partners v. Stanchfield Cattle Co., 274 M 46, 905 P2d 1106, 52 St. Rep. 1115 (1995).

Cap on Benefits Payments as Temporary — Statutory Rate at Time of Injury Following Termination of Cap: The 1987 Legislature placed an arbitrary cap on the benefits payable to injured workers, as an exception to the regular benefit rate provided in 39-71-701(3)(1987). The Supreme Court construed the cap according to standard rules of statutory construction and held that according to the plain meaning of the words used, 39-71-701 was clear and unambiguous in establishing a temporary rather than permanent cap on benefit payments. Following expiration of the benefit cap on June 30, 1991, the maximum benefit rate for workers is set at the state's average weekly wage at the time of the injury. Murer v. St. Comp. Mut. Ins. Fund, 267 M 516, 885 P2d 428, 51 St. Rep. 1145 (1994).

Postconviction Relief From City Court Allowed — Plain Meaning Rule Followed: Christensen was convicted in Plentywood City Court of several traffic violations and, following conviction, filed a petition for postconviction relief in District Court. The District Court dismissed the petition based upon its conclusion that postconviction relief could be had only from judgments of a court of record. The Supreme Court reversed, holding that 46-21-101(2) clearly provides for postconviction relief from judgments of a City Court and that the statute is clear and unambiguous and should be followed. St. v. Christensen, 265 M 374, 877 P2d 468, 51 St. Rep. 542 (1994).

Workers' Compensation Court Error in Amending Termination of Benefits Statute That Legislature Had Not Amended: The Workers' Compensation Court concluded that the Legislature's failure to amend 39-71-710 to disallow retired claimants from receiving partial disability benefits, in light of the subsequent amendment of 39-71-703, was an obvious oversight. The court concluded, without any reference to legislative history, that it was not the Legislature's intent to allow such benefits. However, by its decision, the court amended the termination of benefits statute that the Legislature either failed or declined to amend and, in the process, erred by inserting into the statute what had been omitted. The Supreme Court strictly construed the statutory language, concluding that 39-71-710 (1987) did not provide for termination of benefits that were awarded pursuant to 39-71-703 (1991) when claimant retired. The case was remanded for a determination of the duration over which claimant was entitled to permanent partial disability benefits. Russette v. Chippewa Cree Housing Authority, 265 M 90, 874 P2d 1217, 51 St. Rep. 414 (1994).

Ski Area's Duties Not Limited to Statutory Duties: In response to an injured skier's allegations of negligence, the ski area asserted that its duties were limited to those set forth in 23-2-733 and that because the skier did not allege any breach of the statutory duties, the ski area was entitled to judgment as a matter of law. Applying a court's role in statutory construction to simply ascertain and declare what is contained in the section's terms and substance without inserting what has been omitted, the Supreme Court found that in neither the original enactment of 23-2-733 nor in subsequent amendments did the Legislature provide that a ski area's only duties were those enumerated in that section and that there was no other duty of due care owed by operators to skiers. The duty of due care is imposed by 27-1-701. In holding that the operator's duties were not limited to those listed in 23-2-733, the court interpreted the statute in a way that would give it effect rather than in a way that would render it unconstitutional. Mead v. M.S.B., Inc., 264 M 465, 872 P2d 782, 51 St. Rep. 348 (1994).

Construction of Conflicting Constitutional Provisions: To determine the meaning of a constitutional provision, the Supreme Court will apply the same rules of construction employed to construe statutes. As with the construction of statutes, when there are several constitutional provisions that would otherwise be inconsistent, a construction should be adopted, if possible,

that will give effect to all of them. A possible conflict between statutory law and constitutional provisions should be reconciled, if possible. State ex rel. Nelson v. District Court, 262 M 70, 863 P2d 1027, 50 St. Rep. 1447 (1993).

Intention Shown by Plain Meaning — Other Means of Interpretation Barred:

The rules of statutory construction require the language of a statute to be construed according to its plain meaning. If the language is clear and unambiguous, no further interpretation is required. The Supreme Court will resort to legislative history only if legislative intent cannot be determined from the plain wording of the statute. Lovell v. St. Comp. Mut. Ins. Fund, 260 M 279, 860 P2d 95, 50 St. Rep. 1043 (1993). See also St. v. Zabawa, 279 M 307, 928 P2d 151, 53 St. Rep. 1162 (1996).

Where the intention of the Legislature can be determined from the plain meaning of words used in a statute, the courts may not go further and apply any other means of interpretation. Tongue River Elec. Co-op, Inc. v. Mont. Power Co., 195 M 511, 636 P2d 862, 38 St. Rep. 2032 (1981).

No Coverage by Montana Labor Law for Employees Covered by Federal Fair Labor Standards Act: The claimants argued that they were covered by the provisions of Title 39, ch. 3, part 4, because the federal Fair Labor Standards Act contains a clause stating that nothing in its provisions excuses compliance with state laws creating higher standards. The Supreme Court ruled that the claimants were not covered by Montana law because the language of Title 39, ch. 3, part 4, as it read in 1985, clearly showed that the state Legislature intended to exclude workers covered by the federal Act from coverage under state law. Stewart v. Region II Child & Family Serv., 242 M 88, 788 P2d 913, 47 St. Rep. 572 (1990).

Prima Facie Constitutionality of Legislative Enactments — Limit on Court Contravention of Legislative Power: The constitutionality of a legislative enactment is prima facie presumed, and every intendment in its favor will be presumed unless its unconstitutionality appears beyond reasonable doubt. When the Legislature acts within its constitutional power, courts are unable to contravene such power on any court-presumed grounds of fairness, absent equal protection consequences. Fallon County v. St., 231 M 443, 753 P2d 338, 45 St. Rep. 748 (1988), followed in Stratemeyer v. Lincoln County, 259 M 147, 855 P2d 506, 50 St. Rep. 731 (1993). See also St. v. Clark, 1998 MT 221, 290 M 479, 964 P2d 766, 55 St. Rep. 919 (1998).

Reasonable Construction of Whole Statute Without Inserting or Omitting Anything: In construing a statute, the court must find legislative intent from the plain meaning by reasonably and logically interpreting the statute as a whole without omitting or inserting anything or determining intent from a reading of only a part of the statute. Gaub v. Milbank Ins. Co., 220 M 424, 715 P2d 443, 43 St. Rep. 497 (1986). See also Wild v. Fregein Constr., 2003 MT 115, 315 M 425, 68 P3d 855 (2003).

Review of Bill's Title — First Step in Construction: If a statute requires construction, a review of the title of the original bill is a necessary first step to aid that construction. In this case, a bill's title showed that the parents, guardian, or other responsible person was liable for a minor driver's negligence unless he signed the minor's application for a driver's license and provided proof of financial responsibility. The court would not look at a particular part of the whole statute and read it, as did appellant, to provide that there was no liability if a parent or guardian signed and provided proof, but that there was liability if both parents or some other responsible person signed and provided proof. Gaub v. Milbank Ins. Co., 220 M 424, 715 P2d 443, 43 St. Rep. 497 (1986).

Ambiguous Provision — Harmonizing, Legislative History, and Administrative Interpretation: Legislative intent may be determined in a number of ways when a statute is ambiguous. The court presumes the Legislature would not pass a meaningless statute, and the court must harmonize statutes relating to the same subject so as to give each effect. The court can look to the legislative history of the statute. Great deference and respect must be given to interpretation of the statute by persons and agencies charged with its administration. Mont. Contractors' Ass'n, Inc. v. Dept. of Highways, 220 M 392, 715 P2d 1056, 43 St. Rep. 470 (1986), followed in Albright v. St., 281 M 196, 933 P2d 815, 54 St. Rep. 132 (1997). Albright was followed in Winchell v. Dept. of Natural Resources and Conservation, 1999 MT 11, 293 M 89, 972 P2d 1132, 56 St. Rep. 48 (1999).

Construction When More Than One Statute Applicable to Situation: When several statutes apply to a situation, the statutes should be construed, if possible, in a manner that will give effect to each of them. Schuman v. Bestrom, 214 M 410, 693 P2d 536, 42 St. Rep. 54 (1985).

Court Not to Supply Omissions: In construing a statute, courts cannot insert what has been omitted. State ex rel. Palmer v. Hart, 201 M 526, 655 P2d 965, 39 St. Rep. 2277 (1982); Skrukrud v. Gallatin Laundry Co., Inc., 171 M 217, 557 P2d 278 (1976).

Plain, Unambiguous, Direct Language: The Supreme Court's function in construing legislation is to ascertain and state what, in terms or substance, is contained within the legislation; and if the language is plain, unambiguous, direct, and certain, the statute speaks for itself. It is the court's duty to construe the law as it finds it. State ex rel. Palmer v. Hart, 201 M 526, 655 P2d 965, 39 St. Rep. 2277 (1982). See also Estate of Langendorf, 262 M 123, 863 P2d 434, 50 St. Rep. 1474 (1993).

Presumption Legislature Knew What It Was Doing: In construing a statute, the court must presume that the legislative body knew what it was doing. State ex rel. Palmer v. Hart, 201 M 526, 655 P2d 965, 39 St. Rep. 2277 (1982).

Procedural, Not Substantive Provisions of Wage Payment Law Applicable to Minimum Wage Claims: Plaintiffs filed claims against their former employer, school district, for violation of Minimum Wage and Overtime Compensation Act (MWOCA). The District Court found that plaintiffs were entitled to payment of back wages from the school district but denied plaintiffs' claim for statutory penalty and attorney fees, ruling that the school district was not an "employer" within the meaning of the Montana Wage Payment Act (WPA). The Supreme Court reversed the District Court and ruled that the plain meaning of the statute indicated that it was the Legislature's intent to incorporate the remedial portions of the WPA only and that the substantive provisions of the MWOCA, including its definition of "employer", applied in this case. Sink v. School District, 199 M 352, 649 P2d 1263, 39 St. Rep. 1448 (1982).

Rules of Construction to Apply: It is not the function of the Supreme Court to insert into a statute what has been omitted, and the ordinary rules of statutory construction apply. Kadillak v. The Anaconda Co., 184 M 127, 602 P2d 147 (1979).

Statutes to Be Interpreted From Intent of Whole Act — Dangerous Drug Act: Defendant's contention based on a strict interpretation of one section of the Dangerous Drug Act would totally defeat the legislative intent behind the Act. Statutes must be read and considered in their entirety, and legislative intent may not be gained from the wording of one particular section or sentence but only from a consideration of the whole. The court's duty is to interpret individual sections of the Act in such a manner as to insure coordination with the other sections of the Act. St. v. Meader, 184 M 32, 601 P2d 386 (1979).

Reasonableness — Agency's Interpretation — Legislative History: A reasonable construction of a statute must be adopted if possible. Great deference must be shown to the interpretation given the statute by the officers or agency charged with its administration. Although the intent of the Legislature must first be determined from the plain meaning of the words used, a court can resort to the history of the statute. Dept. of Revenue v. Puget Sound Power & Light Co., 179 M 255, 587 P2d 1282 (1978).

Credit for Out-of-State Service: Section 75-2705(9), R.C.M. 1947 (since repealed), as in effect in 1954, allowed any teacher in the Montana State Teachers' Retirement System to receive credit for "out-of-state teaching employment", without distinction between service in public or in private schools. State ex rel. Sullivan v. St., 174 M 482, 571 P2d 793 (1977).

Rules of Statutory Construction: Rules of statutory construction have no application if the language of the statute is clear and unambiguous. State ex rel. Swart v. Casne, 172 M 302, 564 P2d 983 (1977).

Medical Information — Not a Condition Precedent to Attorneys' Fees: When the statute did not specifically require medical information to be furnished prior to an award of attorneys' fees, the Supreme Court would not read that requirement into the statute. Myers v. 4 B's Restaurant, Inc., 172 M 159, 561 P2d 1331 (1977).

Mutilation of Statute — Presumption Against: In the absence of a saving clause, the presumption is against the mutilation of a statute. The invalidation of one portion of a statute therefore destroys the whole. When corporation license tax was repealed as to federal banks, it was also repealed as to state banks. Sec. Bank & Trust Co. v. Connors, 170 M 59, 550 P2d 1313 (1976).

Court Not to Amend Statute:

The court could not add to the tax statutes a provision granting a special tax status to breeding animals. In re Armstrong's Estate, 133 M 328, 323 P2d 595 (1958).

Supreme Court is not at liberty to amend a statute as passed by the Legislature and approved by the Governor. It must determine the plain meaning of the words used and is not at liberty to add in the statute what has been omitted. In re Coleman's Estate, 132 M 339, 317 P2d 880 (1957).

Separability of Statutes: The requirement that a statute that contains several provisions will be construed to give effect to all does not mean that if it is not possible to give effect to all the court shall give effect to none. It means that as many as possible shall be given effect and not

that they shall all stand or fall together. State ex rel. St. Bd. of Equalization v. Glacier Park Co., 118 M 205, 164 P2d 366 (1945).

Court to Ascertain Meaning:

In construing a statute, the office of the Judge is to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted; he may not indulge in judicial legislation. Taylor v. Rann, 106 M 588, 80 P2d 376 (1938).

In the construction of a statute it is not permissible to read something into or out of it to make it understandable or workable. In re Baxter's Estate, 101 M 504, 54 P2d 869 (1936).

The duty of the Supreme Court in interpreting a statute is not to enact but to expound the law, to apply the law as it finds it, and to maintain its integrity as it is written. It may not insert what has been omitted or omit what has been inserted. State ex rel. King v. Smith, 98 M 171, 38 P2d 274 (1934); Clark v. Olson, 96 M 417, 31 P2d 283 (1934).

In construing a statute the Supreme Court will not read into it words necessary to make it conform to a supposed intention of the Legislature; its intention in enacting it must be gathered from the language employed therein, not from street rumors or other similar sources. Mills v. St. Bd. of Equalization, 97 M 13, 33 P2d 563 (1934).

In construing a statute, the office of courts is simply to ascertain and declare what is in terms or in substance contained therein, not to write into the act words which the Legislature saw fit to omit. Maki v. Anaconda Copper Min. Co., 87 M 314, 287 P 170 (1930); Morrison v. Farmers' & Traders' St. Bank, 70 M 146, 225 P 123 (1924).

Unambiguous — No Room for Construction: It is the province of courts to construe and apply the law as they find it and to maintain its integrity as it has been written by a coordinate branch of the state government. When the terms of a statute are plain, unambiguous, direct, and certain, it speaks for itself and there is no room for construction. Chmielewska v. Butte & Superior Min. Co., 81 M 36, 261 P 616 (1927).

Ordinary and Usual Meaning: The language of a statute must be construed in accordance with its usual and ordinary acceptation, with a view to giving vitality to and making operative all provisions of the law and accomplishing the intention of the Legislature when ascertainable. Hill County v. Liberty County, 62 M 15, 203 P 500 (1921).

Attorney General's Opinions

Statement of Intent Not to Be Used in Interpretation of Clearly Written Statute: Chapter 452, L. 1981, made several substantive changes in the laws relating to health service corporations. The bill's statement of intent, adopted under 5-4-404 (now repealed), stated that certain provisions of the bill were to be implemented only if additional funds were appropriated for their implementation. The Attorney General applied the rule of statutory interpretation that when legislative intent can be determined from a reading of a statute, it is improper to go further in construing the meaning of that statute, and held that the clear meaning of the law must be carried out, regardless of the contents of the statement of intent. 39 A.G. Op. 68 (1982).

Implied Amendment: When the Legislature allowed the Board of Abstracters to "sunset", it impliedly amended another section to remove a requirement that a certificate of title be prepared by a "licensed" abstracter. Although amendments or repeals by implication are not favored, such an amendment or repeal is present where two statutory enactments are clearly repugnant to each other. 38 A.G. Op. 48 (1979).

Rules of Construction Applied to Referendums: The rules of construction applied to statutes passed by the Legislature are equally applicable to laws enacted by referendum. 38 A.G. Op. 15 (1979).

Local Government Charter Requirements for General Election: The positions on the Anaconda-Deer Lodge Commission are subject to election at the primary and general elections to be held in 1978 and 1980, even though the charter creating the positions was implemented by the community in April 1977. 37 A.G. Op. 124 (1978).

Declaration of Marriage Without Solemnization: A marriage license is not a requirement for a valid marriage by written declaration. No fee may be charged for filing the declaration of marriage without solemnization. 37 A.G. Op. 12 (1977).

Insertion of Words Prohibited: This section prohibits insertion of words in a code section to reach a particular construction. 28 A.G. Op. 21 (1959).

1-2-102. Intention of the legislature — particular and general provisions.

Case Notes

Failure to Consult With Subdivider Not Error When Plat Application Denied — Plain Meaning Rule: When the Gallatin County Board of County Commissioners denied an application

for approval of a subdivision, it was not error for the Board to refuse to consult with the subdivider regarding mitigation. Under the language of 76-3-608, and in accordance with the plain meaning rule of interpreting statutes, consultation with the subdivider is required only when mitigation is required. MM&I, LLC v. Bd. of County Comm'rs, 2010 MT 274, 358 Mont. 420, 246 P.3d 1029.

Protracted Impairment as Part of Definition of Serious Bodily Injury Not Unconstitutionally Vague: Trull contended that the term "protracted impairment" as part of the definition of serious bodily injury was constitutionally vague and that the use of the phrase "serious bodily injury" in the aggravated assault statute was therefore misleading. Assuming the constitutionality of the statute, the Supreme Court held that the terms "protracted" and "impairment" are not obscure or incomprehensible and are terms of common usage that the jury could understand. The jury found that during the assault, Trull inflicted a serious bodily injury resulting in a protracted impairment of the victim's vision, and the court declined to disturb the verdict based on vague or misleading definitions in the aggravated assault statute. St. v. Trull, 2006 MT 119, 332 M 233, 136 P3d 551 (2006).

Predispositional Psychosexual Evaluation Without Youth's Consent Authorized Only as Part of Court Disposition — Consideration of Prior Youth Court Offenses Allowed: The Youth Court, over a youth's objection, ordered a psychosexual evaluation for the youth. The specific language of 41-5-1503 controlled over the more general provisions of 41-5-1511. The Supreme Court held that under 41-5-1503, youths must waive their constitutional rights in order to be subjected to a predispositional medical or psychological evaluation. Thus, the District Court erred in ordering a predispositional psychosexual evaluation over the youth's objection. However, the challenged evaluation was essential to the youth's appropriate placement and to the purposes of the Montana Youth Court Act, so the Supreme Court affirmed. State ex rel. D.M.B. v. District Court, 2004 MT 335, 324 M 190, 103 P3d 514 (2004).

Challenge to Driver's License Suspension Considered Special Proceeding — Successful Defendant Entitled to Costs: Neal's driver's license was suspended for failure to take a breath test. Neal challenged the suspension, claiming that he did not refuse to take a breath test, and the District Court agreed. Neal's license was reinstated and Neal was granted costs. The state objected to the award of costs, and the District Court amended the original order and denied costs, so Neal appealed. Neal contended that as the prevailing party, an award of costs was proper under 25-10-101(2) because the license was valued at more than $50 or under 25-10-101(4) because the petition to reinstate the license was a special proceeding. The state contended that the particular provisions of 25-10-711 prevailed over the general provisions of 25-10-101, so 25-10-101 did not apply. The Supreme Court disagreed, finding no inconsistency between the statutes. Section 25-10-711 applies to actions in which a party prevails against a government entity and can establish that the government's claim or defense was frivolous or pursued in bad faith, but no such finding is required for recovery of costs under 25-10-101. The court went on to find that Neal's claim that costs were proper based on the license value was unfounded, because no finding of valuation was ever determined. However, the court concluded that a challenge to a driver's license suspension or revocation was a special proceeding pursuant to 27-1-102, and that as the prevailing party in the action, Neal was entitled to costs pursuant to 25-10-101. Neal v. St., 2003 MT 53, 314 M 357, 66 P3d 280 (2003).

Specific Statute Governing Venue in Contract Cases Controlling Over General Civil Venue Statute — Remand for Determination of Place Where Services to Be Performed Under Terms of Contract: Defendant hired plaintiff to perform legal services. About 1 month later, plaintiff was terminated, but defendant refused to pay for plaintiff's work. The District Court determined that under 25-2-118, proper venue was the place where defendant resided. The court also examined 25-2-121 and held that because the action was a contract action, 25-2-121(1)(a) dictated that the action be held at the place of defendant's residence. Because the action was based on a contract, the specific provisions of 25-2-121 prevailed over the general venue provisions for civil actions in 25-2-118. The District Court neglected to consider 25-2-121(1)(b), which provides that a proper venue for contract actions may also be the county in which the contract was to be performed. Here, the record contained no written contracts for legal services, so the Supreme Court was unable to determine whether specific performance provisions had been included in the contract. The case was remanded so that the District Court could determine whether a specific place of performance was named in the contract, in which case the proper venue would be the named county or the county of residence of defendant. However, if there were no written contracts or if no specific place of performance was named, then proper venue would be the place where the services were performed or the county of residence of defendant. Whalen v. Mont. Right to Life Ass'n, 2002 MT 328, 313 M 204, 60 P3d 972 (2002).

Board of County Commissioners Compelled to Follow Clear Statutory Language and Allow Gravel Pit in Nonresidential Area: Plaintiff owned agricultural property adjacent to a school and sought to develop a gravel pit on the property. Plaintiff applied for the appropriate special review with the Board of County Commissioners. The Board determined that a gravel pit would interfere with surrounding property uses and would violate the rights of people who lived and attended school nearby to a clean and healthful environment, citing 82-4-431 and 82-4-432 as authority for the Board's right to deny the special review. Plaintiff argued that under 76-1-113 and 76-2-209, local planning boards may not prevent the operation of a gravel pit in a nonresidential area. The District Court concluded that plaintiff accurately construed the statutes and that the Board could not deny a gravel pit in a nonresidential area. The Supreme Court affirmed. The Board ruled as if either 76-2-209 did not exist or the statute unconstitutionally deprived residents of a clean and healthful environment, but as an Executive Branch agency, the Board violated the separation of powers doctrine by ruling on the constitutionality of the statute. The statutory language was clear and unambiguous, and the Board was compelled to follow the legal mandate and allow the gravel pit. Further, because the statutes were clear, the District Court was not required to reach the constitutional question and did not err in failing to address the constitutionality of the statute. Merlin Myers Revocable Trust v. Yellowstone County, 2002 MT 201, 311 M 194, 53 P3d 1268 (2002). See also St. v. Still, 273 M 261, 902 P2d 546 (1995), and Goldman Sachs v. District Court, 2002 MT 83, 309 M 289, 46 P3d 606 (2002).

Standard of Review for Statutes Applicable to Administrative Rules — Rules of Statutory Construction Inapplicable Absent Ambiguity in Statute or Rule — Deference Afforded Longstanding Agency Interpretation of Administrative Rule: The Supreme Court generally applies the same principles in construing administrative rules as it applies to statutes. If the plain meaning of a statute or rule can be determined from the language used, the court is not at liberty to add or detract from the language, and absent ambiguity in the language, the court may not consider legislative history or other means of statutory construction. When an agency's interpretation of an administrative rule or statute has stood unchallenged for a considerable length of time, it will be regarded as having great importance in arriving at the proper construction. However, even when a particular meaning has been ascribed to a statute by an agency through a long and continuous course of consistent interpretation, that interpretation will be afforded respectful consideration but is still not binding on the courts. Glendive Medical Center, Inc. v. Dept. of Public Health and Human Services, 2002 MT 131, 310 M 156, 49 P3d 560 (2002).

Joint Bankruptcy Debtors Allowed to Claim Separate Exemption of Interest in Jointly Owned Personal Property: Three married couples filed similar joint bankruptcy petitions wherein each spouse claimed a separate set of personal property exemptions pursuant to 25-13-609. The bankruptcy trustee objected to the claimed objections in each case, contending that joint debtors were limited to a single set of exemptions. The U.S. Bankruptcy Court certified the question to the Montana Supreme Court. The court held that the specific provisions of 31-2-106 control over the general personal property exemptions available to judgment debtors in 25-13-609. Section 31-2-106 allows each individual to claim the allowable exemptions in any bankruptcy proceeding. Because each joint debtor maintains an interest in jointly held personal property, each may claim a separate exemption of personal interest in that property, essentially stacking the two exemptions in one item of personal property. However, in cases when the personal property is owned solely by one of the joint debtors, only the debtor with the ownership interest may claim an exemption for that property. In re Zimmermann, Landon, & Maly, 2002 MT 90, 309 M 337, 46 P3d 599 (2002).

No Authority to Appeal Justice's Court Order Denying Motion to Withdraw Guilty Plea: The Feights got into a fight with a highway patrol officer at a high school basketball game and were charged with misdemeanor assault. They were informed of their rights in Justice's Court, waived their right to counsel, and pleaded guilty. More than a month later, they moved through counsel to withdraw their guilty pleas, claiming good cause under 46-16-105. The Justice's Court denied the motion, holding that the Feights had been given due process and had voluntarily, knowingly, and willingly entered guilty pleas. The Feights appealed the denial of their motion to withdraw their guilty pleas to District Court. The state moved to dismiss the appeal, contending that the District Court lacked jurisdiction to review denial of the motion to withdraw a plea. The District Court dismissed the appeal but remanded to Justice's Court with a recommendation that the Feights be allowed to withdraw their pleas. Instead, the Justice's Court reinstated judgment, and the Feights appealed to the Supreme Court. The Supreme Court affirmed. The statutes that provide for and determine the jurisdiction of a District Court to entertain an appeal from a Justice's Court include 3-5-303, 46-12-204, 46-17-203, and 46-17-311. However, none of these statutes

provide authority for appeal to the District Court from the denial of a motion to withdraw a guilty plea. Further, the specific language of these sections prevails over the general language in 46-20-104 defining the scope of appeal by a criminal defendant. The Legislature has not created a statutory right of appeal from a Justice's Court denial of a motion to withdraw a guilty plea, and the Supreme Court refrained from creating one. St. v. Feight, 2001 MT 205, 306 M 312, 33 P3d 623 (2001), distinguishing St. v. Rogers, 267 M 190, 883 P2d 115 (1994), and followed in St. v. Fox, 2001 MT 209, 306 M 353, 34 P3d 484 (2001).

"Savings Clause" Preserves Existing Statute of Limitations for Debt Collection: After borrowing $25,000 from a Billings bank in the form of a demand note with a March 1, 1991, maturity date, plaintiff Fisher defaulted on the note. The bank attempted to collect the delinquent note, notifying Fisher that the 8-year statute of limitations had not run. Fisher subsequently filed a complaint against the bank, alleging that in conjunction with other modifications to Montana's commercial code, an amendment by the 1991 Legislature, which became effective more than 6 months after his loan default, had shortened the statute of limitations to 6 years. As a result, Fisher argued that the new statute of limitations applied to remove his liability to pay the note. The District Court did not concur with Fisher's assessment, ruling that the applicable statute was the 8-year statute of limitations in effect at the time of default. On appeal, the dispute centered solely around which statute of limitations applied. The Supreme Court affirmed the District Court decision, ruling that the savings clause included in the amendments by the 1991 Legislature preserved the 8-year statute of limitations in effect as of the maturity date of the note. Fisher v. First Citizens Bank, 2000 MT 314, 302 M 473, 14 P3d 1228, 57 St. Rep. 1331 (2000).

Policy Definitions Conflicting With Incontestability Provision — Assertion of Forman Defense Violative of Montana Law: An insured brought an action against Deonier, an insurance agent, and Paul Revere Life Insurance Company (Revere) to recover benefits and damages after the insured's claim was denied on grounds of a preexisting condition, despite the incontestability clause in the policy. The agent cross-claimed against the company for indemnity and breach of fiduciary duty, contending that Revere planned to assert the Forman defense in Montana (see Mass. Cas. Ins. Co. v. Forman, 516 F2d 425 (5th Cir. 1975), in which an insurer asserts a legal defense to the incontestability clause based on its definition of sickness as excluding disabilities that manifested themselves prior to the date of issue of the policy). The District Court declined to decide the issue of the legality of Revere's disability policy, holding that Revere was entitled to assert the Forman defense and that any opinion concerning the interpretation of the policy would be an inappropriate advisory opinion. The Supreme Court found that the question of whether the policy definitions conflicted with the statutorily required incontestability clause was a question of law on which Deonier's punitive damages claim rested and thus did not constitute an inappropriate advisory opinion. Because the incontestability clause is required by statute, interpretation of language in the clause must be construed to effectuate legislative intent, not the intent of the parties, and the incontestability clause takes precedence over other language in the policy. In this case, the definitional and coverage provisions purported to limit available coverage to disabilities caused by sickness or disease that first manifested after the date on which the policy was issued and to exclude coverage for preexisting conditions that were not disclosed on the application; at the same time, the incontestability clause barred the insurer from denying coverage because a sickness or physical condition had existed before the date on which the policy was issued, creating a conflict in which the incontestability clause must control. Consequently, Revere's assertion of the Forman defense violated Montana law, and denial of coverage for a disability, whether or not the causative sickness first manifested itself before the policy's date of issue, was barred by the incontestability clause. Deonier & Associates v. Paul Revere Life Ins. Co., 2000 MT 238, 301 M 347, 9 P3d 622, 57 St. Rep. 989 (2000), following Galanty v. Paul Revere Life Ins. Co., 1 P3d 658 (Calif. 2000).

Civil Procedure Rule That Notice of Entry of Order Be Served by Prevailing Party Inapplicable in Postconviction Relief Proceeding: In a case of first impression, the Supreme Court addressed whether the notice of entry of judgment requirement under former Rule 77(d), M.R.Civ.P. (now superseded), applied to postconviction relief proceedings governed by Title 46, ch. 21. The court previously held in cases unrelated to postconviction proceedings that only when the notice is served does a prospective appellant's time for filing a notice of appeal begin to run. (See In re Marriage of Robertson, 237 M 406, 773 P2d 1213 (1989), Buckley v. Wordal, 262 M 306, 865 P2d 240, 50 St. Rep. 1570 (1993), and Troglia v. Bartoletti, 266 M 240, 879 P2d 1169, 51 St. Rep. 783 (1994).) Here, Garner was convicted of forgery and felony theft and contended that because the state was the "prevailing party", notice should have been provided to him of the entry of the District Court's order and that because notice was not provided, the 60 days within which

to appeal could not have expired because it never commenced to run. However, the Montana Rules of Civil Procedure apply in a postconviction relief proceeding only when they are applicable and not inconsistent with postconviction statutes. Section 46-21-203 specifically requires that an appeal in postconviction proceedings be taken within 60 days of the entry of the order, which is inconsistent with the general notice rule in former Rule 77(d). The Supreme Court applied the particular provision over the general provision and concluded that former Rule 77(d) has no application in postconviction relief proceedings, so the 60-day filing deadline in 46-21-203 commences in all instances and without more upon entry of the court's order granting or denying postconviction relief. St. v. Garner, 1999 MT 295, 297 M 89, 990 P2d 175, 56 St. Rep. 1180 (1999).

Constitutionality of Implied Consent Statutes — General Versus Specific Construction: Section 61-8-403 is a general statute concerning appeals of suspensions and revocations of driver's licenses under the implied consent laws, while 61-8-409 is the specific statute on preliminary alcohol screening tests (PAST), including issues that may be discussed at hearings on license suspension or revocation based upon refusal to submit to a PAST. A specific statute prevails over a general statute. Appellant's contention of conflict among Montana's implied consent statutes was not established because the various provisions are clear and specific and give a person of ordinary intelligence fair notice that the contemplated conduct is forbidden. Smith v. St., 1998 MT 94, 288 M 383, 958 P2d 677, 55 St. Rep. 375 (1998).

Conflicting Statutes of Limitations Resolved in Favor of Longer Limitation — General Rule: As a general rule, when there is a substantial question regarding which of two statutes of limitations should apply, any doubt should be resolved in favor of the statute containing the longer limitation in order to afford a plaintiff party-litigant maximum free access to the court system. Ritland v. Rowe, 260 M 453, 861 P2d 175, 50 St. Rep. 1183 (1993).

Specific Intent to Place Referendum on Primary Ballot as Overriding General Filing Time Provisions: Petitioners argued that because a legislative referendum was passed less than 6 months before the special election at which it was, by order of the Legislature, to be placed on the ballot and because the referendum was therefore necessarily submitted to the Attorney General less than the 6 months before the election required by 13-27-310(2) (now repealed), it should be removed from the ballot as violative of the time constraints in 13-27-310(2) (now repealed). However, the statement of particular intent in the referendum that the measure appear on the special election ballot controlled over the statement of general intent in 13-27-310 (now repealed), and a petition for a writ of injunction preventing placement of the measure on the ballot was therefore denied. State ex rel. Gould v. Cooney, 253 M 90, 831 P2d 593, 49 St. Rep. 410 (1992).

Leasing of Fairground Property Controlled by Specific Versus General Statute: The Supreme Court held that an obvious conflict existed between general statutes concerning the leasing of county property and the specific statute dealing with the leasing of fairground property. The court stated that in interpreting conflicting statutes, the specific controls over the general to the extent of any inconsistency. Gallatin Saddle & Harness Club v. White, 246 M 273, 805 P2d 1299, 47 St. Rep. 2012 (1990).

Statute Specific to Teachers Controls: The plaintiff argued that his firing should be set aside on the basis that he was not given a statement for his discharge as required by 39-2-801. The Supreme Court ruled that the section of law relied on by the plaintiff applied generally to employees in general commerce and that the specific statute relating to termination of teachers was controlling. Harris v. Bailey, 244 M 279, 798 P2d 96, 47 St. Rep. 1622 (1990).

Two-Year Statute of Limitations Applicable to Claim of Assault and Battery: Although a strict reading of 27-2-204 may present some conflict between subsections (1) and (3), the legislative intent was to establish a general 3-year statute of limitations for tort actions with a shorter 2-year period for certain particular tort actions, such as assault and battery. The District Court properly applied the 2-year statute of limitations in 27-2-204(3) when the complaint alleged "assault and battery". Weston v. Cole, 233 M 61, 758 P2d 289, 45 St. Rep. 1292 (1988).

Rating of Impairments Restricted to Licensed Physicians: Under 39-71-122 (repealed, 1987) and 39-71-701 through 39-71-703, the legislative intent was that the making of impairment ratings be restricted to licensed medical physicians. Therefore, the Workers' Compensation Division properly exercised its rulemaking authority by promulgating ARM 24.29.806 (now repealed), which imposes the restriction. Weis v. Div. of Workers' Comp., 232 M 218, 755 P2d 1385, 45 St. Rep. 1004 (1988).

Agency Interpretation Contrary to Legislative Intent — Effect on Conclusions of Law: Conclusions of law will be upheld unless they constitute an abuse of discretion. An abuse of discretion results if an agency's interpretation of a statute is clearly contrary to legislative intent

behind the statute. Swan Corp. v. Dept. of Revenue, 232 M 210, 755 P2d 1388, 45 St. Rep. 998 (1988).

Executive Constructions: Executive constructions of a law acquiesced in by the Legislature are not binding on the court but are persuasive and will be upheld if not erroneous. Cornwall v. St., 231 M 58, 752 P2d 135, 45 St. Rep. 429 (1988), citing State ex rel. Ebel v. Schye, 130 M 537, 305 P2d 350 (1957).

Specific Provisions Outweigh General in Same Section: In construing the apparently conflicting venue provisions of 25-2-118(2) and 25-2-118(3), the Supreme Court held that, as related to dissolution proceedings, the specific provisions in subsection (3) outweigh the general provisions of subsection (2). Therefore, the proper place for trial for an action for dissolution of marriage is the county where the petitioner has resided during the 90 days preceding commencement of the action. In re Marriage of Jones, 226 M 14, 736 P2d 94, 44 St. Rep. 422 (1987).

Reasonable Construction of Whole Statute Without Inserting or Omitting Anything: In construing a statute, the court must find legislative intent from the plain meaning by reasonably and logically interpreting the statute as a whole without omitting or inserting anything or determining intent from a reading of only a part of the statute. Gaub v. Milbank Ins. Co., 220 M 424, 715 P2d 443, 43 St. Rep. 497 (1986).

Review of Bill's Title — First Step in Construction:

If a statute requires construction, a review of the title of the original bill is a necessary first step to aid that construction. In this case, a bill's title showed that the parents, guardian, or other responsible person was liable for a minor driver's negligence unless he signed the minor's application for a driver's license and provided proof of financial responsibility. The court would not look at a particular part of the whole statute and read it, as did appellant, to provide that there was no liability if a parent or guardian signed and provided proof, but that there was liability if both parents or some other responsible person signed and provided proof. Gaub v. Milbank Ins. Co., 220 M 424, 715 P2d 443, 43 St. Rep. 497 (1986).

First step in determining the purpose of a statute is an examination of the title of the act through which the statute was introduced. Dept. of Natural Resources and Conservation v. Clark Fork Logging Co., Inc., 198 M 494, 646 P2d 1207, 39 St. Rep. 1146 (1982).

Ambiguous Provision — Harmonizing Statutes — Legislative History — Administrative Interpretation: Legislative intent may be determined in a number of ways when a statute is ambiguous. The court presumes the Legislature would not pass a meaningless statute, and the court must harmonize statutes relating to the same subject so as to give each effect. The court can look to the legislative history of the statute. Great deference and respect must be given to interpretation of the statute by persons and agencies charged with its administration. Mont. Contractors' Ass'n, Inc. v. Dept. of Highways, 220 M 392, 715 P2d 1056, 43 St. Rep. 470 (1986), followed in Albright v. St., 281 M 196, 933 P2d 815, 54 St. Rep. 132 (1997). Albright was followed in Winchell v. Dept. of Natural Resources and Conservation, 1999 MT 11, 293 M 89, 972 P2d 1132, 56 St. Rep. 48 (1999).

Return of Property — Conflict Between Civil and Criminal Statutes: When property is taken from a pawnbroker and held as evidence for an underlying criminal prosecution, the provisions of the criminal procedure statutes governing return of property apply rather than the civil pawnbroker statutes. The criminal statutes are the particular and specific statutes and the pawnbroker statutes are general. The pawnbroker statutes control the situation where a private citizen discovers his property at a pawnbroker's shop and no criminal prosecution grows out of the incident. In re Williams, 219 M 6, 709 P2d 1008, 42 St. Rep. 1800 (1985).

Extension Within Reasonable Time of Expiration of Period: In October 1981, the Flathead County Commissioners gave preliminary 1-year approval to a subdivision plat. In December 1982, the developer requested an extension to preliminary approval. On January 14, 1983, the Commissioners approved the extension. Plaintiff filed a complaint alleging 76-3-610 precluded the Commissioners from granting an extension to the preliminary approval after the original time period had run. The District Court dismissed the action. Plaintiff appealed, contending that the phrase "At the end of" in the statute meant by or before the period in question expires and not after the expiration. The Supreme Court held that the plain meaning of the statute was evident in the language used. The statute permits County Commissioners to grant an extension to a preliminary plat approval within a reasonable time of the expiration of that period. Oldenburg v. Flathead County, 208 M 128, 676 P2d 778, 41 St. Rep. 217 (1984).

Legislative Intent — Plain Meaning: Plaintiff was not allowed to gather signatures for an initiative petition on a general election day in a school building used as a polling place. The school district had a general policy prohibiting solicitation of any kind in school buildings. Plaintiff

contended the policy violated 13-35-218 by prohibiting solicitation permitted by that section. The Supreme Court held that its function in construing and applying statutes is to effect legislative intent. The primary tool for ascertaining intent is the plain meaning of the words used. The court properly refers to legislative history only when intent cannot be determined from the content of the statute. Section 13-35-218 did not necessitate such an inquiry. The court held that it clearly and unambiguously proscribes a manner of solicitation which results in interference with the election process or obstructing access to and from the polls but in no way guarantees access to persons whose solicitation effects no interference or obstruction. The most that can be said is that some manner of solicitation at polling places on election day may be permitted. Dorn v. Bd. of Trustees, 203 M 136, 661 P2d 426, 40 St. Rep. 348 (1983).

Legislative History — Not Used When Statute Clear and Unambiguous: There is no reason for the use of legislative history to construe a statute when the language of the statute is clear and unambiguous on its face. St. v. Hubbard, 200 M 106, 649 P2d 1331, 39 St. Rep. 1608 (1982).

Single Word Not to Be Used to Find Intent: A statute's intent cannot be derived from the definition of one word; a statute derives its meaning from the entire body of words taken together. Wyse v. District Court, 195 M 434, 636 P2d 865, 38 St. Rep. 2005 (1981).

Other Interpretations Barred if Plain Meaning Shows Intent: The intention of the Legislature must first be determined from the plain meaning of the words used, and if the interpretation of a statute can be so determined, the courts cannot apply any other means of interpretation; plain, unambiguous, direct, and certain language leaves nothing for the court to construe. White v. White, 195 M 470, 636 P2d 844, 38 St. Rep. 2041 (1981).

Two-Judge Disqualification Unavailable to Postconviction Petitioner: Although a postconviction petition filed under the provisions of Title 46, ch. 21, is civil in nature, the petitioner is not entitled to two substitutions of presiding judges as allowed in 3-1-801 (now replaced by 3-1-802). An applicant for postconviction relief is directed by the more specific provisions of the postconviction statute to bring the petition in the Supreme Court or in the court that sentenced him. A specific statute controls over a general statute. Coleman v. St., 194 M 428, 633 P2d 624, 38 St. Rep. 1352 (1981).

Appeal From Tax Appeal Ruling — Applicable Procedure: The Department of Revenue audited respondent's corporate license tax returns and assessed additional taxes. Respondent protested the assessment and appealed to the State Tax Appeal Board (STAB). After a hearing, STAB affirmed the Department's decision. Respondent filed for judicial review of the STAB decision in District Court. Respondent mailed a copy of the summons and petition to the attorney who represented the Department at the hearing and to STAB. The respondent received a default judgment and a reversal of STAB's final order. The Department contends that respondent failed to comply with 2-4-702 and thereby failed to obtain jurisdiction over the Department. Respondent asserts that 15-2-303 is the applicable statute, in that 2-4-702 provides the procedure for initiating judicial review of agency decisions in contested cases, while 15-2-303 provides appeal procedures for initiating judicial review of STAB decisions. Section 15-2-303 is a specific statute while 2-4-702 is general. A specific statute controls over a general statute to the extent of any inconsistency. Dept. of Revenue v. Davidson Cattle Co., 190 M 326, 620 P2d 1232, 37 St. Rep. 2074 (1980).

Sexual Assault Erroneously Dismissed — "Sexual Contact" Construed: The Supreme Court reversed the District Court's decision to grant defendant's motion for dismissal under 46-16-403 of a sexual assault charge and held that the sexual contact proscribed by 45-5-502 is not limited to a touching of the anal or genital area of a male or female or the breast of a female. Looking to the purpose of the statute, the court found that the definition of "sexual contact" encompasses the rubbing of the belly and chest of a prepubescent female child because of the societal concern for such impositions and their resultant outrage, disgust, or shame in the victim. St. v. Weese, 189 M 464, 616 P2d 371, 37 St. Rep. 1620 (1980).

Interpretation Consistent With Intent of Legislature: While a statute may have some ambiguities due to a large variety of possible situations that are covered by a statute, a court is not required under due process standards to find vagueness in the terms used in a statute so as to destroy an act; rather, it is the court's duty to construe a statute so as to be consistent with the will of the Legislature and to comport with constitutional limitations. In re Mont. Pac. Oil & Gas Co., 189 M 11, 614 P2d 1045 (1980), citing CSC v. Letter Carriers, 413 US 548, 37 L Ed 2d 796, 93 S Ct 2880 (1973).

Statutory Construction to Follow Legislative Intent: A statute must be construed pursuant to its legislative intent. Thus, 7-14-2601, requiring either any 10 or a majority of freeholders within a road district to sign a petition for abandonment of a county road, could not be construed to

change "a majority of freeholders in a district" to "a majority of those directly affected" by a road abandonment, even though the road district in this instance was comprised of an entire county consisting of 40,000 residents. Chennault v. Sager, 187 M 455, 610 P2d 173 (1980).

Object Sought to Be Achieved: A statute will not be interpreted to defeat its object or purpose, and the object sought to be achieved by the Legislature is of prime consideration in interpreting it. Dover Ranch v. Yellowstone County, 187 M 276, 609 P2d 711 (1980).

Intent of Legislature Controlling: The cardinal principle of statutory construction is that the intent of the Legislature is controlling. St. v. Meader, 184 M 32, 601 P2d 386 (1979), following Baker Nat'l Ins. Agency v. Dept. of Revenue, 175 M 9, 571 P2d 1156 (1977).

Statutes to Be Interpreted From Intent of Whole Act — Dangerous Drug Act: Defendant's contention based on a strict interpretation of one section of the Dangerous Drug Act would totally defeat the legislative intent behind the Act. Statutes must be read and considered in their entirety, and legislative intent may not be gained from the wording of one particular section or sentence but only from a consideration of the whole. The court's duty is to interpret individual sections of the Act in such a manner as to insure coordination with the other sections of the Act. St. v. Meader, 184 M 32, 601 P2d 386 (1979).

Legislative Intent — Implied Repeal of General Statutes by Later Comprehensive Act: While implied repeals are not favored where an irreconcilable conflict exists between earlier and later statutes, the courts do not hesitate to declare the earlier statute repealed, especially if the later act is a comprehensive act establishing elaborate inclusions and exclusions of persons, things, and relationships ordinarily associated with the subject. In re Estate of Holmes, 183 M 290, 599 P2d 344 (1979).

Prosecution When Conduct Violates Two Statutes: Where defendant argues that he should have been charged under 30-10-301, the specific fraudulent securities practice statute, rather than 45-6-317, the general deceptive practices statute, the Supreme Court said that in the rule of statutory construction a more specific statute controls over an inconsistent general statute but does not apply to criminal prosecutions where defendant's conduct violated two or more criminal statutes. The fact that two statutes overlap does not mean that the defendant can only be prosecuted under the statute providing the lesser penalty. St. v. Duncan, 181 M 382, 593 P2d 1026 (1979).

Title of Act — Presumption as to Intent — Legislative History: The title of an act is presumed to indicate the Legislature's intent. Although the intent of the Legislature must first be determined from the plain meaning of the words used, a court can resort to the history of the statute. Dept. of Revenue v. Puget Sound Power & Light Co., 179 M 255, 587 P2d 1282 (1978), followed, as to the title of an act presumed to indicate legislative intent, in Orr v. St., 2004 MT 354, 324 M 391, 106 P3d 100 (2004).

Examining Legislative Intent: In applying the principle of statutory construction that the intent of the Legislature is controlling, the Supreme Court examined the committee records of the House Ways and Means Committee maintained in conjunction with the consideration of and the ultimate passage of 15-31-141. Baker Nat'l Ins. Agency v. Dept. of Revenue, 175 M 9, 571 P2d 1156 (1977).

Credit for Out-of-State Service: Section 75-2705(9), R.C.M. 1947 (since repealed), as in effect in 1954, allowed any teacher in the Montana State Teachers' Retirement System to receive credit for "out-of-state teaching employment", without distinction between service in public or in private schools. State ex rel. Sullivan v. St., 174 M 482, 571 P2d 793 (1977).

Rules of Statutory Construction: Rules of statutory construction have no application if the language of the statute is clear and unambiguous. State ex rel. Swart v. Casne, 172 M 302, 564 P2d 983 (1977).

Mutilation of Statute — Presumption Against: In the absence of a saving clause, the presumption is against the mutilation of a statute. The invalidation of one portion of a statute therefore destroys the whole. When corporation license tax was repealed as to federal banks, it was also repealed as to state banks. Sec. Bank & Trust Co. v. Connors, 170 M 59, 550 P2d 1313 (1976).

Special Controls General:

Particular intent will control a general one in statute relating to life insurance as part of estate. In re Coleman's Estate, 132 M 339, 317 P2d 880 (1957).

In the construction of a statute, the intention of the Legislature must be pursued, if possible; and when a general and a particular provision are inconsistent, the latter is paramount to the former. O'Connell v. St. Bd. of Equalization, 95 M 91, 25 P2d 114 (1933), explained in St. v.

Toomey, 135 M 35, 335 P2d 1051 (1958); London Guar. & Accident Co. v. Indus. Accident Bd., 82 M 304, 266 P 1103 (1928).

Where one statute deals with a subject in general and comprehensive terms, and another deals with a part of the same subject in a more minute and definite way, the latter will prevail over the former to the extent of any necessary repugnancy between them. In re Stevenson's Estate, 87 M 486, 289 P 566 (1930); Barth v. Ely, 85 M 310, 278 P 1002 (1929).

Where a statute deals generally with a given subject and a later one makes specific provision relating to a certain phase of that subject inconsistent with the former, the latter is controlling. Kester v. Amon, 81 M 1, 261 P 288 (1927).

Where there is a general and a special statutory provision upon a given subject which cannot be harmonized, the special one is controlling, and if the latter is found to be inoperative, resort may be had to the general law with a view to harmonizing them and, if possible, making the later special act operative. State ex rel. Ewald v. Certain Intoxicating Liquors, 71 M 79, 227 P 472 (1924).

County Commissioners' Action: Rules of construction prescribed by this section would be applicable in construing action of Board of County Commissioners in fixing salary of county officer. State ex rel. Thompson v. Gallatin County, 120 M 263, 184 P2d 998 (1947). See also Mesa Communications Group, LLC v. Yellowstone County, 2002 MT 73, 309 M 233, 45 P3d 37 (2002).

Legislative Intent: In the construction of a statute, the intention of the Legislature is to be pursued if possible. State ex rel. Nagle v. The Leader Co., 97 M 586, 37 P2d 561 (1934); State ex rel. Kurth v. Grinde, 96 M 608, 32 P2d 15 (1934); Cottonwood Coal Co. v. Junod, 73 M 392, 236 P 1080 (1925); Wibaux Improvement Co. v. Breitenfeldt, 67 M 206, 215 P 222 (1923); State ex rel. Carter v. Kall, 53 M 162, 162 P 385 (1917); Lerch v. Missoula Brick & Tile Co., 45 M 314, 123 P 25 (1912).

Language Employed — Purpose to Be Served: In the construction of a statute, the intention of the Legislature must control, and to ascertain that intention, recourse must first be had to the language employed and the apparent purpose to be served. O'Connell v. St. Bd. of Equalization, 95 M 91, 25 P2d 114 (1933); Campbell v. Helena, 92 M 366, 16 P2d 1 (1932); McNair v. School District, 87 M 423, 288 P 188 (1930).

Liquor Law: In construing provisions of the liquor law, the intention of the Legislature must be pursued so far as possible, and the language employed must be interpreted in accordance with its usual, ordinary, and accepted meaning so as to give it validity and make operative all of its provisions, particular words and phrases being construed according to the context and their approved usage. St. v. Redmond, 73 M 376, 237 P 486 (1925).

Doubtful Language — Refer to History of the Times: In the construction of a statute, the intent of the Legislature must be pursued, if possible, and if its language is of doubtful meaning, courts may refer to the history of the times when it was passed and of the act itself in order to ascertain the reason as well as the meaning of particular provisions in it. Fergus Motor Co. v. Sorenson, 73 M 122, 235 P 422 (1925).

Words Employed — Evil to Be Remedied: In the construction of a statute, the intention of the Legislature must be pursued. The legislative intent is determined by examining the words used and the evil to be remedied. State ex rel. Boone v. Tullock, 72 M 482, 234 P 277 (1925).

Reconciling Laws: In the construction of a particular statute, all acts relating to the same subject or having the same general purpose should be read in connection with it, as together constituting one law, it being the duty of courts to reconcile them, if possible, and make them operative. State ex rel. Ewald v. Certain Intoxicating Liquors, 71 M 79, 227 P 472 (1924).

Language Indicates Intent: In the interpretation of statutes in the case of doubt as to the legislative intent which must control, recourse must first be had to the language employed, indulging the presumption that the terms used were intended to be understood in their ordinary sense unless it is apparent that they were intended to be given a different meaning, and then if there is room for doubt as to its intent, the title of the act, presumably indicating its intention, may be examined. Morrison v. Farmers' & Traders' St. Bank, 70 M 146, 225 P 123 (1924).

Language Given Its Ordinary Meaning: The language of a statute must be construed in accordance with its usual and ordinary meaning with a view to giving vitality to and making operative all provisions of the law and accomplishing the intention of the Legislature when ascertainable. Hill County v. Liberty County, 62 M 15, 203 P 500 (1921).

Court to Harmonize Parts of Statute: Where one part of a statute deals with the subject in general and comprehensive terms, while another part deals with it in a more minute and definite way, the two parts should be read together and, if possible, harmonized with a view to giving

effect to a consistent legislative policy. Butte v. Indus. Accident Bd., 52 M 75, 156 P 130 (1916); Stadler v. Helena, 46 M 128, 127 P 454 (1912).

Attorney General's Opinions

Conditions for Transfer of School District Bus Depreciation Reserve Fund: Resolving an apparent statutory conflict regarding the transfer of a school district bus depreciation reserve fund, a budgeted fund, the Attorney General applied the specific provisions of 20-10-147 over the general provisions of 20-9-201 and 20-9-208 in holding that before a school district may transfer any money in the district's bus depreciation reserve fund to any other district fund, the school district trustees must have sold all of the district's buses and submitted the proposed fund transfer to the electors of the district. 51 A.G. Op. 6 (2005).

Interpretation of Plumber Licensing Statutes by Board of Plumbers — Licensing Authority Restricted by Statute — Intention of Legislature — Penalty Statute Inapplicable: The Board of Plumbers has the legal authority to interpret Title 37, ch. 69, and the interpretation by the Board must be given deference unless it is incorrect. In interpreting the plumbing licensing statutes, the intent of the Legislature must be determined, and if that intent can be understood from a plain reading of the statutes, there is no need to look further. The statutes as well as the statutory history clearly indicated that a plumber's license is required only for a person who is: (1) working in the field of plumbing in an incorporated city or town; (2) working in the field of plumbing in an area served by a public water supply or sewer system; or (3) working in the field of plumbing and connects or disconnects plumbing to or from a public water supply or sewer system, unless an exemption is granted. There is no penalty applicable to an unlicensed person for whom a license is not required by statute. 47 A.G. Op. 21 (1998).

Penalties for Fraudulent Benefits Claim — Specific Remedy Controlling Over General Remedy: Although 17-8-231 (now repealed) appears to provide a penalty for fraudulent claiming of unemployment insurance benefits, that statute is a general one that provides a penalty in conflict with the more specific penalty provided under 39-51-3201. Because the more particular statute must control to the extent of any inconsistency, the Department of Labor and Industry is limited to recovery of those amounts of benefits wrongfully received by the claimant. The Department may not sue a claimant for all benefits paid to the claimant or for the additional penalty provided in 17-8-231 (now repealed), but may disqualify the claimant under 39-51-3201 from receipt of future benefits. 40 A.G. Op. 21 (1983).

Role of Montana Wheat Research and Marketing Committee: "Marketing" is to be interpreted in its broadest sense to include the transportation of goods, including transportation rates. The Montana Wheat Research and Marketing Committee may take action to assure reasonable transportation rates if it is in the best interest of the wheat and barley growers of Montana as a whole. 39 A.G. Op. 8 (1981).

Right of Access to Sealed Original Birth Records: Considering the legislative history, 50-15-206 (now repealed), as amended in 1979, prohibits disclosure of illegitimacy of birth or information from which illegitimacy can be ascertained except upon court order. This conflicts with 50-15-304, which would allow an adopted illegitimately born person access to his or her sealed original birth records upon demand. Section 50-15-206(1)(a) (now repealed) was enacted as part of a 1979 amendment to that section. Under 1-2-203, "the new provisions are to be considered as having been enacted at the time of the amendment". Earlier statutes are controlled by later statutes when they conflict, so 50-15-206(1)(a) (now repealed) controls. Additionally, when a specific statute conflicts with a general statute, the specific statute controls to the extent of any conflict. Under this rule of construction, 50-15-304 was considered the general statute dealing with the birth records of adopted persons, and 50-15-206(1)(a) (now repealed) was considered a more specific statute regulating disclosure of birth records of illegitimate adopted persons, the statute which controlled. Therefore, legitimately born adopted persons of legal age may have their sealed original birth records opened on demand while illegitimately born adopted persons may apply to court for disclosure of their sealed original birth records. 38 A.G. Op. 62 (1980).

Imprisonment in County Jail Upon Failure to Pay Traffic Fine: Both 46-19-102 and 61-8-711 concern imprisonment upon failure to pay fines for traffic offenses. Because a particular statute governs when a general statute and a particular statute on the same subject are inconsistent, 61-8-711 governs. However, if the failure to pay is based on indigency, constitutional issues arise. The courts have recognized the infirmity of imposing a fine as a sentence and then converting it into a jail term simply because the defendant is indigent and cannot forthwith pay the fine in full. 38 A.G. Op. 61 (1980).

Intent of Legislature in Allowing Board of Abstracters to Terminate: The Legislature, by allowing the Board of Abstracters to "sunset", by plain import of the statutory language involved,

was not expressing the opinion that a certificate required by 76-3-612 was no longer necessary. Rather, it was a determination that the Board's licensing function did not meet the criteria set forth in 2-8-112. 38 A.G. Op. 48 (1979).

Implied Amendment: When the Legislature allowed the Board of Abstracters to "sunset", it impliedly amended another section to remove a requirement that a certificate of title be prepared by a "licensed" abstracter. Although amendments or repeals by implication are not favored, such an amendment or repeal is present where two statutory enactments are clearly repugnant to each other. 38 A.G. Op. 48 (1979).

Legislative Intent to Be Gathered From the Whole: When the Legislature allowed nonresident corporations to vote in elections for officers of a water and sewer district and allowed the combination of that election with the election on the question of creation of the district, the Legislature intended that nonresident corporations participate in the entire election process. 38 A.G. Op. 47 (1979).

Prisoner Voting Rights: No person may vote in the state of Montana while serving a sentence in a penal institution resulting from conviction of a felony. 37 A.G. Op. 125 (1978).

Municipal Annexation: If a proposed annexation of land having no resident freeholders meets the annexation standards of 7-2-4734, including the requirement that the area to be annexed is included in and consistent with a master community development plan previously adopted, and the city also complies with the PCDA planning and public hearing requirements of Title 7, ch. 2, part 47, the city may proceed under annexation procedures of Title 7, ch. 2, part 45. 37 A.G. Op. 119 (1978), overruling 36 A.G. Op. 72 (1976) insofar as it holds that the Planned Community Development Act of 1973, Title 7, ch. 2, part 47, repealed section 11-403, R.C.M. 1947.

Consolidated Law Enforcement Funding: Third-class cities or towns that have consolidated their police departments with county law enforcement offices may not use the funds received from the State Auditor under 19-10-305 (renumbered 19-19-305) to pay the county for their share of the consolidated law enforcement expense unless those funds are used exclusively for pensions and/or training. 37 A.G. Op. 117 (1978).

Taxation — Levy for Liability Insurance: The levy provided by 2-9-212 does not require an election. The school trustees may authorize the levy upon determining that it is in the best interests of the school district. The annual property tax may be used to fund all policies of insurance required or permitted by law. 37 A.G. Op. 109 (1978), reversing contrary language in 35 A.G. Op. 44 (1973).

Declaration of Marriage Without Solemnization: A marriage license is not a requirement for a valid marriage by written declaration. No fee may be charged for filing the declaration of marriage without solemnization. 37 A.G. Op. 12 (1977).

Law Review Articles

Lost Legislative Intent: What Will Montanans Do When the Meaning Isn't Plain?, Gordon & Jazayeri, 70 Mont. L. Rev. 1 (2009).

1-2-103. Statutes in derogation of the common law — liberal construction.

Case Notes

Implied Private Right of Action Under Consumer Loan Act: The Montana Consumer Loan Act (CLA) does not specifically provide for or prohibit a private right of action. Defendant contended that 32-5-401 provides that the Department of Administration is the sole entity authorized to seek a violation of the CLA in the courts. Plaintiffs argued that the remedy provisions of the CLA indicated a legislative intent consistent with allowing a private right of action because the remedy of violating a loan benefits the borrower. The Supreme Court agreed with plaintiffs that the CLA's remedial measures were not inconsistent with allowing a private right of action under the CLA. If only the Department of Administration could take action to enforce the CLA, there would be no need for 32-5-407 providing that a party could be awarded attorney fees in an action on a contract entered pursuant to the CLA, and if the Legislature had wished to prohibit a private cause of action, it could have done so. Wombold v. Associates Financial Serv. Co. of Mont., Inc., 2004 MT 397, 325 M 290, 104 P3d 1080 (2004).

Liberal Construction:

Because the Montana Unfair Trade Practices and Consumer Protection Act of 1973 is in derogation of the common law, it should be liberally construed with a view to effect its object and to promote justice. The approach to defining what is meant by the word "services" should be broad in scope. The Act applies to a consumer loan by a bank. Baird v. Norwest Bank, 255 M 317, 843 P2d 327, 49 St. Rep. 1026 (1992).

The Codes establish the law of this state respecting the subjects to which they relate and their provisions and all proceedings under them are to be liberally construed with a view to effect their objects and to promote justice. Corwin v. Bieswanger, 126 M 337, 251 P2d 252 (1952).

A statute in derogation of the common law must be liberally, not strictly, construed. Anderson v. Wirkman, 67 M 176, 215 P 224 (1923). See also Wall v. Brookman, 72 M 228, 232 P 774 (1925); In re Connolly's Estate, 73 M 35, 235 P 408 (1925); O'Hanion v. Great N. Ry., 76 M 128, 245 P 518 (1926); Chmielewska v. Butte & Superior Min. Co., 81 M 36, 261 P 616 (1927); State ex rel. Hahn v. District Court, 83 M 400, 272 P 525 (1928); State ex rel. Bullard v. District Court, 86 M 358, 284 P 125 (1930); McMullen v. Shields, 96 M 191, 29 P2d 652 (1934).

Though a statute must be liberally construed, the court cannot go beyond its plain provisions. Harrington v. Butte, Anaconda & Pac. Ry., 36 M 478, 93 P 640 (1907).

Legislative Power to Alter Common Law: No one has a vested interest in any rule of common law. The Legislature may alter common-law causes of action to promote legitimate state interests and may alter or abrogate causes of action sounding in tort. Meech v. Hillhaven W., Inc., 238 M 21, 776 P2d 488, 46 St. Rep. 1058 (1989).

Legislative Power to Change Common Law: The Legislature has the power to change the common law. St. v. Bush, 195 M 475, 636 P2d 849, 38 St. Rep. 2045 (1981).

"Marital Status" Condition of Employment — Antinepotism Policy Discriminatory: Plaintiffs were employed as administrators in the Harlem schools. Their wives were teachers in the Harlem schools. The school board adopted a policy that administrators could not have a spouse employed in any capacity in the Harlem school system. The board then terminated one plaintiff and reduced the other to a teaching position. Plaintiffs contended the action was discriminatory under 49-2-303 and 49-3-201. The Supreme Court held that "marital status", as used in the employment nondiscrimination statutes, should be broadly interpreted to accomplish the legislative objective of removing discriminatory practices in employment and therefore "marital status" includes the identity and occupation of one's spouse as well as whether one is married, single, widowed, or divorced. The board's policy was therefore discriminatory. Thompson v. School District, 192 M 266, 627 P2d 1229, 38 St. Rep. 706 (1981).

Obstruction of Drainage Ditch: Where owner had blocked drainage ditch so that water overflowed onto plaintiff's land, court found plaintiff had adequately shown negligence on the part of the owner and was not required to prove a case in trespass or trespass on the case. Rhodes v. Weigand, 145 M 542, 402 P2d 588 (1965).

Whole Act to Be Read Together: In construing a statute the whole act must be read together, and where there are several provisions or particulars such a construction is to be adopted as will give effect to all, if possible. Yurkovich v. Indus. Accident Bd., 132 M 77, 314 P2d 866 (1957).

Change of Venue: The Codes establish the law of this state respecting the subjects to which they relate, under this section, and it is for the Legislature to declare the general spirit and policy of the law, and, it having spoken on the subject of change of venue as provided in Title 25, ch. 2, part 1, its declaration is conclusive upon the courts. Shields v. Shields, 115 M 146, 139 P2d 528 (1943).

Construing a Statutory Departure From the Common Law Under This and Other Sections on Construction: Under this section, contention that Title 25, ch. 3, part 6 (providing for service of process on Secretary of State in action resulting from automobile accident), was in derogation of common law and must be strictly construed as unavailable to a nonresident plaintiff was untenable. The statutes must be liberally construed to effect their object. State ex rel. Gallagher v. District Court, 112 M 253, 114 P2d 1047 (1941).

Construction of Statutes Adopted From Sister States: Where Montana adopted a statute from a sister state prior to interpretation by the highest court of that state, the Supreme Court of this state is not bound by the interpretation of the foreign state if the reasoning does not appeal to it. State ex rel. Kommers v. District Court, 109 M 287, 96 P2d 271 (1939).

Formalities in Execution of Will: Under the rule laid down by this section, section 91-107, R.C.M. 1947 (since repealed), requiring certain formalities in execution of a will, must be liberally construed respecting the method by which the testator makes acknowledgment of his execution of the will. In re Bragg's Estate, 106 M 132, 76 P2d 57 (1938), explained in In re Mickich's Estate, 114 M 258, 136 P2d 223 (1943).

Operation and Effect:

This section is not inharmonious with 1-1-109. Conley v. Conley, 92 M 425, 15 P2d 922 (1932), explained in Dutton v. Hightower & Lubrecht Constr. Co., 214 F. Supp. 298 (D.C. Mont. 1963).

The Code establishes the law of this state respecting the subjects to which it relates. Lawrence v. Westlake, 28 M 503, 73 P 119 (1903). See also St. v. Newman, 66 M 180, 213 P 805 (1923), and Swords v. Occident Elevator Co., 72 M 189, 232 P 189 (1924).

The doctrine that a "statute in affirmance of the common law is to be construed as was the rule by that law" would perhaps be modified by this section. Nelson v. Great N. Ry., 28 M 297, 72 P 642 (1903).

Effect of Other Holdings:

The statutory requirements as to examining an adverse party before instituting an action are simple, direct, and plain, so that no recourse need be had to similar statutes of other states, and the decisions thereon in those states, in order to understand them. State ex rel. Holcomb v. District Court, 54 M 574, 172 P 329 (1918).

What the courts may have said touching other statutes or in an effort to construe provisions similarly clear is not convincing when construing a particular statute before it. State ex rel. Holcomb v. District Court, 54 M 574, 172 P 329 (1918).

1-2-105. General definitional rules — verb tense, gender, and number.

Case Notes

Mailing of Multiple Tax Notices in Same Envelope Allowed: The County Clerk and Recorder mailed seven tax notices that a tax deed may be issued in the same envelope. Appellant contended that the language in 15-18-212(4), referring to mailing of a "notice", required that each tax notice be mailed separately. However, under this section, the singular includes the plural in statutory construction. Therefore, multiple notices of the issuance of a tax deed may be placed in the same envelope for mailing. Boyes v. Eddie, 1998 MT 311, 292 M 152, 970 P2d 91, 55 St. Rep. 1282 (1998).

Legislative Intent That Singular Not Include Plural: The 1974 amendment to 81-2-109 changed "supervising officer or officers" to "supervising officer", indicating a legislative intent to preclude only one employee of the Department from recovering his salary from the rule violator. (Effect of this section was not considered.) St. v. Sand Hills Beef, Inc., 196 M 77, 639 P2d 480, 38 St. Rep. 2140 (1981).

Masculine, Feminine, and Neuter Gender: Words used in the Codes in the masculine gender include the feminine. Our statute therefore declares that the phrase "Imputes to him impotence or want of chastity" would apply to the feminine as well as the masculine. Kosonen v. Waara, 87 M 24, 285 P 668 (1930).

Singular and Plural Numbers: The singular number when used in this Code may include the plural and the plural the singular. A statute requiring the notice of a school election to contain "the time and place of holding the election" may designate different "places". Hauswirth v. Mueller, 25 M 156, 64 P 324 (1901). See also Mitchell v. Banking Corp. of Mont., 81 M 459, 264 P 127 (1928).

Attorney General's Opinions

Water Adjudication Program Not Void Given Sufficient Line Item Appropriations to Avoid Voidness: A contingent voidness clause attached to legislation establishing the water adjudication account required that at least $2 million each fiscal year be appropriated to the water adjudication account by line item appropriation. Although the line item appropriations were directed to two agencies instead of being included in a single programmatic line item, the Attorney General concluded that more than $2 million had been appropriated from state sources other than the water adjudication account to avoid the contingent voidness provision. 51 A.G. Op. 3 (2005).

Rural SIDs — Developer's RSID — Thickly Populated: Section 7-12-2102 allows the Board of County Commissioners to create RSIDs to fund improvements on underdeveloped and unoccupied parcels of land, provided the proposed district lies within an area which is "thickly populated". The Commissioners should exercise great care in assuring that the public interest requires creation of a "developer RSID" since the county taxpayers are exposed to potential financial liability should the developer's business judgment prove faulty. 38 A.G. Op. 23 (1979).

1-2-106. Construction of words and phrases.

Case Notes

Federal Self-Employment Tax Not Considered Income Tax and Not Deductible in Calculating Montana Net Income — No Administrative Rule Required to Explain Denial of Tax Deduction When Deduction Not Explicitly Provided: The federal income tax and the federal self-employment tax are distinct entities, despite their colocation in the federal tax code and their conjoined collection procedures. The self-employment tax, although based on income, is in the nature of an

employment tax and is a Social Security tax rather than an income tax as that term is commonly understood. Montana has the authority to interpret its own tax code without being bound by the vagaries of the federal tax code. Therefore, federal income tax, as used in 15-30-2131(1)(b), does not include federal self-employment taxes for purposes of calculating net income on Montana tax returns. Further, the Department of Revenue is not required to promulgate a rule explaining the denial of a tax deduction that is not explicitly provided for in the tax code. Baitis v. Dept. of Revenue, 2004 MT 17, 319 M 292, 83 P3d 1278 (2004).

Right of Defendant to Plead Guilty Over State's Objection — Erroneous Refusal to Accept Guilty Plea: Peplow was charged with and convicted of DUI, driving with a suspended or revoked license, driving without insurance, failing to report an accident, and tampering with evidence. Prior to trial, Peplow tried to enter guilty pleas to the driving with a suspended or revoked license and driving without insurance counts, but the trial court ruled that it was not required to accept the pleas because Peplow's actions giving rise to the counts were part of the res gestae and probative of the issue of impairment; the trial court proceeded to trial on all counts. Peplow appealed on grounds that the trial court erred in refusing the guilty pleas. In a case of first impression, the Supreme Court considered a defendant's right to plead guilty over the state's objection. The court noted the numerous statutory procedural safeguards in place to ensure that: (1) a guilty plea is made knowingly, voluntarily, and intelligently; (2) there is a factual basis for the plea; (3) the court is not bound by any plea agreements; and (4) a defendant may not withdraw a guilty plea if the plea agreement is not accepted. The Supreme Court cited Lamb v. Missoula Imports, 230 M 183, 748 P2d 965 (1988), for the proposition that when the word "may" is used to confer power upon an officer, court, or tribunal and the public or a third person has an interest in the exercise of power, then the exercise of power becomes imperative. Under 46-16-105, a plea of guilty "may" be accepted before or during trial. The Supreme Court construed this language to mandate the acceptance of a guilty plea as long as the statutory requirements are met. Further, under 46-12-204, a defendant may plead guilty or not guilty without limitation on the right to plead. St. v. Peplow, 2001 MT 253, 307 M 172, 36 P3d 922 (2001).

Unmarked Crosswalk at Every Intersection: Hanson was struck by Edwards's car while crossing an intersection that had no sidewalks, curbs, or painted lines delineating a crosswalk. Hanson moved for a directed verdict on grounds that because he was in an unmarked crosswalk, which gave him the right-of-way, Edwards was negligent as a matter of law. The motion was denied, and the trial court refused to instruct the jury that an unmarked crosswalk exists at every intersection pursuant to 61-1-209 (now repealed). The Supreme Court examined legislative intent and, reading 61-1-209 (now repealed) in pari materia with 61-8-502, concluded that Montana law provides for a crosswalk on any portion of a roadway at an intersection. The jury should have been so instructed, and failure to do so was reversible error. Hanson v. Edwards, 2000 MT 221, 301 M 185, 7 P3d 419, 57 St. Rep. 907 (2000).

Definition of Farm for Purposes of Eminent Domain — Use of Otherwise Inapplicable Definition — Use of Ordinary Meaning of Undefined Term: The Richters brought an action in District Court to condemn an easement across the land of a neighbor that surrounded their property on three sides. The District Court held that the definition of farm in 72-16-331(7) (section now repealed) applied to the use of that term in 70-30-102(6), reasoning that because the term "farm" was undefined in Title 70, ch. 30, the definition in 72-16-331(7) (section now repealed) should be applied because 1-2-107 provides that a definition contained in one section of law should be used for the purposes of other sections of law unless "a contrary intention plainly appears". The District Court then entered a preliminary condemnation order in favor of the Richters. The Supreme Court held that a contrary intention did in fact appear because the Legislature had, by use of the phrase "as used in 72-16-331 through 72-16-349" (all sections now repealed), limited the application of the terms defined in 72-16-331 (now repealed) to only 72-16-331 through 72-16-349 (all sections now repealed). Because farm was then left undefined for the purposes of Title 70, ch. 30, the Supreme Court applied the definition found in the American Heritage Dictionary and held that the Richters' property did not qualify as a farm, as defined in that dictionary, because the Richters had not prepared, fertilized, or tilled the soil on their property nor had they cited any authority for the Supreme Court to hold that naturally occurring timber on the property was a crop. The Supreme Court therefore reversed the condemnation order of the District Court. Richter v. Rose, 1998 MT 165, 289 M 379, 962 P2d 583, 55 St. Rep. 663 (1998).

Restrictive Covenant Prohibiting Mobile Homes — Application to Manufactured Home — "Mobile Home" Used in Ordinary and Popular Sense: Wittmers purchased a 26- by 60-foot manufactured home that was capable of being put on wheels and moved it to a subdivision in Gallatin County. The plaintiffs brought an action to restrain Wittmers from maintaining the

home within the subdivision because it was in violation of a restrictive covenant that prohibited the use of "mobile homes". The Supreme Court held that the covenant was not ambiguous and that the term "mobile home", which was undefined in the covenants, should be understood in its ordinary and popular sense. The Supreme Court noted that other statutory definitions of the term "mobile home" could be looked to for guidance in determining the meaning of the term for the purposes of the covenants and that those other definitions include structures such as Wittmers'. The Supreme Court held that the District Court correctly construed the term "mobile home" to include the Wittmers' manufactured home because their home fell within other definitions of the term "mobile home", because the Supreme Court had previously construed the term to include homes such as the Wittmers' in two other cases before the court, and because the Wittmers' home had the characteristics of a mobile home. Newman v. Wittmer, 277 M 1, 917 P2d 926, 53 St. Rep. 516 (1996).

Public or Governmental Bodies — Committee to Recommend Commissioner of Political Practices Appointees to Governor: The committee that recommends a list of persons from whom the Governor may select the Commissioner of Political Practices is not a board, bureau, commission, or agency within the meaning of those terms as used in the open meeting law. However, the committee is a "public or governmental body" under the plain meaning of those terms as used in that law because it has a clear public and governmental purpose and was created for a specific governmental task and is thus subject to the open meeting law. Common Cause of Mont. v. Statutory Comm. to Nominate Candidates for Comm'r of Political Practices, 263 M 324, 868 P2d 604, 51 St. Rep. 77 (1994).

Judicial Notice of Facts Overruled: The lower court took judicial notice of the fact that livestock raised and intended for sale in the ordinary course of business constituted business inventory. The Supreme Court held that Montana law distinguishes livestock and business inventory so that the lower court had to construe livestock and business inventory according to their peculiar and appropriate meaning as technical words and phrases. Montana Stockgrowers Ass'n v. St., 238 M 113, 777 P2d 285, 46 St. Rep. 1132 (1989).

Legislative Intent — Plain Meaning: Plaintiff was not allowed to gather signatures for an initiative petition on a general election day in a school building used as a polling place. The school district had a general policy prohibiting solicitation of any kind in school buildings. Plaintiff contended the policy violated 13-35-218 by prohibiting solicitation permitted by that section. The Supreme Court held that its function in construing and applying statutes is to effect legislative intent. The primary tool for ascertaining intent is the plain meaning of the words used. The court properly refers to legislative history only when intent cannot be determined from the content of the statute. Section 13-35-218 did not necessitate such an inquiry. The court held that it clearly and unambiguously proscribes a manner of solicitation which results in interference with the election process or obstructing access to and from the polls but in no way guarantees access to persons whose solicitation effects no interference or obstruction. The most that can be said is that some manner of solicitation at polling places on election day may be permitted. Dorn v. Bd. of Trustees, 203 M 136, 661 P2d 426, 40 St. Rep. 348 (1983).

Administrative Rule Void When Contrary to Longstanding Administrative Interpretation: The Department of Revenue's longstanding administrative interpretation of the meaning of "on the same street" as used in 16-3-306 has the force and effect of law due to the repeated reenactment of that section by the Legislature without change in the operative language that no license be issued to a business "on the same street" and within 600 feet of a church or school. Thus, the interpretation could not be changed, and an administrative rule making a change is invalid. Hovey v. Dept. of Revenue, 203 M 27, 659 P2d 280, 40 St. Rep. 272 (1983).

Ordinary Rules of Grammar: Supreme Court is bound to follow common understanding and ordinary rules of grammar in interpreting statutes. Missoula High School Legal Defense Ass'n v. Supt. of Pub. Instruction, 196 M 106, 637 P2d 1188, 38 St. Rep. 2164 (1981).

Single Word Not to Be Used to Find Intent: A statute's intent cannot be derived from the definition of one word; a statute derives its meaning from the entire body of words taken together. Wyse v. District Court, 195 M 434, 636 P2d 865, 38 St. Rep. 2005 (1981).

Intention Shown by Plain Meaning — Other Means of Interpretation Barred: Where the intention of the Legislature can be determined from the plain meaning of words used in a statute, the courts may not go further and apply any other means of interpretation. Tongue River Elec. Co-op, Inc. v. Mont. Power Co., 195 M 511, 636 P2d 862, 38 St. Rep. 2032 (1981).

Standard of Review: In cases involving application of a well-defined statutory term to a given set of facts, the issue for the reviewing court is whether the lower court's application is legally correct. The reviewing court is not required to affirm simply because the lower court's application

is not unreasonable. Therefore, in reviewing the Workers' Compensation Court's application of the definition of "temporary total disability" to its own findings of fact, the reviewing court determined whether the application was legally correct. Anderson v. Home Indem. Co., 178 M 290, 583 P2d 440 (1978).

Concerted Activities: After more than 40 years of construction by federal and state courts, "concerted activities" has acquired a peculiar and appropriate meaning in labor law which includes strikes. Dept. of Highways v. Pub. Employees Craft Council, 165 M 349, 529 P2d 785 (1974).

Force of Ordinary Rules of Grammar: Since under this section statutes must be interpreted according to the ordinary rules of grammar, and if when thus regarded, the words embody a definite meaning involving no absurdity or contradiction, the court may not add to or take from their meaning. In construing 70-27-205 the words "of the damages thus assessed, and of the rent found due" obviously constitute two separate and coordinate prepositional phrases connected by the word "and", the antecedent of both phrases being the noun "amount", and the amount which must be trebled in the judgment includes rent as well as damages, the court having no discretion in the matter. Steinbrenner v. Love, 113 M 466, 129 P2d 101 (1942).

"May" Construed:

The word "may", unless it has acquired a special meaning in law, is to be given its ordinary meaning. Lewis v. Petroleum Co., 92 M 563, 17 P2d 60 (1932), followed in Chouteau County v. Fort Benton, 181 M 123, 592 P2d 504 (1979), and Dover Ranch v. Yellowstone County, 187 M 276, 609 P2d 711 (1980).

Where the word "may" is used in conferring power upon an officer, court, or tribunal, and the public or a third person has an interest in the exercise of the power, the exercise of the power sometimes becomes imperative. Mont. Ore Purchasing Co. v. Lindsay, 25 M 24, 63 P 715 (1901), followed in State ex rel. Stiefel v. District Court, 54 M 602, 172 P 1030 (1918), State ex rel. Case v. Bolles, 74 M 54, 238 P 586 (1925), Durland v. Prickett, 98 M 399, 39 P2d 652 (1935), Colbert Drug Co. v. Elec. Products Consol., 106 M 11, 74 P2d 437 (1937), Thomas v. Cloyd, 110 M 343, 100 P2d 938 (1940), Hansen v. Havre, 112 M 207, 114 P2d 1053 (1941), and Bascom v. Carpenter, 126 M 129, 246 P2d 223 (1952). See also Lamb v. Missoula Imports, 230 M 183, 748 P2d 965 (1988), and St. v. Peplow, 2001 MT 253, 307 M 172, 36 P3d 922 (2001).

Words in Common Use:

"Facility" is not a technical word but one in common use, and its meaning is to be found in the sense attached to it by approved usage. Money raised by a tax to furnish "additional school facilities" may be used to pay the salaries of teachers. State ex rel. Knight v. Cave, 20 M 468, 52 P 200 (1898).

"Width". State ex rel. Keane v. Bd. of County Comm'rs, 83 M 540, 273 P 290 (1929).

"Manufacture". St. v. Hennessy Co., 71 M 301, 230 P 64 (1924).

"Malt liquors". St. v. Centennial Brewing Co., 55 M 500, 179 P 296 (1919).

"Each party". Mullery v. Great N. Ry., 50 M 408, 148 P 323 (1915).

Attorney General's Opinions

"May" Construed: The use of the term "may" in 2-2-132 (now repealed) to convey authority to the Secretary of State to issue ethics opinions and adopt rules with regard thereto falls under the rule that whenever the rights of the public are involved in the exercise of the authority, the word "may" is interpreted to mean "shall". 39 A.G. Op. 32 (1981).

Tort Claims Against State — Fee Regulation: This section requires an attorney representing a party to a tort claim against the state to file a copy of his contract of employment with the Department of Administration. The District Court of Lewis and Clark County has the power to regulate such fees in conjunction with claims which are not litigated. In the case of litigated claims, the District Court before which the case is tried has regulatory power. The method and extent of its regulation are matters for the court's discretion. 37 A.G. Op. 121 (1978).

Elements of DWI: In order to sustain a conviction for driving under the influence of alcohol, the state must prove actual physical control of a motor vehicle while under the influence of alcohol. This section does not require proof that a person is under the influence of alcohol to a degree which renders him incapable of safely driving a motor vehicle. 37 A.G. Op. 120 (1978).

Public Disclosure of Records: The Board of Real Estate when requested must disclose the status of any real estate licensee, whether any disciplinary action has been taken against that individual, and if so, the reason. Public access to information relating to complaints or to allegations and to other files on individual licensees is left to the discretion of the Board, within the guidelines of this opinion. All minutes except those minutes of a meeting closed by the presiding officer pursuant to 2-3-203 must be open to public inspection. 37 A.G. Op. 107 (1978).

"Immediate Family": The Subdivision and Platting Act refers to but does not define "immediate family". Because of the use of "immediate" and the usual common meaning of "family", the term's meaning was intended to be quite restrictive, and it means one's spouse and one's children by blood or adoption. 35 A.G. Op. 70 (1974).

"Volume of Business": A nontechnical term in a statute must be understood in its ordinary sense. If it has not acquired a peculiar meaning in the law, it must be taken in its ordinary sense with the meaning commonly given. "Volume of business", as used in 16-2-101 (prior to amendment in 1979) is the amount of money taken in the performance of the store's statutory functions. 29 A.G. Op. 18 (1961).

"District": The word "district", as it appears in the herd district law, is used in its ordinary sense and is not specially defined. Nothing in the herd district law indicates it is used in a special sense. 28 A.G. Op. 21 (1959).

1-2-107. Applicability of definitions.

Case Notes

Applying Pharmaceutical Definition of "Drug" in DUI Case — Counter to Legislative Intent: The defendant was charged with felony DUI and reckless driving after inhaling aerosol dust-remover that contained 1,1-Difluoroethane (DFE). The defendant argued that the charge should be dismissed because the definition of "drug" in 37-3-101 for pharmaceutical drugs did not include DFE. The District Court denied the motion to dismiss, reasoning that it was illogical to apply the pharmaceutical definition of "drug" in a DUI statute under 1-2-107 because it would run counter to the legislative intent of protecting public safety. On appeal, the Supreme Court affirmed, ruling that the locations of the two uses of the term "drug" in the Montana Code Annotated demonstrated legislative intent that the pharmaceutical definition not apply to DUI statutes. St. v. Pinder, 2015 MT 157, 379 Mont. 357, 350 P.3d 377.

Suspension of Firefighters — All Cities Required to Present Charges to City Council for Hearing — Suspension Procedure Not Part of "Structure" of City Government Under Applicable Definitions — Statute Not Superseded by Charter: Elsenpeter, a Billings firefighter, was suspended from duty by the Billings fire chief. The firefighters' union filed a lawsuit in which the union contended that the suspension procedure used by the city was unlawful because the charges against Elsenpeter were not presented to the Billings City Council for hearing pursuant to 7-33-4124. The city contended that the suspension procedure that it used is part of the structure and organization of the city under its charter and that, pursuant to Art. XI, sec. 5, Mont. Const., and 7-3-701(2), which allow the structure of a chartered city government to supersede statutory requirements, the city may override the statutory requirements for hearing contained in 7-33-4124 because the definition of "structure" contained in 7-1-4121(24) is the definition that should apply. The Supreme Court held that in as much as the definitions in 7-1-4121 are, by the terms of that section, limited in their application to 7-1-4121 through 7-1-4149, the dictionary definition of "structure" is the definition that applies. Because the dictionary definition of structure was narrower, the Supreme Court held that the disciplinary suspension procedure used by the city was not part of the "structure" of city government. Therefore, the Supreme Court held that the statutory procedure contained in 7-33-4124, requiring presentment of the charges to the City Council was not superseded by the city charter and had to be followed for the purposes of the suspension of Elsenpeter. Billings Firefighters Local 521 v. Billings, 1999 MT 6, 293 M 41, 973 P2d 222, 56 St. Rep. 23 (1999).

Definition of Farm for Purposes of Eminent Domain — Use of Otherwise Inapplicable Definition — Use of Ordinary Meaning of Undefined Term: The Richters brought an action in District Court to condemn an easement across the land of a neighbor that surrounded their property on three sides. The District Court held that the definition of farm in 72-16-331(7) (section now repealed) applied to the use of that term in 70-30-102(6), reasoning that because the term "farm" was undefined in Title 70, ch. 30, the definition in 72-16-331(7) (section now repealed) should be applied because this section provides that a definition contained in one section of law should be used for the purposes of other sections of law unless "a contrary intention plainly appears". The District Court then entered a preliminary condemnation order in favor of the Richters. The Supreme Court held that a contrary intention did in fact appear because the Legislature had, by use of the phrase "as used in 72-16-331 through 72-16-349" (all sections now repealed), limited the application of the terms defined in 72-16-331 (now repealed) to only 72-16-331 through 72-16-349 (all sections now repealed). Because farm was then left undefined for the purposes of Title 70, ch. 30, the Supreme Court applied the definition found in the American Heritage Dictionary and held that the Richters' property did not qualify as a farm, as defined in that dictionary, because

the Richters had not prepared, fertilized, or tilled the soil on their property nor had they cited any authority for the Supreme Court to hold that naturally occurring timber on the property was a crop. The Supreme Court therefore reversed the condemnation order of the District Court. Richter v. Rose, 1998 MT 165, 289 M 379, 962 P2d 583, 55 St. Rep. 663 (1998), followed in Billings Firefighters Local 521 v. Billings, 1999 MT 6, 293 M 41, 973 P2d 222, 56 St. Rep. 23 (1999).

Lack of Compensable Injury Precludes Exclusivity of Workers' Compensation Remedy — Definition of Injury — Tort Action Allowed: Lincoln County Deputy Sheriff Stratemeyer filed a tort action against Lincoln County for failing to properly train, debrief, and counsel him to cure his posttraumatic stress disorder incurred from observing a suicide victim. Citing case law from other states and the public policy expressed by the Legislature, the Supreme Court held that the refusal of the Legislature to provide coverage under the workers' compensation laws precluded the applicability of the exclusive remedy theory upon which those laws are based. The Supreme Court also held that because the definition of injury contained in 39-71-411 must be construed consistently with the definition of injury in 39-71-119, an injury excluded by the definition in 39-71-119 must also be excluded from the exclusive remedy provisions of 39-71-411. Because Stratemeyer did not suffer an injury covered by the exclusive remedy provision of the workers' compensation laws, he was free to bring a separate tort action against the county. Stratemeyer v. Lincoln County, 276 M 67, 915 P2d 175, 53 St. Rep. 245 (1996), followed in Kleinhesselink v. Chevron, U.S.A., 277 M 158, 920 P2d 108, 53 St. Rep. 668 (1996), and Buerkley v. Aspen Meadows Ltd. Partnership, 1999 MT 97, 294 M 263, 980 P2d 1046, 56 St. Rep. 415 (1999). Stratemeyer and Kleinhesselink were distinguished in Maney v. La. Pac. Corp., 2000 MT 366, 303 M 398, 15 P3d 962, 57 St. Rep. 1561 (2000).

Malice as Applied to Intentional Injury: The definition of actual malice in 27-1-221, adopted in 1987 for purposes of punitive damages, did not change the standard used to determine whether an injury was intentional for purposes of the exclusivity provision of the Workers' Compensation Act. The definition of malice in 1-1-204 is still applicable to workers' compensation cases. Blythe v. Radiometer America, Inc., 262 M 464, 866 P2d 218, 50 St. Rep. 1640 (1993).

Definitions Improperly Applied to Only Part of MCA: The State Tax Appeal Board improperly interpreted language in a definition section reading "As used in parts 1 through 4 of this chapter, unless the context clearly indicates otherwise, the following definitions apply" to mean that the definitions related only to the parts listed. That language only indicated that the Legislature intended the particular application of the definitions in those parts of the MCA without limitation to the general use of the definitions in other parts of the code pursuant to this section. Dept. of Revenue v. Gallatin Outpatient Clinic, Inc., 234 M 425, 763 P2d 1128, 45 St. Rep. 2025 (1988).

Tax Sale Provisions Applicable to Improvements on Tax-Exempt Land — Meaning of "Real Property" and "Real Estate": Montana's tax collection laws governing real estate tax sales apply to improvements located on tax-exempt lands. The conveyance by tax deed of appellant's log cabin for nonpayment of taxes was upheld against his assertion that the cabin, situated on Forest Service land, is not an improvement fixed to land for purposes of the Realty Transfer Act and not "real estate" for purposes of the tax sale provisions. The court traced the Legislature's circuitous route to a definition of taxable real property in support of its holding. Brown v. Hart, 213 M 517, 692 P2d 14, 41 St. Rep. 2264 (1984).

Definition of "Plat" — Applicability: The definition of "plat" found in 76-3-103 of the Montana Subdivision and Platting Act is clearly applicable to Title 76, ch. 4, part 1, on sanitation in subdivisions. The Department of Health and Environmental Sciences' (now Department of Environmental Quality) contention that it has broad authority in defining the term plat by virtue of the lack of a statutory definition under the sanitation in subdivisions law is without merit. State ex rel. Dept. of Health and Environmental Sciences v. Lasorte, 182 M 267, 596 P2d 477 (1979).

Attorney General's Opinions

Water Adjudication Program Not Void Given Sufficient Line Item Appropriations to Avoid Voidness: A contingent voidness clause attached to legislation establishing the water adjudication account required that at least $2 million each fiscal year be appropriated to the water adjudication account by line item appropriation. Although the line item appropriations were directed to two agencies instead of being included in a single programmatic line item, the Attorney General concluded that more than $2 million had been appropriated from state sources other than the water adjudication account to avoid the contingent voidness provision. 51 A.G. Op. 3 (2005).

Meaning of "Misdemeanor": The word "misdemeanor", as used in 44-5-301, should be assigned the meaning given the word in 45-2-101. 40 A.G. Op. 35 (1984).

"Motor Vehicle" — Aircraft: The motor vehicle laws' definition of "motor vehicle", which obviously excludes aircraft, must be used for the definition of "motor vehicle" in tax statute relating to motor vehicle assessment. 30 A.G. Op. 20 (1963).

"Motor Vehicle" — Trailer Houses: When motor vehicle laws defined "motor vehicle" to include trailer houses, that definition must be used elsewhere in the code absent a contrary intent. As used in tax assessment provision, "motor vehicle" includes trailer houses not affixed to land. 29 A.G. Op. 30 (1961).

1-2-108. Reference to other titles, chapters, parts, sections, or subsections — subsequent amendments.

Compiler's Comments

1983 Amendment: Near beginning of (2), changed "presumed" to "implied"; and inserted (3) relating to retroactive application to the MCA of the presumption in subsection (2).

Case Notes

No Retroactive Application to Open Meeting Law: In 1975 the official misconduct criminal statute (45-7-401) was expanded to include a violation of the open meeting law (2-3-203). In 1977 a broad definition of "meeting" was enacted (2-3-202). In 1979 this section was amended, creating the presumption that a reference to a section encompasses subsequent changes. However, because 1-2-109 states that no law is retroactive unless expressly declared to be, this section does not act to incorporate the 1977 definition of "meeting" into the 1975 criminal statute. St. v. Conrad, 197 M 406, 643 P2d 239, 39 St. Rep. 680 (1982).

Corporate License Tax — Limitations on Assessment Where No Return — No Revival of Impliedly Repealed Section by Internal Reference: The 2-year Statute of Limitations in 27-2-211 applied to the assessment of corporate license tax for corporations that failed to file a return for the reason that the Supreme Court in St. v. King Colony Ranch, 137 M 145, 350 P2d 841 (1960), had held that sec. 1, Ch. 209, L. 1945 (amending 15-31-526), had superseded sec. 9, Ch. 166, L. 1933 (enacting 15-31-542, repealed by Ch. 79, L. 1983), as to the time limitation and the Legislature, in sec. 2, Ch. 186, L. 1963 (enacting 15-31-509), though referencing 15-31-542 (repealed by Ch. 79, L. 1983) in an exception, had not used language to revive it; therefore 15-31-542 (repealed by Ch. 79, L. 1983) remained superseded or repealed. (But see 15-31-544.) Caterpillar Tractor Co., Inc. v. Dept. of Revenue, 194 M 537, 633 P2d 618, 38 St. Rep. 1245 (1981).

1-2-109. When laws retroactive.

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GENERAL

Law in Effect at Time of Offense Controls: A District Court's imposition of costs in the amount of $800 to cover the defendant's cost of a public defender was reversed and remanded to District Court on the grounds that 46-8-113 allowed only up to $500 for costs of counsel in a felony case at the time of the offense. St. v. Dietsch, 2013 MT 245, 371 Mont. 460, 308 P.3d 111.

Unsubstantiated Reports From Another Jurisdiction — Prohibition on Use Not Retroactive: In an abuse and neglect proceeding in 2001, the court ordered the physician doing psychological evaluations of the parents to consider historical documents, including the father's unsubstantiated child neglect history from California from in 1997 and a 1990 conviction for exhibiting a firearm. On appeal of the termination of parental rights, the mother asserted that the use of the information violated the spirit of the Montana statute requiring unsubstantiated reports to be destroyed after 3 years. The requirement to destroy unsubstantiated records was enacted in 2003 and was not retroactive. Without legislative intent, statutes do not apply retroactively, so the 2003 statute did not apply to the District Court's 2001 decision. The court did not err in requiring the physician to consider unsubstantiated allegations from California. In re D.B., 2004 MT 371, 325 M 13, 103 P3d 1026 (2004).

Retroactivity of New Judicial Rules and Judicial Interpretation — Section 46-23-1012 (1999) Applied Retroactively to Parole Revocations Between April 28, 1999, and May 1, 2001: On April 26, 2001, the Supreme Court held that a probable cause hearing was mandatory only when an offender had been arrested pursuant to a warrant issued by a judge. On May 4, 2001, Goebel

petitioned the court to look beyond the plain language of 46-23-1012 and hold that the probable cause hearing was mandatory only when an offender has been arrested by a probation officer rather than pursuant to a warrant issued by a judge. Effective May 1, 2001, the Legislature amended 46-23-1012 to delete the requirement for a probable cause hearing. On May 9, 2001, Giddings filed a petition for rehearing, asking the court to direct the District Court to dismiss the petition to revoke Giddings' suspended sentence on grounds that the District Court lacked jurisdiction to revoke the suspended sentence because of the amendment to 46-23-1012, contending that application of the new statute would violate the constitutional ban on ex post facto legislation. The Supreme Court declined to modify the decision in either Goebel or Giddings because no material fact or question decisive of the cases themselves was overlooked and the decisions did not conflict with any express statute or controlling decision. However, the court did discuss the retroactive application of judicial rules of criminal procedure and the judicial interpretation of a statute, as well as the claim that the retroactive application of 46-23-1012 was a violation of the ex post facto clause. Citing Rivers v. Roadway Express, 511 US 298 (1994), the court held that a court's interpretation of a statute is never new law because the decision declares what the statute meant from the day of its enactment, not from the date of the decision. In determining whether a statute violates the ex post facto clause, the court referred to the test in St. v. Duffy, 2000 MT 186, 300 M 381, 6 P3d 453 (2000), which provided that to be in violation of the clause, a statute must be retrospective and must disadvantage the offender affected by it. In this case, Giddings was not disadvantaged because the statutory change did not alter the definition of or punishment for the probation violation that Giddings was charged with. Further, the error that was the basis for reversal of Giddings' case was jurisdictional, so all proceedings in the District Court were void ab initio, and the state was entitled to proceed anew, following the procedure outlined in the newly amended version of 46-23-1012. The Supreme Court's decisions based on the 1999 version of 46-23-1012 were applicable retroactively to persons whose probation or parole was revoked between April 28, 1999, and May 1, 2001. Thus, if a person was arrested during that period pursuant to a warrant issued by a judge and was not afforded a probable cause hearing within 36 hours of arrest, then the District Court did not have jurisdiction to hold a revocation hearing, so the state could refile the petition to revoke the person's probation pursuant to the 2001 version of 46-23-1012, as long as the probationer was still under the custody or supervision of the Department of Corrections on May 1, 2001. If the person was afforded a probable cause hearing within 36 hours of arrest, then the District Court did have jurisdiction to hold a revocation hearing. St. v. Goebel, 2001 MT 155, 306 M 83, 31 P3d 340 (2001), followed in St. v. Finley, 2003 MT 239, 317 M 268, 77 P3d 193 (2003), and St. v. Van Haele, 2005 MT 153, 327 M 400, 114 P3d 225 (2005).

General Rule That Appellate Court Must Apply Law in Effect at Time of Decision: A statute is not retroactive, in the sense that the word is used in this section, merely because it is applied to conduct that occurred before the statute's effective date. A statute is retroactive for purposes of this section only if it takes away or impairs a right acquired before or imposes a new obligation, duty, or disability with respect to conduct that occurred before the statute's effective date or gives conduct a legal effect different from that which the conduct had when the conduct occurred. The general rule that an appellate court must apply the law in effect at the time of the court's decision (a rule originally applied only to the law in judicial decisions, but later mistakenly applied to statutes and administrative rules) is limited to the law in judicial decisions. To the extent that prior cases of this court are inconsistent with this holding, they are overruled. Porter v. Galarneau, 275 M 174, 911 P2d 1143, 53 St. Rep. 99 (1996), followed in C. Loney Concrete Constr., Inc. v. Employment Relations Div., 1998 MT 230, 291 M 41, 964 P2d 777, 55 St. Rep. 961 (1998). (Annotator's note: See case notes under this section stating that retroactive application of a statute with regard to procedural matters, as against substantive rights, duties, and effects, is permissible.)

Interest on Delinquent Tax Payments — Effect of Conflicting Attorney General's Opinions: After the Legislature passed an amendment raising the rate of interest applied to tax payments in delinquency, the Attorney General issued two opinions as to whether the increase should be given retroactive application, the first opinion saying "no" and the second opinion, issued 2 months later, saying "yes". Appellant claimed that the effect of the Attorney General's opinions was to divide delinquent taxpayers into two groups, those to whom the increase was not retroactively applied, under the first opinion, and those to whom the increase was applied, under the second opinion, and that therefore, retroactive application of the increase violated the Due Process and Equal Protection Clauses of the Montana Constitution as well as the 14th amendment of the United States Constitution. The Supreme Court upheld the District Court's dismissal of appellant's claim, ruling that the constitutionality of a law is determined by looking

at the enactment itself rather than at an administrative interpretation of it. Further, the law is not discriminatory and a delinquent taxpayer does not have a vested right to application of a particular rate of interest. O'Shaughnessey v. Wolfe, 212 M 12, 685 P2d 361, 41 St. Rep. 1557 (1984).

Presumption Against Retroactive Application: This section creates a presumption against construing a statute to apply retroactively without an expressed legislative intent to do so in the statute itself. Penrod v. Hoskinson, 170 M 277, 552 P2d 325 (1976).

Retroactivity Clearly Intended Although No Express Statement: If it is unmistakable that an act was intended to operate retroactively, that intention is controlling as to the interpretation of the statute, even though it is not expressly so stated. Davidson v. Love, 127 M 366, 264 P2d 705 (1953), followed in Neel v. First Fed. S & L Ass'n, 207 M 376, 675 P2d 96, 41 St. Rep. 18 (1984), and O'Shaughnessey v. Wolfe, 212 M 12, 685 P2d 361, 41 St. Rep. 1557 (1984).

Section a Rule of Construction: This section is a rule of construction and, in the absence of express language giving a statute retroactive effect, it will not be so construed. State ex rel. Whitlock v. St. Bd. of Equalization, 100 M 72, 45 P2d 684 (1935).

Intent of Legislature — From What Determinable: Where it becomes necessary to determine whether the Legislature in enacting a statute "expressly declared" it retroactive within the meaning of this section, providing that no law is retroactive unless expressly so declared, its intent in that behalf must be gathered from the act itself and from no other source. Mills v. St. Bd. of Equalization, 97 M 13, 33 P2d 563 (1934).

Curative Statutes: Curative statutes designed to legalize past acts generally can have no prospective operation. Snidow v. Mont. Home for the Aged, 88 M 337, 292 P 722 (1930).

Presumptions: There is always a presumption that statutes are intended to operate prospectively only, and words ought not to have a retroactive operation unless they are so clear, strong, and imperative that no other meaning can be annexed to them or unless the intention of the Legislature cannot be otherwise satisfied. Every reasonable doubt is resolved against a retroactive operation of a statute. State ex rel. Mills v. Dixon, 68 M 526, 219 P 637 (1923). See also State ex rel. Billings v. Osten, 91 M 76, 5 P2d 562 (1931).

Statutes Deemed Retroactive — Elements: A statute which takes away or impairs vested rights acquired under existing laws or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions already past is deemed retroactive. Butte & Superior Min. Co. v. McIntyre, 71 M 254, 229 P 730 (1924).

Definitions: The terms "retroactive" and "retrospective" as applied to law are used interchangeably and are synonymous. Cont. Oil Co. v. Mont. Concrete Co., 63 M 223, 207 P 116 (1922).

PROCEDURAL CIVIL LAWS

Notice of Necessity for Driver to Complete Driver Rehabilitation and Improvement Course Not Required Following Repeal of Notice Requirement — Substantive Right Not Affected: Keeney accumulated 30 conviction points in a 3-year period and was notified by the Department of Justice that his driver's license was revoked for 3 years. Keeney had accumulated 18 conviction points on speeding violations by May 2, 2003, the last points being acquired from a speeding violation in Idaho. Prior to its May 5, 2003, repeal, 61-11-204(3)(b) required that a driver who accumulated 18 or more conviction points be notified of the necessity to complete a driver rehabilitation and improvement course. Keeney asserted that his due process rights were violated when the Department failed to notify him of his status as a habitual offender under the former notice requirement, essentially challenging the perceived retroactive application of the repealed provision. However, the Department was not notified of the Idaho violation until May 28, 2003. Therefore, the Department properly applied the law as it stood on May 5, 2003. The Department did not change the method of calculating points for speeding infractions prior to the repeal and did not punish Keeney for violations that occurred before the repeal, but rather properly considered the previous violations as points against Keeney's record when he finally accumulated 30 points. Once Keeney reached the 30-point plateau within a 3-year period, he was correctly sent a notice of revocation and afforded the option for judicial review of the revocation. Procedural due process required nothing more because it was not necessary to advise Keeney of his continuing duty to act as a law-abiding citizen. In re Driver's License of Keeney v. Dept. of Justice, 2006 MT 152, 332 M 446, 139 P3d 814 (2006).

Plaintiff's Ability to Maintain Action Against Defunct Corporation: In an asbestos contamination case, 47 plaintiffs sued 53 defendants in Cascade County, including one defendant, Robinson Insulation Company (Robinson), that was a defunct corporation. Another defendant,

Atlantic Richfield Company (Atlantic) moved for a change of venue to Flathead County, contending that as a defunct corporation, Robinson did not reside in Cascade County at the commencement of the action and had been improperly joined so that venue could be maintained in Cascade County. However, Robinson's status as a defunct corporation did not mandate a change of venue. The corporate survival statutes, 35-1-935 and 35-1-937, maintained the status quo concerning corporate rights and responsibilities before and after dissolution, including actions against defunct corporations. Atlantic's argument that application of this interpretation to Robinson would require impermissible retroactive application of the corporate survival statutes failed because Robinson acquired no vested right to be free from liability before the running of the statute of repose in former 35-1-930 (repealed 1991). Denial of Atlantic's motion to change venue was affirmed. Allen v. Atl. Richfield Co., 2005 MT 281, 329 M 230, 124 P3d 132 (2005), following Williams v. Hartford Accident & Indem. Co., 174 M 387, 571 P2d 90 (1977).

Use of New Licensing Procedures Not Retroactive Application of Law and Not Violation of Department's Internal Policy: The Wallaces argued that the Department of Fish, Wildlife, and Parks had violated the law by retroactively applying license approval criteria for game farm (now alternative livestock ranch) approval to them when they had filed their license application prior to 1993 legislative changes to the licensing law. The Wallaces also argued that the Department had not followed its own internal policies that required it to act on the application within 60 days of receipt. The Supreme Court held that the Department had correctly applied the new licensing criteria because a license is a privilege, not a vested right, the Department is required to comply with the law circumscribing its powers, and as a general rule, an agency is required to make its decisions on the law as it exists at the time that the decision is made, despite the fact that the law may have changed. The Supreme Court also held that the 60-day requirement to approve or disapprove a license application had been a statutory requirement under the previous law and had ceased to be a requirement when the amendments to the law became effective. Wallace v. Dept. of Fish, Wildlife, and Parks, 269 M 364, 889 P2d 817, 52 St. Rep. 30 (1995). See also Harlem v. St. Highway Comm'n, 149 M 281, 425 P2d 718 (1967), and Saint Vincent Hosp. v. Blue Cross, 261 M 56, 862 P2d 6 (1993).

Retroactivity and Validity of Change in Burden of Proof for Change of Water Appropriation: The fact that a water right existing at the time of adoption of the 1972 Montana Constitution is recognized by that constitution does not mean that if the owner of the right applies for a change in the right, the burden of proof must be placed on the objector. The objector had the burden in 1972, but the holder now has the burden under 85-2-402. The change in the burden of proof is not an impermissible retroactive application of the statute to the detriment of vested rights acquired under the 1972 Montana Constitution. Statutes that modify the procedure for exercising a vested right or for carrying out a duty do not constitute retroactive legislation. In re Application for Change of Appropriation of Water Rights for Royston, 249 M 425, 816 P2d 1054, 48 St. Rep. 747 (1991).

Retroactive Applicability — Commission as Exclusive Remedy for Discrimination in Employment: The 1987 amendment of 49-2-509 (now repealed) demonstrated a clear legislative intent to overrule Drinkwalter v. Shipton Supply Co., Inc., 225 M 380, 732 P2d 1335 (1987), and to allow the Commission for Human Rights to provide the exclusive remedy for discrimination in employment, including claims of sexual harassment. As set out in the applicability provisions of the 1987 law, the exclusive remedy provision applies to all cases pending on or filed after April 16, 1987, and may therefore be applied retroactively. Harrison v. Chance, 244 M 215, 797 P2d 200, 47 St. Rep. 1539 (1990).

Inapplicability of Retroactivity Exclusion to Nonsubstantive Procedural Laws: New legislation that affects only procedural matters and that does not relate to substantive rights of the parties does not fall within the ambit of this section. St. Comp. Ins. Fund v. Sky Country, Inc., 239 M 376, 780 P2d 1135, 46 St. Rep. 1760 (1989), followed in EBI/Orion Group v. Blythe, 281 M 50, 931 P2d 38, 54 St. Rep. 54 (1997).

Retroactivity of Change in Time for Hearing: Subsection (2) of 41-3-401 (renumbered 41-3-422) was amended in 1985 to require adjudicatory hearing within 20 days of filing of petition and amended in 1987 to remove the 20-day requirement. Hearing in this case was held after effective date of 1985 amendment but not within 20 days of filing the petition. The petition was filed before the 1985 amendment became effective. Appellant contended 1985 amendment was procedural and applied retroactively to require hearing within 20 days. The Supreme Court, citing Boehm v. Alanon Club, 222 M 373, 722 P2d 1160, 43 St. Rep. 1341 (1986), held that even though this provision may be procedural and therefore not subject to this section (which states no law is retroactive unless expressly so declared), the 1987 amendment was likewise retroactive

and therefore voided the 20-day requirement. Custody of R.A.D. & J.D., 231 M 143, 753 P2d 862, 45 St. Rep. 496 (1988).

Child's Death Occurring Prior to Amendment of 27-1-512 Providing That Wrongful Death Action May Be Brought by Either Parent — Second Action by Father Permissible — Lack of Standing by Defendant to Challenge Constitutionality of Statute: Prior to its amendment in 1975, section 93-2809, R.C.M. 1947 (now recodified as 27-1-512), provided that an action for wrongful death of a child was to be brought by the child's father, unless the father was dead or had deserted the family. In those instances, the mother could bring the lawsuit. The statute was amended to provide that either parent may bring such an action. Barrett's daughter was killed in an automobile accident 2 weeks before the statute was amended. Barrett and his wife were divorced in 1969, prior to the child's death. The mother was the child's legal custodian. Ten weeks after the amendment went into effect, the mother filed a wrongful death action. The mother settled the case and as personal representative of the child's estate executed a release of all claims arising from the accident. Barrett had not been made a party to the lawsuit or notified of the proceedings, nor did he share in the proceeds of the settlement; however, he was aware of the lawsuit prior to its settlement. In 1978, Barrett filed a wrongful death action on his own behalf. The District Court, over appellant's objection, conducted a jury trial at which Barrett prevailed. The Supreme Court affirmed. The court agreed with appellant's contention that normally there can be only one wrongful death action arising from a death. But the court ruled that, in this case, the father's suit was permissible because an action for wrongful death accrues in the statutory designee at the time of death and the amendment had not been made retroactive. The court further held that appellant lacked standing to challenge the constitutionality of the original statute because appellant was not injured by the alleged under-inclusiveness of the statute. Barrett v. Soyland, 221 M 160, 717 P2d 1090, 43 St. Rep. 712 (1986).

Change in Procedure Not Retroactive Legislation: Application of a statute that modifies a procedure for exercising a vested right or for carrying out a duty does not constitute retroactive legislation. A 1959 amendment which only changed the procedure the Department of Highways (now Department of Transportation) must follow in disposing of property and does not impair the Department's rights or impose additional duties does not constitute retroactive legislation. Castles v. State ex rel. Mont. Dept. of Highways, 187 M 356, 609 P2d 1223 (1980).

No Retroactive Application of Uniform Custody Law in Pending Action: Absent a clear expression of legislative purpose, retroactive application of even a procedural statute so as to affect prior proceedings of a pending action cannot be justified. Therefore, jurisdictional rulings entered before the effective date of the UCCJA (Uniform Child Custody Jurisdiction Act) are not subject to the UCCJA. Wenz v. Schwartze, 183 M 166, 598 P2d 1086 (1979).

Applicability of Amendment: The 1973 amendment to 39-71-601 applies to all claims existing at its effective date without retroactive effect. Since claimant's action had not been barred by the amendment's effective date, the division had the power to consider his petition for an extension of time. Williams v. Hartford Accident & Indem. Co., 174 M 387, 571 P2d 90 (1977).

Retroactivity of Rules of Procedure: Although legislative intent to give retroactive force to a statute must appear and all doubt will be resolved against retroactive application, the Montana Rules of Civil Procedure apply retroactively. State ex rel. Johnson v. District Court, 148 M 22, 417 P2d 109 (1966); Lumbermen's Mut. Cas. Co. v. Babcock & Wilcox Co., 34 F.R.D. 515 (D.C. Mont. 1964); Weber v. Hydroponics, Inc., 226 F. Supp. 177 (D.C. Mont. 1962).

SUBSTANTIVE CIVIL LAWS

Notification Requirement of Underground Tank Release Not Retroactive —Compensation Properly Denied: Plaintiff discovered a possible leak in an underground tank in 2002. Even though the 2001 version of 75-11-308 and related administrative rules required notice to the Department of Environmental Quality within 24 hours of the occurrence of unusual operating conditions, plaintiff waited until after the 2003 amendment of 75-11-308, which eliminated the 24-hour notice provision, to report the possible leak. Plaintiff then sought reimbursement for the cleanup. The Petroleum Tank Release Compensation Board denied the request because plaintiff did not report the unusual operating conditions within 24 hours pursuant to the 2001 law in effect at the time that plaintiff noticed the possible spill. Plaintiff appealed denial of the compensation claim, but the District Court affirmed the Board's decision, so plaintiff appealed to the Supreme Court, which affirmed. Plaintiff asserted that the 2003 amendments to 75-11-308 were to be applied retroactively. However, the retroactive applicability section in the 2003 bill did not include a reference to 75-11-308, so amendments to that section were not retroactive, and the savings clause provided that the amendments to 75-11-308 did not affect duties that

matured prior to the 2003 amendments. Thus, the 2001 version applied, and plaintiff's failure to report the spill within 24 hours rendered plaintiff ineligible for compensation. Town Pump, Inc. v. Petroleum Tank Release Comp. Bd., 2008 MT 15, 341 M 139, 176 P3d 1017 (2008).

Parole Evidence Held Inadmissible to Prove Representative Capacity of Maker of Note — Definition of Debtor — Unambiguous Terms Notwithstanding Security Agreement — Statute Not Retroactive — Former Statute Inapplicable: By use of a note and security agreement, Carelli sold 38 elk to Hall who, as Stireses' partner, operated the Game Ranch. Later, Carelli brought an action against Stireses alleging that Stireses were also liable on the debt because Hall had orally told Carelli at the time of the sale that the elk were being purchased for the Game Ranch. The Supreme Court held that Hall's oral statements to Carelli were inadmissible on the issue of Stireses' liability on the note for three reasons: (1) The note was clear and unambiguous in that Hall's representative capacity did not appear on the note, Hall was the "debtor" as defined in the security agreement, and a reference to the Game Ranch in the security agreement did not make the note ambiguous so as to require explanation by parole evidence. (2) The Supreme Court held that a 1991 amendment to 30-3-403 regarding the capacity in which a person signs an instrument, if applied in this case, would cause a difference in the liability of the parties. Therefore, the amendment is substantive. Because there was no expression of legislative intent that the 1991 version be applied retroactively, the 1985 version of 30-3-403 and not the 1991 version applies, and parole evidence is not relevant to that 1985 version. (3) The facts of the case did not fall within the terms of the 1985 version of 30-3-403. Carelli v. Hall, 279 M 202, 926 P2d 756, 53 St. Rep. 1116 (1996).

Fall From Ladder After Scaffolding Law Amended to Delete Ladders From Definition of Scaffold: In 1992, the employee fell off a ladder while preparing to paint a wall. He died later the same day. The 1995 amendment of 50-77-101, which excluded ladders from the definition of a scaffold, would, if retroactively applied to this case, result in a different legal effect than the prior law. This is forbidden by this section, which provides that a statute is not retroactive unless expressly so declared. Porter v. Galarneau, 275 M 174, 911 P2d 1143, 53 St. Rep. 99 (1996).

Error to Apply Willing Provider Amendment Retroactively: The 1991 willing provider amendment added to 33-22-1704 was a substantive rather than procedural change in insurance law and, as such, absent specific legislative intent under this section, did not apply retroactively. Saint Vincent Hosp. & Health Center v. Blue Cross & Blue Shield of Mont., 261 M 56, 862 P2d 6, 50 St. Rep. 1190 (1993). See also Harlem v. St. Highway Comm'n, 149 M 281, 425 P2d 718 (1967), and Wallace v. Dept. of Fish, Wildlife, and Parks, 269 M 364, 889 P2d 817, 52 St. Rep. 30 (1995).

Change in Method of Determining Attorney Fees — No Retroactivity: A statute should not be retroactively applied unless the Legislature clearly expressed an intention to so apply it. There was no indication the Legislature intended 39-71-614, changing the method of determining attorney fees in workers' compensation cases, to apply retroactively, and the court would not make the section retroactive. The section, effective April 19, 1985, does not apply to cases in which the injury occurred prior to that date. The law in effect on the date of the injury applies in determining the attorney fees. Cadwell v. Bechtel Power Corp., 225 M 423, 732 P2d 1352, 44 St. Rep. 370 (1987).

No Retroactive Application of Amendments Relating to Lump-Sum Conversion of Biweekly Workers' Compensation Benefits and Discount to Present Value — Prospective Application Not Violative of Equal Protection: The lump-sum conversion of biweekly workers' compensation benefits and discounting to present value provisions added to 39-71-741 by 1985 amendment may not be constitutionally applied retroactively to injuries that occurred prior to April 15, 1985, the effective date of the amendment. Prospective application of the amendment relating to lump-sum conversions is not violative of the constitutional equal protection guaranties because the amendment merely codified in detailed form prior case law allowing a conversion and represented no significant change from the law as it existed prior to April 15, 1985. Buckman v. Mont. Deaconess Hosp., 224 M 318, 730 P2d 380, 43 St. Rep. 2216 (1986), followed in Komeotis v. Williamson Fencing, 225 M 356, 736 P2d 93, 44 St. Rep. 298 (1987).

Liability for Alcohol-Related Injuries — Statute Not Retroactively Applied: After consuming alcohol at a bar for 3 hours, a truck driver died from injuries received in an accident. His widow sued the bar, claiming that its action in allowing the driver to drink and then drive was the proximate cause of his death. The District Court granted the bar's motion for a judgment on the pleadings for failure to state a claim for relief, ruling that Montana did not recognize common-law dram shop liability against the bar owner. Upon appeal, the Supreme Court held that the 1986 law (27-1-710) defining civil liability for injuries involving alcohol consumption cannot be applied retroactively. The court also ruled that the District Court erred in granting the motion

for judgment on the pleadings as the widow's complaint alleging negligence by the bar properly stated a claim for relief. Jevning v. Skyline Bar, 223 M 422, 726 P2d 326, 43 St. Rep. 1845 (1986).

Substantive Amendment to Law Regarding Uninsured Employer — Not Retroactive: Appellant contended that the 1985 amendment to 39-71-508 and enactment of 39-71-515 were designed to remedy deficiencies in the prior law so that an uninsured employer would not be able to completely escape liability. He argued that since the 1985 legislation was essentially procedural or remedial, it should apply retroactively under 1-2-109, even though the legislation occurred subsequent to his accident. The Supreme Court disagreed, noting that the statutes imposed a new liability or obligation upon employers and granted employees a new cause of action or right that did not exist prior to enactment. This result fit exactly within the definition of a substantive law, and the court declined to apply the statutes retroactively. Boehm v. Alanon Club, 222 M 373, 722 P2d 1160, 43 St. Rep. 1341 (1986).

No Retroactive Application of Workers' Compensation Social Security Disability Offset Statute: At the time that claimant suffered the injury which rendered him totally permanently disabled, in May 1974, Montana law provided for a 100% offset of social security disability benefits. Shortly afterward, the Legislature reduced the offset to 50%. In 1980, in McClanathan v. Smith, 186 M 56, 606 P2d 507, the Supreme Court ruled that the 100% offset statute was constitutionally unenforceable. Therefore, application of a 50% offset to claimant was error. The statutes in effect at the time of injury set the standards by which the benefits for the claimant are computed, and since the offset statute in effect at the time of claimant's injury was void under the McClanathan decision, no offset can be made of claimant's benefits. Neither can the 50% offset statute be applied retroactively to claimant because this would be an impairment of his vested rights. Trusty v. Consol. Freightways, 210 M 148, 681 P2d 1085, 41 St. Rep. 973 (1984).

Increased Homestead Exemption Held Retroactive: Where the plaintiff filed a homestead declaration after a deficiency judgment had been obtained against her and then brought a declaratory judgment action to determine the retroactive application of an amendment to the homestead exemption statutes allowing the filing of a declaration after judgment, the Supreme Court held that the District Court erred in ruling that the amendment did not apply retroactively to the plaintiff. The Supreme Court held that the amendment would have a retroactive effect under the rationale of Harlem v. St. Highway Comm'n, 149 M 281, 425 P2d 718 (1967), because it impaired a right (the right of execution acquired under existing law). While there was no express declaration that the amendment apply retroactively to judgments obtained prior to the effective date of the amendment (October 1, 1981), the Supreme Court was guided by the maxim of law requiring a liberal application of the homestead exemption in favor of the homestead claimant and held that the amendment was intended to apply retroactively. Neel v. First Fed. S & L Ass'n, 207 M 376, 675 P2d 96, 41 St. Rep. 18 (1984).

Retroactive Calculation of Tax — Unconstitutional: Plaintiffs contended that 15-31-114(2)(b)(ii)(C) was unconstitutionally retroactive. Plaintiff, Havre Federal Savings and Loan Association, had incurred a net operating loss in each of the 5 years from 1974 through 1978. The challenged portion of the statute was enacted in 1979. Under 15-31-114(2)(b)(i), plaintiff carried forward its net operating losses and applied them to its 1979 return, which resulted in no net income for that year. The defendant, acting under the authority of the challenged subsection, recalculated plaintiff's net income for the years 1974 through 1978, which resulted in no net operating losses to carry forward. The Supreme Court held that the subsection was retroactive in effect and therefore unconstitutional. The State cannot change a law in 1979 and compel a recalculation of tax returns filed for 1974 through 1978 based on the new law effective for the first time in 1979. First Fed. S & L Ass'n v. Dept. of Revenue, 200 M 358, 654 P2d 496, 39 St. Rep. 1802 (1982).

Erroneous Application: The court erred by applying 72-16-313 (now repealed), as amended in 1973, and granting a refund of inheritance tax when it accrued prior to amendment with the death of the decedent amounting to a retrospective application in contravention of 1-2-109. Burr v. Dept. of Revenue, 175 M 473, 575 P2d 45 (1978).

Comparative Negligence Statute Not to Be Applied Retroactively: Summary judgment was properly granted defendant where plaintiff was contributorily negligent in a slip and fall case, as the comparative negligence statute is not a procedural law but a substantive law in nature with a presumption against retroactive effect and therefore does not apply to claims which might arise prior to its effective date. Dunham v. Southside Nat'l Bank of Missoula, 169 M 466, 548 P2d 1383 (1976), overruled, as to the distinction between liability based upon natural versus altered accumulations of ice or snow that are open and obvious, in Richardson v. Corvallis Pub. School District No. 1, 286 M 309, 950 P2d 748, 54 St. Rep. 1422 (1997).

Subsequently Enacted Legislation: Enactment providing that new highways shall not be constructed to bypass municipality without its consent would not be enforced in favor of nonconsenting municipality where Highway Commission (now Transportation Commission) had acquired rights and obligations and begun construction of bypass prior to enactment and where enactment did not expressly declare legislative intent to apply statute retroactively. Harlem v. St. Highway Comm'n, 149 M 281, 425 P2d 718 (1967).

Amendment to Bond Law: The amendment to 7-7-4205 by Ch. 62, L. 1945, did not apply to bonds issued prior to the enactment of such amendment. Philipsburg v. Porter, 121 M 188, 190 P2d 676 (1948).

PROCEDURAL CRIMINAL LAWS

Sentencing Under Version of Statute in Effect at Time of Offense — No Error When Penalty Not Reduced in Current Version of Statute: The defendant was convicted of outfitting without a license. Although he was alleged to have committed the acts in 2005, he was sentenced under the 2007 version of the criminalizing statute. On appeal, the defendant argued that the District Court erred in sentencing him under the 2007 statute. The Supreme Court disagreed, finding that the penalty for a violation of the statute had not been reduced in the later version, and affirmed. St. v. Kebble, 2015 MT 195, 380 Mont. 69, 353 P.3d 1175.

Extended Statute of Limitations for Criminal Offense Applicable to Offenses Not Barred at Time of Amendment: When a statute is amended to extend the limitations period for a criminal offense, the extended limitations period applies to all offenses not barred at the time that the amendment was enacted. Mordja v. District Court, 2008 MT 24, 341 M 219, 177 P3d 439 (2008), overruling Penrod v. Hoskinson, 170 M 277, 552 P2d 325 (1976), and other cases reaching conclusions to the contrary.

Extension of Criminal Statute of Limitations Not Considered Retroactive: The 1989 version of 45-1-205 provided that if the victim of sexual intercourse without consent was a minor at the time of the offense, the offender could be prosecuted up to 5 years after the victim turned 18 years old. In 2001, the Legislature extended the statute of limitations to expire 10 years after the victim turned 18 years old. The victim in this case turned 18 in 2001, and Mordja was charged in 2007, 5 years and 10 months after the victim turned 18. Mordja moved to dismiss the charges against him on grounds that the statute of limitations had expired. The District Court denied the motion, holding that because 45-1-205 was amended before the original statute of limitations expired in Mordja's case, the new limitations period applied to Mordja. On appeal, the Supreme Court affirmed. A defendant cannot have a vested right in a statute of limitations that has not yet expired. The statute of limitations did not expire in Mordja's case before 45-1-205 was amended, so Mordja did not have any vested right in an affirmative defense. Application of the 2001 amendment to Mordja's case was not retroactive within the meaning of 1-2-109 because it did not affect Mordja's vested rights or impose any additional obligations or detriments on Mordja. Thus, the state had the right to prosecute Mordja at any time within the newly extended limitations period, and the District Court did not err in denying Mordja's motion to dismiss. Mordja v. District Court, 2008 MT 24, 341 M 219, 177 P3d 439 (2008), following St. v. Wright, 2001 MT 282, 307 M 349, 42 P3d 753 (2001), and Stogner v. Calif., 539 US 607 (2003).

Parent's Prior Conviction of Sexual Offense Properly Applied in Parental Rights Termination Proceeding — No Retroactive Statutory Application: During proceedings to terminate a father's parental rights, the state became aware of the father's prior 1985 conviction in Texas of a sexual offense involving a minor. The District Court held that the prior conviction was an aggravating circumstance under 41-3-423 for purposes of terminating the father's parental rights pursuant to 41-3-609. On appeal, the father argued that the court improperly applied the 1999 amendments to 41-3-423 and 41-3-609 retroactively to a criminal act that occurred at least 13 years prior to enactment of the amendments, in violation of the father's vested constitutional parental rights. Setting out the conditions of retroactivity, the Supreme Court noted that a statute does not operate retroactively merely because it is applied to conduct that occurs prior to the statute's enactment and that an amended statute that is applied to a factual situation that occurred prior to amendment is not viewed as retroactive in application. In this case, no additional sanction was imposed on the prior conviction by enactment of the new statutory provisions, but the prior conviction was made a condition for the termination of parental rights in the event that the children were subsequently neglected or abused. Moreover, the prior conviction did not require or inevitably lead to the children being abused or neglected, necessitating the filing of an abuse and neglect petition. Rather, the prior conviction became relevant as an independent ground for the state to petition for termination of parental rights only after the children were abused and

neglected. Additionally, the statutes went into effect in 1999, and the termination proceeding was initiated in 2003, so the father was on notice that the prior conviction could be used as an aggravating circumstance to justify termination if the father allowed the children to be abused and neglected. Therefore, applying the 1999 versions of 41-3-423 and 41-3-609 to a conviction that occurred prior to 1999 did not constitute an unlawful retroactive application of the statutes. In re. M.A.L., D.L., & T.L., 2006 MT 299, 334 M 436, 148 P3d 606 (2006).

Proper Charge Under Definition of Felony Theft in Effect at Time Crime Committed: Between 1996 and 1999, podiatrist Daniels billed and received Medicaid reimbursement for a number of custom orthotic shoe inserts that were never provided to Medicaid-eligible patients. The 1999 Legislature increased the threshold amount for felony theft from $500 to $1,000, and Daniels argued that because the jury found him guilty of theft over $500 but made no findings that the value exceeded $1,000, he should have been sentenced for a misdemeanor instead of a felony. However, under St. v. Cline, 170 M 520, 555 P2d 724 (1976), persons alleged to have committed criminal offenses must be charged with violating the law in effect at the time that the crime was committed. Further, a change in the definition of an offense does not affect acts committed prior to the effective date of the definitional change. Daniels was properly charged, and the felony theft conviction was affirmed. St. v. Daniels, 2003 MT 30, 314 M 208, 64 P3d 1045 (2003), distinguishing St. v. Wilson, 279 M 34, 926 P2d 712 (1996).

Retroactive Effect of Statute of Limitations on Petitions for Postconviction Relief: In 1997, the Legislature revised procedures for seeking postconviction relief, including a reduction in the statute of limitations for filing a petition from 5 years to 1 year after the date of final conviction. The revised statute of limitations was made to apply retroactively to all convictions occurring during the 12 months prior to the April 24, 1997, effective date of the amendments. Because this procedural change neither altered the definition of a crime nor increased a petitioner's punishment, the amended statute of limitations was not subject to the constitutional prohibition against ex post facto legislation. Wright's conviction fell within the period of retroactive applicability, so Wright had until April 24, 1998, to file a petition for postconviction relief, but did not file until November 16, 2000, in violation of the statute of limitations. The postconviction statute of limitations is a jurisdictional limit on litigation that will be waived by the Supreme Court only when there is a clear miscarriage of justice so obvious as to render the judgment void, and the miscarriage of justice exception does not apply to postconviction claims unless a constitutional violation has resulted in the conviction of an innocent person or unless newly discovered evidence establishes innocence. Wright raised neither of those issues, so the Supreme Court declined to waive the statute of limitations. The District Court's denial of Wright's petition for postconviction relief was affirmed. St. v. Wright, 2001 MT 247, 307 M 100, 38 P3d 772 (2001).

Retroactivity of New Judicial Rules and Judicial Interpretation — Section 46-23-1012 (1999) Applied Retroactively to Parole Revocations Between April 28, 1999, and May 1, 2001: On April 26, 2001, the Supreme Court held that a probable cause hearing was mandatory only when an offender had been arrested pursuant to a warrant issued by a judge. On May 4, 2001, Goebel petitioned the court to look beyond the plain language of 46-23-1012 and hold that the probable cause hearing was mandatory only when an offender has been arrested by a probation officer rather than pursuant to a warrant issued by a judge. Effective May 1, 2001, the Legislature amended 46-23-1012 to delete the requirement for a probable cause hearing. On May 9, 2001, Giddings filed a petition for rehearing, asking the court to direct the District Court to dismiss the petition to revoke Giddings' suspended sentence on grounds that the District Court lacked jurisdiction to revoke the suspended sentence because of the amendment to 46-23-1012, contending that application of the new statute would violate the constitutional ban on ex post facto legislation. The Supreme Court declined to modify the decision in either Goebel or Giddings because no material fact or question decisive of the cases themselves was overlooked and the decisions did not conflict with any express statute or controlling decision. However, the court did discuss the retroactive application of judicial rules of criminal procedure and the judicial interpretation of a statute, as well as the claim that the retroactive application of 46-23-1012 was a violation of the ex post facto clause. Citing Rivers v. Roadway Express, 511 US 298 (1994), the court held that a court's interpretation of a statute is never new law because the decision declares what the statute meant from the day of its enactment, not from the date of the decision. In determining whether a statute violates the ex post facto clause, the court referred to the test in St. v. Duffy, 2000 MT 186, 300 M 381, 6 P3d 453 (2000), which provided that to be in violation of the clause, a statute must be retrospective and must disadvantage the offender affected by it. In this case, Giddings was not disadvantaged because the statutory change did not alter the definition of or punishment for the probation violation that Giddings was charged with. Further, the error that was the basis for

reversal of Giddings' case was jurisdictional, so all proceedings in the District Court were void ab initio, and the state was entitled to proceed anew, following the procedure outlined in the newly amended version of 46-23-1012. The Supreme Court's decisions based on the 1999 version of 46-23-1012 were applicable retroactively to persons whose probation or parole was revoked between April 28, 1999, and May 1, 2001. Thus, if a person was arrested during that period pursuant to a warrant issued by a judge and was not afforded a probable cause hearing within 36 hours of arrest, then the District Court did not have jurisdiction to hold a revocation hearing, so the state could refile the petition to revoke the person's probation pursuant to the 2001 version of 46-23-1012, as long as the probationer was still under the custody or supervision of the Department of Corrections on May 1, 2001. If the person was afforded a probable cause hearing within 36 hours of arrest, then the District Court did have jurisdiction to hold a revocation hearing. St. v. Goebel, 2001 MT 155, 306 M 83, 31 P3d 340 (2001), followed in St. v. Finley, 2003 MT 239, 317 M 268, 77 P3d 193 (2003).

Violent Offender Registration Requirement Not Retroactive: Prior to July 1993, Whitmer was sentenced for felony assault (now assault with a weapon). Upon his release in January 1996, Whitmer was notified of his obligation to register as a violent offender. Whitmer did not register and was charged with and convicted of failure to register as a violent offender. On appeal, he claimed that the 1995 amendments to 46-23-504, which added individuals convicted of a violent offense to the list of those required to register, did not apply retroactively. Although the original bill adding the amendments did contain a retroactive applicability clause, the clause was removed during the legislative process when the issue arose that applying the law retroactively might violate the ban on ex post facto legislation. The Legislature did not express its intent to apply the amendments retroactively in the final version of the bill. Therefore, Whitmer had no obligation to register after his release from prison because the amendments did not apply to crimes committed before October 1, 1995. Whitmer's conviction on failure to register was reversed. St. v. Whitmer, 285 M 100, 946 P2d 137, 54 St. Rep. 1063 (1997).

Application of Repealed Dangerous Offender Law to Offender Who Committed Crime Before Repeal and Was Sentenced After Repeal: The rule that the sentencing law in effect at the that time a crime is committed governs the sentence to be imposed applies to situations in which that law is amended after the crime is committed but before the sentence is imposed and in which the law still exists when the sentence is imposed. It is the law as it read prior to the amendment that governs the sentence. This rule does not apply to a situation in which a sentencing law in effect when a crime is committed is repealed before imposition of sentence. In this case, a dangerous offender statute in effect when Wilson committed his crimes was repealed before the judge sentenced him for the crimes, yet the judge used it to designate Wilson as a dangerous offender, thus increasing the punishment. In this type of situation, when the effect of the repeal is to lessen, not to increase, punishment and the repealer has no saving clause, the law in effect at the time of sentencing applies. Because the dangerous offender statute had been repealed before sentencing, it was not in effect at the time of sentencing and did not apply to the sentence. St. v. Wilson, 279 M 34, 926 P2d 712, 53 St. Rep. 1034 (1996).

Ex Post Facto: The substantive portion of the aggravated kidnapping statute, enumerating the elements of the crime and declaring the quantum of punishment, has not been altered since its enactment in 1973. The changes made by the 1977 Legislature ameliorated a mandatory death penalty to one imposed only after certain procedural steps were taken. Those procedural steps were followed in the resentencing of Dewey Coleman. At the time the crime was committed the statutes were clear that the penalty of death was a very probable consequence for the commission of the crime. Therefore, the District Court properly applied the 1977 statutes relating to the imposition of the death penalty, and it was not an ex post facto violation. St. v. Coleman, 185 M 299, 605 P2d 1000 (1979).

Retroactive Application of Death Penalty Provisions — No Ex Post Facto Violation: Where after the commission of the crime of homicide, the U.S. Supreme Court found the death penalty statute unconstitutional and the state Legislature took only the procedural step of redefining the punishment, not the crime, there is no ex post facto violation in upholding the previous death penalty imposed, since the defendant had "fair warning" of the consequences of homicide. St. v. Coleman, 185 M 299, 605 P2d 1000 (1979).

Retroactive Power to Prosecute Crimes: The statutory grant of authority of 5-13-310 is a procedural statute which may be given retroactive effect. St. v. Cline, 170 M 520, 555 P2d 724 (1976).

SUBSTANTIVE CRIMINAL LAWS

New Conditions of Parole Imposed After Original Sentence — No Increase in Punishment — No Ex Post Facto Violation: The criminal defendant had originally been sentenced to 30 years in prison with 10 years suspended. After being discharged to serve the suspended portion of his sentence, he violated the conditions of his parole. The District Court imposed a new suspended sentence with 14 new conditions, and the defendant argued that the imposition of the conditions violated ex post facto laws. The state argued that the conditions did not violate ex post facto laws because they did not increase the defendant's original sentence and were standard conditions placed on sex offenders who are on parole. On appeal, the Supreme Court agreed that the new conditions were not punitive in nature and therefore affirmed the sentence. St. v. Piller, 2014 MT 342, 377 Mont. 374, 343 P.3d 153.

Reference to Other Sections — Subsequent Changes — Not Retroactive: In 1975 the official misconduct criminal statute (45-7-401) was expanded to include a violation of the open meeting law (2-3-203). In 1977 a broad definition of "meeting" was enacted (2-3-202). In 1979 1-2-108 was amended, creating the presumption that a reference to a section encompasses subsequent changes. However, because this section states that no law is retroactive unless expressly declared to be, 1-2-108 does not act to incorporate the 1977 definition of "meeting" into the 1975 criminal statute. St. v. Conrad, 197 M 406, 643 P2d 239, 39 St. Rep. 680 (1982).

CIVIL PENALTY LAWS

No Retroactive Application When Amended Statute Applied to Factual Situation Occurring Prior to Amendment: Section 61-8-402 was amended in 1983 to provide for a 1-year revocation of a driver's license upon the holder's refusal to submit to a chemical test within 5 years of a previous refusal. The court held that application of this provision, when the first refusal had occurred prior to the 1983 amendment, was not a retroactive application of law precluded by 1-2-109. Stiffarm v. Furois, 217 M 335, 704 P2d 75, 42 St. Rep. 1227 (1985).

Attorney General's Opinions

No Revival of Previously Barred Paternity Actions by Adoption of New Statute of Limitations: In conformity with the general rule disfavoring retroactive application of legislation, the 1987 change in the statute of limitations for paternity actions initiated by a state agency did not revive actions barred under the previous statute of limitations. 42 A.G. Op. 99 (1988).

Deputy Sheriffs and Undersheriffs — Compensatory Time: Since no statutory right to compensation for overtime for Deputy Sheriffs and undersheriffs existed prior to enactment of 7-4-2509 in 1981, they are not entitled to a cash payment in lieu of compensatory time off for overtime hours worked before July 1, 1981 (The opinion inadvertently referred to July, but the correct month is October. Chapter 603, L. 1981, which enacted 7-4-2509, did not contain a specific effective date provision, and the effective date is thus October 1, 1981, under 1-2-201 as amended by Ch. 466, L. 1981). The enactment of 7-4-2509 was not expressly retroactive. 40 A.G. Op. 55 (1984).

Planning Board Appointees — Residency — Law Not Retroactive: Members of a City-County Planning Board appointed prior to July 1, 1979, remain qualified to serve out their appointed terms although new residence requirements were enacted after they began their terms. A statute must be expressly declared retroactive to be retroactive. The amended residence requirements statute had no such declaration and so has only prospective application. 38 A.G. Op. 28 (1979).

Retroactive Effect of Firemen's Salaries: The law relating to firemen's salaries is not applied retroactively. 37 A.G. Op. 8 (1977).

Fees and Bonds: A law is retroactive if it takes away or impairs vested rights acquired under existing law or creates a new obligation, duty, or disability respecting past transactions. It is not retroactive merely because it relates to prior facts or transactions without changing their legal effect or because some of the requisites for its operation are drawn from a time prior to the law's passage. Law exempting the state from fees and bonds on its mining operations applied to operations then existing and could not be objected to as being retroactive. 36 A.G. Op. 31 (1975).

Section With No Indication of Retroactivity: A code section was not retroactive where it did not contain an express declaration of retroactivity and none of its language could be construed to show a clear legislative intent of retroactivity. 30 A.G. Op. 17 (1963).

1-2-110. All statutes subject to repeal.

Case Notes

Repeal by Implication Not Favored: The Supreme Court looks with disfavor upon repeal by implication. Without an express declaration by the Legislature that an enactment repeals

an existing law, a later statute will not repeal an earlier law unless the two are plainly and irreconcilably repugnant to or in conflict with each other. W.R. Grace & Co. v. Dept. of Revenue, 238 M 439, 779 P2d 470, 46 St. Rep. 1399 (1989).

Veterans' Preference Gratuity — Not Vested Right: Plaintiff served in the capacity of deputy clerk of the Supreme Court for 20 years. He ran for the Clerk of Court position but was defeated. The newly elected Clerk terminated plaintiff and appointed a new deputy. Plaintiff contended that as a veteran he was entitled to a preference in employment and that the Legislature's repeal of the former veterans' preference law was invalid. On appeal, the Supreme Court held that the veterans' preference rights granted under the repealed portion of the veterans' preference law are not rights earned through years of service to the state, but are a gratuity given to citizens of Montana by the state to show its appreciation for service in the armed forces. They do not amount to rights vested in the veterans. The Legislature could properly repeal the law by majority vote at any time, and veterans acting under the old law are considered to have acted in contemplation of the Legislature's power of repeal. Conboy v. St., 214 M 492, 693 P2d 547, 42 St. Rep. 120 (1985), followed in Nick v. Dept. of Highways, 219 M 168, 711 P2d 795, 42 St. Rep. 1926 (1985).

Termination of Pending Proceedings: Although under common law repeal of a statute terminated all pending proceedings, priority of plaintiff's petition for appropriation of water, filed before repeal of the former water law, was an existing right preserved under Art. IX, sec. 3(1), Mont. Const. Gen. Ag. Corp. v. Moore, 166 M 510, 534 P2d 859 (1975).

Basis for Appellate Review: Notwithstanding this section, an appellate court on appeal from an order of the Livestock Commission (now the Board of Livestock) must apply the law in effect when the Commission made its order. Peterson v. Livestock Comm'n, 120 M 140, 181 P2d 152 (1947).

Effect of Repeal on Remedies and Pending Actions: It is the general rule that the repeal of a statute without any reservation takes away all the remedies existing under the repealed act and defeats all actions pending under it at the time of its repeal. The rule is peculiarly applicable to the repeal of a statute which creates a cause of action providing a remedy not known to the common law. This principle is in harmony with the above section. Cont. Oil Co. v. Mont. Concrete Co., 63 M 223, 207 P 116 (1922).

Attorney General's Opinions

Inconsistent Statutes: When two statutes are wholly inconsistent, incompatible, and incapable of being reconciled, the later statute impliedly repeals the earlier one if it does not expressly do so. 38 A.G. Op. 13 (1979).

1-2-112. Statutes imposing new local government duties.

Compiler's Comments

2001 Amendment: Chapter 574 in (1) in first sentence substituted "As provided in subsection (3)" for "Except as provided in this section", near middle after "additional funds" inserted "and that is not expected of local governments in the scope of their usual operations", and at end substituted "a mill levy" for "mill levies or the all-purpose mill levy"; deleted former (2) that read: "(2) The legislature may fulfill the requirements of this section by providing for an increase in the existing authorized mill levies, the all-purpose mill levy, special mill levies, or the remission of money by the state to local governments. However, an increase in the existing authorized mill levies, the all-purpose mill levy, or any special mill levy must provide an amount necessary to finance the additional costs, and if financing is provided by remission of funds by the state, the remission must bear a reasonable relationship to the actual cost of performing the activity or providing the service or facility"; inserted (3) enumerating mandates legislature is required to fund; in (4) in introductory clause substituted "Subsection (1)" for "This section"; inserted (4)(a) enumerating areas to which subsection (1) does not apply; in (4)(b) in second sentence substituted "1 mill" for "0.1 mill or less" and after "unit" inserted "or $10,000, whichever is less"; and made minor changes in style. Amendment effective July 1, 2001.

1997 Amendment: Chapter 246 in (1), at beginning, inserted exception clause; inserted (4)(b) regarding implementation of National Voter Registration Act; and made minor changes in style. Amendment effective April 11, 1997.

1995 Amendment: Chapter 416 in (1), in first sentence after "legislature", deleted "after July 1, 1979" and after "other than" deleted "the existing authorized" and in second sentence, after "finance any", inserted "activity", after "facility" deleted "other than the existing authorized mill levies or the all-purpose mill levy", and at end inserted "from state or federal funds"; in (4), at end of first sentence, substituted "an insubstantial amount that can be readily absorbed into the budget of an existing program" for "incidental to the main purpose of the law" and inserted

second sentence determining mill levy considered an insubstantial amount; and made minor changes in style.

Saving Clause: Section 7, Ch. 416, L. 1995, was a saving clause.

Attorney General's Opinions

Property Tax Freeze and Additional Local Funds for Workers' Compensation — Both Applicable to Local Governments: Local governments must meet the requirements of both Ch. 664, L. 1987, requiring additional local funding for the workers' compensation fund, and Ch. 654, L. 1987, implementing the property tax freeze. The additional funding requirement did not constitute an implied repeal of the property tax freeze. 42 A.G. Op. 30 (1987).

Required Supplemental Funding for Workers' Compensation — Local Funds Incidental to Purpose of Act: The Legislature had the authority to pass Title 39, ch. 71, part 25 (now repealed), establishing supplemental funding for workers' compensation, without giving local governments the ability to raise new revenues to pay for that liability because the additional local funds were incidental to the main purposes of the law. 42 A.G. Op. 30 (1987).

All-Purpose Mill Levy — Forfeiture of Powers: Municipalities that adopt the all-purpose mill levy authorized in 7-6-4452 (now repealed) forfeit the power to impose levies for any particular purpose not clearly excepted by statute. Thus, the all-purpose mill levy supplants the taxing authority granted in 7-33-4111, 19-10-301 (renumbered 19-19-301), and 19-11-503 (renumbered 19-18-503) but does not supplant the taxing authority granted in 7-32-4117, 7-33-4130, 19-3-204, 19-9-704 (renumbered 19-9-209), sec. 2, Ch. 324, L. 1975 (not codified), sec. 2, Ch. 359, L. 1975 (not codified), and sec. 3, Ch. 438, L. 1975 (not codified). 38 A.G. Op. 112 (1980).

1-2-113. Statutes imposing new duties on a school district to provide means of financing.

Compiler's Comments

1995 Amendment: Chapter 416 in (1), in first sentence after "legislature", deleted "after July 1, 1981, except any law implementing a federal law or a court decision"; in (3), after "approved", deleted "after October 1, 1981"; and made minor changes in style.

Saving Clause: Section 7, Ch. 416, L. 1995, was a saving clause.

Section Superseded: Section 8, Ch. 664, L. 1987, provided that Ch. 664 supersedes 1-2-113 as it may apply to Ch. 664. Chapter 664 enacted an employers' payroll tax to help lower the unfunded liability of the state workers' compensation fund. "Employer" includes a school district.

Attorney General's Opinions

Property Tax Freeze and Additional Local Funds for Workers' Compensation — Both Applicable to Local Governments: Local governments must meet the requirements of both Ch. 664, L. 1987, requiring additional local funding for the workers' compensation fund, and Ch. 654, L. 1987, implementing the property tax freeze. The additional funding requirement did not constitute an implied repeal of the property tax freeze. 42 A.G. Op. 30 (1987).

Required Supplemental Funding for Workers' Compensation — Local Funds Incidental to Purpose of Act: The Legislature had the authority to pass Title 39, ch. 71, part 25 (now repealed), establishing supplemental funding for workers' compensation, without giving local governments the ability to raise new revenues to pay for that liability because the additional local funds were incidental to the main purposes of the law. 42 A.G. Op. 30 (1987).

1-2-114. Bill restriction.

Compiler's Comments

Saving Clause: Section 7, Ch. 416, L. 1995, was a saving clause.

1-2-115. Enforcement.

Compiler's Comments

Saving Clause: Section 7, Ch. 416, L. 1995, was a saving clause.

1-2-116. State agencies not to shift cost to local governments.

Case Notes

Requirement for Arrangement of Transportation for Delinquent Youth by District Court Held Constitutional — Counties Required to Pay Transportation Costs Only Within State — Unfunded Mandate Unaddressed: After the District Youth Court found that J.A. was a delinquent youth, the court committed J.A. to the custody of the Department of Corrections (DOC) for placement at a treatment center in Texas and ordered the DOC to pay the costs of transporting J.A. to that center. When the DOC refused to pay those costs, Lake County paid the costs but later challenged the constitutionality of 52-5-109 as being a violation of the doctrine of the separation

of powers and, in addition, argued that 52-5-109 is an unfunded mandate in violation of this section and that 52-5-101 and 52-5-109 require Lake County to pay for transportation costs only within Montana. The Supreme Court held that the requirement of 52-5-109 that the District Court "arrange the transportation" of a committed youth does not encroach on judicial authority, require the judiciary to exercise executive power, or interfere with internal judicial operations, but, in the context of the statutes, is only an administrative detail. The Supreme Court also held that it was logical to assume that the DOC, being a Montana state agency, would receive custody only within Montana and not in some other state. The Supreme Court pointed out that 52-5-101 names only in-state institutions for the commitment of youth and that neither that statute nor 52-5-109 makes any mention of out-of-state facilities and, for those reasons, ruled that the DOC must pay for transportation costs of a committed youth outside of the State of Montana. Because the Supreme Court considered its holding "dispositive", it declined to address the issue of whether 52-5-109 is an unfunded mandate in violation of this section. In re J.A., 1999 MT 148, 295 M 46, 983 P2d 327, 56 St. Rep. 585 (1999).

Part 2
Effect of Legislature's Actions

Part Case Notes

Prima Facie Constitutionality of Legislative Enactments — Limit on Court Contravention of Legislative Power: The constitutionality of a legislative enactment is prima facie presumed, and every intendment in its favor will be presumed unless its unconstitutionality appears beyond reasonable doubt. When the Legislature acts within its constitutional power, courts are unable to contravene such power on any court-presumed grounds of fairness, absent equal protection consequences. Fallon County v. St., 231 M 443, 753 P2d 338, 45 St. Rep. 748 (1988), followed in Stratemeyer v. Lincoln County, 259 M 147, 855 P2d 506, 50 St. Rep. 731 (1993). See also St. v. Clark, 1998 MT 221, 290 M 479, 964 P2d 766, 55 St. Rep. 919 (1998).

1-2-201. Statutes — effective date.

Compiler's Comments

2003 Amendment: Chapter 104 in (1)(a) in exception clause inserted reference to subsection (1)(d); at beginning of (1)(b) and (1)(c) inserted "Subject to subsection (1)(d)"; inserted (1)(d) concerning immediate effective date for statutes enacted during a special session of the legislature; and made minor changes in style. Amendment effective March 24, 2003.

1995 Amendment: Chapter 18 at end of (1)(a), (1)(b), and (1)(c) substituted "in the enacting legislation" for "therein"; and made minor changes in style.

1991 Amendment: In (1)(a), at beginning, inserted exception clause and after "1981" deleted "except those that provide for appropriation by the legislature of public funds for a public purpose"; in (1)(b), after "appropriation", substituted "by the legislature for public funds for a public purpose" for "as specified in this subsection"; inserted (1)(c) establishing the first day of January following passage and approval as the effective date for statutes that provide taxation or a fee on motor vehicles; and made minor changes in style. Amendment effective July 1, 1991.

Effective Date — Applicability: Section 17, Ch. 604, L. 1991, provided: "[This act] is effective July 1, 1991, and applies to motor vehicles, boats, snowmobiles, and off-highway vehicles that must be registered or reregistered on or after July 1, 1991."

1981 Amendment: In (1) substituted language related to effective dates of October 1 for general legislation and July 1 for appropriations unless otherwise specified for "Every statute, unless a different time is prescribed therein, takes effect on the first day of July following its passage and approval".

Case Notes

Claim of Justifiable Killing of Dog in March Not Governed by Statute Effective in October: Walter shot a dog on March 7, 1993, and was subsequently convicted of misdemeanor cruelty to animals under 45-8-211. Walter defended on the basis that his actions were justified under 81-7-401. Walter, the state, and the District Court applied the version of 81-7-401 effective October 1993. This version of the statute allowed the owner of livestock to shoot a dog if it was harassing livestock. The Supreme Court held that Walter, the state, and the District Court applied the wrong version of the law. Because the killing happened in March of 1993, the statute that should have been applied was the version in effect in March and not the version that became effective in October. Injury to livestock was required under the effective version of the statute. St. v. Walter, 266 M 429, 880 P2d 1346, 51 St. Rep. 903 (1994).

Referred Measures: Under this section, every statute, unless a definite time is prescribed therein, takes effect on July 1 of the year of passage and approval (1979 amendment changed "of the year of" to "following"; 1981 amendment changed date to October 1 following passage and approval) and remains in full force and effect during the interim in which the referendum clause of the Constitution may be resorted to under Art. V, sec. 1, 1889 Mont. Const. (now Art. III, sec. 5(2), 1972 Mont. Const.), unless it becomes "inoperative" by reason of the signing of a petition for referendum by 15% of the legal voters of a majority of the whole number of counties of the state, under such constitutional provision. Lodge v. Ayers, 108 M 527, 91 P2d 691 (1939).

Attorney General's Opinions

Mill Levy Increase — Proration to Parts of Fiscal Year to Accommodate October Effective Date: Section 7-14-2501 was amended in 1981 to authorize the Board of County Commissioners to levy 15 mills rather than 12 mills for the county road fund. The increase, under the 1981 amendments to 1-2-201, becomes effective October 1, 1981. However the county budget year begins July 1, 1981. The reasonable way to give effect to both amendments is to construe them to allow the Board to apply a rate of 12 mills for the 3 months of the current county fiscal year which fall before October 1, 1981, and a rate of 15 mills for the 9 months of the current county fiscal year which fall after October 1, 1981. (See 2001 amendment to 7-14-2501.) 39 A.G. Op. 29 (1981).

1-2-203. Effect of amendment of statute.

Case Notes

Law in Effect at Time of Offense Controls: A District Court's imposition of costs in the amount of $800 to cover the defendant's cost of a public defender was reversed and remanded to District Court on the grounds that 46-8-113 allowed only up to $500 for costs of counsel in a felony case at the time of the offense. St. v. Dietsch, 2013 MT 245, 371 Mont. 460, 308 P.3d 111.

Proper Charge Under Definition of Felony Theft in Effect at Time Crime Committed: Between 1996 and 1999, podiatrist Daniels billed and received Medicaid reimbursement for a number of custom orthotic shoe inserts that were never provided to Medicaid-eligible patients. The 1999 Legislature increased the threshold amount for felony theft from $500 to $1,000, and Daniels argued that because the jury found him guilty of theft over $500 but made no findings that the value exceeded $1,000, he should have been sentenced for a misdemeanor instead of a felony. However, under St. v. Cline, 170 M 520, 555 P2d 724 (1976), persons alleged to have committed criminal offenses must be charged with violating the law in effect at the time that the crime was committed. Further, a change in the definition of an offense does not affect acts committed prior to the effective date of the definitional change. Daniels was properly charged, and the felony theft conviction was affirmed. St. v. Daniels, 2003 MT 30, 314 M 208, 64 P3d 1045 (2003), distinguishing St. v. Wilson, 279 M 34, 926 P2d 712 (1996).

Legislative Intent in Adopting Amendments: A Legislature in adopting an amendment is presumed to intend some change in the existing law, and the courts will endeavor to give effect to that amendment. Gwynn v. Eureka, 178 M 191, 582 P2d 1262 (1978), following State ex rel. Jones v. Giles, 168 M 130, 541 P2d 355 (1975).

Implied Repeal by Amendment of Conflicting Law: Section 3-10-303 was not repealed by implication by the subsequent amendment of section 4-413, R.C.M. 1947 (since repealed), by Ch. 71, L. 1953, since under this provision, the amendment of section 4-413, R.C.M. 1947 (since repealed), did not have the effect of reenacting those provisions which were not altered. St. v. Wild, 130 M 476, 305 P2d 325 (1956).

Original Meaning Preserved:

Where statute as originally enacted was clear as to meaning of word "return", language added by subsequent amendment will not be held to have changed the original meaning since the main clause first enacted will not be regarded as a complete new enactment to be explained or modified by the new matter added. State ex rel. Montgomery Ward & Co., Inc. v. District Court, 115 M 521, 146 P2d 1012 (1944).

Where the substance of 7-6-2501 was never changed, although other subdivisions of the statute as originally enacted had been subsequently amended, under this section the unchanged portion must be given the same meaning as it originally had. N. Pac. Ry. v. Dunham, 108 M 338, 90 P2d 506 (1939).

Continuation of Prior Provisions:

Under this section, where a section or a part of a statute is amended, the portions thereof which are not altered are to be considered as having been the law from the time when they were enacted, and the new provisions are to be considered as having been enacted at the time of the amendment. Blackford v. Judith Basin County, 109 M 578, 98 P2d 872 (1940).

Where a statute or section of the Codes is amended merely by adding to or taking therefrom, the portion carried forward in the new law is not a new act but has been the law since the beginning. State ex rel. St. Bd. of Equalization v. Jacobson, 107 M 461, 86 P2d 9 (1938).

The true rule in this state is that where a section or a part of a statute is amended, it is not to be considered as repealed and enacted in its new form. The portions which are not amended are considered to have been in force from the time of the first enactment. Snidow v. Mont. Home for the Aged, 88 M 337, 292 P 723 (1930). See also St. v. Yale Oil Corp., 88 M 506, 295 P 255 (1930).

Ambiguity in Amendment: Of two constructions, either of which is warranted by the words of the amendment of a statute, that is to be preferred which best harmonizes the amendment with the general tenor and spirit of the act amended. In re Klune, 74 M 332, 240 P 286 (1925).

Repeal by Omission: Where the Legislature declares that an existing statute is amended "to read as follows", the new act takes the place of the old one exclusively, and so much only of the original act as is repeated in the new statute is continued in force. State ex rel. Paige v. District Court, 54 M 332, 169 P 1180 (1918).

Common-Law Rule: This section merely states a general rule as it was recognized by the authorities at the time of the adoption of the Codes. State ex rel. Jacobson v. Bd. of Comm'rs, 47 M 531, 134 P 291 (1913).

Attorney General's Opinions

Right of Access to Sealed Original Birth Records: Considering the legislative history, 50-15-206 (now repealed), as amended in 1979, prohibits disclosure of illegitimacy of birth or information from which illegitimacy can be ascertained except upon court order. This conflicts with 50-15-304, which would allow an adopted illegitimately born person access to his or her sealed original birth records upon demand. Section 50-15-206(1)(a) (now repealed) was enacted as part of a 1979 amendment to that section. Under 1-2-203, "the new provisions are to be considered as having been enacted at the time of the amendment". Earlier statutes are controlled by later statutes when they conflict, so 50-15-206(1)(a) (now repealed) controls. Additionally, when a specific statute conflicts with a general statute, the specific statute controls to the extent of any conflict. Under this rule of construction, 50-15-304 was considered the general statute dealing with the birth records of adopted persons, and 50-15-206(1)(a) (now repealed) was considered a more specific statute regulating disclosure of birth records of illegitimate adopted persons, the statute which controlled. Therefore, legitimately born adopted persons of legal age may have their sealed original birth records opened on demand while illegitimately born adopted persons may apply to court for disclosure of their sealed original birth records. 38 A.G. Op. 62 (1980).

Deleted Subsection Not Revised by Contemporaneous Amendment: The amendment by Ch. 428 and Ch. 443, L. 1979, of former subsection (2) of 7-4-4201, which was deleted and in effect repealed by Ch. 221, L. 1979, did not have the effect of reviving former subsection (2). Neither Ch. 428 nor Ch. 443, L. 1979, expressly repealed Ch. 221, L. 1979, and there is a strong presumption against implied repeal. It is not possible for the Legislature to put life into a dead statute by amendment of it. 38 A.G. Op. 45 (1979).

1-2-204. Amendment of repealed act void.

Case Notes

Inadvertent Repeal: This section applies even though the act sought to be amended has been inadvertently repealed. Dept. of Revenue v. Burlington N., Inc., 169 M 202, 545 P2d 1083 (1976).

Repeal by Implication: This section applies where the act is repealed by implication. St. v. Holt, 121 M 459, 194 P2d 651 (1948).

Attorney General's Opinions

Amendment of Section Repealed During Same Legislative Session: The 1979 amendments to 15-6-102 through 15-6-121 made by Ch. 686, Ch. 706, and Ch. 712, L. 1979, are void by virtue of the repeal of those sections by Ch. 693, L. 1979. 38 A.G. Op. 71 (1980).

Deleted Subsection Not Revised by Contemporaneous Amendment: The amendment by Ch. 428 and Ch. 443, L. 1979, of former subsection (2) of 7-4-4201, which was deleted and in effect repealed by Ch. 221, L. 1979, did not have the effect of reviving former subsection (2). Neither Ch. 428 nor Ch. 443, L. 1979, expressly repealed Ch. 221, L. 1979, and there is a strong presumption against implied repeal. It is not possible for the Legislature to put life into a dead statute by amendment of it. 38 A.G. Op. 45 (1979).

1-2-205. Repeal of law creating criminal offense.

Case Notes

Commencement of Felony Prosecution Possible — Mootness: Plaintiff caregivers alleged the 2009 Medical Marijuana Act allowed caregiver-to-caregiver transactions for the purpose of supplying qualified patients with medical marijuana. The MMA was amended in 2011 to prohibit caregiver-to-caregiver transactions, but the plaintiffs' declaratory judgment claim was not rendered moot since the plaintiffs could theoretically be charged under the 2009 MMA up to 5 years from the date of the alleged offense. Medical Marijuana Growers Ass'n, Inc. v. Corrigan, 2012 MT 146, 365 Mont. 346, 281 P.3d 210.

Proper Charge Under Definition of Felony Theft in Effect at Time Crime Committed: Between 1996 and 1999, podiatrist Daniels billed and received Medicaid reimbursement for a number of custom orthotic shoe inserts that were never provided to Medicaid-eligible patients. The 1999 Legislature increased the threshold amount for felony theft from $500 to $1,000, and Daniels argued that because the jury found him guilty of theft over $500 but made no findings that the value exceeded $1,000, he should have been sentenced for a misdemeanor instead of a felony. However, under St. v. Cline, 170 M 520, 555 P2d 724 (1976), persons alleged to have committed criminal offenses must be charged with violating the law in effect at the time that the crime was committed. Further, a change in the definition of an offense does not affect acts committed prior to the effective date of the definitional change. Daniels was properly charged, and the felony theft conviction was affirmed. St. v. Daniels, 2003 MT 30, 314 M 208, 64 P3d 1045 (2003), distinguishing St. v. Wilson, 279 M 34, 926 P2d 712 (1996).

Application of Repealed Dangerous Offender Law to Offender Who Committed Crime Before Repeal and Was Sentenced After Repeal: The rule that the sentencing law in effect at the that time a crime is committed governs the sentence to be imposed applies to situations in which that law is amended after the crime is committed but before the sentence is imposed and in which the law still exists when the sentence is imposed. It is the law as it read prior to the amendment that governs the sentence. This rule does not apply to a situation in which a sentencing law in effect when a crime is committed is repealed before imposition of sentence. In this case, a dangerous offender statute in effect when Wilson committed his crimes was repealed before the judge sentenced him for the crimes, yet the judge used it to designate Wilson as a dangerous offender, thus increasing the punishment. In this type of situation, when the effect of the repeal is to lessen, not to increase, punishment and the repealer has no saving clause, the law in effect at the time of sentencing applies. Because the dangerous offender statute had been repealed before sentencing, it was not in effect at the time of sentencing and did not apply to the sentence. St. v. Wilson, 279 M 34, 926 P2d 712, 53 St. Rep. 1034 (1996).

Constitutionality: This section is to be interpreted so as to preserve for prosecution all criminal offenses committed prior to repeal, in absence of an express legislative intent to contrary contained in repealing act, irrespective of whether charges are filed before or after such repeal. Such interpretation does not violate Art. III, sec. 11, 1889 Mont. Const. (now Art. II, sec. 31, 1972 Mont. Const.), as ex post facto legislation. State ex rel. Huffman v. District Court, 154 M 201, 461 P2d 847 (1969).

Pending Prosecutions: The repeal of a criminal statute without a saving clause does not operate to terminate all pending prosecutions. St. v. Cline, 135 M 372, 339 P2d 657 (1959).

1-2-207. Repeal of repealing act — no revival.

Case Notes

Licensing of Motion Picture Theaters: In an action to collect alleged license taxes due for operation of several motion picture theaters, the defendant corporation was relieved of any liability on the rationale that it was not a theater as contemplated by 7-21-2205 (now repealed) and that it was not subject to section 84-3205, R.C.M. 1947, since the latter section was repealed by Ch. 91, L. 1937, in light of Montana's nonrevival provision, even though section 84-3205, R.C.M. 1947, was carried forward into the Revised Codes of Montana, 1947. State ex rel. Jenkins v. Carisch Theatres, Inc., 172 M 453, 564 P2d 1316 (1977).

Attorney General's Opinions

Deleted Subsection Not Revised by Contemporaneous Amendment: The amendment by Ch. 428 and Ch. 443, L. 1979, of former subsection (2) of 7-4-4201, which was deleted and in effect repealed by Ch. 221, L. 1979, did not have the effect of reviving former subsection (2). Neither Ch. 428 nor Ch. 443, L. 1979, expressly repealed Ch. 221, L. 1979, and there is a strong presumption against implied repeal. It is not possible for the Legislature to put life into a dead statute by amendment of it. 38 A.G. Op. 45 (1979).

1-2-208. Provisions of law not codified in Montana Code Annotated because redundant.

Compiler's Comments

Purpose: A provision of law not codified in the MCA because it is redundant with a codified provision is still in effect. If the codified provision is amended or repealed, one could argue that the uncodified provision is the law, since it is still in effect. This would create an obvious but unintended conflict. This section was passed to address such a situation. This section applies to RCM sections not codified in the MCA and to session laws passed since the MCA became effective.

CHAPTER 3
MAXIMS OF JURISPRUDENCE

Part 2
Text of Maxims

1-3-201. Obsolete reason, obsolete rule.

Case Notes

Applicability of Deadline to Redistricting: The Supreme Court, in Barthelmess v. Bergerson, 218 M 398, 708 P2d 1010, 42 St. Rep. 1685 (1985), ordered the redistricting of Custer County to comply with 7-4-2102, including the provision that "no change in the boundary lines of any commissioner district shall be made within 6 months next preceding a primary election". A primary election was scheduled for June 2, 1986, necessitating a December 2, 1985, deadline for redistricting. On December 3, 1985, the two judges of the district issued a memorandum expressing concern over the inability to create new districts within the time prescribed by 7-4-2102, and not until January 3, 1986, was a redistricting plan reviewed and approved. The Supreme Court noted that the purpose of the deadline was to prevent gerrymandering and to provide sufficient time for candidates for County Commissioner to file for election. The provision should not be construed so as to prevent the formation and filing of districts when, as here, the former districts did not meet the statutory requirements of compactness and equality of population. Strict enforcement of the 6-month provision in this case would prevent the residents from legally electing their Commissioners, disenfranchising the voters and impeding county business. The court stated the concept in 1-3-201 that when the reason for a rule ceases, the reason for its enforcement also ceases. By way of declaratory relief, the court upheld the January 3, 1986, districting plan and allowed the County Commissioners to append to the plan a copy of the court order in lieu of the requirement of 7-4-2103 that the certificate shall be dated and signed by the District Judges. Barthelmess v. Bergerson, 220 M 74, 713 P2d 990, 43 St. Rep. 186 (1986).

Change in Trial Judges: Rule that an appellate court will not ordinarily disturb findings of fact of a trial court where there is conflict in evidence is not applicable where deciding judge was not judge who heard testimony. Kostbade v. Metier, 150 M 139, 432 P2d 382 (1967).

Presumption on Trial Judge's Ruling: Where a judge, other than the one who presided at the trial, passes upon a motion for a new trial, the presumption in favor of the trial judge's ruling does not attach on appeal to his ruling. Gibson v. Morris St. Bank, 49 M 60, 140 P 76 (1914).

1-3-202. Same reason, same rule.

Case Notes

Pledge and Chattel Mortgage Assignees: A bona fide purchaser of property for value from a pledgee who sold it in violation of the pledge succeeds to all the rights of the pledgee, and under this section a purchaser from a chattel mortgagee will likewise succeed to the rights of his grantor with respect to the property purchased on the principle of subrogation, although there is no contract of assignment between him and his grantee. Potter v. Lohse, 31 M 91, 77 P 419 (1904).

1-3-203. Change in purpose.

Compiler's Comments

2007 Amendment: Chapter 61 made minor changes in style. Amendment effective October 1, 2007.

1-3-204. Waiver of benefit of law.

Compiler's Comments

2007 Amendment: Chapter 61 made minor changes in style. Amendment effective October 1, 2007.

Case Notes

Acceptance of Partial Payment After Demanding Full Payment — Waiver of Right to Statutory Damages — Summary Judgment Warranted for Violation of Fair Debt Collection Practices Act: Plaintiff collection agency sought to collect $148.96 for eight of defendant's bad checks, plus a $30 service charge for each check, for a total of $388.96. Defendant sent a partial payment, which plaintiff accepted, but missed two promised payments, so plaintiff filed suit for the balance due, plus statutory damages of $100 for each of the eight checks. The Supreme Court affirmed the District Court conclusion that the right of a payee on a dishonored check to pursue statutory damages is a right created solely for the payee's benefit and is subject to waiver under this section and that by accepting a partial payment after demanding full payment, plaintiff waived the right to statutory damages under 27-1-717. In order to reinstate the right to statutory damages, plaintiff was required to make further demand for full payment and wait the requisite 10 days before filing suit. The District Court also held that by seeking statutory damages without giving the requisite demand, plaintiff had attempted to collect an amount that was not permitted by law, in violation of 15 U.S.C. 1692f(1) of the federal Fair Debt Collection Practices Act. Plaintiff contended that any mistake was a bona fide error, relieving plaintiff of liability under 15 U.S.C. 1692k(c). The Supreme Court again affirmed, accepting the majority view of Circuit Courts that the bona fide error defense is available only for clerical and factual errors and that plaintiff's mistake of law did not make its action any less intentional and was insufficient to rise to the level of a bona fide error. Summary judgment for defendant was proper. Collection Bureau Serv., Inc. v. Morrow, 2004 MT 84, 320 M 478, 87 P3d 1024 (2004). See also Baker v. G.C. Serv. Corp., 677 F2d 775 (9th Cir. 1982).

Waiver of Right to Earn Good Time Credits in Boot Camp Program — Incarceration for Full Term Not Considered Cruel and Unusual Punishment: After being sentenced to 5 years in prison for negligent homicide, Campbell applied for admission to the boot camp program. As part of the application process, Campbell was required to read and sign a detailed, clearly written explanation of program goals, objectives, rules, and criteria, which included an acknowledgment that Campbell would be ineligible for good time credits while in the program. Pursuant to its administrative authority, the Department of Corrections had determined that good time credits would conflict with the program's emphasis on positive achievement, earned rewards, and the possibility of sentence reductions for successful program completion. Campbell was accepted in the program and spent nearly 3 months in boot camp, but did not complete the program because of a series of infractions. As a consequence, Campbell did not earn either a sentence reduction or the good time credits that might have been earned in prison. Campbell then filed a writ of habeas corpus, contending that he had a right to good time credits and that the Department's refusal to award the credits deprived him of liberty without due process and resulted in his being held beyond the lawful term of his sentence, which constituted cruel and unusual punishment. The Supreme Court noted that under Orozco v. Day, 281 M 341, 934 P2d 1009 (1997), Campbell had a protected liberty interest in the opportunity to earn good times credits at boot camp. However, Campbell voluntarily chose to relinquish his interest in good time credits in order to gain the benefits of boot camp. Thus, the state did not deprive Campbell of anything, and his due process claim failed. The Supreme Court went on to examine the distinction between nonwaivable public rights and waivable private rights, as contemplated in this section, holding that there were no grounds to conclude that Campbell could not voluntarily waive his interest in good time credits. Allowing an inmate to waive good time credits does not defeat any protectionist purpose of the good time allowance statute, particularly when the inmate chooses to relinquish the benefits of one legislatively created program for another. Finally, Campbell's cruel and unusual punishment argument was predicated on the belief that he was entitled to good time credits, but by choosing to forego the opportunity to earn good time at boot camp, Campbell actually received all the good time credit to which he was entitled and could not complain that incarceration for the full term of his lawfully imposed sentence was cruel and unusual. Campbell v. Mahoney, 2001 MT 146, 306 M 45, 29 P3d 1034 (2001). See also Davidson v. Cannon, 474 US 344 (1986), and Zinermon v. Burch, 494 US 113 (1990).

Purpose of Choice of Law Rule — Public Policy Subsumed: Addressing the question of whether, in a personal injury and wrongful death action, Montana recognized a public policy

exception that would require application of Montana law even when Montana's choice of law rules dictate application of the laws of another state, the Supreme Court noted that for choice of law purposes, the public policy of a state is simply the rules, as expressed in its legislative enactments and judicial decisions, that it uses to decide controversies. The purpose of choice of law rules is to resolve conflicts between competing policies. In this case, considerations of public policy were accounted for, being expressly subsumed within the "most significant relationship" approach in Restatement (Second) of Conflict of Laws 6(2)(b) and (2)(c) (1971), which mandate consideration of the relevant policies of all the interested states, so a public policy exception to the most significant relationship test would have been redundant. Phillips v. Gen. Motors Corp., 2000 MT 55, 298 M 438, 995 P2d 1002, 57 St. Rep. 259 (2000). See also Casarotto v. Lombardi, 268 M 369, 886 P2d 931, 51 St. Rep. 1350 (1994), and Rothwell v. Allstate Ins. Co., 1999 MT 50, 293 M 393, 976 P2d 512, 56 St. Rep. 203 (1999).

Sole Exception to Employer Indemnification — Waiver of Public Benefit of Indemnification by Employment Contract Inappropriate: The only exception to the requirement that an employer indemnify its employees, as required in 39-2-701, is that an employer is not bound to indemnify an employee for losses suffered in consequence of the ordinary risks of the business. In the present case, the employer argued that indemnification could be waived under this section if the parties agreed to a different relationship pursuant to the employment contract. However, under this section, the waiver of statutory rights is not allowable if the waiver violates public policy. Distinguishing several cases related to the waiver of private benefits, the Supreme Court held that indemnification of an employee for expenses incurred in the discharge of the employee's duties is a form of employee compensation similar to the payment of overtime compensation and minimum wage and constitutes an expression of public policy. Thus, even though 39-2-701 is not accompanied by an express statement of public policy or an express prohibition of contracts that waive the right to indemnify, waiver of the indemnification provisions by contract would, in this instance, result in forfeiture of a valuable right guaranteed as a public benefit to all Montana employees and therefore is not allowed. Rothwell v. Allstate Ins. Co., 1999 MT 50, 293 M 393, 976 P2d 512, 56 St. Rep. 203 (1999).

Waiver of Workers' Compensation Benefits Allowed — Distribution of Proportionate Share of Benefits: Decedent who died in the course of employment was survived by two children of a prior marriage and by the widow of a second marriage. Decedent's insurer and others with potential liability for death claims settled with the widow for substantial sums, but the children were not parties to the settlement. No workers' compensation claim was filed by the widow, though one was filed by decedent's employer. The compensation carrier began paying one-third of the compensation benefits to the widow and reserved two-thirds pending final determination of the children as beneficiaries. The widow advised the carrier that she did not wish to receive workers' compensation benefits and returned those she had been issued. The Workers' Compensation Court held that, as a matter of public policy, the widow could not waive death benefits and that the children's interest in the benefits would vest only if the widow died or remarried prior to the passing of 500 weeks after decedent's death. On rehearing, the court found the children to be stepchildren of the widow and therefore entitled to benefits, to be equally divided between the parties. The children appealed, contending that the widow should not be compelled to receive benefits she did not claim or intended to waive and that the children were each entitled to one-half of all available benefits. The Supreme Court held that under this section, the surviving widow could waive or abandon her right to benefits and that upon waiver the surviving children were entitled to no more than their proportionate share provided by law. In re Benefits of Gaither, 244 M 383, 797 P2d 208, 47 St. Rep. 1549 (1990).

Effect of "As Is" Clause in Used Car Sales Agreement: When defendant failed to inspect a car for defects before sale to plaintiff and the defect that was the proximate cause of plaintiff's accident and subsequent injuries would have been discovered in a reasonable safety inspection, defendant should not be allowed to hide behind the cloak of a simple "as is" disclaimer. Public policy requires a used car dealer to inspect the cars he sells and to make sure they are in safe, working condition. Kopischke v. First Cont. Corp., 187 M 471, 610 P2d 668 (1980).

Release Void as Contrary to Public Policy: This section together with 27-1-701 and 28-2-701 was broad enough to render illegal any exculpatory clause or release relieving a potential tortfeasor from all liability for future negligent conduct where such clause or release was contrary to public policy or against the public interest. A release relieving County Fair Board from any liability to livestock while on fairgrounds was illegal and unenforceable as contrary to public policy and against public interest and precluded county from disclaiming liability in negligence action for exhibitor's horses killed in barn fire on county fairgrounds. Suppression of release in

exhibitor's negligence action was not error or ground for new trial. Haynes v. Missoula County, 163 M 270, 517 P2d 370 (1973).

Possessory Rights of Tenant: The benefits of 70-19-412 may be waived by the terms of a lease. Johnstone v. Sanborn, 138 M 467, 358 P2d 399 (1960).

Venue Established by Contract: Defendant in action to recover monthly rental for electric signs was not entitled to change of venue where stipulation in contract established venue of any future suit or action instituted for enforcement of contract. Elec. Products Consol. v. Bodell, 132 M 243, 316 P2d 788 (1957).

Implied Waiver: Under this section one may waive by implication or by agreement the advantage of a law intended solely for his benefit. H. Earl Clack Co. v. Staunton, 105 M 375, 72 P2d 1022 (1937); Anaconda Copper Min. Co. v. Ravalli County, 56 M 530, 186 P 332 (1919).

Failure to Act as Waiver: Plaintiff who did nothing toward having a decree of foreclosure amended for a period of more than 6 months and whose action was not filed for more than a year after foreclosure sale was not entitled to relief; one may waive the advantage of a law intended solely for his benefit. Fed. Land Bank of Spokane v. Gallatin County, 84 M 98, 274 P 288 (1929).

Employment Benefits: An employee may waive the advantage of any provision of law that was intended solely for his benefit so long as the waiver does not violate public policy. Shea v. North-Butte Min. Co., 55 M 522, 179 P 499 (1919).

Notice of Judgment: The party intending to move for a new trial may waive formal notice of entry of judgment and serve his notice of intention without it. State ex rel. Brown v. District Court, 55 M 158, 174 P 601 (1918).

Statute of Limitations: A stipulation in a contract waiving the benefit of the Statute of Limitations is binding for a reasonable time, at least until the expiration of an additional period equal to that prescribed by the Statute for the particular cause of action. Parchen v. Chessman, 49 M 326, 142 P 631 (1914).

Time and Manner of Waiver:

A party may waive the benefit of the Statute of Limitations, either before or after the expiration of the prescribed limit, not only by either of the acts mentioned in 27-2-409 but also by express agreement based upon a consideration, though made contemporaneously with and as a part of the principal agreement or obligation out of which the action has arisen. Parchen v. Chessman, 49 M 326, 142 P 631 (1914). See Shea v. North-Butte Min. Co., 55 M 522, 179 P 499 (1919).

This section does not prescribe the time when or the mode by which the waiver may be made effective, nor does it impose any restriction or limitation upon the right of waiver. It must therefore be assumed that the party desiring to waive his right is free to do so in any way and at any time he chooses. Parchen v. Chessman, 49 M 326, 142 P 631 (1914).

Administration of Estate: The prior right conferred upon those most interested in an estate to administer it may be waived. In re Blackburn's Estate, 48 M 179, 137 P 381 (1913).

Justification by Sureties: The right to require the sureties on the undertaking on appeal to justify is personal to the exceptant and may therefore be waived by him. Bush v. Baker, 46 M 535, 129 P 550 (1913).

Negotiability of Instruments: A provision in a note that it is negotiable at a particular bank is not a waiver of the effect of a stipulation for payment of attorney's fees in case of suit, which under other statutory provisions renders the note nonnegotiable. Stadler v. First Nat'l Bank, 22 M 190, 56 P 111 (1899).

1-3-205. Limit on rights.

Compiler's Comments

2007 Amendment: Chapter 61 made minor changes in style. Amendment effective October 1, 2007.

Case Notes

Landowner's Duty:

The law does not countenance the principle that one tract of land may be reclaimed at the expense of the destruction of another without compensation. O'Hare v. Johnson, 116 M 410, 153 P2d 888 (1944), followed in St. v. Feenan, 231 M 255, 752 P2d 182, 45 St. Rep. 589 (1988).

A landowner who lets a contract for the repair of a skylight on the roof of his building is liable for damages caused by the negligent leaving of waste material on the roof in such manner that it was blown off and injured a nearby building, irrespective of whether the contractor was required to remove such waste material. A. M. Holter Hardware Co. v. W. Mtg. Co., 51 M 94, 149 P 489 (1915).

Use of Property:

One may use his own property as he sees fit for all purposes to which it is adaptable without being answerable for the consequences if he is not an active agent in designedly causing injury, if he does not create a nuisance, or if he exercises due care and caution to prevent injury, but must so use his right as not to infringe upon the rights of another. Purcell v. Davis, 100 M 480, 50 P2d 255 (1935).

The doctrine of the maxim sic utere tuo ut alienum non laedas is not inconsistent with the rule of law that a man may use his own property as he pleases for all purposes for which it is adaptable without being answerable for the consequences if he is not an active agent in designedly causing injury, if he does not create a nuisance, or if he exercises due care and caution to prevent injury. Fleming v. Lockwood, 36 M 384, 92 P 962 (1907).

Police Power: The police power is not restricted to the regulation or supervision of what is offensive, disorderly, or insanitary but embraces regulation designed to promote the public convenience and the peace and good order of society, i.e., it may be exercised in aid of what is sanctioned by usage or held by the prevailing morality and preponderant opinion to be necessary to the public welfare and has its foundation in the maxim sic utere tuo ut alienum non laedas. St. v. Loomis, 75 M 88, 242 P 344 (1925).

Water Rights:

One who has a prior right to the use of the waters of one creek cannot let those waters run to waste and use the full amount of his appropriation of the waters of another creek to the detriment of a junior appropriator on the latter creek. Noman v. Corbley, 32 M 195, 79 P 1059 (1905).

An appropriator of an upper water right who, in a contract to deliver it to a lower owner of land at a certain place, has reserved the right to use the water for placer mining purposes acquires no title to the water itself or any right to pollute the water to any greater extent than is permitted by law. Chessman v. Hale, 31 M 577, 79 P 254 (1905); Fitzpatrick v. Montgomery, 20 M 181, 50 P 416 (1897); Nelson v. O'Neal, 1 M 284 (1871); Lincoln v. Rodgers, 1 M 217 (1870).

Floodwaters of a river which become severed from the main current still form a part of the river and may not be obstructed by a railroad company by a fill along its right-of-way without openings so as to injure the property of another. Fordham v. N. Pac. Ry., 30 M 421, 76 P 1040 (1904). See Wine v. N. Pac. Ry., 48 M 200, 136 P 387 (1913); E. Oreg. Land Co. v. Willow River Land & Irrigation Co., 201 F 203 (9th Cir. 1912).

Equity Application: The maxim of jurisprudence announced in this section is a principle of substantive law peculiarly applicable to equity actions. Quinlan v. Calvert, 31 M 115, 77 P 428 (1904).

1-3-206. Consent.

Compiler's Comments

2007 Amendment: Chapter 61 made minor changes in style. Amendment effective October 1, 2007.

Case Notes

Divorce Proceedings: Even though a wife did not know the attorney whom she authorized to represent her in a divorce suit, in the absence of charges of misconduct against the attorney, she was not justified in attacking the divorce decree. Deich v. Deich, 136 M 566, 323 P2d 35 (1958).

Irregular Tax Deed: Where a tax deed was invalid for failure to give the owner the statutory notice of application therefor, such owner could not be held to have waived his right to question the validity of the deed or acquiesced in the taking of his property by being represented at the county's public auction sale by an agent who bid on it, because he had no rights to waive by bidding on the property. Kerr v. Small, 112 M 490, 117 P2d 271 (1941).

Search and Seizure: Where officers searching the home of defendant, with his consent, found a quantity of mash in the process of manufacture into beer, they were properly permitted to give evidence as to what they found since one who consents to a search cannot complain that his constitutional rights were invaded by the search. St. v. Roop, 73 M 177, 235 P 336 (1925).

1-3-207. Acquiescence.

Case Notes

Failure to Renew Venue Objection During Voir Dire — Fatal on Appeal: During the District Court's jury selection proceeding in a civil trial, the state failed to renew a motion for change of venue, and it ultimately agreed to the 12 empaneled jurors. On appeal, the state claimed that the District Court abused its discretion by denying the state's original motion to change venue, as there were reports in a local newspaper that were allegedly biased in favor of the plaintiffs.

The Supreme Court applied St. v. Kingman, 2011 MT 269, 362 Mont. 330, 264 P.3d 1104, even though it was a criminal case, and held that the state waived the opportunity to object to venue when it failed to give the District Court an opportunity to revisit the venue ruling during the jury selection process. Weaver v. St., 2013 MT 247, 371 Mont. 476, 310 P.3d 495.

Failure to Object to Use of Nonvisible Leg Restraint During Trial — Acquiescence: Security measures were addressed before Jackson's homicide trial, and the District Court concluded that use of a nonvisible leg restraint would be allowed. Jackson did not object, but following conviction Jackson contended that use of the restraint was unlawful. The Supreme Court declined to address the issue because Jackson did not object to the unobtrusive leg brace and thus failed to preserve the issue for appeal by acquiescing in any error that occurred. St. v. Jackson, 2009 MT 427, 354 M 63, 221 P3d 1213 (2009).

Failure to Timely Object to Appropriateness of Parental Treatment Plan — Waiver of Right to Object: A mother contended that certain requirements of her treatment plans were inappropriate and should not have been considered in terminating her parental rights. However, the mother was represented by counsel at all stages of the matter, including negotiation of the treatment plans, and with advice of counsel agreed to three of the four plans. By failing to object to the treatment plan requirements in a timely manner, the mother waived the argument that portions of the plans were inappropriate. The Supreme Court declined to hold the District Court in error for an action to which the mother acquiesced. In re A.A. & D.A., 2005 MT 119, 327 M 127, 112 P3d 993 (2005).

Defendant's Request for Erroneous Instruction: United States District Court found that Montana law is unclear as to absorption of the former affirmative defense of assumption of risk into the comparative negligence law but that latest Montana cases indicate assumption of risk has been abolished as an absolute defense and that it was therefore error to instruct jury on assumption of risk question. However, since defendants contended assumption of risk was absolute defense and requested the erroneous instruction, they invited the error; hence, motion for judgment notwithstanding, the verdict and motion to amend judgment must be denied. Ingram v. Dick-Char, Inc., 39 St. Rep. 96 (D.C. Mont. 1982) (apparently not reported in Federal Supplement).

Waiver of Record Requirement: An attorney may waive the requirement that all interviews with the child be on the record but may not then complain that he was prejudiced by not having the interviews recorded. Lehman v. Billman, 178 M 367, 584 P2d 662 (1978).

Failure to Reform Deed: A purchaser who at the time of the delivery of the deed knew of the mistake and who paid the balance of the purchase price acquiesced in the mistake and could not urge the mistake as a ground for reformation. Schillinger v. Huber, 133 M 80, 320 P2d 346 (1957), followed in Goodman Realty, Inc. v. Monson, 267 M 228, 883 P2d 121, 51 St. Rep. 1074 (1994).

Failure to Reform Contract:

Acquiescence in a contract after learning that it does not represent the actual agreement destroys the right of reformation under this section. Such acquiescence may be implied from an unreasonable delay in applying for redress after notice of the mistake, the rule applying not only where reformation is asked for on the ground of mistake but also on the ground of fraud. Krueger v. Morris, 110 M 559, 107 P2d 142 (1940).

A party loses his right to reformation of a contract on the ground of mistake in its execution if he acquiesces therein after becoming aware of the mistake or circumstances such that he will be presumed to have known of it. Acquiescence may be implied from an unreasonable delay in applying for redress after notice of the mistake. Cook-Reynolds Co. v. Beyer, 107 M 1, 79 P2d 658 (1938).

1-3-208. Own wrong — no advantage.

Compiler's Comments

2007 Amendment: Chapter 61 made minor changes in style. Amendment effective October 1, 2007.

Case Notes

Failure to Disclose FELA Claim in Bankruptcy — Intent Inappropriate for Summary Judgment — Judicial Estoppel: Dovey had financial difficulties that ultimately led him to file for bankruptcy. He first met with his bankruptcy attorney on June 1, 2004. At this initial meeting, Dovey filled out a worksheet listing all his debts and assets. Two weeks later, Dovey sustained severe injuries to his right knee, allegedly in the course of performing his duties as a conductor for BNSF. On October 21, 2004, Dovey filed a Chapter 7 petition for bankruptcy. In the attached forms, Dovey failed to list his potential claim against BNSF as an asset. Dovey's bankruptcy petition was

discharged on February 8, 2005, and later terminated on April 3, 2006. On September 8, 2005, Dovey filed a complaint against BNSF under the Federal Employers' Liability Act (FELA). A year later, on September 26, 2006, BNSF filed a motion for summary judgment on the grounds that Dovey was judicially estopped from pursuing his claim against the railroad. Since Dovey did not list his potential FELA claim against BNSF as an asset in his bankruptcy proceedings, BNSF argued, his claim against BNSF was barred by judicial estoppel. Dovey's attorney for the FELA claim stated he was unaware that Dovey had filed for bankruptcy until he read BNSF's motion. That attorney immediately contacted Dovey's bankruptcy attorney and trustee to notify them of Dovey's pending FELA lawsuit. Dovey's bankruptcy claim was reopened on October 20, 2006. In response to BNSF's summary judgment motion, Dovey claimed that he did not know that his potential FELA claim was an asset that should have been included in the settlement of his bankruptcy petition. Dovey noted that judicial estoppel is an affirmative defense that should have been raised in BNSF's answer to his complaint, not on a motion for summary judgment. BNSF subsequently brought a motion to amend its answer to assert judicial estoppel as an affirmative defense. The District Court granted BNSF's motion for summary judgment and dismissed Dovey's claims on the basis of judicial estoppel. Dovey appealed, and the Supreme Court reversed. Courts may invoke the equitable doctrine of judicial estoppel to prevent a party from asserting a claim that is incompatible with a position advanced by that party in a previous proceeding in which the party prevailed. The court relied on the three factors in U.S. v. Ibrahim, 522 F3d 1003, 1009 (9th Cir. 2008) to determine whether a party is judicially estopped from raising a certain claim: (1) whether a party's later position is "clearly inconsistent" with its original position; (2) whether the party has successfully persuaded the court of the earlier position; and (3) whether allowing the inconsistent position would allow the party to "derive an unfair advantage or impose an unfair detriment on the opposing party". Before reaching a conclusion on these three factors, the Ninth Circuit first addressed a threshold matter of whether the party intentionally sought to manipulate the courts by taking inconsistent positions. The District Court erred as a matter of law in failing to consider whether the inconsistent positions advanced by Dovey were attributable to mistake or inadvertence or whether he deliberately attempted to manipulate the courts by failing to report his FELA claim. The District Court also erred by failing to view the facts in the light most favorable to Dovey. Dovey raised a genuine issue of material fact as to whether his unscheduled claim was the product of a good faith mistake or an inadvertent omission or whether he deliberately attempted to manipulate the courts. The District Court erred by granting BNSF's motion for summary judgment and by dismissing Dovey's claim. A genuine issue of material fact exists as to whether Dovey's failure to list his claim against BNSF as an asset in his bankruptcy petition was intentional. The case was remanded to the District Court for further proceedings. Dovey v. BNSF Railway Co., 2008 MT 350, 346 M 305, 195 P3d 1223 (2008).

Dissolution of Limited Liability Company — Member Not Entitled to Share in Distribution of Judgment Against Member: Wallace owned about 72% of a limited liability company. A dispute arose between the company and Wallace, and the company was granted a $2.5 million judgment against Wallace. The judgment was to be used to pay current company debts and liabilities, including any owed to Wallace, and the remainder was to be distributed to remaining members in proportion to their ownership. Wallace contended that as a remaining member, he was entitled to his proportional share of the distribution. The District Court held that Wallace would not be allowed to share in the distribution, and Wallace appealed. The Supreme Court affirmed. Wallace was considered a remaining member for purposes of receiving payment of company debts owed to him, but considering Wallace to be a remaining member for purposes of sharing in the distribution of the punitive award against him would have allowed Wallace to profit from his own wrong, and the District Court did not err in so concluding. Wallace v. Hayes, 2008 MT 248, 344 M 523, 191 P3d 365 (2008).

Admission of Note Written by Homicide Victim Not Violative of Right to Confront Witnesses — Forfeiture by Wrongdoing Doctrine: Sanchez argued that admission at trial of a note written by Sanchez's admitted deliberate homicide victim violated Sanchez's right to confront witnesses. The Supreme Court noted that the confrontation clause applies only to testimonial hearsay, and in this case, the note was considered testimonial because the purpose of the note was to explain the victim's untimely death or poisoning, the intended audience reasonably included law enforcement, and circumstances surrounding the note indicated that an objective declarant reasonably should have anticipated that the state would use the statement at trial. However, the U.S. Supreme Court set out an equitable exception to the confrontation clause in Crawford v. Wash., 541 US 36 (2004), known as the forfeiture by wrongdoing doctrine. The doctrine states that one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to

confrontation. The Supreme Court agreed with the holding in U.S. v. Garcia-Meza, 403 F3d 364 (6th Cir. 2005), that a defendant whose intentional criminal act results in a victim-declarant's death benefits from the defendant's wrongdoing if the defendant can use the death to exclude the victim-declarant's otherwise admissible testimony, regardless of whether the defendant specifically intended to silence the victim. Therefore, Sanchez forfeited his right to confront the victim when he killed her and could not claim that his constitutional right to confront witnesses was violated when his admittedly deliberate wrongdoing prevented the confrontation. Although the trial court admitted the note based on hearsay exceptions without addressing the confrontation clause, the court's decision was nevertheless legally correct, and the Supreme Court declined to disturb the trial court's decision. St. v. Sanchez, 2008 MT 27, 341 M 240, 177 P3d 444 (2008). See also Sanchez v. St., 2012 MT 191, 366 Mont. 132, 285 P.3d 540, in which the Montana Supreme Court held that the U.S. Supreme Court's holding in Giles v. California, 554 U.S. 353, 128 S. Ct. 2678 (2008), that the forfeiture by wrongdoing doctrine applies only when the defendant kills another person specifically to prevent the person from testifying, was not retroactive and did not apply to Sanchez's conviction, which had become final long before the Giles decision.

Contractor Entitled to Stop Work Pursuant to Developer's Breach of Contract — Contractor Improperly Required to Reimburse Postbreach Expenses: Plaintiff contractor submitted a claim for construction costs to defendant developer's architect, who approved payment, but the developer refused to pay the costs, so the contractor stopped work. The developer hired another contractor to finish the work, and the District Court penalized the contractor by requiring reimbursement of the developer's costs for finishing the work. The Supreme Court reversed the award. The contractor was entitled to stop work because of the developer's material breach of contract, and the developer was not entitled to benefit from its own wrong, so it was error to penalize the contractor for amounts expended by the developer to finish the work. James Talcott Constr., Inc. v. P&D Land Enterprises, 2006 MT 188, 333 M 107, 141 P3d 1200 (2006).

Misrepresentation of Value of Estate — Estoppel Applicable to Prevent Advantage From Misrepresentation: A conservator knew, but failed to mention, that an estate included annuities and jointly held property that was not included in the final estate inventory. Other parties, to their detriment, relied on the inventory as an accurate representation of the value of the estate. The District Court properly held that it would not be equitable for the conservator to take advantage of the misrepresentation of the value of the estate by reducing the distribution to the other parties. The Supreme Court held that the elements of equitable estoppel were met, and the District Court was affirmed. In re Estate of Stukey, 2004 MT 279, 323 M 241, 100 P3d 114 (2004). See also Elk Park Ranch, Inc. v. Park County, 282 M 154, 935 P2d 1131 (1997).

Partner Estopped From Claiming Damages From Formation of Corporation Necessitated by Partner's Own Acts: As a result of one partner's refusal to sign documents necessary for a farm partnership to qualify for federal funding benefits, the remaining partners formed a separate business and qualified for the benefits. The abstaining partner then claimed damages because of formation of the new business and its subsequent leasing of partnership property. The District Court held that the partner was estopped from complaining about the new business, and on appeal, the Supreme Court affirmed. The partner knew the history and significance of the federal benefits to the partnership and yet refused to sign the necessary documentation shortly before the deadline, which amounted to a representation or concealment of material fact, and induced the remaining partners to form the new business. The six elements of equitable estoppel as set out in Selley v. Liberty NW. Ins. Corp., 2000 MT 76, 299 M 127, 998 P2d 156 (2000), were met, and the partner was estopped from complaining that the partnership detrimentally altered its position and then denying the just and legal consequences that were caused by the partner's own conduct, act, or omission. Pankratz Farms, Inc. v. Pankratz, 2004 MT 180, 322 M 133, 95 P3d 671 (2004).

Party Estopped From Asserting That Property Placed in Trust Given Prior Denial of Interest in Property: When dividing the marital estate, the District Court found that the husband had gifted a parcel of property to the wife. Title to the property was never in the husband's name, but was always held by the husband's parents or by one of his previous wives. The husband asserted that the intent in transferring the property was to establish a trust for his benefit, with the wife as trustee. However, the husband was judicially estopped from the trust argument because he had repeatedly and unequivocally denied that he had any interest in the property in a prior lawsuit against him for past-due child support. Allowing the husband to reverse his position would have substantially altered the wife's share of the marital distribution after she helped support the husband and helped add to the value of the property. No person may take advantage of the person's own wrong, and a court of equity will not aid a person who has caused title to

property to be transferred to another for the purpose of defrauding creditors. Cowan v. Cowan, 2004 MT 68, 320 M 332, 87 P3d 443 (2004), following Kauffman-Harmon v. Kauffman, 2001 MT 238, 307 M 45, 36 P3d 408 (2001). See also Cowan v. Cowan, 2004 MT 97, 321 M 13, 89 P3d 6 (2004), in which adjudication of the husband's claim in Cowan, id., was held to have extinguished any derivative claim in the property that the husband's parents and sister may have had.

Claim of Resulting or Constructive Trust Barred by Judicial Estoppel and Clean Hands Doctrine: The parents created a family corporation and made their four children equal, sole shareholders through transfers and gifts. When two medical malpractice suits were filed against the father, he claimed that he had no right to or control over the corporation's assets. In a separate action, two sisters instituted a shareholder derivative action and petitioned for judicial review of their brother's fiduciary duties. The brother called a special meeting to issue additional stock to himself and to transfer property back to the parents, but the sisters objected and the brother was enjoined from doing so. The parents then claimed that the property was held in a resulting or constructive trust, and the District Court ordered that the assets and stock be conveyed to the parents. The sisters appealed, and the Supreme Court reversed. Both the sisters and the plaintiffs in the medical malpractice action relied to their detriment on the father's judicial declaration that he had no right to or control over the corporate assets, and the father was thus barred by judicial estoppel and the clean hands doctrine from raising equitable claims that a resulting or constructive trust existed. Judicial estoppel binds a party to that party's judicial declarations and precludes the party from taking a position inconsistent with the previous declaration in a subsequent action or proceeding. The clean hands doctrine provides that a party must not expect relief in equity unless the party comes into court with clean hands. The evidence here showed that the parents knowingly transferred assets to the family corporation to circumvent creditors and avoid estate taxes, and the Supreme Court will not aid a party whose claim had its inception in the party's wrongdoing, whether the victim of the wrongdoing is the other party or a third party. Kauffman-Harmon v. Kauffman, 2001 MT 238, 307 M 45, 36 P3d 408 (2001).

Marital Misconduct Not Factor in Equitable Distribution of Marital Assets — Portion of Husband's Retirement Funds Awarded to Wife Who Depleted Her Own Retirement in Restitution for Criminal Offense: The wife was convicted of embezzling nearly $25,000 from her employer and made restitution from her retirement account. The parties later sought a divorce, and the District Court awarded the wife one-fourth of her husband's retirement funds, plus child support and maintenance conditioned upon the wife's management of her personal finances according to the court's requirements. The husband appealed the pension distribution, citing this section for the proposition that his wife's crime and consequent restitution resulted in dissipation of the marital assets and that she should not be allowed to take advantage of her own wrong. The Supreme Court declined to apply a general maxim of jurisprudence in light of the specific provisions of 40-4-202, which preclude consideration of marital misconduct as a factor in the equitable distribution of marital property. The record showed that the husband also contributed to dissipation of the estate. The trial court conducted a thorough analysis in equity of the required statutory factors in determining how to allocate the marital estate in toto. Its findings were not clearly erroneous and were thus affirmed. In re Marriage of Kotecki, 2000 MT 254, 301 M 460, 10 P3d 828, 57 St. Rep. 1043 (2000).

No Extension of Statute of Repose Under Equity Principles: The omission that gave rise to Joyce's claim for legal malpractice was attorney Garnaas's failure to serve a summons within the 3-year time limit. Joyce claimed a second cause of action in Garnaas's failure to notify Joyce about the status of the case even after the underlying action was lost, arguing that the concealment of a claim is a separate tort that resets the start date for the statutes of limitations and repose. However, there was no separate claim in this case, in addition to the alleged malpractice, because that claim was subsumed within the initial malpractice. Joyce argued on appeal that the statute of repose should be extended in this case because: (1) an attorney who intentionally misleads a client regarding the true status of a case is not entitled to claim the benefit of the statute of repose because the attorney would be allowed to take advantage of his wrong, in violation of this section; or (2) equitable estoppel should bar Garnaas from taking advantage of his wrong while asserting a strict legal right, in violation of 27-2-102. In this case, however, principles of equity did not extend the otherwise absolute statute of repose. Section 27-2-102 does not apply to legal malpractice actions. Further, Joyce's allegations of continuing fraudulent concealment failed because claims for damages against Garnaas for not informing Joyce of the legal malpractice related back to the date that the summons was not served. Thus, Joyce could not claim any actual damages separate from Garnaas's original omission, which was barred by the statute of repose. Joyce v. Garnaas, 1999 MT 170, 295 M 198, 983 P2d 369, 56 St. Rep. 661 (1999).

Intentional and Negligent Injuries by Joint Tortfeasor — Comparative Negligence Unaddressed When Plaintiff Fully Compensated: Boyken sued Steele for intentional injuries and Lee's Northside Bar for negligent injuries that Boyken received in a bar fight. Boyken settled with the bar for $5,000 before trial, and the jury determined Boyken's injuries in the amount of $2,500 but that Boyken was 75% responsible for those injuries. The District Court granted judgment, notwithstanding the verdict, based upon Boyken's argument that comparative negligence should not be applied when injuries also resulted from an intentional tort and awarded Boyken $2,500. The Supreme Court refused to address the issue of whether comparative negligence should be applied to an intentional tort and held that Boyken was fully compensated for his injuries and that when a joint tortfeasor settles with a claimant, the remaining joint tortfeasor is entitled to offset to the extent of the settlement. Boyken v. Steele, 256 M 419, 847 P2d 282, 50 St. Rep. 131 (1993).

Insurance Company Breaching Contract Retains Subrogation Rights: An insurance company refused to pay the plaintiff on a claim, and the plaintiff recovered his losses from other parties. The insurance company argued that any judgment against it should be reduced by the amount recovered by the plaintiff from others because the company had a subrogation right. The plaintiff contended that the insurer wrongfully refused to pay the claim and should not be allowed to benefit from the subrogation clause in the contract. The Supreme Court ruled that the other parties had no indemnity rights against the plaintiff for any payments received from the insurer. Therefore, to not allow subrogation would result in double payments to the plaintiff—a practice not favored under state law. Maddux v. Bunch, 241 M 61, 784 P2d 936, 47 St. Rep. 82 (1990).

Late Claim Caused by Misstatement of Employer or Insurer — Equitable Estoppel Allows Claim: Affirming the legal maxim that no one can take advantage of his own wrong, the Supreme Court applied to the Occupational Disease Act of Montana (now repealed and merged with Workers' Compensation Act) the concept set out in Davis v. Jones, 203 M 464, 661 P2d 859 (1983), that when misstatements by an employer or insurer prevent a claimant from filing a claim in a timely manner or mislead the claimant into believing that no claim can or need be filed, the doctrine of equitable estoppel applies to toll the limitation period and allow filing of the claim. Mellem v. St. Comp. Ins. Fund, 237 M 439, 774 P2d 390, 46 St. Rep. 932 (1989), followed in Shelley v. USF&G, 252 M 106, 827 P2d 1288, 49 St. Rep. 277 (1992).

Plaintiff's Understandable Failure to Plead Pertinent Facts — No Constructive Fraud: Wife pleaded a 1965 marriage and did not mention husband's 1972 Tennessee divorce obtained while he was living in that state and his wife was living in Texas, and she did not plead a common-law marriage or mention that her husband lived in Tennessee. However, husband did not inform wife of the Tennessee divorce until almost 8 years after it occurred, when she told him she was going to sue for a Montana divorce, and it was understandable she might not believe him. When wife filed, she knew of no address for husband other than his most recent (Montana) address. She filed on August 1, and he was found and served in Tennessee on August 11. In addition, the two had lived together and held themselves out as husband and wife in Texas and Montana; therefore, a common-law marriage existed. Wife's divorce and the child support decree were not based on extrinsic, constructive fraud by wife. A court hearing a divorce action sits in equity. Given husband's acts of deceit and wife's good faith in pleading, the Supreme Court saw no reason to grant husband equitable relief by voiding wife's decree. In re Marriage of Appleton, 234 M 345, 763 P2d 658, 45 St. Rep. 1959 (1988).

No Unilateral Resumption of Contract Terms Following Breach of Contract: Once a contract has been breached, its terms may not be unilaterally resumed. The breaching party cannot claim entitlement to the contract benefits, and the nonbreaching party has no duty to perform under the contract terms. W. Media, Inc. v. Merrick, 232 M 480, 757 P2d 1308, 45 St. Rep. 1212 (1988), followed, with regard to performance under a construction contract, in James Talcott Constr., Inc. v. P&D Land Enterprises, 2006 MT 188, 333 M 107, 141 P3d 1200 (2006).

Contracts — Defaulting Party's Right to Accounting — Contract Entire or Divisible: To determine whether or not a party defaulting on a contract is entitled to an accounting (either contractually or equitably), it must be determined first whether the contract was entire or severable. This depends very largely on contractual terms and on the intention of the parties disclosed by those terms. As a general rule, a contract is entire when by its terms, nature, and purpose it contemplates and intends that each and all of its parts are interdependent and common to one another and to the consideration. A contract contemplating the feeding of cattle by one party until 80% graded "choice", followed by sale and splitting of the proceeds with the supplier of the cattle, was held clearly intended to be entire and nonseverable. The feeder's default and abandonment completely frustrated the purpose, intent, and terms of the joint venture agreement.

The feeder thereby forfeited any right it may have had to an accounting under the contract. When the joint venture was destroyed by abandonment by one of the joint venturers, equity would not compel an accounting, because a wrongdoer may not take advantage of his own wrong. Roundup Cattle Feeders v. Horpestad, 184 M 480, 603 P2d 1044 (1979), distinguishing Murphy v. Redland, 178 M 296, 583 P2d 1049 (1978).

Impossibility of Performance of Contract: A joint venture was formed, the contract contemplating the feeding of cattle by one party until 80% graded "choice", followed by sale and splitting of the proceeds with the supplier of the cattle, who was the second party. A drop in cattle prices which caused the feeder to lose his financing was not a case of commercial impossibility for two reasons. First, in order for commercial impossibility to excuse performance of a contract, the parties thereto must have had no reason to foresee the impossibility at the time they contracted. Fluctuation in cattle prices is foreseeable. Second, in order for commercial impossibility to excuse performance, the contractual duties must be impossible for anyone to perform. Subjective (personal) impossibility does not inhere to the nature of the act to be performed and does not excuse nonperformance. A loss of financing is personal impossibility. Roundup Cattle Feeders v. Horpestad, 184 M 480, 603 P2d 1044 (1979).

Partial Performance — Restitution — Damages: A joint venture was formed, the contract contemplating the feeding of cattle by one party until 80% graded "choice", followed by sale and splitting of the proceeds with the supplier of the cattle, who was the second party. When cattle prices dropped, the feeder lost his financing and defaulted on the contract. The agreement was entire and nonseverable. Having failed in the complete performance of the contract, the feeder could not recover under it. Restitution to the feeder of his expenses before default would have to be based on implied contract theory. In order for a claim of restitution to lie, there must be no willful or intentional departure from the contract, and the defects in performance must not pervade the whole or be so essential that the object which the parties intended to accomplish is not accomplished. The feeder could not recover his prior expenses because a party who has completely breached an entire, nonseverable contract, without justification or excuse, may not recover for any performance rendered prior to the breach. On the contrary, a counterclaim against the feeder for damages was upheld. Roundup Cattle Feeders v. Horpestad, 184 M 480, 603 P2d 1044 (1979), distinguishing Murphy v. Redland, 178 M 296, 583 P2d 1049 (1978).

Loss of Right of Survivorship:

Wife who feloniously killed her husband did not acquire by right of survivorship his share of property held jointly with her but took the property under a constructive trust. Sikora v. Sikora, 160 M 27, 499 P2d 808 (1972).

Where husband feloniously killed his wife, he did not acquire by right of survivorship her share of property held jointly with him but took the property under a constructive trust, and when he thereafter committed suicide his heirs had no right to wife's share. In re Cox's Estate, 141 M 583, 380 P2d 584 (1963).

Surety's Liability: This statute was one ground for holding surety liable on bond, even though bond was not in effect at time act occurred giving rise to liability, since surety company had been tardy in processing papers of party to be bonded and had accepted premium on bond. Lapke v. Hunt, 151 M 450, 443 P2d 493 (1968).

Fraud Against Spouse: The widow as administratrix of her husband's estate could not impress a trust upon property for which her deceased husband had given downpayment to his son and daughter-in-law, even though fraud was alleged on the basis that the gift was made with a parol agreement that the contract would be assigned to him as soon as he was legally separated from his wife, since to allow such claim would result in recovery on decedent's own fraud for the benefit of a stranger to the action. Platts v. Platts, 134 M 474, 334 P2d 722 (1959).

Oil and Gas Drilling Agreement: Where an oil and gas lessee was ready, able, and willing to drill further wells and develop the lessor's property, an attack upon the lessee's title by lessors will relieve the lessee of the duty either to proceed with the drilling operations or the payment of the delay rentals specified during the contest of his title. Fey v. A. A. Oil Corp., 129 M 300, 285 P2d 578 (1955).

Defaulting Contractor: A subcontractor, failing to provide all materials and perform all work necessary to complete subcontract with federal public building contractor or to pay for materials furnished subcontractor by others, with result that surety on contractor's bond completed work and paid less than contract prices for such materials, was not entitled to credit for difference between sums agreed to be paid therefor and sums actually paid by surety in action on such bond. United States ex rel. Watsabaugh & Co. v. Seaboard Co., 26 F. Supp. 681 (D.C. Mont. 1938).

Fraudulent Mortgage: Where plaintiff's mortgage was valueless through defendant's misrepresentations that it was a first mortgage when in fact it was a second, and plaintiff without first foreclosing attached, it was error for court to dissolve the attachment without plaintiff's foreclosing first to prove the mortgage valueless under the requirements of 71-1-222, i.e., to exhaust the security before resorting to general assets. To so hold would be to award a prize for fraud and deceit and permit a party to take advantage of his own wrong contrary to this section. Bailey v. Hansen, 105 M 552, 74 P2d 438 (1937).

Improper Bail: If a court did not have authority to accept Liberty bonds in lieu of money as bail, plaintiff upon whose solicitations the court accepted them, having been in pari delicto, was estopped to assert lack of authority in the court to receive them as bail since she could not take advantage of her own wrong. Kirschbaum v. Mayn, 76 M 320, 246 P 953 (1926).

Discharge of Employee: The provision of sec. 2, Ch. 11, Ex. L. 1919, that a police officer can recover salary only for services actually rendered did not apply where he was unlawfully discharged and, though offering to perform them, was thereafter prevented from so doing since the city could not take advantage of its own wrong. Sweeney v. Butte, 64 M 230, 208 P 943 (1922).

Appropriation of Property: A telegraph company cannot urge the public character of its business as a justification for its trespass when, without first resorting to eminent domain proceedings, it erects poles on and strings its wires across private property, the owner not consenting. Postal Telegraph-Cable Co. v. Nolan, 53 M 129, 162 P 169 (1916).

Attorney General's Opinions

Illegal Deeds: The Montana Subdivision and Platting Act makes contracts and deeds conveying land in violation of the act illegal. Under case and statutory law, illegal contracts are void. Case and statutory law do not declare deeds violating the act void, but since they are illegal and contracts in violation of the act are void, the deeds are also void. To hold otherwise would defeat the act's purpose and allow one to take advantage of his own wrong contrary to equity and this section. 35 A.G. Op. 65 (1974).

1-3-209. Fraudulent dispossession.

Compiler's Comments

2007 Amendment: Chapter 61 made minor changes in style. Amendment effective October 1, 2007.

1-3-210. Acts on one's behalf.

Compiler's Comments

2007 Amendment: Chapter 61 made minor changes in style. Amendment effective October 1, 2007.

Case Notes

Laches Inapplicable to Bar Suit to Enforce Divorce Settlement Payments Fifteen Months in Arrears: A divorce settlement agreement that wife sought to enforce was a contract. It was subject to an 8-year statute of limitations. Wife filed the suit 15 months after husband stopped making payments under the agreement. Husband failed to show the extraordinary circumstances requiring application of laches that is required to dismiss a suit filed within the limitations period. In re Marriage of Hahn, 263 M 315, 868 P2d 599, 51 St. Rep. 73 (1994).

1-3-211. Acts of others.

Case Notes

Calculation of Restitution — No Joint and Several Liability for Restitution for 11-Day Vandalism Spree When Youth Participated Only 2 Days: A youth pleaded guilty to participating in 2 nights of an 11-day vandalism spree. The judge ordered that he was jointly and severally liable for the amount of damage caused throughout the entire spree, which exceeded $70,000. The youth argued he should be ordered to pay restitution for only the damages caused during the 2 days instead because the state did not establish his accountability for the vandalism that occurred during the other 9 days of the spree. The state argued it did not have to establish his accountability under the criminal mischief statutes for each day of the spree. The youth appealed to the Supreme Court, which agreed with the youth that the state was required to prove his accountability for the acts of others. The Supreme Court reversed the District Court's order of restitution and remanded for a recalculation of restitution for the 2 days on which the youth participated in the acts of vandalism. In re B.W., 2014 MT 27, 373 Mont. 409, 318 P.3d 682.

1-3-212. Benefit — burden.

Compiler's Comments

2007 Amendment: Chapter 61 made minor changes in style. Amendment effective October 1, 2007.

Case Notes

Competency of Executioner: One who received benefit from trustee's termination of trust could not at a later proceeding deny trustee's competence to execute termination of trust in order to prove incompetency of the same person to execute a will, which will the beneficiary was attempting to avoid. In re Estate of Powers, 163 M 67, 515 P2d 368 (1973).

Surety's Liability: This statute was one ground for holding surety liable on bond, even though bond was not in effect at time act occurred giving rise to liability, since surety company had been tardy in processing papers of party to be bonded and had accepted premium on bond. Lapke v. Hunt, 151 M 450, 443 P2d 493 (1968).

Surety Contract: Where defendant furnished contractors with surety bond providing that contractors would faithfully perform contract with State Highway Commission (now Transportation Commission) for roadwork, and contract required contractors to carry public liability insurance to indemnify public for injuries sustained by reason of work on highway, defendant was liable for satisfaction of judgments notwithstanding exclusion clause under which use of automobiles was excluded from coverage of policy. The defendant assumed the burden of protecting members of the public from injury, and having accepted the benefit (premium) should also accept the burden. Doheny v. USF&G Co., 34 F. Supp. 888 (D.C. Mont. 1940), affirmed in 123 F2d 746 (9th Cir. 1941).

1-3-213. Grant includes essentials.

Case Notes

Easement by Grant Interpreted in Favor of Grantee — Access Provided by Initial Easement Affirmed: When Watson, in conjunction with her former husband Roger, purchased a parcel of property from defendants, Roger's parents, Watson and Roger received a permanent easement across defendants' property to access the parcel, as evidenced by defendants' representation in a loan agreement that allowed the purchase of the parcel. When Watson and Roger later divorced, Watson was granted full title to the parcel, but defendants then redefined the easement and informed Watson that only part of their property could be accessed through defendants' property, so Watson sued to enforce the terms of the initial easement. The District Court granted defendants summary judgment, but on appeal, the Supreme Court reversed. Applying general principles of contract law and interpreting the easement in favor of grantee Watson, the court noted that under this section, one who grants a thing is presumed to also grant whatever is essential to its use. Further, the granting document, written by and thus construed against defendants, contained a significant ambiguity by providing Watson and Roger a permanent easement across all of defendants' remaining lands while contradictorily limiting the easement to cover only part of defendants' property. Interpreting the document as a whole and considering the acceptable intrinsic evidence, the Supreme Court concluded that Watson was entitled to a permanent easement across defendants' remaining property as necessary and essential to the complete use and enjoyment of the landlocked parcel sold by defendants. Watson v. Dundas, 2006 MT 104, 332 M 164, 136 P3d 973 (2006), following Erker v. Kester, 1999 MT 231, 296 M 123, 988 P2d 1221 (1999).

Sale of Lot Presumptively Including Access: It is a presumption, albeit disputable, that the complete use and enjoyment of a parcel of land includes access to that parcel. To overcome the presumption, the seller must offer evidence or some legal basis that would controvert the buyer's reliance on the presumption. Here, the Kester's sold the Erkers a house in Big Sky for approximately $310,000. The Kesters' attorney later discovered through the title company that a portion of the driveway, which provided sole access to the house, had not been conveyed by the deed to the lot and requested additional money for the deed to the driveway. There was no indication at the time of sale that any parcel was separate and distinct from the lot, nor did the Kesters reveal any intention to reserve the driveway from the purchase of the lot. Although the Erkers were charged with constructive notice of the contents of properly recorded instruments describing prior conveyances of the property, under Montana subdivision laws, the driveway was not an individual parcel of land at the time of purchase, so the Erkers could be charged only with knowledge that the purchase of the lot described in the common metes and bounds description included the driveway. Absent evidence to the contrary, the Erkers were entitled to the presumption that purchase of the lot included access to it and to summary judgment as a

matter of law. Erker v. Kester, 1999 MT 231, 296 M 123, 988 P2d 1221, 56 St. Rep. 912 (1999), following Yellowstone Valley Co. v. Assoc. Mtg. Investors, Inc., 88 M 73, 290 P 255 (1930).

1-3-214. Wrong — remedy.

Case Notes

Demand for Performance of Term Not Contained in Contract — Statement That Party Will Not Perform Unless Demand Met — Anticipatory Breach of Contract: "A party acts at his peril if, insisting on what he mistakenly believes to be his rights, he refuses to perform his duty." Therefore, a demand for performance of a term not contained in the parties' contract, accompanied by an unequivocal statement that the demanding party will not perform unless the additional term is met, constitutes an anticipatory breach of the contract, excusing performance by the other party. In determining whether an anticipatory breach was committed, the concern is whether the promisor communicated an unequivocal indication of an intent not to perform rather than the promisor's uncommunicated subjective intent in repudiating its contractual obligations. A promisee need not jeopardize its own interests by speculating about the promisor's clear refusal to perform or by waiting until the time set for performance to ascertain whether the promisor's unequivocal repudiation was serious. Chamberlin v. Puckett Constr., 277 M 198, 921 P2d 1237, 53 St. Rep. 593 (1996), following United Calif. Bank v. Prudential Ins. Co, 681 P2d 390 (Ariz. Ct. App. 1983), and followed in Eschenbacher v. Anderson, 2001 MT 206, 306 M 321, 34 P3d 87 (2001). See also Comment d, Restatement (Second) of Contracts 250 (1981).

Principles of Equity as Limitation of Freedom to Contract Retroactively: For equitable reasons, the lower court refused to enforce an agreement by some of the investors in a real estate project to retroactively treat certain contributions as loans accruing interest. The Supreme Court agreed, noting that not all investors had been part of the agreement and that the result of the agreement would be devastating to some of the parties. World Realty Ltd. v. Goulding, 245 M 188, 800 P2d 161, 47 St. Rep. 1974 (1990).

Legislative Power to Alter Common Law: No one has a vested interest in any rule of common law. The Legislature may alter common-law causes of action to promote legitimate state interests and may alter or abrogate causes of action sounding in tort. Meech v. Hillhaven W., Inc., 238 M 21, 776 P2d 488, 46 St. Rep. 1058 (1989).

Case of First Impression — Breach of Contract by Anticipatory Repudiation: Combining two maxims of jurisprudence, "The law neither does nor requires idle acts", and "For every wrong there is a remedy", court found no reason in policy or in law for denying an immediate action for damages based on breach of contract by anticipatory repudiation. However, court held for defendant, as language asserted by plaintiff as a repudiation was subject to different interpretations; and since breach of contract by anticipatory repudiation works harsh results, for its application, there must be a positive unequivocal statement to the promisee indicating that the promisor will not or cannot substantially perform his contractual duties before his time for performance has arrived. STC, Inc. v. Billings, 168 M 364, 543 P2d 374 (1975).

Inducing Withdrawal of Bail Bond: Complaint in an action for damages based upon acts of defendants in wrongfully and by false representations persuading bondsmen on a bail bond furnished by plaintiff charged with crime to withdraw therefrom, with the result that plaintiff was kept in jail for 38 days and until a new bond was furnished by some of the persons who had previously withdrawn on the solicitation of defendants, was held to state a cause of action, irrespective of the form or nature of the action, upon the theory that for every wrong there is a remedy. Pyles v. Melvin, 84 M 338, 275 P 753 (1929).

1-3-215. Equal in right or wrong.

Case Notes

Unlawful Conduct Not Necessarily Bar to Negligence Action: Plaintiff and defendant were illegally hunting coyotes from defendant's airplane without a proper permit when the plane crashed. The pari delicto doctrine, found in 1-3-215, does not bar plaintiff's negligence action against the defendant as pilot. Conduct prohibited by law that is not strongly condemned by public policy as a matter of serious criminal conduct or delinquency may not be sufficient to bar recovery. The hunting statute in issue is not of a type involving conduct of which the law so strongly disapproves as a matter of public policy that access to the courts should be denied for tort purposes. In light of this holding, the court overrules two prior Montana cases that relied on the pari delicto doctrine to bar lawsuits. The two are Melville v. Butte-Balaklava Copper Co., 47 M 1, 130 P 441 (1913), and Jackson v. Lomas, 60 M 8, 198 P 434 (1921). Waller v. Engelke, 227 M 470, 741 P2d 385, 44 St. Rep. 1241 (1987). However, see Patten v. Raddatz, 271 M 276, 895 P2d 633, 52 St. Rep. 439 (1995), in which the court applied the doctrine of in pari delicto to

bar recovery when prostitution and drug consumption constituted the primary purpose of the contract.

Injured Party in Pari Delicto: A city ordinance prohibited the sale as well as the discharge of fireworks within the city limits. A minor purchased a package of fireworks from defendant, discharged one, and was injured. Having been in pari delicto with defendant in violating the ordinance, he could not recover damages for the injuries sustained. The rule that the violation of a penal statute or ordinance by one resulting in injury to another is negligence per se does not apply where the wrongdoer and the injured party are in pari delicto. Jackson v. Lomas, 60 M 8, 198 P 434 (1921), overruled in Waller v. Engelke, 227 M 470, 741 P2d 385, 44 St. Rep. 1241 (1987), which held that the pari delicto doctrine, found in 1-3-215, does not necessarily bar a plaintiff's negligence action against a defendant because the plaintiff himself violated a statute. Waller held that conduct prohibited by law that is not strongly condemned by public policy as a matter of serious criminal conduct or delinquency may not be sufficient to bar recovery.

1-3-216. Preference to earliest.

Case Notes

Competing Petitions for Adoption: The court did not abuse its discretion by delaying determination of a jurisdictionally perfected adoption petition ready for hearing to consider subsequent petitions since the court cannot be compelled to fragment the case because of different filings and readiness for hearing of competing petitions. The best interest of the child is the paramount consideration. In re Red Crow, 172 M 366, 563 P2d 1121 (1977).

1-3-217. Beyond control.

Compiler's Comments

2007 Amendment: Chapter 61 made minor changes in style. Amendment effective October 1, 2007.

Case Notes

Calculation of Restitution — No Joint and Several Liability for Restitution for 11-Day Vandalism Spree When Youth Participated Only 2 Days: A youth pleaded guilty to participating in 2 nights of an 11-day vandalism spree. The judge ordered that he was jointly and severally liable for the amount of damage caused throughout the entire spree, which exceeded $70,000. The youth argued he should be ordered to pay restitution for only the damages caused during the 2 days instead because the state did not establish his accountability for the vandalism that occurred during the other 9 days of the spree. The state argued it did not have to establish his accountability under the criminal mischief statutes for each day of the spree. The youth appealed to the Supreme Court, which agreed with the youth that the state was required to prove his accountability for the acts of others. The Supreme Court reversed the District Court's order of restitution and remanded for a recalculation of restitution for the 2 days on which the youth participated in the acts of vandalism. In re B.W., 2014 MT 27, 373 Mont. 409, 318 P.3d 682.

1-3-218. Vigilance.

Case Notes

Application of Laches — Statute Not Yet Tolled: The defendants argued that laches barred an action for damages brought 5 years after a breach of a contract concerning the sale of their business interests to the plaintiff, but they failed to submit evidence showing extraordinary circumstances or prejudice sufficient to justify the application of laches when the statute of limitations had not yet tolled. Although the business at issue was worth substantially less at the time of the action's filing than it was at the time of the breach of contract, the evidence did not show that the delay in filing changed the nature of the damages, other than the potential amount of interest due. Bottrell Family Investments Ltd. Partnership v. Diversified Financial, Inc., 2015 MT 185, 379 Mont. 504, 352 P.3d 620.

Probate Not Barred by Laches — Contestants Unaware of Will's Existence: Laches did not bar the probating of a 1997 will because the individuals contesting the probate were not aware of the existence of the will until the estate's personal representative initiated informal probate proceedings 14 years after the testator's death. However, laches would have barred an earlier will benefiting the contestants because at least one contestant was aware of the will's existence and did not seek to probate it for 14 years. In re Estate of Harris, 2015 MT 182, 379 Mont. 474, 352 P.3d 20.

Detrimental Reliance on Failure to Enforce Covenants — Laches Applied: A property owner sued his neighbor for violating restrictive covenants after the neighbor built two fences on his

property and extended a deck on his home to reach as far as the eaves of his home. A surveyor testified that the eaves of the home, as well as the newly extended deck, extended 2 feet beyond the 90-foot setback covenant. The District Court concluded that the fences did not violate the restrictive covenants but ordered that the deck addition be removed. Both parties appealed. The Supreme Court agreed that the fences did not violate the covenants. With regard to the deck, the Supreme Court determined that the defendant neighbor had detrimentally relied on the belief that the eaves of his home did not violate the covenants and that he could therefore extend the deck to the same distance as the eaves. Because the plaintiffs had never challenged the eaves on the neighbor's home as a violation of the restrictive covenants, the doctrine of laches applied, and the Supreme Court vacated the District Court's order for the removal of the deck extension. Wagner v. Woodward, 2012 MT 19, 363 Mont. 403, 270 P.3d 21.

Lack of Diligence and Prejudice Required to Assert Laches: In 1949, plaintiffs' predecessor in interest granted an easement to defendant's predecessor in interest to allow the construction of radio towers on a portion of a 160-acre parcel, conditioned on location and maintenance of the property. Defendant subsequently notified plaintiffs that he intended to expand the radio facilities beyond the original construction site. Plaintiffs sued, asserting that the expansion would encompass property not included in the original grant and contending that defendant had neglected to maintain the property. Defendant asserted the defense of laches on grounds that plaintiffs unreasonably delayed in asserting their claims. The District Court rejected the laches defense, and on appeal, the Supreme Court affirmed. For laches to apply, a court must find lack of diligence by the party against whom the defense is asserted and prejudice to the party asserting the defense. In this case, defendant made no showing of prejudice as a result of the allegedly unreasonable delay, and the laches defense was correctly rejected. Anderson v. Stokes, 2007 MT 166, 338 M 118, 163 P3d 1273 (2007).

Challenge to Term Limits Barred by Doctrine of Laches: Constitutional Initiative No. 64, which in 1992 enacted term limits for various elective offices, was challenged in 2002 on several grounds by two state senators whose terms were affected by the limits. The Supreme Court did not address the merits of the claims because it held that they were barred by the doctrine of laches. Laches is a concept of equity that can apply when a person is negligent in asserting a right, and exists when there has been an unexplainable delay of such duration or character as to render the enforcement of an asserted right inequitable. Laches is appropriate when a party is actually or presumptively aware of the party's rights, but fails to act. In order to apply laches, a showing must be made that the passage of time has prejudiced the party asserting laches or has rendered the enforcement of a right inequitable. To allow plaintiffs' challenge 9 years after the enactment of the initiative would prejudice those who relied on its presumptive validity, and raise a question of the inequity of permitting the claim to be enforced. The court noted that voters still retain the right to repeal the term limits provision, by initiative or through legislative referendum, but that the point had been reached at which a claim asserting that voters failed to follow the proper procedures in enacting the constitutional initiative was simply too late. Cole v. State ex rel. Brown, 2002 MT 32, 308 M 265, 42 P3d 760 (2002), followed in Phillips v. Whitefish, 2014 MT 186, 375 Mont. 456, 330 P.3d 442, in which the Supreme Court concluded that filing a lawsuit challenging a referendum 4 days after the referendum passed did not warrant dismissal based on laches when no demonstration of prejudice or inequity was made, aside from the ordinary cost of the election process.

Motion to Amend Petition for Dissolution Properly Denied When Basis for Petition Known for Twenty-One Months: Citing this maxim of jurisprudence, the Supreme Court upheld a District Court's refusal to allow amendment of a petition for dissolution to include spousal maintenance when the petitioner knew the facts upon which her motion was based 21 months before trial but made the motion to amend only 1 month before trial and offered no explanation for the delay. Stundal v. Stundal, 2000 MT 21, 298 M 141, 995 P2d 420, 57 St. Rep. 108 (2000).

Failure to Submit Available Evidence Precluding Setting Aside of Judgment: At a 1995 hearing on child support, a father was defiantly uncooperative in providing documentation of any kind regarding his finances, assets, the provision of insurance for the children, and past child support payments. At a 1998 hearing on suspension of his driver's, hunting and fishing, and electrician's licenses, he claimed that he should be allowed to present the evidence that he refused to provide earlier. The District Court declined to reopen the 1995 hearing, and the Supreme Court affirmed. If there was anything that prevented the father from a fair submission of the controversy, it was his own defiance of the justice system. His failure to avail himself of the opportunity to present the appropriate information in 1995 and his desire to retroactively argue a factual issue in the case were not sufficient reasons to justify setting aside the judgment.

His motion for a new trial was properly denied, and in the interests of finality of litigation, the Supreme Court declined to upset the judgment. In re Marriage of Hopper, 1999 MT 310, 297 M 225, 991 P2d 960, 56 St. Rep. 1247 (1999). See also Karlen v. Evans, 276 M 181, 915 P2d 232, 53 St. Rep. 337 (1996).

Laches:

Laches is a concept of equity that can apply when a person is negligent in asserting a right. Laches can apply when there has been an unexplained delay of such duration or character as to render enforcement of the asserted rights inequitable. Each case must be determined on its own unique facts. In re Marriage of Hahn, 263 M 315, 868 P2d 599, 51 St. Rep. 73 (1994), following Fillner v. Richland, 247 M 285, 806 P2d 537 (1991). See also Kelleher v. Bd. of Social Work Examiners & Professional Counselors, 283 M 188, 939 P2d 1003, 54 St. Rep. 556 (1997) (holding that laches did not apply when the Board knew that applicant had a pending statutory right to attorney fees despite a delay in asserting the right).

Laches exists when there is unexplained delay of such duration or character as to render the enforcement of the asserted claim inequitable. Jackson v. St., 181 M 257, 593 P2d 432 (1979).

Laches is an equitable defense, meaning negligence in the assertion of a right. Cremer v. Cremer Rodeo Land & Livestock Co., 181 M 87, 592 P2d 485 (1979).

Ignorance of Law Not Loss of Opportunity to Defend: Ignorance of the law is not an argument for the lack of opportunity to defend. NW. Farm Credit Serv., ACA v. Lund, 255 M 114, 841 P2d 490, 49 St. Rep. 910 (1992).

Claim for Past Salary Barred by Laches: The plaintiff initiated a claim for sums due for conversion compensation brought about by a change of contract entered into by the plaintiff and a university 17 years prior to the suit. The Supreme Court ruled that the claim was barred by the equitable doctrine of laches due to an unexplained delay in bringing the suit that was of such duration or character as to render the enforcement of the asserted right inequitable. Sperry v. Mont. St. Univ., 239 M 25, 778 P2d 895, 46 St. Rep. 1482 (1989).

Failure to Assert Rights Under Will for Seven Years — Jury Instructions — Equity Issues in Discretion of District Court: Plaintiffs who waited 7 years to assert their rights under decedent's will were not entitled to proposed instructions relating to laches and equitable estoppel. The District Court refused the instructions, and the Supreme Court affirmed. The determination of equitable issues rests solely within the discretion of the District Court. Equity aids the vigilant. The plaintiffs were not entitled to the aid of equity. Tope v. Taylor, 235 M 124, 768 P2d 845, 45 St. Rep. 2242 (1988). See also Turner v. Wells Fargo Bank, N.A., 2012 MT 213, 366 Mont. 285, 291 P.3d 1082 (no equity when the plaintiffs failed to conduct a title search upon purchase of property from a family member).

Failure to Ascertain Property Status for Nearly Forty Years — Laches Applicable: The trial court properly applied laches in a quiet title case where appellants "slept on their rights by not ascertaining the status of their property for nearly 40 years", then claimed the warranty deed had been materially altered to deprive them of their mineral rights. Absence from the state was not an excuse for sleeping on their rights. Benson v. Diehl, 228 M 199, 745 P2d 315, 44 St. Rep. 1455 (1987).

Failure to Assert Royalty Interest in Tax Deed Land — Laches:

A tax deed issued to the county in 1930 without affidavits setting forth the statutorily requisite statements as to notice to the owner and as to occupancy was void. The county sold the land to A.O., reserving a 6 1/4% royalty interest. Plaintiff children of the original owner who had lost the land for failure to pay taxes quitclaimed all their interest in the land to A.O.'s successors, reserving their claim to and interest in the 6 1/4% royalty claimed by the county, and in turn A.O.'s successors conveyed to plaintiffs all of the successors' interest in that royalty. Plaintiffs' conveyance cleared the title of any insufficiency in the tax deed proceedings but did not convey or give up plaintiffs' claim to the 6 1/4% royalty interest. Plaintiffs' redemption argument failed because they had never attempted a redemption. After analyzing nine factors relating to laches, the court ruled that laches barred plaintiffs' claim to the county's royalty interest. Richardson v. Richland County, 219 M 48, 711 P2d 777, 42 St. Rep. 1834 (1985), followed in Filler v. Richland County, 247 M 285, 806 P2d 537, 48 St. Rep. 200 (1991). (The court also stated that King v. Rosebud County, 193 M 268, 631 P2d 711, 38 St. Rep. 1145 (1981), in which the court concluded that laches was inapplicable because laches did not commence until oil was produced and royalties earned, was incomplete in its laches analysis because the court overlooked the inchoate ownership of the royalty interest.)

County's tax deed was void for insufficient notice of the tax sale and failure to give notice of application for a tax deed to the owners of the property. The county had deeded the land to

Swigart, reserving a 6 1/4% royalty interest. Swigart, using a statutory proceeding, applied for and received a deed confirming the tax deed. The confirmation deed did not mention the county's 6 1/4% royalty interest. The confirmation deed was void for failure to give sufficient notice to the owners who had lost the land to the county or to their successors in interest. The two original owners had each had an undivided one-half interest in the land. Plaintiff heirs of one of the original owners sued to quiet title to the county's 6 1/4% royalty interest and then quitclaimed to Swigart's heirs all plaintiffs' interest in the land, reserving a 6 1/4% royalty interest. In return, Swigart's heirs quitclaimed the 6 1/4% royalty interest to plaintiffs. Plaintiffs' quitclaim to Swigart's heirs did not convey or give up any claim plaintiffs had to or any interest they had in the 6 1/4% royalty interest. The court analyzed 10 factors relating to laches and ruled that laches barred plaintiffs' claim and that the 6 1/4% royalty interest was vested in the county. Anderson v. Richland County, 219 M 60, 711 P2d 784, 42 St. Rep. 1843 (1985).

Laches — Elements — Questioning One's Right to Real Property: The length of time during which rights are not asserted is not the only factor to be considered in determining whether laches applies. There must be negligence in asserting a right and an unexplained delay that would render enforcement of the asserted right inequitable. Plaintiff here did not have to seek judicial determination of her right to a one-half mineral interest in land until that right was questioned. There was no harm to defendants as they were unaware of their possible claim to the one-half interest until lessee of plaintiff's interest raised a title question. Peterson v. Hopkins, 210 M 429, 684 P2d 1061, 41 St. Rep. 1140 (1984).

Suit for Exclusive Ownership of Joint Savings Account Funds: A son was added as a joint tenant on his mother's savings accounts. Three years later the mother made a written demand upon her son for the return of the passbooks and 1 month following the demand filed a lawsuit to establish her exclusive ownership of the funds in the accounts. The doctrine of laches was inapplicable as the mother was not negligent in prosecuting her claim, having waited less than 1 month after her written demand to file suit. Anderson v. Baker, 196 M 494, 641 P2d 1035, 39 St. Rep. 273 (1982).

Objection to Termination of Trust Barred by Laches: Where 4 years after his appointment as trustee appellant objected to the termination of a trust on the grounds that the decree of distribution made 32 years earlier was based on fraud and offered no reasonable explanation for his failure to earlier file an objection, the appellant would be barred by laches from objecting to the petition for termination of the trust. Estate of Wallace v. McAlear, 186 M 18, 606 P2d 136 (1980).

Untimely Motion: When motion to intervene was made for the first time at the beginning of trial after intervenor sat on his claimed right for 2 1/2 years, the judge correctly denied the motion on the basis of untimeliness. Archer v. LaMarch Creek Ranch, 174 M 429, 571 P2d 379 (1977).

Mining Claims:

A person claiming an interest in property must be diligent in asserting his claim, and this is especially true as to mining claims. A stockholder's action for cancellation of mining lease allegedly procured through secret collusion between corporate lessor's confidential agent and lessee and other defendants was barred by "laches", where plaintiff failed to make due inquiry, permitted lessee to expend large sums, accepted benefits of lease, ratified it twice, and delayed 2 years after collusion should have been discovered before bringing action. Jeffrey v. Pioneer Placer Dredging Co., 50 F. Supp. 43 (D.C. Mont. 1943).

The rule of laches is most rigidly applied in cases involving mining claims for the reason that no other class of property is subject to more violent fluctuations in value. O'Hanlon v. Ruby Gulch Min. Co., 64 M 318, 209 P 1062 (1922).

Default Judgment: Where defendant in a mortgage foreclosure suit, who had been regularly served in person with summons, permitted 2 years to elapse after entry of judgment by default against him and 8 months after execution of the Sheriff's deed to the property before moving to set it aside on the ground that the judgment, having been entered 1 day too soon, was void, he was not entitled to relief by Writ of Certiorari. Under such circumstances the judgment will be presumed to have been entered within jurisdiction. State ex rel. Matt v. District Court, 86 M 193, 282 P 1042 (1929).

Foreclosure Decree: Plaintiff who did nothing toward having a decree of foreclosure amended for a period of more than 6 months and whose action was not filed for more than a year after foreclosure sale was not entitled to relief. Fed. Land Bank of Spokane v. Gallatin County, 84 M 98, 274 P 288 (1929).

Adverse Claim to Property:

Where a claimant of land permitted 30 years to elapse before he seriously attempted to enforce his claim, and during that time the value of the land had increased more than a hundredfold, and innocent third parties without notice of his claim had purchased portions thereof and expended time and money in their improvement, he was guilty of such laches in prosecuting his alleged right as to make this maxim applicable. Kimes v. N. Pac. Ry., 49 M 573, 144 P 156 (1914).

The maxim enunciated in this section was applied in a case where the plaintiff, knowing of the defendant's adverse claim to the property in controversy, remained silent for 12 years and offered no explanation for the delay in bringing suit. Kavanaugh v. Flavin, 35 M 133, 88 P 764 (1907).

1-3-219. Form and substance.

Case Notes

Error in Placing Factual Allegations in Supporting Memorandum — Amendment of Petition for Postconviction Relief to Be Freely Given: Nava inadvertently placed his recitation of facts supporting his petition for postconviction relief (PCR) in his supporting memorandum rather that in his PCR petition. The Supreme Court held that leave to amend his PCR petition should be freely granted by the District Court and that to not do so was an elevation of form over substance. Nava v. St., 2011 MT 77, 360 Mont. 96, 255 P.3d 53.

Members of County Commission Also Members of Zoning Commission — Zoning Regulations Properly Adopted: Plaintiffs contended that: (1) zoning regulations were not properly adopted because the Yellowstone Board of County Commissioners did not create a development pattern and the regulations themselves did not create a development pattern; (2) it was inappropriate for a development pattern and regulations to be promulgated together; (3) the zoning commission did not submit draft regulations to the Board; and (4) the Board itself did not vote to adopt the regulations. The District Court held that the Board substantially complied with statute in adopting the regulations, and the Supreme Court concurred. The zoning commission, not the Board, is charged with creating and adopting a development pattern, and nothing in law proscribes the creation of a development plan and zoning regulations simultaneously. The proposed regulations were properly submitted to the Board for consideration and public hearing. In this case, the County Commissioners were also members of the zoning commission, and although the members did not clearly state in what capacity they were voting when they adopted the regulations, the court found it difficult to imagine that the members would not have voted similarly in either capacity. To avoid confusion, the court recommended that members in similar positions make clear in what capacity they are voting and sign appropriately. Yurczyk v. Yellowstone County, 2004 MT 3, 319 M 169, 83 P3d 266 (2004).

Sufficiency of Single Petition to Transfer Territory From One K-12 District to Another K-12 District: Residents of Upper Nine Mile Valley petitioned the Missoula County School Superintendent to be transferred from Alberton K-12 district to Frenchtown K-12 district. The superintendent determined that the petition was valid and scheduled a hearing, but prior to the hearing, the Alberton Board of Trustees requested that the hearing be canceled because two separate petitions were not filed—one for elementary students and one for high school students. The superintendent denied the request, and on appeal to District Court, summary judgment was granted in favor of the superintendent. The Alberton Board of Trustees then appealed to the Supreme Court, asserting that two petitions were required under either 20-6-213 or 20-6-320 (both now repealed) in order to transfer both elementary and high school territories from one K-12 district to another K-12 district. Conversely, the superintendent maintained that because the request was for the transfer of combined elementary and high school territory from one K-12 district, as defined in 20-6-701, to another, only one petition was necessary. In order to give meaning to all the applicable statutes, the Supreme Court concluded that a K-12 school district is a high school district upon which an elementary district has been attached and remains a high school district for purposes of the governing statutes. Therefore, 20-6-320 (now repealed) applied to the petition in question because it concerned transfer of territory from one high school district to another. The question then became not whether a formal, second petition was required to address the elementary district, but whether under 20-6-320(8) (now repealed) the petition in question was "accompanied" by an elementary "petition" that satisfied the corollary requirements of 20-6-213 (now repealed). The Alberton trustees argued that a distinct, second elementary petition, also signed by a majority of registered electors, was required or else the entire transfer process was invalid. The Supreme Court refused to abide by such a strict, formalistic approach, noting that the law respects form less than substance. The petition clearly identified that the territory was K-12, meaning that any attached elementary territory would also be transferred,

thus the petition to transfer high school territory was unquestionably "accompanied" by a petition to transfer elementary territory as well, and it was not fatal that both petitions appeared on a single sheet of paper. The court held that it would be unreasonable and far too formalistic to require that two separate petitions be submitted when one petition, clearly identifying the intent to transfer both high school and elementary territory, served the same function. The District Court was affirmed. McKirdy v. Vielleux, 2000 MT 264, 302 M 18, 19 P3d 207, 57 St. Rep. 1101 (2000).

Good Will Exception Applicable to Stock Sale as Well as Asset Sale: Roessmans purchased 100% of the stock in a construction company, which constituted a complete transfer and conveyance of all of Laabses' right, title, and interest in the company. The sale agreement contained a covenant not to compete, restricting Laabses from performing any construction in the area for 7 years, including construction for any prior, existing, or referred clients of the company. About 4 years later, Roessmans filed a complaint alleging that Laabses had repeatedly breached the covenant not to compete by continuing construction in the area and performing projects for prior clients. Laabses moved for summary judgment on grounds that the covenant was void because it violated public policy against restraint of trade, contending that the exception in 28-2-704 did not apply because the sale in question was a sale of stock rather than a sale of assets. Laabses asserted that shareholders do not own the good will of a business, which belongs to the corporation, and that when shares of stock are bought and sold by individuals, the good will itself is not transferred. The Supreme Court found that such an interpretation would exalt form over substance. In this context, the stock purchase agreement specifically contemplated the transfer of good will and there was no substantive difference between sale of the company stock and sale of the company's assets, so the good will exception applied to the stock sale as well as the asset sale. Snow Country Constr., Inc. v. Laabs, 1999 MT 279, 296 M 520, 989 P2d 847, 56 St. Rep. 1125 (1999). See also Earthworks, Inc. v. Sehn, 553 NW 2d 490 (N. Dak. 1996).

Law Review Articles

Economic Substance in the Context of Federal Estate and Gift Tax: The Internal Revenue Service Has It Wrong, Gagliardi, 64 Mont. L. Rev. 389 (2003).

1-3-220. What ought to have been done.

Compiler's Comments

2007 Amendment: Chapter 61 made minor changes in style. Amendment effective October 1, 2007.

Case Notes

Fraudulently Induced Release: Where vendee of an elevator bought under a contract permitting him to pay for it out of the profits derived in operating it had in that manner fully paid for it on a certain day, but in reliance upon the correctness of an erroneous audit of his books by the vendor, about a month thereafter executed a surrender of his rights, a court of equity will, on the theory that that was done which ought to have been done, decree that legal title vested in him when full payment was made, and defendant vendor may not be heard to say in defense that plaintiff had relinquished his rights which then had become fixed, but of which he was kept in ignorance by the vendor's acts. Whorley v. Patton-Kjose Co., Inc., 90 M 461, 5 P2d 210 (1931).

Execution of Deed: Where a vendor executes a deed to an interest in oil land and receives an adequate consideration therefor, he may not come into a court of equity to evade his obligation on the ground that the instrument was so drawn that, tested by the technical rules of law, it does not convey what was intended to be conveyed. The court will consider that as done which should have been done and sustain the transaction if, on sound rules of law and equity, effect can be given to all the provisions of the deed and the intention of the parties carried out. Krutzfeld v. Stevenson, 86 M 463, 284 P 553 (1930).

Parties to Obligation: The equitable doctrine that that which ought to have been done must be regarded as done does not operate in favor of every person but only in favor of the one who holds the equitable right to have the act performed, as against the one upon whom the duty of such performance has devolved. Morton v. Union Cent. Life Ins. Co., 80 M 593, 261 P 278 (1927).

Delivery of Lease: Where an oil and gas lease had been placed in escrow and all conditions precedent to delivery had been complied with, it will be considered to have been delivered under the doctrine that that which ought to have been done will be regarded as having been done. Guerin v. Sunburst Oil & Gas Co., 68 M 365, 218 P 949 (1923).

1-3-222. Impossibilities.

Case Notes

What Constitutes Impossibility: Appealing in a breach of contract case, the seller asserted a defense of impossibility attributable to harsh weather conditions at the time set for delivery. The trial court apparently found the seller did not intend to deliver until after January 1 in any case. Such a finding was supported by the following facts: the seller had been telling the buyer for some time that no delivery could be made until after January 1; the seller had been intimating an unwillingness or inability to comply with the contract for months; and the seller, in order to wean the calves for the agreed 45-day period before delivery, would have had to start weaning by October 31 in order to deliver by December 15, the extended delivery date. (The contract had called for a mid-November delivery.) October 31 was 9 days before the snow that allegedly created impossibility of performance because of an inability to round up the calves. The Supreme Court found there was adequate evidence to support the trial court's rejection of this defense. Miller v. Titeca, 192 M 357, 628 P2d 670, 38 St. Rep. 853 (1981).

Substantial Compliance: Where farm contract required party in possession to summer-fallow 80 acres and court found he had summer-fallowed 74.5 acres and that was all the tillable land available, this constituted substantial and sufficient performance since the law never requires impossibilities. Letz v. Lampen, 110 M 477, 104 P2d 4 (1940).

Tender of Performance Dispensed With: Since the law does not require impossibilities or the doing of idle acts, where a school board by filling the position for which it had employed plaintiff had put it out of its power to place her, all other positions being filled, did not hold any meeting at which plaintiff could have presented herself for duty, and the superintendent had advised her that the board had repudiated its contract with her, she was not required to tender her services to the board or the superintendent, within the meaning of the instruction above, to entitle her to recover. Le Clair v. School District, 74 M 385, 240 P 391 (1925).

Return of Consideration on Disaffirmance by Minor: Where from the very nature or character of a consideration received by a minor for the execution of a contract (services performed by attorneys under a contract of employment to institute an action) it cannot be returned by him as required by 41-1-304, as a condition precedent to disaffirmance, he may disaffirm though unable to make return. Downey v. N. Pac. Ry., 72 M 166, 232 P 531 (1924).

1-3-223. Idle acts.

Case Notes

Disposition of Counterclaim by Separate Proceeding as Idle Act: Defendants argued that because a bad faith counterclaim was not before the District Court at the time of a summary judgment hearing on whether insurance coverage existed, it was improperly dismissed. However, the court properly decided that because there was no coverage under the insurance policies, the counterclaim was without merit. To compel the court to dispose of the bad faith counterclaim in a separate independent proceeding would be to compel an inefficient and idle act. Truck Ins. Exch. v. Waller, 252 M 328, 828 P2d 1384, 49 St. Rep. 318 (1992).

Exception to Procedural Requirements of Tax Break Statute: Plaintiff, at hearing by the State Tax Appeal Board, was denied tax benefits under the Montana Economic Land Development Act (MELDA), specifically under section 84-7526, R.C.M. 1947 (now repealed), which created an exception to the local implementation requirement. The trial court found for plaintiff. In affirming, the Supreme Court found a clear purpose for MELDA and held that if the Legislature did not intend for there to be an exception to the procedural requirements of the Act, it would not have adopted language creating an exception because the Legislature does not perform useless acts. An interpretation that gives effect is always preferred over an interpretation that makes a statute void or treats the statute as mere surplusage. The decision of the Board did not reconcile the provisions of MELDA in such a manner as to honor the legislative purpose behind it. Am. Linen Supply v. Dept. of Revenue, 189 M 542, 617 P2d 131, 37 St. Rep. 1707 (1980), followed in Corwin v. Bd. of Pub. Educ., 272 M 14, 898 P2d 1227, 52 St. Rep. 589 (1995).

Perfection of Appeal — Motion to Amend Findings Not Required: When a party's trial memorandum indicated that the opposing party's proposed findings were insufficient in two regards, the failure to move for amendment of the trial court's findings in that regard is not fatal to an appeal raising the same issue. Metcalf v. Metcalf, 183 M 266, 598 P2d 1140 (1979).

Case of First Impression — Breach of Contract by Anticipatory Repudiation: Combining two maxims of jurisprudence, "The law neither does nor requires idle acts", and "For every wrong there is a remedy", court found no reason in policy or in law for denying an immediate action for damages based on breach of contract by anticipatory repudiation. However, court

held for defendant, as language asserted by plaintiff as a repudiation was subject to different interpretations; and since breach of contract by anticipatory repudiation works harsh results, for its application, there must be a positive unequivocal statement to the promisee indicating that the promisor will not or cannot substantially perform his contractual duties before his time for performance has arrived. STC, Inc. v. Billings, 168 M 364, 543 P2d 374 (1975).

Contract of Purchase: Where purchaser conditioned annual payment on performance of certain acts by vendor contained in contract and subsequently brought suit for breach of contract when vendor did not perform such acts, trial court properly entered judgment for vendor on evidence that purchaser, prior to payment, was going to insist on performance by vendor of other acts not contained in contract, since performance of acts specified in contract would have been idle, and under this section law does not require performance of idle acts. Quayle v. Counts, 155 M 57, 466 P2d 911 (1970).

Demand on Trustee: While a demand is ordinarily required as a condition precedent to a suit by a cestui que trust against a trustee, no demand is necessary when it would be of no avail. Poepping v. Monson, 138 M 38, 353 P2d 325 (1960).

Transcript Where No Right to Appeal: Where person convicted in District Court petitioned Supreme Court for Writ of Mandate to compel District Court to furnish "copy of trial and court record transcript" for purpose of appeal in forma pauperis, but no notice of appeal had been filed as required by statute and time for appeal had elapsed, Writ would be denied. State ex rel. Treat v. District Court, 124 M 234, 221 P2d 436 (1950).

Clearing Title of Void Claim: Where a decree of distribution of an estate was entered and no appeal was taken from such decree, an affidavit thereafter filed and recorded, stating that the affiant was an heir and devisee of the will and claiming an interest in the real estate distributed, was void on its face and no suit to quiet title was necessary to convey clear title. Hart v. Barron, 122 M 350, 204 P2d 797 (1949).

Useless Gas Drilling: Where plaintiffs sought to cancel gas lease for failure to market the product and for failure to drill offset wells but there was no market for the gas produced, the drilling of such wells would have been a useless act and failure to do so might not be considered a breach of the contract. Severson v. Barstow, 103 M 526, 63 P2d 1022 (1937).

Tender of Performance Under Repudiated Contract:

Defendant, a defaulting purchaser of realty at execution sale, in an action by the Sheriff brought under 25-13-705 to recover the difference in the amount of defendant's bid and the amount which the officer received on resale, was not in a position to rely on the Sheriff's failure to tender him a certificate of sale where he had stated that he would not have paid the amount of his bid even if a certificate had been tendered, thus showing that tender would have been an idle ceremony not required by law. Sherlock v. Vinson, 90 M 235, 1 P2d 71 (1931).

To have given the 10 days' notice in writing to a tenant present in person repudiating the lease and declaring that he could not go on with it would have been an idle act not required by law. First Nat'l Bank of Columbus v. Coit, 79 M 468, 257 P 469 (1927).

On the opening of school plaintiff knew that her former position was occupied and to appear there seeking to discharge the duties of that position would have resulted only in embarrassment to her successor, to the principal of the school, and to herself; it would have been but an idle gesture, and this section exactly fits the case. Le Clair v. School District, 74 M 385, 240 P 391 (1925).

Insolvency of Principal Obligor: Where in an action on a surety bond indemnifying a depositor in a bank against loss, the bank as principal has put it out of its power to fulfill the condition of the bond by becoming insolvent, a demand upon it for payment is not necessary to fix the liability of the sureties and therefore the complaint need not allege such demand. Mut. Oil Co. v. Hamilton, 73 M 385, 236 P 545 (1925).

Attorney General's Opinions

State Fee For State Bond: Law providing that the Secretary of State must charge a $5 fee for recording an official bond does not apply to bonds filed by state officers because that would result in the state charging itself, a needless bookkeeping expense. 28 A.G. Op. 48 (1959).

1-3-224. Trifles.

Case Notes

Employee's Remedy Against Employer for Assault: When employee's claim of assault against coworker consisted merely of "pats on the rear" and being called "sweetheart", nominal damages were justified because in a plant working environment a "pat on the rear" is hardly actionable

assault and battery, for the law disregards trifles. Brown v. Stauffer Chem. Co., 167 M 418, 539 P2d 374 (1975).

Omission of Comma: The omission of a comma in quoting words of statute in caption of complaint to quiet title action was unimportant. Clinton v. Miller, 124 M 463, 226 P2d 487 (1951).

Misrepresentation as to Immaterial Facts: To constitute actionable fraud the representations must relate to material facts upon the theory that "the law disregards trifles". Stillwell v. Rankin, 55 M 130, 174 P 186 (1918).

1-3-225. Particular versus general.

Case Notes

Contradicting Clauses in Separate Contracts Construed Against Drafter — Employee Waiver — Health Insurance: The plaintiff health insurance company filed a breach of contract action against the defendant, an employer providing health insurance for its employees. The contracts between the parties required the defendant to cover 75% or more of its employees; however, a subsequent contract allowed the defendant's employees to waive coverage. The District Court granted summary judgment in favor of the defendant, finding that the two provisions in the contracts were ambiguous and the contract should be interpreted against the drafter. On appeal, the Supreme Court affirmed, holding that the contracts must be interpreted as part of the same transaction and that giving effect to both contract provisions is not reasonably practical, that the ambiguity is construed against the drafter, that the newer specific contract controlled over the older general contract, and that the waiver provision was meant to modify the minimum employee participation provision. Mont. Health Network, Inc., v. Great Falls Orthopedic Associates, 2015 MT 186, 379 Mont 513, 353 P.3d 483.

Conflicting Taxation Statutes Not Invalid: Certain counties and individual taxpayers argued that statutes enacted to tax coal, oil, and natural gas were invalid because the statutes did not classify those properties as required by 15-6-101. The Supreme Court held that the specific statutes providing for taxation of coal, oil, and natural gas were superior to and not invalidated by the more general classification statute. Powder River County v. St., 2002 MT 259, 312 M 198, 60 P3d 357 (2002).

Specific Provisions Outweigh General in Same Section: In construing the apparently conflicting venue provisions of 25-2-118(2) and 25-2-118(3), the Supreme Court held that, as related to dissolution proceedings, the specific provisions in subsection (3) outweigh the general provisions of subsection (2). Therefore, the proper place for trial for an action for dissolution of marriage is the county where the petitioner has resided during the 90 days preceding commencement of the action. In re Marriage of Jones, 226 M 14, 736 P2d 94, 44 St. Rep. 422 (1987).

Costs — Expert Witness Fees: A District Court cannot award costs in excess of $10 a day per witness as costs for expert witnesses. The statute specifically limiting expert witness fees to $10 a day controls the general statute authorizing a District Court to award costs in accordance with the course and practice of the court. Witty v. Pluid, 220 M 272, 714 P2d 169, 43 St. Rep. 354 (1986), followed in Goodover v. Lindey's Inc., 255 M 430, 843 P2d 765, 49 St. Rep. 1059 (1992).

General Phrase in Livestock Quarantine Statute to Be Qualified by Previous Particular Phrase: The general phrase "all expenses" in the second sentence of 81-2-109 must be limited to those expenses particularly described in the first sentence of the statute. St. v. Sand Hills Beef, Inc., 196 M 77, 639 P2d 480, 38 St. Rep. 2140 (1981).

Pension Dispute Controlled by Two-Year Statute of Limitations: Appellant's action to adjust his retirement benefits based on a claim of two constitutional violations and promissory estoppel is barred by the Statute of Limitations (27-2-207) relating to property rights and is not controlled, as appellant contends, by 27-7-202, applying to written contracts, or 27-2-203, applying to obligations other than a contract. "Only in the broadest sense could 27-2-203 or 27-2-202 be considered controlling, and since there is a more specific statute involving injury to personal property rights, of which retirement benefits are one, the Supreme Court is constrained to follow the more specific statute." Rierson v. Mont., 191 M 66, 622 P2d 195, 38 St. Rep. 3 (1981).

Conflicting Statutes: When there are two statutes, one of which deals with a subject in general terms and another in more detailed terms, the special statute controls the general statute to the extent of any inconsistency. St. v. Dept. of Public Service Regulation, 181 M 225, 592 P2d 34 (1979).

1-3-228. Superfluity.

Case Notes

Referendum Title Unnecessarily Redundant but Legally Sufficient — Clarification in Ballot Statement Required: MEA-MFT challenged the title of a legislative referendum that ended same-

day voter registration, claiming it was inaccurate and misleading. The title of the referendum "ensur[ed] compliance with the National Voter Registration Act", and a provision was placed in the bill referencing the federal law, although Montana was already compliant with the federal Act. MEA-MFT argued that the title's reference to the National Voter Registration Act (NVRA) misled voters by suggesting that ending same-day voter registration was required by the Act. The Supreme Court found that although the reference to NVRA compliance was unnecessary, the superfluous language did not make it void. Nevertheless, the court found that the stand-alone title could lead to voter confusion and ordered the Attorney General to revise the ballot statement to make it clear that the NVRA did not require elimination of same-day voter registration. MEA-MFT v. St., 2014 MT 33, 374 Mont. 1, 318 P.3d 702.

Two Sales of Dangerous Drugs Charged as One Offense, but Only One Sale Proved — Conviction Stands: Defendant claimed that because he was charged with one offense of criminal sale of dangerous drugs (now criminal distribution of dangerous drugs), committed on two separate occasions, the state must prove his connection with both sales and that failure to prove his connection with one of the sales should result in dismissal of the entire charge. The Supreme Court relied on U.S. v. Bruno, 809 F2d 1097 (5th Cir. 1987), in holding that it is unnecessary to independently prove defendant's involvement in both sales when proof of either sale is sufficient to satisfy a prima facie case. Superfluity in an information does not vitiate; therefore, every charge in an information need not be proved to convict defendant of the offense, but only a sufficient number of charges in each count so as to make out a violation of the statute relied on. St. v. McColley, 239 M 466, 781 P2d 280, 46 St. Rep. 1836 (1989).

Irrigation District Proceedings: Where in an order establishing an irrigation district the descriptions of the lands included in it were sufficient, the fact that the court went further and made a tabulation under various headings such as gross area, area included, etc., did not render the order void, such matter having been surplusage which may properly be disregarded under the statutory maxim that superfluity does not vitiate. Walden v. Bitter Root Irrigation District, 68 M 281, 217 P 646 (1923).

1-3-229. Certainty.

Case Notes

Computation of Amounts: Where a pleading alleged a tender of the balance due under a contract of sale of real property but failed to set out the amount tendered and the exact amount may be arrived at by a simple mathematical calculation by reference to the allegations of the complaint, the pleading should be considered sufficient. Thompson v. Lincoln Nat'l Life Ins. Co., 110 M 521, 105 P2d 683 (1940).

Names of Described Persons: The fact that the letter of the insured to the insurer suggesting a change of beneficiaries in his policy from his second wife to his children by his first wife did not name the proposed beneficiaries did not render the request insufficient, since under this section "that is certain which can be made certain". Bell v. Criviansky, 98 M 109, 37 P2d 673 (1934).

1-3-230. Void act.

Case Notes

Void Probate Order: All proceedings founded upon a void order of the District Court sitting in probate are ineffective for any purpose. The order is open to collateral attack and may be set aside at any time. St. v. McCracken, 91 M 157, 6 P2d 869 (1931).

1-3-232. Avoiding voidness.

Case Notes

Lack of Specificity in Statute Makes Statute Void — Absurd Interpretation: Plaintiffs suffered injury from inhaling dust-borne vermiculite, a known carcinogen, while working in a mine in Libby, Montana, but the injuries were not manifested until 1998 when plaintiffs were diagnosed as suffering from various forms of cancer induced by the dust present in the mine. In determining whether the state had an obligation to inspect the mine under a statute requiring inspection of an "industry", the District Court held that because the statute did not specifically require inspection of "mines", the state had no duty to inspect the Libby mine for causing occupational diseases. The Supreme Court reversed, noting that under the District Court's rationale, carried to its logical conclusion, the required inspection of an "industry" would require no inspections at all because no specific industry was included in the statute. This interpretation, the Supreme Court said, would make the statute void and was to be avoided. Orr v. St., 2004 MT 354, 324 M 391, 106 P3d 100 (2004).

Deaf and Blind School Employee Contracts Not Personal Services Contracts — Employees Entitled to Annual Leave and Holiday Pay Accrued: Employees of the Montana School for the Deaf and Blind signed standard form year-to-year employment contracts that granted them "all holidays and annual leave to which [the employee] is entitled under state law" and "all employee benefits to which [the employee] is entitled under the laws of the State of Montana". The employees were required to work evenings and to be on call much of the time. Nevertheless, the employees were required to complete time cards showing employment for only 8-hour days and were paid for only that time. The employees submitted a claim to the Board of Public Education for annual leave and holiday pay accrued but not paid and sued the Board when it refused to pay them. The Board defended, claiming that the employees' contracts were personal services contracts and that therefore the employees were exempt from the definition of an "employee" under 2-18-601. The Supreme Court held that the District Court properly granted summary judgment for the employees because the employees were not hired on an ad hoc basis because of the highly technical nature of their employment—rather, the employees are year-round employees given the benefit of the state group health plan and given grade and pay increases on state payroll accounting forms. The Supreme Court concluded that to hold otherwise would mean that all state employees are hired under personal services contracts and no state employee is entitled to annual leave and holiday pay, a construction that the Supreme Court determined would be unreasonable. Corwin v. Bd. of Pub. Educ., 272 M 14, 898 P2d 1227, 52 St. Rep. 589 (1995).

Ski Area's Duties Not Limited to Statutory Duties: In response to an injured skier's allegations of negligence, the ski area asserted that its duties were limited to those set forth in 23-2-733 and that because the skier did not allege any breach of the statutory duties, the ski area was entitled to judgment as a matter of law. Applying a court's role in statutory construction to simply ascertain and declare what is contained in the section's terms and substance without inserting what has been omitted, the Supreme Court found that in neither the original enactment of 23-2-733 nor in subsequent amendments did the Legislature provide that a ski area's only duties were those enumerated in that section and that there was no other duty of due care owed by operators to skiers. The duty of due care is imposed by 27-1-701. In holding that the operator's duties were not limited to those listed in 23-2-733, the court interpreted the statute in a way that would give it effect rather than in a way that would render it unconstitutional. Mead v. M.S.B., Inc., 264 M 465, 872 P2d 782, 51 St. Rep. 348 (1994).

Modification of Property Settlement Resulting in Conflicting Provisions — Interpretation Giving Effect, Not Voidness, Preferred: An original property settlement agreement provided that husband and wife would equally divide the proceeds from the sale of their house. An escrow agreement, signed by all parties, later assigned the balances on a percentage basis, 72% to wife and 28% to husband, and further provided that wife would receive a total of $30,000 from the net proceeds of the sale. However, the percentage amount did not approximate the total amount. Husband contended that because the conflicting portions could not be taken together so as to give effect to every part of the contract and the intention of the parties, the modification should be voided and the original equal division contained in the dissolution should rule. The District Court inquired as to the instrument's intent and its legal consequences, favoring effect over voidness. The court properly confined its inquiry to the language of the instrument and held that the 72/28 provision ruled. The interpretation was reasonable and within the scope of the court's inquiry. In re Marriage of Bourque, 241 M 38, 785 P2d 699, 47 St. Rep. 64 (1990).

Exception to Procedural Requirements of Tax Break Statute: Plaintiff, at hearing by the State Tax Appeal Board, was denied tax benefits under the Montana Economic Land Development Act (MELDA), specifically under section 84-7526, R.C.M. 1947 (now repealed), which created an exception to the local implementation requirement. The trial court found for plaintiff. In affirming, the Supreme Court found a clear purpose for MELDA and held that if the Legislature did not intend for there to be an exception to the procedural requirements of the Act, it would not have adopted language creating an exception because the Legislature does not perform useless acts. An interpretation that gives effect is always preferred over an interpretation that makes a statute void or treats the statute as mere surplusage. The decision of the Board did not reconcile the provisions of MELDA in such a manner as to honor the legislative purpose behind it. Am. Linen Supply v. Dept. of Revenue, 189 M 542, 617 P2d 131, 37 St. Rep. 1707 (1980), followed in Corwin v. Bd. of Pub. Educ., 272 M 14, 898 P2d 1227, 52 St. Rep. 589 (1995).

Attorney General's Opinions

Water Adjudication Program Not Void Given Sufficient Line Item Appropriations to Avoid Voidness: A contingent voidness clause attached to legislation establishing the water adjudication account required that at least $2 million each fiscal year be appropriated to the water adjudication

account by line item appropriation. Although the line item appropriations were directed to two agencies instead of being included in a single programmatic line item, the Attorney General concluded that more than $2 million had been appropriated from state sources other than the water adjudication account to avoid the contingent voidness provision. 51 A.G. Op. 3 (2005).

County Jails — City's Use: Because the consent of the County Commissioners is required before a municipality may use the county jail, it was not presumed that consent was meaningless, and therefore counties may refuse the use of county jails for confinement of persons accused or convicted of violating local ordinances. Likewise, a county may charge a municipality for maintaining prisoners committed to county jail at the request of a municipal police department in the course of enforcing local ordinances and state laws. 37 A.G. Op. 10 (1977).

1-3-233. Reasonableness.

Case Notes

Contradicting Clauses in Separate Contracts Construed Against Drafter — Employee Waiver — Health Insurance: The plaintiff health insurance company filed a breach of contract action against the defendant, an employer providing health insurance for its employees. The contracts between the parties required the defendant to cover 75% or more of its employees; however, a subsequent contract allowed the defendant's employees to waive coverage. The District Court granted summary judgment in favor of the defendant, finding that the two provisions in the contracts were ambiguous and the contract should be interpreted against the drafter. On appeal, the Supreme Court affirmed, holding that the contracts must be interpreted as part of the same transaction and that giving effect to both contract provisions is not reasonably practical, that the ambiguity is construed against the drafter, that the newer specific contract controlled over the older general contract, and that the waiver provision was meant to modify the minimum employee participation provision. Mont. Health Network, Inc., v. Great Falls Orthopedic Associates, 2015 MT 186, 379 Mont 513, 353 P.3d 483.

Modification of Custody Order Required by Substantial Change in Circumstances — Application of In re Marriage of Johnson Required — Jurisdictional Prerequisites — Absurd Application of Statute Avoided: After making an agreement for child custody as part of the dissolution of her marriage, Kimberly determined to attend college and moved from Lewistown to Billings with her children. On a remand from the Supreme Court, the District Court held that In re Marriage of Johnson, 266 M 158, 879 P2d 689 (1994), did not apply because custody was not being transferred from the primary custodian to the secondary custodian. The Supreme Court held that contrary to the District Court's interpretation, Johnson did apply to the case and that Johnson applied to any case in which a custody modification would have the effect of substantially changing the children's primary residence, requiring that the District Court must first meet the jurisdictional requirements of 40-4-219. However, the Supreme Court found that a literal application of that statute would cause an absurd result by its application only to movement of a child to another state and not to instances in which the child is moved from one end of the state to another or to another country. For this reason, the Supreme Court held that if a change has occurred in the circumstances of the child or the child's custodian, causing the children to move from one location to another in a manner that would hinder the effectiveness of the custody arrangement, then the jurisdictional requirements of 40-4-219 have been met and the District Court may modify the custody arrangement pursuant to 40-4-212. The Supreme Court then applied the rule to the case before it and concluded that the modification of the custody arrangement changing the custody of Kimberly's ex-husband from 160 days to 75 days annually was in the best interests of the children, as demonstrated in the record. In re Marriage of Syverson, 281 M 1, 931 P2d 691, 54 St. Rep. 32 (1997), followed in In re Marriage of Oehlke, 2002 MT 79, 309 M 254, 46 P3d 49 (2002).

Demand for Performance of Term Not Contained in Contract — Statement That Party Will Not Perform Unless Demand Met — Anticipatory Breach of Contract: "A party acts at his peril if, insisting on what he mistakenly believes to be his rights, he refuses to perform his duty." Therefore, a demand for performance of a term not contained in the parties' contract, accompanied by an unequivocal statement that the demanding party will not perform unless the additional term is met, constitutes an anticipatory breach of the contract, excusing performance by the other party. In determining whether an anticipatory breach was committed, the concern is whether the promisor communicated an unequivocal indication of an intent not to perform rather than the promisor's uncommunicated subjective intent in repudiating its contractual obligations. A promisee need not jeopardize its own interests by speculating about the promisor's clear refusal to perform or by waiting until the time set for performance to ascertain whether the promisor's

unequivocal repudiation was serious. Chamberlin v. Puckett Constr., 277 M 198, 921 P2d 1237, 53 St. Rep. 593 (1996), following United Calif. Bank v. Prudential Ins. Co, 681 P2d 390 (Ariz. Ct. App. 1983), and followed in Eschenbacher v. Anderson, 2001 MT 206, 306 M 321, 34 P3d 87 (2001). See also Comment d, Restatement (Second) of Contracts 250 (1981), and Boyne USA, Inc. v. Spanish Peaks Dev., LLC, 2013 MT 1, 368 Mont. 143, 292 P.3d 432.

Deaf and Blind School Employee Contracts Not Personal Services Contracts — Employees Entitled to Annual Leave and Holiday Pay Accrued: Employees of the Montana School for the Deaf and Blind signed standard form year-to-year employment contracts that granted them "all holidays and annual leave to which [the employee] is entitled under state law" and "all employee benefits to which [the employee] is entitled under the laws of the State of Montana". The employees were required to work evenings and to be on call much of the time. Nevertheless, the employees were required to complete time cards showing employment for only 8-hour days and were paid for only that time. The employees submitted a claim to the Board of Public Education for annual leave and holiday pay accrued but not paid and sued the Board when it refused to pay them. The Board defended, claiming that the employees' contracts were personal services contracts and that therefore the employees were exempt from the definition of an "employee" under 2-18-601. The Supreme Court held that the District Court properly granted summary judgment for the employees because the employees were not hired on an ad hoc basis because of the highly technical nature of their employment—rather, the employees are year-round employees given the benefit of the state group health plan and given grade and pay increases on state payroll accounting forms. The Supreme Court concluded that to hold otherwise would mean that all state employees are hired under personal services contracts and no state employee is entitled to annual leave and holiday pay, a construction that the Supreme Court determined would be unreasonable. Corwin v. Bd. of Pub. Educ., 272 M 14, 898 P2d 1227, 52 St. Rep. 589 (1995).

Statutory Construction — Reasonableness of Alternatives: When the result of one among alternative possible interpretations of a constitutional provision is unreasonable, the interpretation is in favor of another which would produce a reasonable result. Yunker v. Murray, 170 M 427, 554 P2d 285 (1976); Keller v. Smith, 170 M 399, 553 P2d 1002 (1976).

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1-3-234. Third parties — who suffers.

Compiler's Comments

2007 Amendment: Chapter 61 made minor changes in style. Amendment effective October 1, 2007.

Case Notes

Corporate Defendant's Right of Indemnity From Joint Tortfeasor — Fraudulent Misrepresentation: Where the plaintiff sued for damages caused by the defendants' fraud in the execution of a contract for deed for the sale of a shale and concrete block plant, alleging misrepresentation by the defendant company and its president, and the record showed that both the company's plant manager and its president made misrepresentations concerning the status of the company's compliance with air and water pollution control laws, the court erroneously required the company's president to indemnify the company for the judgment against it. Because the company is responsible as a principal for the fraudulent misrepresentations of its plant manager, the company and its president were joint tortfeasors and were in pari delicto. As a general rule, one compelled to pay damages for the negligent or tortious act of another is not entitled to indemnity from the latter where both parties are joint tortfeasors or in pari delicto. Poulsen v. Treasure St. Indus., Inc., 192 M 69, 626 P2d 822, 38 St. Rep. 218 (1981), followed in St. v. Butte-Silver Bow County, 2009 MT 414, 353 M 497, 220 P3d 1115 (2009).

Surety's Liability: This statute was one ground for holding surety liable on bond even though bond was not in effect at time act occurred giving rise to liability, since surety company had been tardy in processing papers of party to be bonded and had accepted the premium on bond. Lapke v. Hunt, 151 M 450, 443 P2d 493 (1968).

Contract of Sale: In vendor's action against subsequent bona fide purchaser to determine ownership and right to possession of an airplane, vendor was estopped to challenge sale by vendee by failing to record title document to avoid transfer tax, making no inquiry for a number of months about the plane, which he allowed vendee to have, even though the payments were due

under the contract, and failing to make a diligent effort to recover the plane after the payments became due. Lakes v. Orley, 148 M 325, 420 P2d 151 (1966).

Failure to Record Contract: Where purchaser of standing timber failed to have contract acknowledged and recorded, such contract was of no effect as against a subsequent purchaser without knowledge of the first purchaser's interest. Gullicksen v. Shadoan, 124 M 56, 218 P2d 714 (1950).

Joint Bank Accounts: Where a mother opened joint bank account in both her own and daughter's names, signed signature card setting out withdrawal provision authorizing both to withdraw the funds, and the daughter drew a check covering practically the entire account, the bank was legally bound to pay it, and if the mother suffered injury it resulted from exercise of the power the mother placed in the daughter's hands, bringing the mother under the provisions of the maxim contained in this section. Ludwig v. Mont. Bank & Trust Co., 109 M 477, 98 P2d 379 (1939).

Apparent Agency:

Where plaintiff wrote and delivered to defendants a fire insurance policy contracted for by the father of one of the defendants who managed the store for them and who the previous year had tended to the same matter with the defendants paying the premium, the fact that the defendants had obtained fire insurance from a different company could not defeat plaintiff's claim since under this section those through whose fault the loss is sustained must bear it, defendants having impliedly held out their store manager as their agent, and plaintiff is entitled to recover the $42 premium for the policy sold to manager. Coover v. Davis, 112 M 605, 121 P2d 985 (1941).

In a foreclosure suit in which the defense was payment, the evidence showed that the mortgagee knew that the property had been transferred to another by the mortgagor with the purchaser assuming the mortgage. The interest coupons were payable at the office of a real estate dealer where the mortgagee had originally listed the property for sale, where he received payment therefore and also a part payment on his note. He was advised by the purchaser that the entire debt had been paid at that office on a certain day. The real estate agent converted the final payment to his own use. The mortgagee by his conduct caused the purchaser to believe that the real estate dealer was his agent for the purpose of receiving payment, and therefore he was estopped to deny his authority to receive it. Millious v. Thompson, 94 M 110, 20 P2d 1060 (1933).

Notice of Assignment of Note: The assignee of a nonnegotiable note is presumed to know the law, and if he would protect his interests he should notify the maker of the note that he is the assignee thereof. If he neglects to do so, and through his negligence either he or the maker must suffer through the act of the payee in collecting the amount due on the note, he should be the one to suffer. Erlandson v. Erskine, 76 M 537, 248 P 209 (1926).

CHAPTER 4
INTERPRETATION OF INSTRUMENTS

Part 1
General Provisions

1-4-101. Role of the judge — preference to construction giving each provision meaning.

Case Notes

Interpretation of Trust Agreement — Plain Language Controls: After the death of the sole beneficiary of an irrevocable inter vivos trust, the daughter of the sole beneficiary, whom the sole beneficiary had given up for adoption, claimed that she was a descendent of the sole beneficiary as defined under the trust and was entitled to distribution of the trust proceeds. The District Court determined that the daughter should be included in the trust distribution. On appeal, the Supreme Court reversed, concluding that the trust language, which defined an adopted child as the descendant of the adopting parents, made no distinction between children adopted into and adopted out of a family. The daughter was not a descendant of the sole beneficiary because she was adopted and was therefore regarded under the plain language of the trust as the descendant of her adoptive parents. In re Kincaid Gift Trust, 2012 MT 119, 365 Mont. 179, 278 P.3d 1026.

Living Trust — Judicial Construction of Amendment so as to Give Effect to All Provisions: Clifford and his wife Mary established a living trust for the benefit of their family. The trust documents provided that major modifications to the trust should be made through the formal amendment process but that minor modifications could be made through trust minutes. Other

trust documents provided that amendments had to be made by Clifford and Mary acting together, and the first page of the trust minutes provided that instructions to successor trustees must be signed and dated by the trust settlors. The District Court found that the fourth trust minute, amending other trust documents so as to convey the 120-acre farm on which Clifford and Mary lived to Mary, to be valid and binding. The Supreme Court held that the fourth trust minute, which was signed only by Clifford, was invalid because a construction of all of the other provisions of the trust dealing with amendments and the provisions of this section required that the fourth trust minute be signed by both Clifford and Mary. Consequently, the Supreme Court held that the farm remained in the separate property trust and was conveyed to the children of Clifford and Mary and not to Mary alone. In re Estate of Dern, 279 M 138, 928 P2d 123, 53 St. Rep. 1087 (1996).

Contract With Dispute Resolution Clause Not Superseded by Unexecuted Oral Agreement: Nelcon made an agreement with the state for highway construction work, and Nelcon subcontracted the clearing of trees to Westfork, agreeing that Westfork could have the timber that was removed from the property. After discovering that the timber belonged to Champion and had been removed, Westfork wrote Nelcon, requiring additional payment for the missing trees. Nelcon provided notice to the state that Nelcon needed additional compensation for the missing trees and was paid approximately $20,000, which Nelcon paid to Westfork. Westfork brought an action against Nelcon for additional compensation, and the District Court granted a directed verdict for Nelcon. Citing Kraft v. Hodson, 254 M 262, 836 P2d 1234 (1992), the Supreme Court held that there was no executed oral modification of the original contract. The Supreme Court also held that the language of the original contract was clear in its meaning, binding Westfork to the same rights against Nelcon that Nelcon had against the state. Westfork Constr. Co. v. Nelcon, Inc., 265 M 398, 877 P2d 481, 51 St. Rep. 553 (1994), distinguished in Lewistown Miller Constr. Co., Inc. v. Martin, 2011 MT 325, 363 Mont. 208, 271 P.3d 48.

Contract Providing for Both Termination and Renegotiation — Plain Language to Determine Parties' Standing: Paragraph 7 of a contract provided that the contract terminated on June 30, 1996. Paragraph 10 provided for renegotiation of the contract upon 30 days' written notice from either party. The District Court found the provisions to be at odds with each other. The law favors giving effect to each provision of a contract, and courts must interpret contractual provisions so as to allow each provision to be effective. Courts are without authority to insert components in or erase components from unambiguous contract provisions. Upon review, the Supreme Court looked to the plain language in the contract and found that paragraph 10 did not render the contract vague or indefinite; rather, it provided for a continuing contractual relationship if, after notice, a successful renegotiation was accomplished. The District Court erred, and the case was reversed and remanded for further proceedings. Hennen v. Omega Enterprises, Inc., 264 M 505, 872 P2d 797, 51 St. Rep. 369 (1994).

Letter Relating to Execution of Lease — Properly Accepted Parol Evidence: In reviewing the trial court's interpretation of the heating cost provisions of a 5-year lease, the Supreme Court held that a letter containing a payment schedule and testimony relating to the schedule were properly accepted parol testimony to explain circumstances surrounding the lease agreement. The letter and testimony aided in resolving the ambiguity existing in the instrument as permitted by 28-2-905(2). The role of the judge is to construe an instrument according to its terms or its substance, not to insert or omit terms. The judge, however, may consider circumstances surrounding the execution, including the situation of the subject of the instrument and of the parties, to place himself in a position to interpret the language. In construing terms, evidence is admissible to show a local, technical, or otherwise peculiar signification used and understood by the parties. Martin v. Laurel Cable TV, Inc., 215 M 229, 696 P2d 454, 42 St. Rep. 314 (1985).

Time of Mortgage Payments — Where Contract Silent as to Time of Day: According to the terms of the mortgage, monthly payments were to be made no later than 30 days after due date or mortgagor could be declared in default. Mortgagor deposited payment in escrow account after 3 p.m. on the 30th day, a Friday. Because of the time of the deposit, the escrow account was not credited until the 33rd day, the following Monday. The District Court ruled that the mortgage contract had not been breached since contract provided simply for deposit by 30th day and did not require that deposit be made by a particular time of day. The Supreme Court affirmed, ruling that for the District Court to have found in mortgagee's favor, it would have had to rewrite the contract, and this would have been improper. First Bank-Southside Missoula v. Sadler, 199 M 323, 649 P2d 454, 39 St. Rep. 1428 (1982).

Written and Oral Real Property Agreements — No Timing of Valuation Provision: The parties were married in 1973. They entered a prenuptial agreement providing that the real and personal

property of each would remain separate. In 1974, defendant brought a quiet title action against his sisters. He executed a handwritten agreement with plaintiff that if she would finance the legal expenses of the action he would give her 10% of the land or the value thereof. He was successful, and the parties entered into an oral agreement containing the same provisions for appellate costs. The trial court found that defendant owed plaintiff 20% of the value of the land and that the value was to be determined at the time he elected to pay and be based on 20% of the value of all the land. The Supreme Court held that the defendant, under the clear terms of the written contract, had the option to select the acreage which he wished to convey. The District Court, in its initial findings, disregarded this language in ordering him to convey the percentage of his land as a whole. Since no contract provision addressed the timing of the valuation of the land and conflicting evidence was presented, the District Court's initial determination that it be valued at the time of payment was upheld. Kartes v. Kartes, 195 M 383, 636 P2d 272, 38 St. Rep. 1941 (1981).

Summary Judgment on Construction of Instruments: When a summary judgment was granted plaintiff in an action for conversion based upon corporate documents (bank loan contracts and security agreements), defendants could not prevail on appeal on the theory that questions regarding the content of these documents were questions of material fact which would preclude the granting of a summary judgment under former Rule 56(b), M.R.Civ.P. (now superseded), because under this section the construction of instruments is a matter of law. Farmers St. Bank v. Johnson, 188 M 55, 610 P2d 1172 (1980).

Lack of Consideration or Setoff: There was no issue of material fact precluding summary judgment, either of lack of consideration or of setoff, because the express language of the note sued on stated that consideration existed and the second action was a personal claim unrelated to the note. Keller v. Llewellyn, 175 M 164, 573 P2d 166 (1977).

Medical Information — Not a Condition Precedent to Attorneys' Fees: When the statute did not specifically require medical information to be furnished prior to an award of attorneys' fees, the Supreme Court would not read that requirement into the statute. Myers v. 4 B's Restaurant, Inc., 172 M 159, 561 P2d 1331 (1977).

Unambiguous Contract Requires No Interpretation: Court erred in imposing a restriction on the use of premises when life tenant was granted the right to use premises "as he may deem fit". Danielson v. Danielson, 172 M 55, 560 P2d 893 (1977).

Insurance Policy: Clause in disability insurance policy, which provided that benefits were payable only in cases involving continuous and total disability within 30 days of date of accident preventing performance of every duty pertaining to insured's occupation, precluded recovery under policy by insured who returned to work temporarily within 30-day period and was able to do a portion of his duties since, where language admits of only one meaning, there is no room for interpretation under the guise of ambiguity. Nelson v. Combined Ins. Co. of America, 155 M 105, 467 P2d 707 (1970).

Surety Bond: In construing an instrument, the judge's office is simply to ascertain and declare what it contains in terms or substance, not to insert omitted matter or omit inserted matter. A subcontractor was not entitled to recover from surety on federal building contractor's bond for loss suffered because of delays growing out of others' acts or omissions. United States ex rel. Watsabaugh & Co. v. Seaboard Sur. Co., 26 F. Supp. 681 (D.C. Mont. 1938).

Trust Agreement: In interpreting the language of a trust agreement the province of the court under this section is simply to ascertain and declare what is in terms or substance contained therein. Conley v. Johnson, 101 M 376, 54 P2d 585 (1936).

Employment Rules: In an action by an engineer for injuries received by jumping from his engine to avoid a collision, where the language of the defendant company's rules relative to the operation of its trains under the block signal system was plain and its meaning apparent, it was the duty of the trial court to declare that meaning and not leave it to the speculation of the jury. Lynes v. N. Pac. Ry., 43 M 317, 117 P 81 (1911).

1-4-102. Consideration of circumstances surrounding execution.

Compiler's Comments

2007 Amendment: Chapter 61 made minor changes in style. Amendment effective October 1, 2007.

Case Notes

Deed Within Chain of Title Not Considered Extrinsic Evidence: In a declaratory action involving a boundary dispute, the District Court properly examined the chains of title to the parties' properties in determining the boundary. A deed contained in the chain of title, which

provided the first description of the disputed boundary, was not extrinsic evidence and, therefore, was properly considered. Ethen Revocable Trust v. River Resource Outfitters, LLC, 2011 MT 143, 361 Mont. 57, 256 P.3d 913.

Expectation of Arbitration Unreasonable Under Contract of Adhesion: Plaintiff signed a contract to purchase a used motor home and subsequently discovered that it needed $17,000 in mitigation damages. Defendant moved to compel arbitration and the motion was granted, so plaintiff appealed. The Supreme Court held that because plaintiff's options were to accept or reject the contract without an opportunity to negotiate the preprinted terms, the contract was one of adhesion. The arbitration clause in the contract by which plaintiff waived various constitutional and procedural rights was not within plaintiff's reasonable expectations, so the arbitration clause was determined to be unenforceable. The District Court was reversed. Woodruff v. Bretz, Inc., 2009 MT 329, 353 M 6, 218 P3d 486 (2009), following Kloss v. Edward D. Jones & Co., 2002 MT 129, 310 M 123, 54 P3d 1 (2002), distinguishing Denton v. First Interstate Bank of Commerce, 2006 MT 193, 333 M 169, 142 P3d 797 (2006).

No Improper Reliance on Extrinsic Evidence in Finding of Valid and Enforceable Express 60-Foot Easement for Subdivision: Defendant acquired certain property after an express easement across the property was created by the former owner. Defendant refused to allow the building of an access road across the property, contending that the easement agreement was invalid on several grounds. The District Court examined the agreement and concluded that the easement was valid and enforceable and granted summary judgment for plaintiffs. On appeal, defendant asserted that the District Court erroneously relied on facts outside the agreement, making summary judgment inappropriate, but the Supreme Court affirmed. For purposes of interpreting a writing granting an interest in real property, evidence of the surrounding circumstances, including the situation of the property and the context of the parties' agreement, may be shown so that the judge is placed in the position of those whose language the judge is to interpret. However, to comply with the statute of frauds and the recording system, the writing itself must ultimately stand on its own and meet the formal requirements for granting a property interest. In this case, the District Court was allowed to consider various facts not contained in the easement agreement for purposes of understanding the situation, but the court's analysis of the easement's validity apparently was limited to the face of the agreement, so the court did not erroneously rely on extrinsic facts. The easement agreement satisfied the formal requirements for expressly granting an easement and created a valid 60-foot emergency public access and utility easement that was enforceable against defendant. Additionally, the District Court properly concluded that because there was no dominant tenement, the easement was in gross and could be used by members of the public to travel between the subdivision and the public highway for emergency purposes and to provide utility services. There being no questions of material fact, summary judgment was proper. Broadwater Dev., LLC v. Nelson, 2009 MT 317, 352 M 401, 219 P3d 492 (2009), distinguishing Blazer v. Wall, 2008 MT 145, 343 M 173, 183 P3d 84 (2008). See also Kuhlman v. Rivera, 216 M 353, 701 P2d 982 (1985).

No Ambiguity in Complete, Final Sales Agreement — Parol Evidence Inadmissible: The parties entered a sale agreement for a ready-mix concrete plant. Plaintiff subsequently filed an action alleging that defendant violated the agreement by breaching the covenant to not compete and the covenant of good faith and fair dealing, which constituted malice resulting in lost profits, sales, and goodwill. The District Court granted summary judgment to defendant and plaintiff appealed, but the Supreme Court affirmed. The District Court correctly concluded that the sales agreement constituted a complete, final agreement and unambiguously did not include a noncompetition provision, but in fact provided that plaintiff would sell concrete to defendant for use in the area. The intention of the parties was ascertainable from the writing alone, and the agreement was presumed to represent all transactions regarding elements extrinsic to the agreement and was thus considered complete and final, so parol evidence was inadmissible. Richards v. JTL Group, Inc., 2009 MT 173, 350 M 516, 212 P3d 264 (2009). See also Lindey's, Inc. v. Professional Consultants, Inc., 244 M 238, 797 P2d 920 (1990), and Mary J. Baker Revocable Trust v. Cenex Harvest States, Cooperatives, Inc., 2007 MT 159, 338 M 41, 164 P3d 851 (2007).

Evidence of Circumstances Under Which Instrument Made Admissible for Determining Ambiguity: As a general rule, evidence of the circumstances under which an instrument was made may not be considered when the language of the instrument is clear and certain in its terms. However, objective evidence of those circumstances, including the situation of the subject of the instrument and the parties to it, may be shown and considered to aid the court in determining, as a preliminary matter, whether the instrument contains an ambiguity. If the court determines that no ambiguity exists, then the extrinsic evidence may not be considered

further, but if the court determines that an ambiguity is present in the instrument, then the extrinsic evidence may be introduced at trial to allow the trier of fact to determine the intent of the parties in entering into the contract. In the present case, both parties agreed that language in a right-of-way contract was unambiguous, so the trial court did not err in refusing to consider the circumstances under which the contract was made. Mary J. Baker Revocable Trust v. Cenex Harvest St., Cooperatives, Inc., 2007 MT 159, 338 M 41, 164 P3d 851 (2007). See 11 Williston on Contracts, 33:39 (4th Ed. 1999).

Use of Phrase "Together With" in Contract Not Considered Limiting Language: The contract for a utility right-of-way granted defendants the right to construct, maintain, and operate a pipeline for the transportation of oil, liquids, and gases "together with" a buried fiber optic communications cable. The right-of-way landowners contended that the phrase "together with" unambiguously limited the use of the cable to operating and monitoring the pipeline and precluded defendants from leasing part of the cable to a third party for telecommunication purposes. The District Court disagreed, holding that the phrase meant nothing more than "and", rather than plaintiffs' limiting interpretation "in connection with", and granted summary judgment for defendants. The landowners appealed, but the Supreme Court affirmed. The term "together with" in the granting language did not unambiguously limit defendants' use of the fiber optic cable to operating and monitoring the pipeline. Mary J. Baker Revocable Trust v. Cenex Harvest St., Cooperatives, Inc., 2007 MT 159, 338 M 41, 164 P3d 851 (2007).

Promissory Note Not Considered Contract of Adhesion: Plaintiff read and signed a promissory note to secure a loan for a friend who subsequently went bankrupt. The promissory note provided that plaintiff waived the right to rely on the defense of impairment. Nevertheless, after defendant bank foreclosed on the property that plaintiff used to secure the loan, plaintiff claimed impairment, arguing that the waiver constituted a contract of adhesion that was unenforceable. The District Court disagreed, and plaintiff appealed. The Supreme Court noted that a contract of adhesion is a contract whose terms are dictated by one party to another who has no voice in the contract's formulation and that the contract is unenforceable if it is not within the expectations of the weaker party or if the contract terms are unduly oppressive, unconscionable, or against public policy. Plaintiff was a sophisticated businessman who did not attempt to negotiate the contract terms and who studied the contract prior to signing and thus could not later claim that he was unaware of the waiver provision and that it was not within his reasonable expectations. Although the bank prepared the contract, the transaction was entered solely at plaintiff's behest, and plaintiff voluntarily waived the defense of collateral impairment under 30-3-607. Therefore, the Supreme Court concluded that the promissory note was not a contract of adhesion, nor were the contract's general provisions outside of plaintiff's reasonable expectations. The District Court was affirmed. Denton v. First Interstate Bank of Commerce, 2006 MT 193, 333 M 169, 142 P3d 797 (2006), following Kloss v. Edward D. Jones & Co., 2002 MT 129, 310 M 123, 54 P3d 1 (2002).

Investment Agreement Containing Arbitration Clause Considered Contract of Adhesion — Remand for Consideration of Investor's Reasonable Expectations and Potential Contract Formation Defenses: Zigrang entered an investment agreement with defendant investment company. The agreement contained an arbitration provision. When Zigrang learned that defendant frequently traded securities in Zigrang's account without permission, Zigrang filed a complaint, which was one of 23 suits filed by investors alleging defendant's mismanagement of accounts. Defendant moved to compel arbitration pursuant to the agreement. A panel of three judges sat en banc to hear evidence common to all 23 cases. Defendant's motion to compel arbitration was denied, but the order contained common findings of fact that did not apply to Zigrang, including a mischaracterization of Zigrang's investment agreement. Defendant appealed. The Supreme Court noted that the agreement constituted a contract of adhesion that supported other contract formation defenses, but did not in itself constitute a sufficient basis for invalidating the agreement. The Supreme Court was unable to completely examine Zigrang's contract formation defenses, including unconscionability, waiver, and reasonable expectations, because the District Court's order relied on the mistaken finding of fact. Thus, the court remanded for further findings of fact related to Zigrang's investment agreement, noting that an inquiry into Zigrang's expectations should consist only of an analysis of Zigrang's objectively reasonable expectations regarding the agreement from Zigrang's perspective and that Zigrang's expectations might negate the arbitration provisions. Zigrang v. U.S. Bancorp Piper Jaffray, Inc., 2005 MT 282, 329 M 239, 123 P3d 237 (2005). See also Iwen v. U.S. W. Direct, 1999 MT 63, 293 M 512, 977 P2d 989 (1999), and Kloss v. Edward D. Jones & Co., 2002 MT 129, 310 M 123, 54 P3d 1 (2002).

Predispute Arbitration Provisions Unenforceable — Motion to Compel Arbitration Properly Denied: Plaintiff opened several Piper Automatic Transfer Accounts and later brought an action

alleging defendants' mismanagement of the accounts. Defendants sought to compel arbitration based on predispute arbitration clauses in the account agreements requiring that any dispute be resolved by arbitration. The motion to compel arbitration was denied, and defendants appealed. The Supreme Court held that because the agreements granted defendants' brokers the discretion to buy and sell securities, a fiduciary duty was created that defendants breached by failing to explain the consequences of the arbitration provision prior to formation of the contract. The predispute arbitration provisions were therefore unenforceable, and denial of the motion to compel arbitration was affirmed. Willems v. U.S. Bancorp Piper Jaffray, Inc., 2005 MT 37, 326 M 103, 107 P3d 465 (2005), following Kloss v. Edward D. Jones & Co., 2002 MT 129, 310 M 123, 54 P3d 1 (2002). See also Chor v. Piper, Jaffray & Hopwood, 261 M 143, 862 P2d 26 (1993).

Conscionability Analysis of Contractual Liquidated Damages Clause — Liquidated Damages Clause Presumed Enforceable: To provide direction to contracting parties and resolve the disparities in case law regarding liquidated damages, the Supreme Court adopted a rule to analyze liquidated damages clauses from the perspective of whether or not the clause is unconscionable as indicated by the nature of the bargaining process between the parties. Unconscionability involves a two-pronged determination regarding whether: (1) the clause fits the doctrine of contract of adhesion such that the weaker party had no meaningful choice regarding acceptance of the contract provisions; and (2) the contractual terms are unreasonably favorable to the drafter, which is usually the party with superior bargaining power. Whether the clause is unreasonably favorable to the drafter in turn involves an inquiry into whether the clause is within the reasonable expectations of or unduly oppressive to the weaker party. Liquidated damages clauses are presumed enforceable, and the party seeking to avoid the clause has the burden of proving unconscionability. Unless there are underlying disputed issues of fact, the question of unconscionability is purely a matter of law for the court to decide. Arrowhead School District No. 75 v. Klyap, 2003 MT 294, 318 M 103, 79 P3d 250 (2003), overruling Daugherty Cattle Co. v. Gen. Constr. Co., 254 M 479, 839 P2d 562 (1992), to the extent that it prevented one party from introducing relevant evidence by granting summary judgment based on contract language alone, overruling Story v. Bozeman, 259 M 207, 856 P2d 202 (1993), to the extent that it placed the burden on the nonbreaching party to prove the enforceability of a liquidated damages clause, and followed in Highway Specialties, Inc. v. Mont. Dept. of Transportation, 2009 MT 253, 351 M 527, 215 P3d 667 (2009).

Liquidated Damages Clause in Personal Services Contract — Conscionability of Liquidated Damages Clause in Teacher's Form Contract: In determining the enforceability of a 20% liquidated damages clause in defendant's teaching contract, the Supreme Court examined the conscionability of the clause. The court first held that the clause constituted a contract of adhesion because defendant, as the weaker bargaining party, had no meaningful choice regarding acceptance of the contract provisions. The court also noted that the contract was a form contract that provided no negotiation between the parties. However, the court held that unconscionability does not render all form contracts unacceptable and that form contracts are only unconscionable if the terms are not within the reasonable expectation of the party who had no opportunity to negotiate. Although the liquidated damages clause in defendant's contract was harsher than most, as a teacher, defendant knew that teachers are typically employed for an entire year and how difficult it is to replace equivalent services at small rural schools, so it was within defendant's reasonable expectations to agree to a contract with a 20% liquidated damages provision for departing so close to the start of the school year, even though defendant had no meaningful choice regarding the provision. The enforceability of the liquidated damages clause was affirmed. Arrowhead School District No. 75 v. Klyap, 2003 MT 294, 318 M 103, 79 P3d 250 (2003).

Collective Bargaining Agreement Not Considered Contract of Adhesion: When plaintiff filed a wrongful discharge claim, defendant pointed out that the employment was covered by a union collective bargaining agreement (CBA) and that 39-2-912 precludes an employee covered by a CBA from seeking relief under the Wrongful Discharge From Employment Act. At argument in District Court on defendant's motion for summary judgment, plaintiff argued that the CBA was a contract of adhesion. The District Court held that the CBA was not a contract of adhesion and granted summary judgment, and on appeal the Supreme Court agreed. A contract of adhesion is a contract with terms dictated by one contracting party to another party who has no voice in the contract's formulation, and such contracts are unenforceable if they are not within the reasonable expectations of the weaker party or if they are unduly oppressive, unconscionable, or against public policy. Because CBAs arise only after a public employer and a union representative have bargained collectively and in good faith, it cannot be said that one party dictates the terms of a CBA to another, so a CBA cannot be considered a contract of adhesion. The court noted that

under Kloss v. Edward D. Jones & Co., 2002 MT 129, 310 M 123, 54 P3d 1 (2002), a contract of adhesion may also be found in cases when an contract arbitration provision is presented on a standardized form without the opportunity for negotiation. Arbitration provisions are also negotiated in a CBA rather than dictated by standardized form, so Kloss did not apply. Summary judgment was affirmed. LaFournaise v. Mont. Developmental Center, 2003 MT 240, 317 M 283, 77 P3d 202 (2003).

Security Brokerage Contracts — Contract of Adhesion Rendering Arbitration Clause Unenforceable: Kloss opened a full-service brokerage account with defendant, which permitted Kloss to purchase securities and maintain a money market account and which included a living trust account. The account did well, and Kloss decided to set up a charitable trust with the bond proceeds. The initial account and the living trust agreement contained a mandatory arbitration clause, and the charitable trust incorporated the arbitration clause by reference. Kloss then had second thoughts about the charitable trust and petitioned to revoke it. Defendant moved to compel arbitration, and the District Court granted the motion, citing Chor v. Piper, Jaffray & Hopwood, 261 M 143, 862 P2d 26 (1993), and Iwen v. U.S. W. Direct, 1999 MT 63, 293 M 512, 977 P2d 989 (1999), for the holding that defendant had no obligation to explain the terms of the contract because it was within Kloss's reasonable expectations and that even if the contract was considered a contract of adhesion, it was not unenforceable because it was not unconscionable. Kloss appealed, arguing that the arbitration clause was part of a contract of adhesion and that waiver of the constitutional right to jury trial should not be presumed from the signing of a contract of adhesion. Defendant maintained that form contracts prepared by securities brokers are not contracts of adhesion dictated by one party to another who has no voice in its formulation, and that arbitration clauses contained in the contracts are not unconscionable. The Supreme Court examined Passage v. Prudential-Bache Sec., Inc., 223 M 60, 727 P2d 1298 (1986), for an explanation of contracts of adhesion in the securities context and the circumstances under which they are unenforceable. The court distinguished both Chor and Passage, finding that the contracts in this case were clearly contracts of adhesion because they were standardized forms containing terms that Kloss had no opportunity to negotiate if wishing to invest with defendant. Further, the arbitration clause by which Kloss waived the right to access to state courts, the right to jury trial, the right to reasonable discovery, the right to findings of fact based on the evidence, and the right to enforce the law by way of appeal was clearly not within Kloss's reasonable expectations. The arbitration clause was never explained by defendant, and Kloss was not aware of the arbitration provision in the contract. Thus, the District Court committed reversible error when it concluded that the arbitration clause was enforceable. Kloss v. Edward D. Jones & Co., 2002 MT 129, 310 M 123, 54 P3d 1 (2002), followed in Larsen v. W. St. Ins. Agency, Inc., 2007 MT 270, 339 M 407, 170 P3d 956 (2007), with regard to factors to be applied in determining a contract of adhesion.

Burden of Proof on Plaintiff to Establish Title and Boundary Line in Quiet Title Action: In an action to quiet title to real property, the burden is on plaintiff on all issues arising upon the essential allegations of the complaint. If the answer denies plaintiff's title, plaintiff must prove title in himself. Want of title in plaintiff renders an examination of defendant's title unnecessary. The burden of proof is also on plaintiff to establish the true location of a disputed boundary line. Here, the plain language of the deed conveying the property to plaintiff in 1951 established that an old county road rather than a newer state highway was the legal boundary of the property. Plaintiff failed to establish the location of the boundary as the state highway and thus did not meet the burden of proof. The trial court's conclusion that the state highway was the true legal boundary was reversible error. Tester v. Tester, 2000 MT 130, 300 M 5, 3 P3d 109, 57 St. Rep. 538 (2000). See also McAlpin v. Smith, 123 M 391, 213 P2d 602 (1950), and Brady v. St. Highway Comm'n, 163 M 416, 517 P2d 738 (1973).

Examination of Chain of Title and Circumstances of Making of Deed in Establishing Legal Boundary: Plaintiff sought to quiet title in a strip of land in Bridger Canyon, alleging that a state highway formed the western boundary of the property rather than an older county road. The District Court agreed. The Supreme Court examined plaintiff's chain of title back to 1903 and found that a deed conveying the property in 1951 unambiguously established the county road as the western boundary of the property. An unambiguous deed must be interpreted according to its written language, without resort to extrinsic evidence of the grantor's intent. Further, under this section, the Supreme Court may examine the circumstances under which a deed was made. Here, the section plats and state highway records, coupled with the plain language of the deed, established that the old county road was the legal western boundary, so the District Court was reversed. Tester v. Tester, 2000 MT 130, 300 M 5, 3 P3d 109, 57 St. Rep. 538 (2000), followed in

Ethen Revocable Trust v. River Resource Outfitters, LLC, 2011 MT 143, 361 Mont. 57, 256 P.3d 913.

Contents of Safe Deposit Box Not Considered Jointly Held Asset: Silver directed his son to lease a safe deposit box for Silver's cash and signed a statement authorizing his son's access to the box. The lease form was prepared by a bank employee, who indicated that it was a joint agreement. Without Silver's direction, consent, or knowledge, the son subsequently removed the cash and placed it in his own safe deposit box in the same bank. Silver died 8 days later, and the personal representative sought to recover the cash, a substantial portion of which Silver had bequeathed to a charitable foundation. The District Court allowed the personal representative and a family friend to testify regarding statements that Silver made to them about the cash and its disposition. The court also admitted extrinsic evidence regarding the safe deposit box lease, holding that the fact that the lease form was prepared by a bank employee was relevant to interpretation of the document. The son alleged error on both issues, contending that the cash was a jointly held asset. The Supreme Court, citing Thompson v. Steinkamp, 120 M 475, 187 P2d 1018 (1947), and Anderson v. Baker, 196 M 494, 641 P2d 1035 (1982), found that the contested testimony put into context Silver's lease of the box and constituted evidence of Silver's intent to retain ownership of the cash. The fact that Silver did not select the form of lease or check the box on the lease form was supported by substantial credible evidence and was not clearly erroneous. Nevertheless, the son cited 70-1-308 for the contention that the cash was a jointly held asset. However, both the lease agreement and the statute provided for joint access to and possession of the safe deposit box and its contents, but not for joint ownership of the contents. Moreover, the language regarding the rights of surviving joint tenants did not apply here because Silver was still alive when the cash was removed. Thus, the District Court correctly concluded that the cash was not a jointly held asset by virtue of the agreement or the statute. The son could cite no contract theory under which he could be declared the owner of the cash, so the District Court did not err in applying gift theory rather than contract theory in determining ownership of the contents of the box or in concluding that the cash was not a gift to the son, based on the fact that Silver retained ownership. The District Court properly awarded the contents of the box to the estate. In re Estate of Silver, 2000 MT 127, 299 M 506, 1 P3d 358, 57 St. Rep. 526 (2000), distinguishing Malek v. Patten, 208 M 237, 678 P2d 201 (1984).

Parol Evidence of Circumstances Under Which Bid Prepared Proper in Interpreting Uncertain Contract Provisions: Bid estimates on a road building project contained vague and ambiguous project requirements, and testimony at trial regarding the height of the finished road was conflicting. Thus, the District Court, in interpreting provisions of the contract that appeared ambiguous or uncertain, properly considered parol evidence of the circumstances under which the bid was prepared. The court found more credible the contractor's testimony that there was not agreement that a subroad would be constructed of pit run gravel 6 inches above field grade, and that determination was affirmed on appeal. DeNiro v. Gasvoda, 1999 MT 129, 294 M 478, 982 P2d 1002, 56 St. Rep. 521 (1999).

Arbitration Clause in Standardized Form Advertising Agreement — Lack of Mutuality of Obligation and Meaningful Choice Considered Unconscionable Contract of Adhesion: Iwen sued U.S. W. Direct for damages for negligent construction of a yellow pages advertisement, infliction of emotional distress, and punitive damages. The District Court held that the parties were bound by the arbitration clause in the directory advertising order. The advertising order was a standardized form, the terms of which Iwen was unable to negotiate and for which Iwen's only choice was to accept or reject, constituting an agreement of adhesion. The arbitration provision lacked mutuality of obligation, was one-sided, and contained terms that were unreasonably favorable to U.S. West Direct, leaving Iwen, as the weaker bargaining party, no meaningful choice regarding acceptance of its provisions. Viewed from the perspective of consumer Iwen, the arbitration clause was held to be unconscionable, and the Supreme Court reversed, striking the arbitration clause, pursuant to 30-2-302, and remanding for further proceedings. Iwen v. U.S. W. Direct, 1999 MT 63, 293 M 512, 977 P2d 989, 56 St. Rep. 263 (1999), following Passage v. Prudential-Bache Sec., Inc., 223 M 60, 727 P2d 1298, 43 St. Rep. 1532 (1986), and Leibrand v. Nat'l Farmers Union Property & Cas. Co., 272 M 1, 898 P2d 1220, 52 St. Rep. 557 (1995), and distinguishing Snap-on Tools Corp. v. Vetter, 838 F. Supp. 468 (D.C. Mont. 1993).

Loan of Title Based Upon Exchange of Deeds Upheld — Oral Extrinsic Evidence Controlling: Johnson agreed to loan Anderson the title to several lots that Johnson owned on Flathead Lake so that Anderson could mortgage the lots and use the proceeds for a business venture. Johnson and Anderson both executed deeds to the property, and Anderson occupied the property pursuant to a lease agreement. Later, the agreement was breached when Anderson conveyed his interest

to a third party and cut trees from the property. Both parties sought a declaration of ownership in a quiet title action. The District Court admitted oral evidence showing that nothing more than a loan of title evidenced by an exchange of deeds was intended. The Supreme Court held that the timing of the execution and delivery of the two deeds was not controlling and that the deed conveying the property back to Johnson, even though it may have been signed and delivered first, was controlling in light of the circumstances of the transaction. The Supreme Court held that the deed conveying the property back to Johnson was valid as between the parties even though it was not recorded until later. Anderson v. Johnson, 264 M 66, 870 P2d 59, 51 St. Rep. 149 (1994).

Court Review of Claim of Fraud Inducing Arbitration Clause Not Fraud Inducing Entry Into Contract Allowed Under Federal Arbitration Act: The appellant alleged that fraud had induced him to enter into an option agreement and margin contract with the respondents. The appellant further stated that he had not read the arbitration clause or the clause that exposed him to unlimited losses. The Supreme Court ruled that since the appellant only alleged fraud in the inducement and did not specifically allege that he had been induced to agree to the arbitration clause, the entire matter, including fraud in the inducement, was subject to arbitration under the Uniform Arbitration Act (Title 27, ch. 5). Larsen v. Opie, 237 M 108, 771 P2d 977, 46 St. Rep. 660 (1989).

Extrinsic Evidence Unnecessary When Devise Clear: The language of a devise bequeathed property, if any, left in a partnership at the time of testator's demise. The District Court found the partnership to be a conduit through which the partners conducted their tenancy-in-common business and reported income for tax purposes; however, absent any partnership interest in real property, the court determined no property should pass and properly granted summary judgment. Because the testator's intention could be ascertained from the plain language of the devise alone, it was not necessary or proper for the court to receive extrinsic evidence in making its determination. In re Estate of Greenfield, 232 M 357, 757 P2d 1297, 45 St. Rep. 1112 (1988).

Enforceability of Arbitration Clause in Adhesion Contract: Plaintiffs contended that an arbitration clause in a brokerage agreement should have been declared unenforceable because it appeared in a contract of adhesion. The Supreme Court found nothing in the record to indicate that the arbitration clause was not within the parties' expectations or that the clause was oppressive or unconscionable. The court noted that federal case law demonstrates that arbitration clauses are common and enforceable in brokerage agreements (citing Finkle & Ross v. A.G. Becker Paribas, Inc., 622 F. Supp. 1505 (D.C. N.Y. 1985), and Southland Corp. v. Keating, 465 US 1, 79 L Ed 2d 1, 104 S Ct 852 (1984)) and held that even if the customer agreement form was an adhesion contract, the arbitration clause was enforceable. Passage v. Prudential-Bache Sec., Inc., 223 M 60, 727 P2d 1298, 43 St. Rep. 1532 (1986), followed in Chor v. Piper, Jaffray & Hopwood, 261 M 143, 862 P2d 26, 50 St. Rep. 1234 (1993), and Iwen v. U.S. W. Direct, 1999 MT 63, 293 M 512, 977 P2d 989, 56 St. Rep. 263 (1999). See also Cohen v. Wedbush, Noble, Cooke, Inc., 841 F2d 282 (9th Cir. 1988).

Merger of Prior Agreement Into Deed — No Presumption of Surrender of Covenants: Appellants contended that since there was no express language in deeds recorded in 1972 that the parties intended to merge the restrictive provisions of a 1971 agreement into the deeds, the commercial use restrictions in the 1971 agreement still applied, regardless of being left out of the deeds. The Supreme Court, recalling its decision in Story v. Montforton, 112 M 24, 113 P2d 507 (1941), noted that "whether or not there has been a merger depends on the intention of the parties". The court applied this principle in Thisted v. Country Club Tower Corp., 146 M 87, 405 P2d 432 (1965), quoting Reid v. Sykes, 27 Ohio St. 285: "... evidence of that intention may exist in or out of the deed. There is no presumption that a party, in giving or accepting a deed, intends to give up the covenants of which the deed is not a performance or satisfaction." In the present case, the court found strong evidence that the deeds contained all of the restrictions on the lands that were intended by the parties and that the contract had merged in the deeds. Haggerty v. Gallatin County, 221 M 109, 717 P2d 550, 43 St. Rep. 674 (1986).

Death of Partner — Disposition of Property Held Jointly by Partners: Robert and William, brothers, opened a joint checking account in 1947, paid all ranch expenses through the account, put all ranch income in the account, and equally split net profits. All cattle were branded with either of two brands, each of which was registered in the name of "William Palmer or Robert Palmer". The brothers were also joint tenants in a commodity brokerage account. The Supreme Court held that the cattle and both accounts were partnership property not held in joint tenancy and remained so upon Robert's death. Thus, they did not pass to William as the surviving joint tenant; rather, they remained in the partnership for the purpose of winding up the partnership and paying its liabilities, after which William must account to Robert's survivor, his widow,

for Robert's share of the partnership. By its very nature, partnership property must be treated differently than property of individuals, including property held by individuals as joint tenants but who are not in partnership. This rule applies regardless of the formal legal manner in which the property is held. This is a rule of equity developed over hundreds of years and codified in the Uniform Partnership Act. In re Estate of Palmer, 218 M 285, 708 P2d 242, 42 St. Rep. 1585 (1985), followed in Fiedler v. Fiedler, 266 M 133, 879 P2d 675, 51 St. Rep. 691 (1994).

Letter Relating to Execution of Lease — Properly Accepted Parol Evidence: In reviewing the trial court's interpretation of the heating cost provisions of a 5-year lease, the Supreme Court held that a letter containing a payment schedule and testimony relating to the schedule was properly accepted parol testimony to explain circumstances surrounding the lease agreement. The letter and testimony aided in resolving the ambiguity existing in the instrument as permitted by 28-2-905(2). The role of the judge is to construe an instrument according to its terms or its substance, not to insert or omit terms. The judge, however, may consider circumstances surrounding the execution, including the situation of the subject of the instrument and of the parties, to place himself in a position to interpret the language. In construing terms, evidence is admissible to show a local, technical, or otherwise peculiar signification used and understood by the parties. Martin v. Laurel Cable TV, Inc., 215 M 229, 696 P2d 454, 42 St. Rep. 314 (1985).

Ambiguous Assignment — Explanatory Evidence Admissible: A contract for deed reserved one-half the mineral rights in seller. Seller's subsequent assignment was ambiguous where it assigned all of seller's right, title, and interest in the property, together with the contract for deed, yet also stated that it was subject to the contract for deed. Therefore, the evidence was admissible to explain the ambiguity and the intent of seller and assignee of seller's rights under the contract for deed. Peterson v. Hopkins, 210 M 429, 684 P2d 1061, 41 St. Rep. 1140 (1984).

Savings Account Signature Card: Evidence of the circumstances under which a signature card creating joint savings accounts was signed was properly admissible under 28-2-905 and showed that no gift was intended by the depositor. Anderson v. Baker, 196 M 494, 641 P2d 1035, 39 St. Rep. 273 (1982).

Commodity Account Agreement: A stock brokerage firm explained to a customer the risk involved in a commodity straddle for tax deferral purposes and also had the customer sign a written agreement acknowledging the high degree of risk involved. What the parties meant by the term "risk" was subject to interpretation and could be proved by parol testimony. Brown v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 197 M 1, 640 P2d 453, 39 St. Rep. 305 (1982).

Section Inapplicable When Language Plain and Unambiguous: This section is irrelevant in a dispute involving a real estate listing contract where the contract was plain and unambiguous. When the language is plain and unambiguous, the language alone controls and there is nothing for the court to interpret or construe. This section applies when an ambiguity exists in the language of the contract. Payne v. Buechler, 192 M 311, 628 P2d 646, 38 St. Rep. 799 (1981), clarified in Mary J. Baker Revocable Trust v. Cenex Harvest St., Cooperatives, Inc., 2007 MT 159, 338 M 41, 164 P3d 851 (2007).

Termination of Lease — Removal of Holdover Tenant — Agricultural Exception to Landlord-Tenant Act: Defendant sold plaintiff her property. The instrument contained a lease back to defendant of the buildings and 6 acres. Plaintiff gave notice that the lease was to terminate. Defendant refused to vacate. Plaintiff brought an action under the unlawful detainer statutes, which provide for an award of treble damages. Defendant contended the dispute was governed by the Montana Residential Landlord and Tenant Act of 1977. Plaintiff contended the lease was within the "agricultural" exclusion contained in 70-24-104(8). The lease provisions gave no indication of the nature of the buildings or of the intended use of the 6 acres. The trial court allowed the introduction of photographs and oral testimony regarding the lease, which established that the use of the land was for maintenance of defendant's livestock. The trial court properly allowed parol evidence to resolve an ambiguity in the lease. The Supreme Court determined that the legislative intent of 70-24-104 was for a comprehensive coverage of all agricultural operations, whether they are large-scale operations for profit or small-scale operations secondary to the use of the residence. The unlawful detainer provisions were properly applied. Dussault v. Hjelm, 192 M 282, 627 P2d 1237, 38 St. Rep. 738 (1981).

Variation of Terms of Written Contract Held Improper — Evidentiary Rule as Procedural Rule Only: In an action to collect the amount due under a promissory note, the District Court erred in allowing the plaintiff to prove that the terms of a written contract concerning only the terms of sale of a bar also applied to a previous sale of another business. Rule 106, Montana Rules of Evidence, relied on by the District Court to vary the clear terms of the parties' written agreement, is a procedural rule concerning the introduction of only a portion of a whole agreement

and cannot be used to affect the substance of the existing law of parol evidence. Spraggins v. Elvidge, 192 M 8, 625 P2d 1151, 38 St. Rep. 493 (1981).

Intent of Contracting Parties — Parol Evidence Admissible to Show Knowledge of Agent: In an action by the plaintiff contractor against the defendant motor carrier for breach of contract caused by the defendant's refusal to haul fabricated silo sections, the court did not err in finding that a memorandum of the agreement by the defendant's employee was sufficiently clear to form a valid contract. Parol evidence is admissible to apply the memorandum to the subject matter of the contract. The evidence showed that agents of the defendant knew the subject matter of the contract and that knowledge is imputed to the defendant and will be applied to the memorandum to determine the intent of the defendant as to the subject matter of the contract. Empire Steel Mfg. v. Carlson, 191 M 189, 622 P2d 1016, 38 St. Rep. 101 (1981).

Written Divorce Settlement Agreement — Simultaneous Oral Agreement Given Effect When No Objection Made: At the conclusion of a hearing on the enforcement of his divorce settlement agreement several months after his divorce, the former husband moved to amend the finding of deficiency of the settlement agreement or, in the alternative, to grant a new trial. Appeal was taken from the denial of the motion. One ground was the assertion that the District Court erred in considering evidence of an oral agreement made simultaneously with the written settlement agreement. The record disclosed no objection during trial to the wife's testimony about the automobile and the insurance to be furnished her. The failure to raise the issue of parol evidence at the trial court forfeited any right to a remedy on appeal. In re Marriage of Harris, 189 M 509, 616 P2d 1099, 37 St. Rep. 1696 (1980).

Waiver of Mechanics' Lien (Now Construction Lien): The circumstances of the parties to a transaction and their real purpose in executing instruments relating thereto is subject to interpretation and may be proved by parol testimony. Plaintiff retained lien rights for money owing to him despite his execution of a series of lien releases written in general terms when each release was executed upon the payment of an amount of money and uncontradicted parol testimony indicated that the parties regarded the lien waivers to be releases only as to amounts paid and not general releases of lien rights. Fillbach v. Inland Constr. Corp., 178 M 374, 584 P2d 1274 (1978).

Amended Contract for Deed: When sellers of land argued that the buyers misled them as to the effect of an escrow agreement and warranty deed, estoppel had no application since the court found that sellers possessed a copy of the instruments for a considerable length of time and had ample opportunity to examine them. Furthermore, since sellers failed to plead fraud by amending their pleadings, they were not entitled to present parol evidence to show that these instruments constituted an acceptance of the land under the doctrine of estoppel. Tschache v. Barclay, 172 M 415, 564 P2d 1299 (1977).

Building Lease: Statements made by various agency personnel in regard to continued use of defendant's office building were not admissible under parol evidence rule to alter or contradict terms of express written contract since such statements and assurances did not come within any recognized exception to rule and since defendant admitted that he knew written contract would be controlling. U.S. v. Willard E. Fraser Co., 308 F. Supp. 557 (D.C. Mont. 1970), affirmed in 459 F2d 483 (9th Cir. 1972).

Intention of Parties:

Informal written instrument stating "I wish to pay" and uncontradicted evidence that donor rejected lawyers and wanted to give a gift established donative intent. Faith Lutheran Retirement Home v. Veis, 156 M 38, 473 P2d 503 (1970).

Under this section and 1-4-103, a contract, the provisions of which are called in question years after its making, must be construed in the light of the circumstances under which it was made and the intention of the parties must be pursued if possible. Cove Irrigation District v. Yellowstone Ditch Co., 90 M 323, 3 P2d 280 (1931).

Mineral Deed: No ambiguity existed between clause conveying one-half of the minerals in 1,040 acres and the conveyance of 520 mineral acres so that mineral deed could not be varied by parol evidence. Superior Oil Co. v. Vanderhoof, 297 F. Supp. 1086 (D.C. Mont. 1969).

Farm Lease Agreement: Where the issue was whether a lease valid on its face was intended by the parties to be conditioned on approval of an FHA loan to the lessee, the court could, despite 70-20-202, consider all the surrounding circumstances. Platt v. Clark, 141 M 376, 378 P2d 235 (1963).

Insurance Policies: The entire series of transactions respecting issuance of an automobile liability policy by defendant to contractors, who had contracted with state to construct bridges, and the furnishing of a surety bond by defendant providing that contractors would faithfully

perform their contract was to be considered in determining defendant's liability for satisfaction of judgments which plaintiff recovered against contractors in action for deaths of plaintiff's intestates who died as consequence of negligence of contractors' employee while operating an automobile. USF&G Co. v. Doheny, 123 F2d 746 (9th Cir. 1941), affirming 34 F. Supp. 888 (D.C. Mont. 1940).

Sale Contract: Parol evidence is admissible to show the situation and relation of the parties to an oral contract of sale of personalty evidenced by a memorandum in writing, as well as the surrounding circumstances at the time of its execution, and also for the purpose of applying the description in the memorandum and thus identifying the subject matter of the contract, provided the subject matter is so described by the memorandum as to be capable of certain identification as well as to explain latent ambiguities. Lewis v. Aronow, 77 M 348, 251 P 146 (1926).

Employment Contract: Letters interchanged between the president of a corporation, signed by him personally, and plaintiff, considered in the light of the circumstances under which they were written, showed a contract of employment for a certain term, for the breach of which plaintiff was entitled to recover. Edwards v. Plains Light & Water Co., 49 M 535, 143 P 962 (1914).

Bill of Sale: To aid the construction of a bill of sale, the circumstances under which it was made may be shown; and in doing this, conversations prior to the sale about the subject matter thereof and not in conflict with the terms of the bill of sale may be considered. Sutherland v. Green, 49 M 379, 142 P 636 (1914).

Stipulations: In arriving at the intent of parties to a stipulation, the circumstances under which the stipulation was made, its subject matter, and the parties to it may be considered. The rules applicable to the construction of contracts generally control in interpreting stipulations. Murphy v. Stone & Webster Eng'r Corp., 44 M 146, 119 P 717 (1911).

Mercantile Usage of Terms: The evidence of merchants and businessmen is admissible to explain the meaning of mercantile phrases endorsed upon a memorandum of sale. Newell v. Nicholson, 17 M 389, 43 P 180 (1896).

Building Contract Bond: A bond given in connection with a building contract and conditioned for the furnishing of all labor and material necessary to the completion of the building, as specified and shown on the plans furnished by the architect, need not be so reformed, before a recovery thereon, as to refer to said contract, since the instruments, being contemporaneous and parts of the same transaction, may be construed together to explain each other under this section. Watson v. O'Neill, 14 M 197, 35 P 1064 (1894). See also Hogan v. Shields, 20 M 438, 52 P 55 (1898).

1-4-103. Intention of the parties — particular and general provisions.

Case Notes

Parol Evidence Necessary to Determine Intention When Latent Ambiguity Exists: A party transferred property back to sellers in lieu of foreclosure. The transfer arguably constituted a technical conveyance. "Conveyance" had different meanings for the parties and therefore was to be interpreted in accord with the manifest intent of the parties. Parol evidence was necessarily admissible to demonstrate and explain this latent ambiguity, and summary judgment on the issue was improper. Ellingson Agency, Inc. v. Baltrusch, 228 M 360, 742 P2d 1009, 44 St. Rep. 1598 (1987), followed in Fox Grain & Cattle Co. v. Maxwell, 267 M 528, 885 P2d 432, 51 St. Rep. 1136 (1994).

Trust Instruments: Subsequent declarations of the trustor are relevant and are to be considered in determining the meaning of the word "issue" used in an instrument creating a trust. Holter v. First Nat'l Bank & Trust Co., 135 M 27, 336 P2d 701 (1959).

Intention of Parties to Contract:

In the construction of a contract the intention of the parties at the time of contracting must be pursued if possible, which intention must be gathered from the entire instrument and not from particular words or phrases or disjointed parts of it, and in the ascertainment of such intention the subject matter of the contract and the purposes of its execution are material. St. v. Rosman, 84 M 207, 274 P 850 (1929).

In the construction of an antenuptial agreement settling property rights, the rule appertaining to the interpretation of contracts that the intention of the parties must govern is controlling. Further, such an agreement must be liberally construed. In re Oppenheimer's Estate, 73 M 560, 238 P 599 (1925).

In the interpretation of a contract the intention of the parties must be pursued if possible, the intention to be gathered from the entire agreement, not from particular words or phrases or disjointed or particular parts of it, the subject matter and the purposes of its execution being

material to the ascertainment of their intention and the meaning of the terms used. Lee v. Lee Gold Min. Co., 71 M 592, 230 P 1091 (1924).

In the construction of a contract the courts must if possible ascertain and give effect to the mutual intention of the parties at the time they entered into it so far as that may be done without contravening legal principles, greater regard being had to their clear intent than to any particular words used in the expression of that intent. Winkelmann v. Minn. Mut. Life Ins. Co., 66 M 451, 213 P 1104 (1923).

Particular and General Provisions:

Where under the first clause of a contract a party bound himself generally as a surety but under a subsequent one the conditions under which he would be liable were particularly set forth which in effect made him a guarantor, the two clauses were so inconsistent with each other as to warrant application of the doctrine that where a general and a particular provision of a contract are inconsistent the latter must prevail, and therefore the promisor was a guarantor and not a surety and could not be joined as defendant in an action to recover the amounts, payment of which he had guaranteed. Butte Mach. Co. v. Carbonate Hill Mill. Co., 75 M 167, 242 P 956 (1925).

In an action against the sureties upon the official bond of their principal, where the sureties had limited their penal obligation to specified sums, which sums were also set opposite their respective signatures, and the bond contained a general provision reading, "for the payment of which, well and truly to be made, we bind ourselves, our heirs, representatives, administrators, and assigns, jointly and severally, by these presents", the particular provision limiting the liability of the sureties would prevail over the inconsistent general provision, and the sureties were bound severally and not jointly. Butte v. Cohen, 9 M 435, 24 P 206 (1890).

1-4-105. Written words versus words in printed form.

Case Notes

"Payable on Death" Designation Negates Joint Tenancy Language on CD Form: The deceased's personal representative was his granddaughter, who was also the person named as the payable on death (POD) beneficiary of the deceased on several certificates of deposit (CDs). The granddaughter obtained a ruling from the District Court that she was a joint tenant with the right of survivorship with respect to the CDs, based upon the language on the CD forms specifically stating that the persons named on the CD were joint tenants. The Supreme Court held that a joint tenancy must be created by specific unambiguous language and that the POD designation on the CDs created an ambiguity negating the joint tenancy language. The Supreme Court further held that the POD language meant that the granddaughter could not have a present interest in the CDs at the time that the CDs were obtained by the deceased and that they could not pass to her under the principles of joint tenancy. The Supreme Court ruled that the POD designation acted to transfer the CDs to the granddaughter outside of the probate estate as a nontestamentary transfer. In re Estate of Lahren, 268 M 284, 886 P2d 412, 51 St. Rep. 1311 (1994), following In re Estate of Shaw, 259 M 117, 855 P2d 105 (1993).

Petition for Judicial Relief: When a printed form for a petition to declare children to be dependent and neglected contained a blank space and the words "we request temporary custody" were typed in the space, the written words controlled those which were printed and the petition was one for temporary and not permanent custody. Welfare Dept. v. Endres, 166 M 379, 533 P2d 959 (1975).

Sale Contract: Where a contract of sale of an automobile provided in writing "Terms on balance—140.00 due on delivery" and in printing "Balance due upon delivery", the former supplanted the latter. Backer v. Parker-Morelli-Barclay Motor Co., 87 M 595, 289 P 571 (1930). See also New Home Sewing Mach. Co. v. Songer, 91 M 127, 7 P2d 238 (1931).

1-4-106. Interpretation of language according to usage in place of execution.

Case Notes

Custom and Usage for Interpretation: Evidence of a custom or usage in a particular business, in the instant case the brokerage business, is admissible in aid of the interpretation of a written instrument. Healy v. First Nat'l Bank of Great Falls, 108 M 180, 89 P2d 555 (1939).

Must Plead Custom or Usage: Where customs or usages relating to a particular locality or trade are relied upon, they must be pleaded by the party seeking to make them a basis for recovery or defense. Lewis v. Aronow, 77 M 348, 251 P 146 (1926).

Contract Explicit — No Need to Interpret: Evidence of custom is never competent when the contract is clear and explicit in its terms and the necessity for interpretation does not arise.

Under these circumstances the intention of the parties is to be ascertained from the writing itself without resort to evidence. Wheeler v. James, 70 M 37, 223 P 900 (1924).

1-4-107. Construction of terms.

Case Notes

Subjective Standard Applicable to Term "Satisfactory": A real estate listing contract contained the following clause, typed in by the realtor: "This listing is subject to Fultz being able to satisfactory [sic] trade the above lands for lands in Big Horn Co. on a tax free exchange." The realtor argued that an objective standard for a satisfactory trade should be used. The District Court found that because the realtor drafted the contract, any ambiguities should be construed against him. The term "satisfactory" was found to be a subjective standard rather than a reasonable man standard. Because the trade arrangement set up by the realtor did not meet the requirement of a tax-free exchange, the arrangement was properly found to be unsatisfactory under the contract terms. Watson v. Fultz, 239 M 364, 782 P2d 361, 46 St. Rep. 1751 (1989).

Letter Relating to Execution of Lease — Properly Accepted Parol Evidence: In reviewing the trial court's interpretation of the heating cost provisions of a 5-year lease, the Supreme Court held that a letter containing a payment schedule and testimony relating to the schedule was properly accepted parol testimony to explain circumstances surrounding the lease agreement. The letter and testimony aided in resolving the ambiguity existing in the instrument as permitted by 28-2-905(2). The role of the judge is to construe an instrument according to its terms or its substance, not to insert or omit terms. The judge, however, may consider circumstances surrounding the execution, including the situation of the subject of the instrument and of the parties, to place himself in a position to interpret the language. In construing terms, evidence is admissible to show a local, technical, or otherwise peculiar signification used and understood by the parties. Martin v. Laurel Cable TV, Inc., 215 M 229, 696 P2d 454, 42 St. Rep. 314 (1985).

Prior Agreement Establishing Meaning: Where amended agreement between automobile insurer and reinsurer was the same as that contained in prior agreement, which the parties had interpreted as contended for by the insurer, findings that agreement was ambiguous and that the parties did not intend to give the words in the amendment a different meaning than that given in the agreement, being supported by substantial evidence, warranted judgment in favor of insurer. Peerless Cas. Co. v. Mtn. St. Mut. Cas. Co., 283 F2d 268 (9th Cir. 1960).

Trade Usage: For the purpose of enabling the court to interpret the abbreviations No. 1 D. N. S., used in a memorandum evidencing the sale of wheat to a wheat buyer, where the oral contract of sale was attacked on the ground that it was void under the Statute of Frauds, parol evidence was admissible to show their customary meaning in the business of dealing in wheat. Lewis v. Aronow, 77 M 348, 251 P 146 (1926).

1-4-110. Hydrocarbons distinguished.

Compiler's Comments

Saving Clause: Section 6, Ch. 379, L. 1993, was a saving clause.

Part 2
Seals

1-4-202. Manner of making a seal.

Compiler's Comments

1985 Amendment: In first sentence in two places before "impression", inserted "stamp or"; and made minor changes in phraseology.

CHAPTER 5
PROOF AND ACKNOWLEDGMENT OF INSTRUMENTS NOTARIES PUBLIC

Chapter Administrative Rules

Title 44, chapter 15, subchapter 1, ARM Commissioning of Notaries Public.

Part 3
Proof of Execution

Part Case Notes

DECISIONS UNDER FORMER LAW

Negligence in Taking Acknowledgment — Liability for Damages: At the behest of the husband, a notary public took the acknowledgment of a deed transferring real property without knowing or having satisfactory evidence that the wife, whose name appeared on the deed as signator-grantor, was the individual described in and who executed the deed. The wife was not present at the time of acknowledgment and was never contacted by the notary; nevertheless, the notary signed the certificate of acknowledgment as if the wife had personally appeared and made the acknowledgment. The notary public was negligent in performance of official duty and was liable for damages proximately caused by such negligence. McWilliams v. Clem, 228 M 297, 743 P2d 577, 44 St. Rep. 1536 (1987), distinguishing Mahoney v. Dixon, 31 M 107, 77 P 519 (1904), and Ellis v. Hale, 58 M 181, 194 P 155 (1920).

Illegally Acknowledged Assignment Document: Since a broker altered an assignment document after it was signed by taping the acknowledgment paragraph to the document and illegally presenting it to a notary for an acknowledgment and the notary illegally acknowledged the purchasers' signatures without requiring their presence, the assignment was invalid and could not convey a security interest in the contract for deed to secure performance of the promissory note signed by the purchasers. Hoefer v. Wilckens, 210 M 218, 684 P2d 468, 41 St. Rep. 1019 (1984).

Power of Attorney in Heirship Matter: A power of attorney was given by an heir residing in Spain to the Spanish Consul General in the United States. The acknowledgment was made as required by 1-5-103 (now repealed), and this was sufficient compliance with the requirements of section 91-3802, R.C.M. 1947 (now repealed). In re Astibia's Estate, 100 M 224, 46 P2d 712 (1935).

1-5-302. When execution may be proved by handwriting.

Compiler's Comments

2007 Amendment: Chapter 61 made minor changes in style. Amendment effective October 1, 2007.

1-5-303. Facts that must be shown when offering proof of handwriting.

Compiler's Comments

2007 Amendment: Chapter 61 made minor changes in style. Amendment effective October 1, 2007.

1-5-305. Contents of certificate of proof.

Compiler's Comments

2007 Amendment: Chapter 61 made minor changes in style. Amendment effective October 1, 2007.

Part 6
Notarial Acts

Part Official Comments

The official comments for the Revised Uniform Law on Notarial Acts are available at www.uniformlaws.org.

Part Compiler's Comments

Saving Clause: Section 29, Ch. 391, L. 2015, was a saving clause.

1993 Statement of Intent: The statement of intent attached to Ch. 192, L. 1993, provided: "It is the intent of the legislature that the secretary of state adopt rules establishing fees commensurate with the costs of reviewing the applications for and bonds of those persons submitting applications to become notaries public and with the costs of preparing their certificates of commission. The fees adopted by the secretary of state should reflect the cost of maintaining or upgrading the recordkeeping system used in the filing of the commissions."

Applicability: Section 23, Ch. 192, L. 1993, provided: "[This act] [1-5-601 through 1-5-611 . . .] applies to notarial acts performed on or after [the effective date of this act]." Effective October 1, 1993.

Source: Uniform Law on Notarial Acts (2010).

1-5-601. Short title.

Compiler's Comments

2015 Amendment: Chapter 391 in short title inserted "Revised". Amendment effective October 1, 2015.

Applicability: Section 30, Ch. 391, L. 2015, provided: "[This act] applies to notarial acts performed on or after [the effective date of this act] and to the duties of and applications to be a notary public or to renew a notary public commission on or after [the effective date of this act]. The commission of a notary public in effect on [the effective date of this act] remains in effect until the commission's date of expiration." Effective October 1, 2015.

1-5-602. Definitions.

Compiler's Comments

2015 Amendment: Chapter 391 in definition of acknowledgment in four places substituted "individual" for "person", in three places substituted "signed" for "executed", in five places substituted "record" for "instrument", near beginning inserted "before a notarial officer", before "signed a record" inserted "willingly", and near end before "identified" deleted "represented and"; inserted definitions of electronic, electronic signature, notary public, official stamp, person, record, sign, signature, stamping device, and state; in definition of in a representative capacity inserted "acting as", in (a) before "an authorized officer" deleted "for and on behalf of a corporation, partnership, trust, or other entity as" and at end inserted "for a person other than an individual", in (b) substituted "stated in a record" for "recited in the instrument", and in (c) inserted "agent or"; in definition of notarial act substituted "an act, whether performed with respect to a tangible or electronic record, that a notarial officer may perform under the law of this state" for "any act that a notary public of this state is authorized to perform" and near end inserted "certifying or attesting a transcript of an affidavit or deposition"; in definition of notarial officer substituted "individual" for "officer"; in definition of verification on oath or affirmation substituted current definition for former definition that read: ""Verification upon oath or affirmation" means a declaration that a statement is true made by a person upon oath or affirmation"; and made minor changes in style. Amendment effective October 1, 2015.

Applicability: Section 30, Ch. 391, L. 2015, provided: "[This act] applies to notarial acts performed on or after [the effective date of this act] and to the duties of and applications to be a notary public or to renew a notary public commission on or after [the effective date of this act]. The commission of a notary public in effect on [the effective date of this act] remains in effect until the commission's date of expiration." Effective October 1, 2015.

1-5-603. Requirements for certain notarial acts — personal appearance — identification methods.

Compiler's Comments

2015 Amendment: Chapter 391 substituted current section text regarding notarial acts for former text (see 2015 Session Law for former text). Amendment effective October 1, 2015.

Applicability: Section 30, Ch. 391, L. 2015, provided: "[This act] applies to notarial acts performed on or after [the effective date of this act] and to the duties of and applications to be a notary public or to renew a notary public commission on or after [the effective date of this act]. The commission of a notary public in effect on [the effective date of this act] remains in effect until the commission's date of expiration." Effective October 1, 2015.

2001 Amendment: Chapter 161 in (6)(c) substituted "a current identification document or documents that show a photograph and signature of the person" for "identification documents". Amendment effective October 1, 2001.

Saving Clause: Section 13, Ch. 161, L. 2001, was a saving clause.

Case Notes

Fatally Deficient Bill of Costs — Award of Costs Vacated: Defense attorney Nelson signed a verification of costs, but was not actually sworn and did not attest to personal knowledge of the costs incurred. Rather, Nelson signed a document purporting to present his partner Dahle's knowledge and belief and indicating that Dahle had been duly sworn. However, Dahle was not actually present to subscribe to the statement, sign the verification, or be sworn by the notary. The bill of costs was therefore fatally defective, and the Supreme Court vacated the award of costs to defendant. McDermott v. Carie, LLC, 2005 MT 293, 329 M 295, 124 P3d 168 (2005).

1-5-604. Notarial acts in this state — authority to perform notarial act.

Compiler's Comments

2015 Amendment: Chapter 391 substituted current text concerning notarial acts in this state for former text that read: "(1) A notarial act may be performed within this state by the following persons:

(a) a notary public of this state;

(b) a judge, clerk, or deputy clerk of any court of this state; or

(c) any other person authorized to perform the specific act by the law of this state.

(2) Notarial acts performed within this state under federal authority as provided in 1-5-607 have the same effect as if performed by a notarial officer of this state.

(3) Subject to the provisions of 1-5-605, notarial acts performed within Montana by notarial officers of bordering states have the same effect as if performed by a notarial officer of Montana.

(4) The signature and title of a person performing a notarial act are prima facie evidence that the signature is genuine and that the person holds the designated title." Amendment effective October 1, 2015.

Applicability: Section 30, Ch. 391, L. 2015, provided: "[This act] applies to notarial acts performed on or after [the effective date of this act] and to the duties of and applications to be a notary public or to renew a notary public commission on or after [the effective date of this act]. The commission of a notary public in effect on [the effective date of this act] remains in effect until the commission's date of expiration." Effective October 1, 2015.

1-5-605. Notarial act in another state — reciprocity — notary public authority.

Compiler's Comments

2015 Amendment: Chapter 391 substituted current text regarding recognition of notarial acts in other state for former text that read: "(1) A Montana notarial officer may perform a notarial act in a bordering state if the state recognizes the officer's authority within the state.

(2) A notarial act performed in Montana by a notarial officer of a bordering state has the same effect under Montana law as if the act were performed by a Montana notarial officer, provided that the bordering state grants Montana's notarial officers similar authority within the bordering state." Amendment effective October 1, 2015.

Applicability: Section 30, Ch. 391, L. 2015, provided: "[This act] applies to notarial acts performed on or after [the effective date of this act] and to the duties of and applications to be a notary public or to renew a notary public commission on or after [the effective date of this act]. The commission of a notary public in effect on [the effective date of this act] remains in effect until the commission's date of expiration." Effective October 1, 2015.

1-5-606. Notarial acts under authority of federally recognized Indian tribes.

Compiler's Comments

2015 Amendment: Chapter 391 substituted current text concerning notarial acts under authority of federally recognized Indian tribes for former text that read: "(1) A notarial act has the same effect under the law of this state as if performed by a notarial officer of this state if it is performed in another state, commonwealth, territory, district, or possession of the United States by any of the following persons:

(a) a notary public of that jurisdiction;

(b) a judge, clerk, or deputy clerk of a court of that jurisdiction; or

(c) any other person authorized by the law of that jurisdiction to perform notarial acts.

(2) Notarial acts performed in other jurisdictions of the United States under federal authority as provided in 1-5-607 have the same effect as if performed by a notarial officer of this state.

(3) The signature and title of a person performing a notarial act are prima facie evidence that the signature is genuine and that the person holds the designated title.

(4) The signature and indicated title of an officer listed in subsection (1)(a) or (1)(b) conclusively establish the authority of a holder of that title to perform a notarial act." Amendment effective October 1, 2015.

Applicability: Section 30, Ch. 391, L. 2015, provided: "[This act] applies to notarial acts performed on or after [the effective date of this act] and to the duties of and applications to be a notary public or to renew a notary public commission on or after [the effective date of this act]. The commission of a notary public in effect on [the effective date of this act] remains in effect until the commission's date of expiration." Effective October 1, 2015.

1-5-607. Notarial acts under federal authority.

Compiler's Comments

2015 Amendment: Chapter 391 in (1) near beginning inserted "performed under federal law" and at end substituted "under federal law is performed by" for "anywhere by any of the following persons under authority granted by the law of the United States"; in (1)(b) substituted "an individual" for "a commissioned officer of active duty" and inserted "or performing duties under the authority of the military service if authorized to perform notarial acts under federal law"; in (1)(c) substituted "an individual designated as a notarizing officer by the United States department of state for performing notarial acts overseas" for "an officer of the foreign service or consular officer of the United States"; in (1)(d) substituted "individual" for "person"; in (2) substituted "an individual acting under federal authority and" for "a person"; in (3) substituted "an officer described in subsection (1)" for "an officer listed in subsection (1)(a), (1)(b), or (1)(c)" and after "authority of" substituted "the officer" for "a holder of that title"; and made minor changes in style. Amendment effective October 1, 2015.

Applicability: Section 30, Ch. 391, L. 2015, provided: "[This act] applies to notarial acts performed on or after [the effective date of this act] and to the duties of and applications to be a notary public or to renew a notary public commission on or after [the effective date of this act]. The commission of a notary public in effect on [the effective date of this act] remains in effect until the commission's date of expiration." Effective October 1, 2015.

Administrative Rules

ARM 44.15.105 Foreign notary, apostille fees, and federal authority.

1-5-608. Foreign notarial acts.

Compiler's Comments

2015 Amendment: Chapter 391 substituted current language regarding foreign notarial acts for former text (see 2015 Session Law for former text). Amendment effective October 1, 2015.

Applicability: Section 30, Ch. 391, L. 2015, provided: "[This act] applies to notarial acts performed on or after [the effective date of this act] and to the duties of and applications to be a notary public or to renew a notary public commission on or after [the effective date of this act]. The commission of a notary public in effect on [the effective date of this act] remains in effect until the commission's date of expiration." Effective October 1, 2015.

Administrative Rules

ARM 44.15.105 Foreign notary, apostille fees, and federal authority.

1-5-609. Certificate of notarial acts.

Compiler's Comments

2015 Amendment: Chapter 391 in (1) substituted current language regarding requirements for a certificate of notarial acts for former (1) that read: "(1) A notarial act must be evidenced by a certificate signed and dated by a notarial officer. The certificate must include identification of the jurisdiction in which the notarial act is performed, the date on which the notarial act is performed, the type of notarial act being performed, and the title of the office of the notarial officer and must include the official seal of office. If the officer is a Montana notary public, the certificate must also indicate the place of the notarial officer's residence and the date of expiration of the commission of office, but omission of that place or date may subsequently be corrected. If the officer is a commissioned officer on active duty in the military service of the United States, it must also include the officer's rank"; inserted (2) regarding notarial acts regarding tangible and electronic records; in (3) substituted "subsections (1) and (2) and this subsection" for "subsection (1)"; in (3)(b) and (3)(c) substituted "permitted" for "prescribed"; in (3)(c) substituted "laws applicable in the jurisdiction" for "laws or regulations applicable in the place"; in (3)(d) substituted "the notarial act as provided in 1-5-610, 1-5-616, and this section or of the laws of this state other than specified in this part" for "the designated notarial act"; deleted former (3) that read: "(3) By executing a certificate of a notarial act, the notarial officer certifies that the officer has made the determinations required by 1-5-603"; inserted (4) regarding subsequent corrections to certificates; and made minor changes in style. Amendment effective October 1, 2015.

Applicability: Section 30, Ch. 391, L. 2015, provided: "[This act] applies to notarial acts performed on or after [the effective date of this act] and to the duties of and applications to be a notary public or to renew a notary public commission on or after [the effective date of this act]. The commission of a notary public in effect on [the effective date of this act] remains in effect until the commission's date of expiration." Effective October 1, 2015.

2001 Amendment: Chapter 161 in (1) in second sentence near middle after "performed" inserted "the date on which the notarial act is performed, the type of notarial act being performed" and in third sentence substituted "Montana notary" for "notary" and after "indicate the" inserted "place of the notarial officer's residence and the"; and made minor changes in style. Amendment effective October 1, 2001.

Saving Clause: Section 13, Ch. 161, L. 2001, was a saving clause.

1-5-610. Short forms.

Compiler's Comments

2015 Amendment: Chapter 391 substituted current language providing short-form certificates for former text providing short-form certificates (see 2015 Session Law for former text). Amendment effective October 1, 2015.

Applicability: Section 30, Ch. 391, L. 2015, provided: "[This act] applies to notarial acts performed on or after [the effective date of this act] and to the duties of and applications to be a notary public or to renew a notary public commission on or after [the effective date of this act]. The commission of a notary public in effect on [the effective date of this act] remains in effect until the commission's date of expiration." Effective October 1, 2015.

2009 Amendment: Chapter 319 in introductory clause inserted references to subsections (1)(e) and (1)(f) of 1-5-416. Amendment effective October 1, 2009.

2003 Amendment: Chapter 12 in five places added to the short-form certificates a line for the notarial officer's typed, stamped, or printed name. Amendment effective October 1, 2003.

2001 Amendment: Chapter 161 in introductory clause inserted reference to 1-5-416; and near end of each of the five forms inserted "(Residing at)". Amendment effective October 1, 2001.

Saving Clause: Section 13, Ch. 161, L. 2001, was a saving clause.

1-5-611. Uniformity of application and construction.

Compiler's Comments

2015 Amendment: Chapter 391 substituted current language regarding uniformity of application and construction for former text that read: "This part must be applied and construed to effectuate the general purpose to make uniform the law with respect to the subject of this part among states enacting it." Amendment effective October 1, 2015.

Applicability: Section 30, Ch. 391, L. 2015, provided: "[This act] applies to notarial acts performed on or after [the effective date of this act] and to the duties of and applications to be a notary public or to renew a notary public commission on or after [the effective date of this act]. The commission of a notary public in effect on [the effective date of this act] remains in effect until the commission's date of expiration." Effective October 1, 2015.

1-5-615. Notification regarding performance of notarial act on electronic record — selection of technology.

Compiler's Comments

Effective Date: This section is effective October 1, 2015.

Applicability: Section 30, Ch. 391, L. 2015, provided: "[This act] applies to notarial acts performed on or after [the effective date of this act] and to the duties of and applications to be a notary public or to renew a notary public commission on or after [the effective date of this act]. The commission of a notary public in effect on [the effective date of this act] remains in effect until the commission's date of expiration." Effective October 1, 2015.

Administrative Rules

ARM 44.15.108 Remote notarizations.

1-5-616. Official stamp.

Compiler's Comments

Effective Date: This section is effective October 1, 2015.

Applicability: Section 30, Ch. 391, L. 2015, provided: "[This act] applies to notarial acts performed on or after [the effective date of this act] and to the duties of and applications to be a notary public or to renew a notary public commission on or after [the effective date of this act]. The commission of a notary public in effect on [the effective date of this act] remains in effect until the commission's date of expiration." Effective October 1, 2015.

Administrative Rules

ARM 44.15.107 Official stamp.

1-5-617. Stamping device.

Compiler's Comments

Effective Date: This section is effective October 1, 2015.

Applicability: Section 30, Ch. 391, L. 2015, provided: "[This act] applies to notarial acts performed on or after [the effective date of this act] and to the duties of and applications to be a notary public or to renew a notary public commission on or after [the effective date of this act]. The commission of a notary public in effect on [the effective date of this act] remains in effect until the commission's date of expiration." Effective October 1, 2015.

1-5-618. Notary public journal — retention.

Compiler's Comments

Effective Date: This section is effective October 1, 2015.

Applicability: Section 30, Ch. 391, L. 2015, provided: "[This act] applies to notarial acts performed on or after [the effective date of this act] and to the duties of and applications to be a notary public or to renew a notary public commission on or after [the effective date of this act]. The commission of a notary public in effect on [the effective date of this act] remains in effect until the commission's date of expiration." Effective October 1, 2015.

1-5-619. Notary public qualifications — commission — renewals.

Compiler's Comments

Effective Date: This section is effective October 1, 2015.

Applicability: Section 30, Ch. 391, L. 2015, provided: "[This act] applies to notarial acts performed on or after [the effective date of this act] and to the duties of and applications to be a notary public or to renew a notary public commission on or after [the effective date of this act]. The commission of a notary public in effect on [the effective date of this act] remains in effect until the commission's date of expiration." Effective October 1, 2015.

Administrative Rules

ARM 44.15.106 Notification to Secretary of State of change in information.

1-5-620. Examination of notary public.

Compiler's Comments

Effective Date: This section is effective October 1, 2015.

Applicability: Section 30, Ch. 391, L. 2015, provided: "[This act] applies to notarial acts performed on or after [the effective date of this act] and to the duties of and applications to be a notary public or to renew a notary public commission on or after [the effective date of this act]. The commission of a notary public in effect on [the effective date of this act] remains in effect until the commission's date of expiration." Effective October 1, 2015.

1-5-621. Grounds to deny — terms for refusing to renew, revoking, suspending, or conditioning notary public commissions.

Compiler's Comments

Effective Date: This section is effective October 1, 2015.

Applicability: Section 30, Ch. 391, L. 2015, provided: "[This act] applies to notarial acts performed on or after [the effective date of this act] and to the duties of and applications to be a notary public or to renew a notary public commission on or after [the effective date of this act]. The commission of a notary public in effect on [the effective date of this act] remains in effect until the commission's date of expiration." Effective October 1, 2015.

1-5-622. Authority to refuse to perform notarial act.

Compiler's Comments

Effective Date: This section is effective October 1, 2015.

Applicability: Section 30, Ch. 391, L. 2015, provided: "[This act] applies to notarial acts performed on or after [the effective date of this act] and to the duties of and applications to be a notary public or to renew a notary public commission on or after [the effective date of this act]. The commission of a notary public in effect on [the effective date of this act] remains in effect until the commission's date of expiration." Effective October 1, 2015.

Code Commissioner Correction: In (1)(b) the code commissioner inserted brackets around "not" to indicate that the word was apparently inserted in error.

1-5-623. Signature if individual unable to sign.

Compiler's Comments

Effective Date: This section is effective October 1, 2015.

Applicability: Section 30, Ch. 391, L. 2015, provided: "[This act] applies to notarial acts performed on or after [the effective date of this act] and to the duties of and applications to be a notary public or to renew a notary public commission on or after [the effective date of this act]. The commission of a notary public in effect on [the effective date of this act] remains in effect until the commission's date of expiration." Effective October 1, 2015.

1-5-624. Validity of notarial acts.

Compiler's Comments

Effective Date: This section is effective October 1, 2015.

Applicability: Section 30, Ch. 391, L. 2015, provided: "[This act] applies to notarial acts performed on or after [the effective date of this act] and to the duties of and applications to be a notary public or to renew a notary public commission on or after [the effective date of this act]. The commission of a notary public in effect on [the effective date of this act] remains in effect until the commission's date of expiration." Effective October 1, 2015.

1-5-625. Prohibited acts — advertising requirements.

Compiler's Comments

Effective Date: This section is effective October 1, 2015.

Applicability: Section 30, Ch. 391, L. 2015, provided: "[This act] applies to notarial acts performed on or after [the effective date of this act] and to the duties of and applications to be a notary public or to renew a notary public commission on or after [the effective date of this act]. The commission of a notary public in effect on [the effective date of this act] remains in effect until the commission's date of expiration." Effective October 1, 2015.

1-5-626. Fees for notarial acts — collection of fees.

Compiler's Comments

Effective Date: This section is effective October 1, 2015.

Applicability: Section 30, Ch. 391, L. 2015, provided: "[This act] applies to notarial acts performed on or after [the effective date of this act] and to the duties of and applications to be a notary public or to renew a notary public commission on or after [the effective date of this act]. The commission of a notary public in effect on [the effective date of this act] remains in effect until the commission's date of expiration." Effective October 1, 2015.

Administrative Rules

ARM 44.15.109 Fees for notarial acts.

1-5-627. Database of notaries public.

Compiler's Comments

Effective Date: This section is effective October 1, 2015.

Applicability: Section 30, Ch. 391, L. 2015, provided: "[This act] applies to notarial acts performed on or after [the effective date of this act] and to the duties of and applications to be a notary public or to renew a notary public commission on or after [the effective date of this act]. The commission of a notary public in effect on [the effective date of this act] remains in effect until the commission's date of expiration." Effective October 1, 2015.

1-5-628. Rulemaking.

Compiler's Comments

Effective Date: This section is effective October 1, 2015.

Applicability: Section 30, Ch. 391, L. 2015, provided: "[This act] applies to notarial acts performed on or after [the effective date of this act] and to the duties of and applications to be a notary public or to renew a notary public commission on or after [the effective date of this act]. The commission of a notary public in effect on [the effective date of this act] remains in effect until the commission's date of expiration." Effective October 1, 2015.

CHAPTER 6
OATHS

Part 1
General Provisions

1-6-102. Form of ordinary oath.

Compiler's Comments

2007 Amendment: Chapter 61 made minor changes in style. Amendment effective October 1, 2007.

1-6-104. Affirmation or declaration in lieu of oath.

Compiler's Comments

2007 Amendment: Chapter 61 made minor changes in style. Amendment effective October 1, 2007.

1-6-105. Unsworn declarations — penalty of perjury.

Compiler's Comments

Effective Date: This section is effective October 1, 2011.

Saving Clause: Section 11, Ch. 238, L. 2011, was a saving clause.

CHAPTER 11
PUBLICATION AND UPDATING OF THE CODE
CODE COMMISSIONER

Chapter Compiler's Comments

Adoption of Code: Section 1, Ch. 1, L. 1979, provided: "(1) The Montana Code Annotated (1978) as recodified and published by the code commissioner under the authority of Chapter 419, Laws of 1975, as amended by Chapter 1, Laws of 1977, is adopted as prima facie the law of Montana.

(2) The Montana Code Annotated may be cited as "MCA" and shall be given effect as provided in section 6, Chapter 419, Laws of 1975, as amended by section 4, Chapter 1, Laws of 1977, and set forth in 1-11-103, MCA."

Chapter Law Review Articles

Decius S. Wade's Necessity for Codification, Morriss, 61 Mont. L. Rev. 407 (2000).

Debating the Field Civil Code 105 Years Late, Morriss, Burnham, & Nelson, 61 Mont. L. Rev. 371 (2000).

The Creation of the Montana Code Annotated, Dowling, 40 Mont. L. Rev. 1 (1979).

Part 1
General Provisions

1-11-101. Definitions.

Compiler's Comments

1997 Amendment: Chapter 42 in definition of code, after "means the", inserted "Montana Code Annotated, which is a reenactment of the" and after "1947" substituted "as provided in 1-11-103" for "the pocket supplements thereto, and the replacement volumes"; and in definition of recodify, at end of (2)(h) after "amendments", deleted "such as those found in 1-1-202(7)". Amendment effective March 12, 1997.

1995 Amendment: Chapter 292 at end of (2)(h) deleted "or 3-11-101(2)"; and made minor changes in style.

Code Commissioner Instruction: Section 62, Ch. 16, L. 1991, provided: "The code commissioner is instructed to implement 1-11-101(2)(g)(ii) by correcting any clearly inaccurate references to other sections of the Montana Code Annotated contained in material enacted by the 52nd legislature." Section 1-11-101(2)(g)(ii) provides that recodification includes correcting (without changing the meaning, effect, or intent of any law) any inaccurate or obsolete references to other code sections, such as those that have been repealed or repealed and replaced, when given authority by another statute. Therefore, sec. 62, Ch. 16, L. 1991, constitutes authority for the Code Commissioner to correct erroneous references without the necessity of legislative action.

1981 Amendment: In (2)(i), deleted "whether originally written by the legislature or by the code publisher" at the beginning and at end inserted "unless the section captions are specifically and expressly adopted as part of the law by the legislature".

Case Notes

Codification — Proper Statement of Law — No Practical Difference Between Two Versions: In an action by an out-of-state corporation against Montana parties for interference with a contract, it was discovered that the codified version of 27-19-405, a statute central to the case, differed from the corresponding official enrolled bill passed by the Legislature. The difference arose because the section was amended in two separate bills by the 1979 Legislature. The version as codified by the Code Commissioner is a hybrid of the two legislative enactments; there is no practical difference between the different versions of the section. The Legislature has given the Code Commissioner the power to change the language of a law without changing its substance or intent. The present codification of 27-19-405 contained in the 1983 Montana Code Annotated is a proper statement of the law as intended by the Legislature. Mktg. Specialists, Inc. v. Serv. Mktg. of Mont., Inc., 214 M 377, 693 P2d 540, 42 St. Rep. 32 (1985).

1-11-102. Name — citation — correct form.

Compiler's Comments

2003 Amendment: Chapter 114 inserted (2) giving an example of the correct citation form for the MCA; and made minor changes in style. Amendment effective October 1, 2003.

Adoption of Code: Section 1, Ch. 1, L. 1979, provided: "(1) The Montana Code Annotated (1978) as recodified and published by the code commissioner under the authority of Chapter 419, Laws of 1975, as amended by Chapter 1, Laws of 1977, is adopted as prima facie the law of Montana.

(2) The Montana Code Annotated may be cited as "MCA" and shall be given effect as provided in section 6, Chapter 419, Laws of 1975, as amended by section 4, Chapter 1, Laws of 1977, and set forth in 1-11-103, MCA."

1-11-103. Effect of Montana Code Annotated — official version.

Compiler's Comments

1993 Amendment: Chapter 100 inserted (7) establishing the Montana Code Annotated as the official version of Montana statutes; and made minor changes in style. Amendment effective March 17, 1993.

1981 Amendment: In (5), inserted "and expressly" before "adopted" and substituted "part of the law" for "such".

Case Notes

Effect of Recodification: The recodification of a statute is merely a ministerial and administrative function performed by the Code Commissioner under the authority of the Legislature. It does not serve as a reenactment of the statute, nor does it remove any constitutional infirmity that existed at the time the statute was enacted. The test of a statute's constitutionality is made at the time it takes effect and is made against the constitution as it exists at the time the statute takes effect. Gallatin County v. McClue, 222 M 201, 721 P2d 338, 43 St. Rep. 1174 (1986).

Codification — Proper Statement of Law — No Practical Difference Between Two Versions: In an action by an out-of-state corporation against Montana parties for interference with a contract, it was discovered that the codified version of 27-19-405, a statute central to the case, differed from the corresponding official enrolled bill passed by the Legislature. The difference arose because the section was amended in two separate bills by the 1979 Legislature. The version as codified by the Code Commissioner is a hybrid of the two legislative enactments; there is no practical difference between the different versions of the section. The Legislature has given the Code Commissioner the power to change the language of a law without changing its substance or intent. The present codification of 27-19-405 contained in the 1983 Montana Code Annotated is a proper statement of the law as intended by the Legislature. Mktg. Specialists, Inc. v. Serv. Mktg. of Mont., Inc., 214 M 377, 693 P2d 540, 42 St. Rep. 32 (1985).

Text of Statute Controlling: A term found in the title (catchline) of a statute that was inadvertently placed there does not violate due process principles. It is the body of an act and not its title which controls in satisfying notice requirements. In re Mont. Pac. Oil & Gas Co., 189 M 11, 614 P2d 1045 (1980), citing Mfr's Acceptance Corp. v. Krsul, 151 M 28, 438 P2d 667 (1968).

Attorney General's Opinions

Transfer of License Plates to Unregistered Vehicle — Vehicle Registration Fees to Be Paid: A conflict arose between the codified version of 61-3-321 and the version amended in Ch. 596, L. 2005, raising a question whether vehicle registration fees must be paid if the vehicle to which

license plates are transferred is not currently registered. The Attorney General invoked this section to resolve the inconsistency and to give effect to the amendments in Ch. 596, concluding that the coordination section in Ch. 596 prescribed that all registration fees imposed under 61-3-321, as amended, must be paid if the vehicle to which license plates are transferred is not currently registered. 51 A.G. Op. 14 (2006).

Concurrence of Guaranty Fund Required When Department Seeks Additional Security by Self-Insured Employer — Legal Effect of Saving Clause: The saving clause attached to Ch. 150, L. 1993, although not codified, was part of the enrolled bill and must be given legal effect. The saving clause controls by providing that in all cases except those involving workers' compensation liabilities accrued prior to July 1, 1989, the Department of Labor and Industry must obtain the concurrence of The Montana self-insurers guaranty fund when seeking to require an employer who self-insures to give security in addition to the security that the employer has already provided. 46 A.G. Op. 1 (1995).

Part 2
Code Commissioner

1-11-201. Code commissioner.

Compiler's Comments

1995 Amendment: Chapter 545 near end, after "legislative", substituted "services division a" for "council the office of"; and made minor changes in style. Amendment effective July 1, 1995.

1995 Transition: Section 81, Ch. 545, L. 1995, provided: "(1) The members of the legislative council, as provided in 5-11-101, the members of the legislative finance committee, as provided in 5-12-202, the members of the legislative audit committee, as provided in 5-13-202, and the members of the environmental quality council, as provided in 5-16-101, must be appointed as soon as possible following [the effective date of this section] [effective April 27, 1995].

(2) To implement the changes provided in [this act], the office of the legislative council, the office of budget and program planning, and the department of administration shall establish all necessary authorizations during the accounting preparation process known as the "turnaround" process, beginning in April or May 1995, to administer the several appropriations made by any means to programs of the legislative branch agencies consolidated under [sections 3 and 4] [5-2-503 and 5-2-504] for fiscal year 1996 or 1997 or the biennium ending June 30, 1997, as appropriations to a single legislative agency while maintaining the specific identification, legislative intent, and purpose for which the appropriations were made. During this transition, the executive director may authenticate documents as required to accomplish the purposes of [this act]. Appropriate changes on the statewide budgeting and accounting system and the payroll, personnel, and position control system must also be made and authorized as required to accomplish the purposes of [this act].

(3) Personnel and property of the environmental quality council are transferred to the legislative services division effective July 1, 1995."

1-11-204. Duties of code commissioner.

Compiler's Comments

2009 Amendment: Chapter 160 in (2)(l) near beginning after "subject index" inserted "a separate index for the constitution"; and made minor changes in style. Amendment effective April 6, 2009.

2005 Amendment: Chapter 108 inserted (3)(b) directing the code commissioner to recodify on a title-by-title basis; and made minor changes in style. Amendment effective October 1, 2005.

1993 Amendment: Chapter 349 near middle of (1), before "submit", deleted "as provided in 5-11-210".

1991 Amendments: Chapter 16 deleted former (1) and (2) that read: "(1) Prior to January 1, 1979, the code commissioner shall recodify all the laws of a general and permanent nature appearing in the codes and session laws and prepare them for publication.

(2) Prior to January 1, 1979, the commissioner shall prepare and submit to the legislature a report which is certified by the commissioner as the "Official Report of the Montana Code Commissioner", together with a bill enacting the Montana Code Annotated. A copy of the report and bill shall be deposited with the secretary of state. The report shall explain and indicate, in tabular or other form, all changes made during recodification, other than punctuation and capitalization, to clearly indicate the character of each change"; and made minor changes in style.

Chapter 112 in (1) inserted reference to 5-11-210. Amendment effective March 20, 1991.

Code Commissioner Instruction: Section 83, Ch. 83, L. 1989, provided: "The code commissioner is instructed to implement 1-11-101(2)(g)(ii) by correcting any clearly inaccurate references to other sections of the Montana Code Annotated contained in material enacted by the 51st legislature."

1985 Amendment: Near beginning of (5)(c) substituted "publish a report entitled" for "submit to each legislature a report certified as the".

Effect of Publishing Supreme Court Rules: Section 2, Ch. 1, L. 1979, provided: "(1) The legislature recognizes the supreme court's authority pursuant to Article VII, section 2, of the Montana constitution to make rules governing procedure and practice before the courts.

(2) The legislature also recognizes that the practice of printing such rules with the Montana statutes is of benefit to code users and facilitates implementation of Article VII, section 2(3), of the Montana constitution concerning disapproval by the legislature.

(3) Therefore, the Montana Rules of Civil Procedure, printed as chapter 20, Title 25, MCA; the Montana Rules of Appellate Civil Procedure [redesignated the Montana Rules of Appellate Procedure in 1987, now superseded], printed as chapter 21, Title 25, MCA; and the Montana Rules of Evidence, printed as chapter 10, Title 26, MCA, appear only for the purpose of facilitating use of the code. Neither this act nor publication of the rules may be construed as an attempt to readopt or promulgate the rules."

Code Commissioner Report: The Official Report of the Montana Code Commissioner—1979 appears in the unnumbered volume to the MCA, 1978. The Official Report of the Montana Code Commissioner—1979 (Supplemental) appears in Vol. 1 of the annotations.

Case Notes

Codification — Proper Statement of Law — No Practical Difference Between Two Versions: In an action by an out-of-state corporation against Montana parties for interference with a contract, it was discovered that the codified version of 27-19-405, a statute central to the case, differed from the corresponding official enrolled bill passed by the Legislature. The difference arose because the section was amended in two separate bills by the 1979 Legislature. The version as codified by the Code Commissioner is a hybrid of the two legislative enactments; there is no practical difference between the different versions of the section. The Legislature has given the Code Commissioner the power to change the language of a law without changing its substance or intent. The present codification of 27-19-405 contained in the 1983 Montana Code Annotated is a proper statement of the law as intended by the Legislature. Mktg. Specialists, Inc. v. Serv. Mktg. of Mont., Inc., 214 M 377, 693 P2d 540, 42 St. Rep. 32 (1985).

Part 3
Publication

1-11-301. Publication and sale of Montana Code Annotated — free distribution.

Compiler's Comments

2007 Amendment: Chapter 95 in (5)(a) at end after "library" substituted "as defined in 22-1-211" for "under 22-1-214". Amendment effective October 1, 2007.

2005 Amendment: Chapter 73 deleted former (5)(a)(ii) requiring that one copy of the Montana Code Annotated be provided to each library designated as a federation headquarters library; and made minor changes in style. Amendment effective October 1, 2005.

1995 Amendment: Chapter 4 in first sentence of (3), after "public", inserted "of all Montana Code Annotated material"; and made minor changes in style. Amendment effective July 1, 1995.

1993 Amendment: Chapter 291 in (3) increased sale price from cost plus 20% to cost plus 25%; in (4) inserted reference to nonprofit organizations and increased price from cost to cost plus 5%; and made minor changes in style. Amendment effective April 7, 1993.

1989 Amendment: In (4), before "local governmental agencies", inserted "Montana".

1983 Amendment: Substituted reference to state special revenue fund for reference to revolving fund.

1981 Amendment: Added (5) requiring free copies of the MCA and related publications to be given to certain libraries and providing for recovery of the cost of the free copies.

Amendment Superseded: Section 3, Ch. 1, L. 1979, amended 1-11-301. Section 4, Ch. 265, L. 1979, amended sec. 3, Ch. 1, L. 1979. Therefore, the changes made by Ch. 265 superseded those made by Ch. 1.

1-11-302. Updates of Montana Code Annotated.

Compiler's Comments

1995 Amendment: Chapter 18 deleted (2) that read: "(2) The supplements or replacements shall be certified, published, copyrighted, and deposited with the secretary of state. The supplements and replacements become effective on the date deposited with and certified to the secretary of state."

1-11-303. Authority to issue ancillary publications.

Compiler's Comments

1995 Amendment: Chapter 545 near beginning of each sentence substituted "code commissioner" for "legislative council"; and made minor changes in style. Amendment effective July 1, 1995.

1995 Transition: Section 81, Ch. 545, L. 1995, provided: "(1) The members of the legislative council, as provided in 5-11-101, the members of the legislative finance committee, as provided in 5-12-202, the members of the legislative audit committee, as provided in 5-13-202, and the members of the environmental quality council, as provided in 5-16-101, must be appointed as soon as possible following [the effective date of this section] [effective April 27, 1995].

(2) To implement the changes provided in [this act], the office of the legislative council, the office of budget and program planning, and the department of administration shall establish all necessary authorizations during the accounting preparation process known as the "turnaround" process, beginning in April or May 1995, to administer the several appropriations made by any means to programs of the legislative branch agencies consolidated under [sections 3 and 4] [5-2-503 and 5-2-504] for fiscal year 1996 or 1997 or the biennium ending June 30, 1997, as appropriations to a single legislative agency while maintaining the specific identification, legislative intent, and purpose for which the appropriations were made. During this transition, the executive director may authenticate documents as required to accomplish the purposes of [this act]. Appropriate changes on the statewide budgeting and accounting system and the payroll, personnel, and position control system must also be made and authorized as required to accomplish the purposes of [this act].

(3) Personnel and property of the environmental quality council are transferred to the legislative services division effective July 1, 1995."

1993 Special Session Amendment: Chapter 22 inserted second and third sentences requiring the Legislative Council to publish a legislative review and a history and final status containing corrected voting records; and made minor changes in style. Amendment effective December 23, 1993.

1-11-304. Copyrights prohibited.

Compiler's Comments

1993 Amendment: Chapter 100 at end substituted "may not be copyrighted" for "shall be copyrighted for and in behalf of the state of Montana by the secretary of state"; and made minor changes in style. Amendment effective March 17, 1993.

CHAPTER 12
COMMISSION ON UNIFORM STATE LAWS

Part 1
General Provisions

1-12-101. Appointment, composition, term of office.

Compiler's Comments

Name Change — Directions to Code Commissioner: Pursuant to sec. 36, Ch. 308, L. 1995, in this section the Code Commissioner changed "university of Montana" to "university of Montana-Missoula".

1993 Amendment: Chapter 99 in (1), in second sentence, substituted "legislative council" for "governor" and inserted third sentence regarding recommendations to Legislative Council for appointments; inserted (2) regarding commissioner reimbursement; and made minor changes in style. Amendment effective March 17, 1993.

Transition: Section 4, Ch. 99, L. 1993, provided: "Uniform state law commissioners appointed by the governor shall continue in office until the expiration of their current term."

1-12-102. Vacancies.

Compiler's Comments

1993 Amendment: Chapter 99 at beginning of second sentence substituted "legislative council" for "governor"; and made minor changes in style. Amendment effective March 17, 1993.

Transition: Section 4, Ch. 99, L. 1993, provided: "Uniform state law commissioners appointed by the governor shall continue in office until the expiration of their current term."

1-12-104. Duties of commissioners.

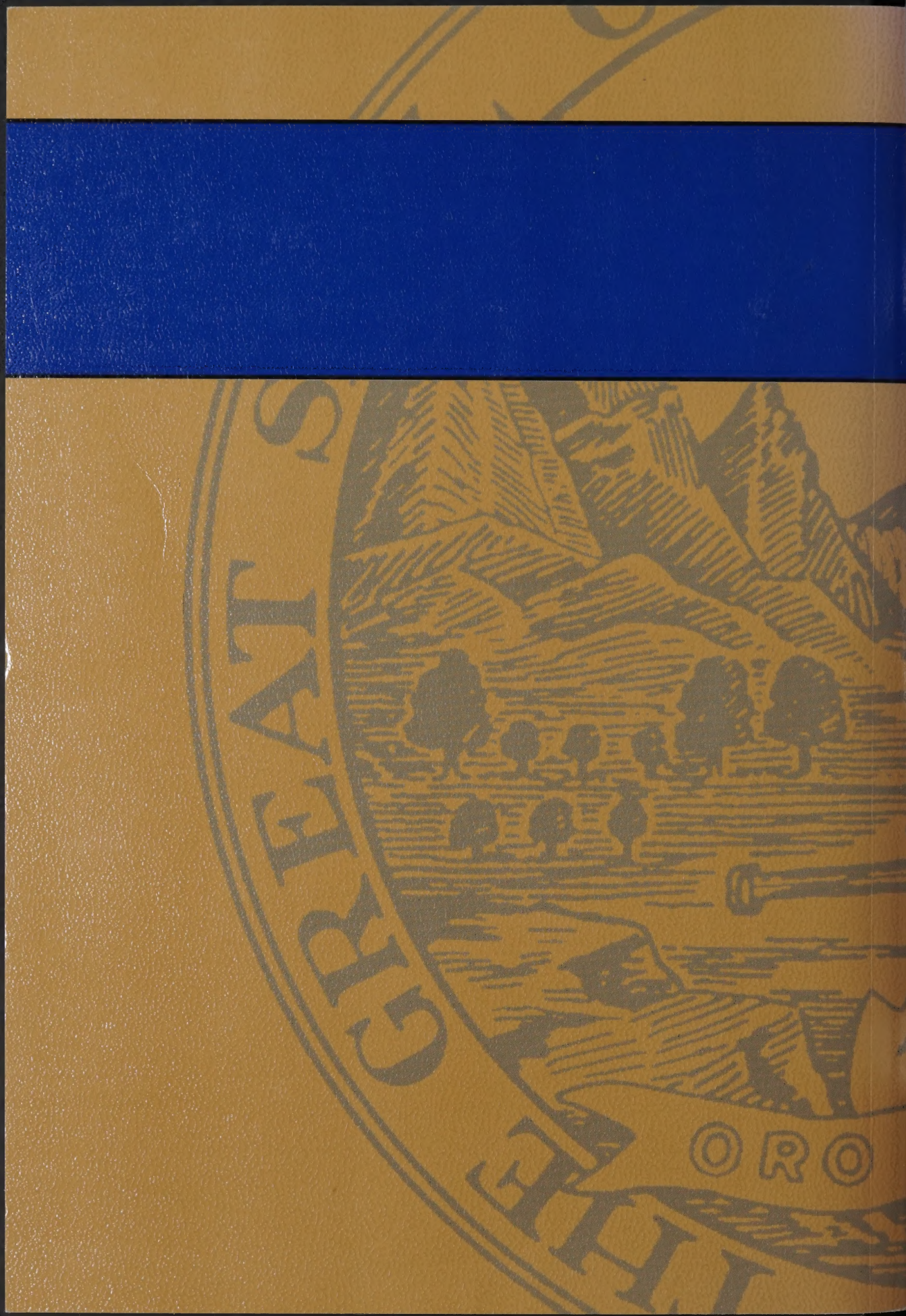
Compiler's Comments

1993 Amendment: Chapter 99 in (1), before "attend", inserted "attempt to", after "laws and" deleted "both in and out of such national conference", and before "promote" deleted "do all in his power to"; and made minor changes in style.

1983 Amendment: Deleted former (2), which read: "Said commission shall report as provided in 2-7-102."

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